

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 19.09.2022

DELIVERED ON : 23.09.2022

CORAM :

THE HONOURABLE MRS.JUSTICE J. NISHA BANU

and

THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

Crl.A.(MD)Nos.451, 458, 479, 482, 498 of 2019 and 60 of 2020

Balakarupasamy	... Appellant / Accused No.1 in Crl.A(MD)No.60 of 2020
Mariyappan @ Ashok	... Appellant/ Accused No.2 in Crl.A(MD)No.498 of 2019
Mahesh	... Appellant/ Accused No.3 in Crl.A(MD)No.482 of 2019
Lakshmi Kandhan	... Appellant/ Accused No.4 in Crl.A(MD)No.479 of 2019
Jeganathan @ Jegan	... Appellant/ Accused No.5 in Crl.A(MD)No.451 of 2019

S.Murugash

... Appellant/ Accused No.6
in Crl.A(MD)No.458 of 2019

Vs.

State Represented by
Inspector of Police,
Tuticorin South Police Station,
Tuticorin.
(Crime No.693 of 2011)

... Respondent/Complainant
in all cases

COMMON PRAYER: Criminal Appeals filed under Section 374 (2) of Criminal Procedure Code, 1973 to set aside the conviction and sentence imposed in S.C.No.233/2012 dated 13.08.2019 on the file of the learned Sessions Judge, Mahalir Neethimandram(Fast Track Court), Tuticorin.

For Appellant : Mr.R.Anand for Mr.R.L.Dhilipan Pandian
in Crl.A(MD)No.60 of 2020 for A1

Mr.Gopala Krishna Laxhmipathy
Senior Counsel for Mr.V.Malaiyendran
in Crl.A(MD)No.498 of 2019 for A2

Mr.A.Ramesh
Senior Counsel for M/s.S.Sathya Chidambaram
in Crl.A(MD)No.482 of 2019 for A3

Mr.V.Kathirvelu
Senior Counsel for Mr.K.Prabhu
in Crl.A(MD)No.479 of 2019 for A4

Mr.N.Ananthapadmanabhan
Senior Counsel for M/s.APN Law Associates
in Crl.A(MD)No.451 of 2019 for A5

Mr.KA.Ramakrishnan
in Crl.A(MD)No.458 of 2019 for A6

For Respondent : Mr.S.Ravi
Additional Public Prosecutor
(In all the cases)

COMMON JUDGMENT

J.NISHA BANU, J.
and
N.ANAND VENKATESH, J.

These Criminal Appeals have been filed against the judgment of the Mahalir Neethimandram (Fast Track Court), Tuticorin made in S.C.No.233 of 2012, dated 13.8.2019, convicting and sentencing the appellants (A1 to A6) in the following manner:

<i>S.No.</i>	<i>Rank of the Accused</i>	<i>Conviction for offence under Section</i>	<i>Sentence/Punishment</i>
1.	A1	Section 120B IPC read with Section 364A IPC	Life Imprisonment and Rs. 5000/- fine, in default, to undergo 6 months simple imprisonment.
		Section 342 IPC	Fine of Rs.1000/-, in default, to undergo 3 months simple imprisonment.
2.	A2	Section 120B IPC read with Section 364A IPC	Life Imprisonment and Rs. 5000/- fine, in default, to undergo 6 months simple imprisonment.
		Section 342 IPC	Fine of Rs.1000/-, in default, to undergo 3 months simple imprisonment.
		Section 323 IPC	Fine Rs.1000/-, in default, to undergo 3 months simple imprisonment.
3.	A3	Section 120B IPC read with Section 364A IPC	Life Imprisonment and Rs. 5000/- fine, in default, to undergo 6 months simple imprisonment.
		Section 342 IPC	Fine of Rs.1000/-, in default, to undergo 3 months simple imprisonment.
		Section 323 IPC	Fine Rs.1000/-, in default, to undergo 3 months simple imprisonment.
		Section 506 (ii) IPC	7 years rigorous imprisonment and fine of Rs.1000/-, in default, to undergo 6 months simple imprisonment.

<i>S.No.</i>	<i>Rank of the Accused</i>	<i>Conviction for offence under Section</i>	<i>Sentence/Punishment</i>
4.	A4	Section 120B IPC read with Section 364A IPC	Life Imprisonment and Rs.5000/- fine, in default, to undergo 6 months simple imprisonment.
		Section 342 IPC	Fine of Rs.1000/-, in default, to undergo 3 months simple imprisonment.
5.	A5	Section 120B IPC read with Section 364A IPC	Life Imprisonment and Rs. 5000/- fine, in default, to undergo 6 months simple imprisonment.
6.	A6	Section 120B IPC read with Section 364A IPC	Life Imprisonment and Rs. 5000/- fine, in default, to undergo 6 months simple imprisonment.

2. The case of the prosecution is that A2 and A3 got in touch with P.W-7, who is a land broker, during August 2011, and asked him to arrange for taking a premises for rent, for a monthly rent of Rs.5000/- and accordingly, a house was also fixed at Muthu Krishnan Nagar. A3 is said to have paid an Advance of Rs.10,000/- and Commission of Rs.4500/- on 12.08.2011. P.W-1, preferred a complaint on 17.08.2011, before the Thoothukudi South Police Station, at about 6.00 p.m., regarding the kidnapping of his son (P.W-3). Based on the said complaint, an FIR came to be registered under Ex.P23 in Crime No.693

of 2011, for offence under Section 364A and Section 506 Part 2 of IPC against A1 and others. According to P.W-1, his son (P.W-3) was kidnapped and a ransom of Rs.5 Crores was demanded. After the FIR was registered, the son of P.W-1 viz. P.W-3 and A1 were found near Tuticorin road by a police party and P.W-3 was sent along with his parents and A1 was sent along with his father.

