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CrI.RC.No.542 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.10.2022

Pronounced on : 03.11.2022

CORAM

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CrI.RC.No.542 of 2018

Abdul Aziz

... petitioner

Vs.

The State rep. by through
The Inspector of Police,
Erode Town Police Station,
Erode District
Crime No.28 of 1994

...Respondent

PRAYER: Criminal Revision filed under Sections 397 and 401 of the Code of Criminal Procedure, to call for the records relating to the conviction imposed in the judgment dated 28.03.2018 made in CA.No.40 of 2015 on the file of the learned I Additional District and Sessions Court, Erode confirming the judgment dated 12.05.2015 made in CC.No.798 of 2010 on the file of the learned Judicial Magistrate No.III, Erode and to set aside the same by allowing this criminal revision petition.

For Petitioner : Mr.N.Manokaran

For Respondent : Mr.A.Gopinath,
Government Advocate(crl.side)



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ORDER

This revision is filed as against the judgment passed in CA.No.40 of 2015 on the file of the learned I Additional District and Sessions Court, Erode dated 28.03.2018, thereby confirmed the judgment passed in CC.No.798 of 2010 dated 12.05.2015 on the file of the learned Judicial Magistrate-III, Erode, thereby convicted the petitioner for the offence punishable under Sections 120(B), 471, 420 r/w 109, 468 r/w 109 of IPC.

2. The case of the prosecution is that during the first week of December 1993, at Sadgar Lodge, Church Gate, Mumbai City, the appellant herein and the first accused Salim Siraj Gillani and the third accused committed criminal conspiracy by entering into an agreement to do certain acts or offences of committing forgery of stolen Bank demand drafts, using them as genuine and cheating the financial institutions and others in Tamilnadu by encashing them through fraudulent means. In pursuance of the said conspiracy, the first accused Salim @ Siraj Gillini committed forgery by filling up of two blank demand drafts with serial No.001707 and 001710 which he obtained as stolen properties from Bank of India at Nagapada Branch at Mumbai City to the value of Rs.4,86,200/- and Rs.4,91,400/- in favour of the fictitious names of Usha Traders and Lakshmi Enterprises respectively purporting to have been



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genuinely issued by the said Bank of India, Nagpada Branch, Mumbai intending that the same should be used for the purpose of cheating by fraudulent encashment. On 24.12.1993, the accused A4 Muthukrishnan Oil Stores situated at Ettayapuram, Tuticorin, this appellant / accused who is the second accused herein handed over the said two forged demand drafts to A3 and A4 for using the same as genuine and cheating the financier at Erode. But both A3 and A4 handed over the same to A5, A6 and the approver witness Dhayanidhi on 27.12.1993 at the said Shop of A4 for the same purpose.

2.1 Thereupon on 28.12.1993 at Erode, approver witness Thayanidhi committed further forgery by fraudulently signing as Ramesh for Usha Traders and as Nagaraj for Lakshmi Enterprises on the said forged demand drafts respectively on the direction and abetment of A5 intending that they should be used for the purpose of cheating the bank. Thereupon in further pursuance of the above said conspiracy on 28.12.1993 at Erode, A4, A5 and the approver witness Thayanidhi fraudulently and dishonestly used as genuine the said forged demand drafts which they knew to be forged documents by presenting them before the Catholic Syrian Bank and Punjab National Bank both situated at Cutchery Road, Erode, and thereby cheated both the said banks by inducing



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them to deliver the sum of Rs.4,86,200/- and Rs.4,91,400/- to the 8th accused

Murugesan.

2.2 During this occurrence, accused A7 abetted A5 and A6 by introducing A8 to them for these purpose, and A8 associated with A5 and A6 in the commission of offence in presenting both the said demand drafts with his signature and in his name into the said banks for encashment and A10 abetted the accused A8 in the commission of the above said offences by fraudulently accepting both the above said forged demand drafts without comparing the code number and signatures of issuing authority and cleared them as genuine instruments for the encashment of money through Catholic Syrian Bank and Punjab National Bank, Erode knowing well that the said demand drafts appeared to have been drawn on the Bank of India, Erode Branch code No. as 8002, where the actual code number of this Branch was 8202. Hence, the Inspector of Police, Crime Branch, CID, Erode charge sheeted the accused under Sections 120(B), 468 r/w 109, 471, 420 r/w 109 of IPC.

2.3 On receipt of the charge sheet, the trial court framed charges as against accused persons under Sections 120(B), 468, r/w 109, 471, 420 r/w 109 of IPC. In order to bring the charges to home, the prosecution examined PW1 to



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PW24 and marked Ex.P1 to Ex.P37. On the side of the accused, no one was examined and no documents were marked. On perusal of oral and documentary evidence, the trial court convicted the appellant for the offence under Sections 120(B), 468, r/w 109, 471, 420 r/w 109 of IPC and sentenced him to undergo two years rigorous imprisonment for each of the offences and also imposed fine of Rs.2,500/- for each of the offences and in default to pay fine, to undergo two months rigorous imprisonment for each of the offences. Aggrieved by the same, the present revision has been filed.

3. The learned counsel for the petitioner would submit that neither charges nor witnesses have proved the overt act of the petitioner for the alleged conspiracy held at Mumbai. There was no link to connect the petitioner with the offence as alleged by the prosecution. PW3 did not even whisper anything about the overt act of the petitioner. The trial court convicted the petitioner only on relying Ex.P18 which was marked through PW5 i.e. the Judicial Magistrate. Ex.P18 is nothing but statement recorded under Section 164 of Cr.P.C. and it cannot be used as substantial piece of evidence. Only on the strength of Ex.P18, the petitioner was convicted by the courts below, though PW3 did not even whisper about the overt act of the petitioner. The statement recorded under Section 164 of Cr.P.C. of PW3 has no legal basis for want of certificate under



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Section 164(4) of Cr.P.C. The confession of an accused will not bind the co-accused unless he has been tried along with other accused. The evidence of PW3 has no significance since he has not even identified the petitioner as an accused in the court. The evidence of PW3 cannot be the basis for the conviction in view of the presumption under Section 114(b) of Evidence Act. Unfortunately both the courts below relied on the confession statement recorded under Section 164 Cr.P.C. of PW3 and the deceased A3. Therefore, the conviction cannot be sustained as against the petitioner. In support of his contention, he relied upon the following judgments:

(i) ***R.Palanisamy Vs. State*** reported in ***MANU/TN/0377/2013***

(ii) ***Kashmira Singh Vs. The State of MP*** reported in ***AIR 1952 SC 159***

4. Per contra, the learned Government Advocate(crl.side) appearing for the respondent / police would submit that after having been taken cognizance by the trial court, the petitioner absconded and as such, the case was split up as against the petitioner. There are totally 10 accused, in which A3 already died. After having been taken cognizance by the trial court, A1 and A2 failed to appear before the trial court and as such, the case had been split up as against the other accused persons in CC.No.240 of 2001. The trial court found



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A4, A5 and A6 as guilty and convicted and sentenced them to undergo two years rigorous imprisonment by judgment dated 09.01.2017. A5 and A6 preferred appeal and they were acquitted in CA.Nos.40 & 41 of 2008 by judgment dated 28.04.2008. Insofar as the fourth accused, he was in custody for 589 days and his imprisonment was set off out of the conviction of two years. Therefore, he did not prefer any appeal and he served the remaining period of sentence. A7 to A10 were acquitted by the trial court. The petitioner was arrested in some other case and produced on PT warrant before the trial court. However, A1 is still absconding and as such, again the case has been split up in CC.No.798 of 2010 as against the petitioner. The trial court convicted the petitioner on the strength of the confession statement of A3 recorded under Section 164 of Cr.P.C. before PW5, which was marked as Ex.P18.

4.1 He further submitted that though the trial court acquitted the other accused persons for the very same set of charges, as against the petitioner, the prosecution categorically proved its case and both the courts below rightly convicted the petitioner. One of the accused turned approver and he was examined as PW3. He categorically deposed about the entire transaction and specifically deposed about the overt act of each accused. His confession statement recorded under Section 164 Cr.P.C. was marked as Ex.P15 through



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PW3. Therefore, it cannot be stated that it is not a substantial evidence to convict the petitioner. After recording the confession statement under Section 164 of Cr.P.C. of A3, he died. Therefore, the prosecution could not able to examine him. Even then, his confession statement recorded by the Magistrate who was examined as PW5 and she deposed that without any compulsion or coercion, the third accused voluntarily confessed and the same was recorded and as such, it can be reliable for conviction of the petitioner. Therefore, both the courts below rightly convicted the petitioner and it does not require any interference by this Court.

5. Heard, Mr.N.Manokaran, the learned counsel for the petitioner and Mr.A.Gopinath, Government Advocate(crl.side) appearing for the respondent / police.

6. The only point raised by the learned counsel for the petitioner is that the confession statement recorded under Section 164 of Cr.P.C. can be relied upon to convict the petitioner. Admittedly after recording statement under Section 164 of Cr.P.C. before PW5, A3 died. Though another accused turned approver and he was examined as PW3, he did not even whisper about the overt



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act of the petitioner herein. His confession statement recorded under Section 164 of Cr.P.C. was marked as Ex.P15. It also corroborated the evidence of PW3 and nothing whispered against the petitioner. Therefore, the trial court found the petitioner as guilty only on the strength of Ex.P18, which is nothing but confession statement recorded under Section 164 of Cr.P.C. This court as well as the Hon'ble Supreme Court of India repeatedly held that the statement recorded under Section 164 of Cr.P.C. is like a 'previous statement' given during investigation under Section 161 of Cr.P.C. and it is not a 'substantive evidence' adduced before the trial court since it was not recorded in the presence of the accused. The provision under Section 161 says the statement recorded before the investigation officer and the provision under Section 164 says statement recorded before the Judicial Officer.

7. In this regard, the learned counsel for the petitioner relied upon the judgment of this Court in the case of ***R.Palanisamy Vs. State*** reported in ***MANU/TN/0377/2013***, wherein it is held as follows:

35. A statement given by a witness u/s.164 Cr.P.C., is like a 'previous statement' given during investigation u/s.161 Cr.P.C. It is not 'substantive evidence' adduced before the Trial Judge, because it was not recorded in the presence of the accused.



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Because it was recorded - 'res inter alia acta - recorded behind the back of the accused. Because it was recorded from a witness during investigation. Besides giving it to a police officer, it was also given to a Magistrate.

36. With regard to the value to be given to a statement recorded under [Section 164](#) Cr.P.C., in RAM KISHAN SINGH VS. HARMIT KAUR [AIR 1972 SC 468], the Hon'ble Apex Court held as under :

"8. A statement under [Section 164](#) of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness....."

37. Under [Section 161](#) Cr.P.C., during investigation, the Investigating Officer can orally examine any person acquainted with the facts of the case. When he reduces the true account of it, then it becomes a statement under [Section 161](#) Cr.P.C. and gist of it must find a place in his Case Diary (C.D.) (See [Section 172](#) Cr.P.C). This is the 'previous statement' recorded by the Investigating Officer during investigation stage. It cannot be used as 'substantive evidence' as against the accused. There is total embargo in [Section 162](#) Cr.P.C. for such usage with an exception in [Section 162\(2\)](#) Cr.P.C., that is, when the author of the statement dies it becomes his dying declaration under [Section 32\(1\)](#) of the Evidence Act. The [section](#)



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161 statement can be used by the accused to contradict and impeach the credibility of the witness by the accused. It can be used by the accused in his favour. It cannot be used by the prosecution as against him. [See Sections 145, 155, 157 Evidence Act].

38. Although the statement of a witness recorded under Section 164 Cr.P.C. during investigation is also a previous statement like a statement recorded under Section 161 Cr.P.C., but, it has some higher value than the statement recorded under Section 161 Cr.P.C. by the police since it was recorded by a Magistrate.

39. With regard to the statement of a witness recorded by a Magistrate u/s. 164 Cr.P.C., in RAMPRASAD VS. STATE OF MAHARASHTRA [1999 CRI.L.J. 2889 (SC)], the Hon'ble Apex Court observed as under :

"15. Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before any authority legally competent to investigate the fact but its use is limited to corroboration of the testimony of such a witness. Though a police officer is legally competent to investigate, any statement made to him during such an investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section



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162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such a statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof."

8. Thus, it is clear that the statement recorded by the Magistrate under Section 164 of Cr.P.C. becomes usable to corroborate the witness as provided under Section 157 of Evidence Act or to contradict him as provided under Section 155 thereof. The learned counsel for the petitioner also relied upon the judgment in the case of **Kashmira Singh Vs. The State of MP** reported in **AIR 1952 SC 159**, wherein it is held as follows:

The confession of an accused person is not evidence in the ordinary sense of the term as defined in S.3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the



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confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to set on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

9. In the case on hand, though the confession statement of the co-accused was recorded under Section 164 of Cr.P.C. by the Judicial Magistrate i.e. PW5, it cannot be used as a substantial piece of evidence. Further, though he turned approver, he was not examined before the court in the presence of the accused since he died after recording statement under Section 164 of Cr.P.C. Therefore, the petitioner had no opportunity to cross examine him since the confession statement was recorded in the absence of the petitioner. Therefore, the above judgments are squarely applicable to the case on hand. The conviction based on Ex.P18 cannot be sustained as against the petitioner herein. Unfortunately, the courts below, without considering the above facts and



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circumstances, convicted the petitioner only on the ground that he was absent before the trial court and he was produced on PT warrant after several years.

10. In view of the above, this Criminal Revision is allowed and the judgment of conviction and sentence dated 12.05.2015 made in CC.No.798 of 2010 on the file of the learned Judicial Magistrate No.III, Erode, which was confirmed by the judgment dated 28.03.2018 in CA.No.40 of 2015 on the file of the learned I Additional District and Sessions Court, Erode is set aside. The petitioner / A2 is acquitted of all charges in CC.No.798 of 2010 on the file of the learned Judicial Magistrate No.III, Erode. Fine amount, if any paid, shall be refunded to the petitioner/A2 forthwith and the bail bonds, if any executed, shall stand cancelled.

03.11.2022

Speaking/Non-speaking order

Index: Yes / No

Internet: Yes

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To

- 1.The learned I Additional District and Sessions Court,
Erode
- 2.The learned Judicial Magistrate No.III,
Erode
- 3.The Inspector of Police,
Erode Town Police Station,
Erode District
- 4.The Public Prosecutor,
High Court, Madras.



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