3. Based on the FIR registered in Crime No: 693 of 2011, P.W-24, Investigation Officer, took up the investigation and on 19.8.2011, he prepared the Observation Mahazar, Ex.P9 in the presence of P.W-14. P.W-3 was taken to the doctor (P.W-13) and he was examined on 19.8.2011 and an Accident Register (Ex.P6) was prepared.

4. Thereafter, A1 was arrested on 20.8.2011 at about 1 PM in the presence of P.W-14 and based on the confession of A1, which was reduced to writing under Ex.P7, the admissible portion was made use of under Section 27 of the Evidence Act and under Ex.P8 Mahazar, the car key (M.O.5) was recovered.

5. In furtherance of the confession made by A1, the car (M.O.11) in which P.W-3 is said to have been kidnapped, was recovered in the presence of P.W-10 and P.W-11. The recovery of the car was evidenced under Ex.P26. The house where the boy was kept after he was kidnapped, was also identified and an Observation Mahazar was prepared under Ex.P9 and Ex.P10.

6. The Investigation Officer arrested A2 and his confession was recorded in the presence of P.W-15 and the bike (M.O.6) was seized under Ex.P11. Similarly, A3 was also arrested and his confession was recorded in the presence of P.W-15 and his two wheeler (M.O.7) was also seized under Ex.P12.

7. In the course of investigation, A4 was also arrested in the presence of P.W-15 under Ex.P28 and a mobile phone was seized from him. Similarly, A5 was also arrested and his confession was recorded in the presence of P.W-16 and his mobile phone (M.O.9) was seized under Ex.P14. A6 was also arrested and his confession was recorded in the presence of P.W-16 and his two wheeler (M.O.10) was seized under Ex.P15.

8. In the course of investigation, the house where P.W-3 was confined was opened and an Observation Mahazar was prepared in the presence of P.W-17 under Exhibits P4 and P18.M.O.1 to M.O.4 were recovered inside the house under Ex.P5. That apart, P.W-19 inspected the premises and lifted fingerprints under Ex.P19 on 24.8.2011 at about 2.30 PM.

9. Section 164 Cr.P.C statement of P.W-7 was recorded before the Judicial Magistrate (P.W-20) and he spoke about leasing the property and A2 and A3 involving themselves in the said process and this statement was marked as Ex.P21.

10. The victim boy P.W-3 was also taken to the Judicial Magistrate for recording his statement under Section 164 of Cr.P.C and the learned Magistrate came to a conclusion that he is not capable of giving the statement and this document was marked as Ex.P20.

11. Based on the fingerprints that were lifted from the house and the one obtained from the accused persons, an opinion was given by P.W-19 to the effect that the fingerprints matched the sample fingerprints

of A1 to A4.

12.In the course of investigation, the Test Identification parade was conducted in the presence of the Judicial Magistrate, P.W-20 and A1 to A4 were identified by P.W-3 to P.W-7 and this report was marked as Ex.P22.

13. The Investigation Officer recorded the statements of all the witnesses under Section 161 of Cr.P.C. and collected all the reports and laid the final report before the Judicial Magistrate No.1, Thoothukudi. The case was committed and it was tried by the Court below in S.C.No. 233 of 2012.

14. The prosecution examined P.W-1 to P.W-24 and Ex.P1 to Ex.P29 were marked and M.O.1 to M.O.15 were identified and marked as Material Objects. The Trial Court, based on the incriminating materials that evolved in the course of trial, questioned all the accused persons under Section 313 (1)(b) of Cr.P.C and the accused persons denied the commission of any offence and A1 to A3 also submitted their written explanation by putting forth the case of the defence.

15. The Trial Court, after considering the facts and circumstances of the case and on appreciation of the evidence available on record, came to a conclusion that the prosecution has proved the case beyond reasonable doubts and convicted and sentenced the accused persons in the manner indicated supra. Aggrieved by the same, these Criminal Appeals have been filed before this Court.

16. Heard Mr.R.Anand for Mr.R.L.Dhilipan Pandian for A1, Mr.Gopala Krishna Laxhmipathy, Senior Counsel for Mr.V.Malaiyendran for A2, Mr.A.Ramesh, Senior Counsel for M/s.S.Sathya Chidambaram for A3, Mr.V.Kathirvelu, Senior Counsel for Mr.K.Prabhu for A4, Mr.N.Ananthapadmanabhan, Senior Counsel for M/s.APN Law Associates for A5, Mr.KA.Ramakrishnan for A6 and Mr.S.Ravi, learned Additional Public Prosecutor for respondent in all cases.

17. The main grounds that were projected on the side of the appellants and which are common to all the accused persons are:

- The call details that were marked as Ex.P24 through

P.W-23, Nodal Officer regarding the ransom calls as deposed by P.W-1 and P.W-2 is totally inadmissible since the mandatory certificate under Section 65-B (4) of the Indian Evidence Act was not produced. Hence, the oral evidence of P.W-23 regarding the calls is inadmissible. To substantiate the same, the judgment of the Apex Court in ***Ravinder Singh @ Kaku v. State of Punjab*** reported in **(2022) 7 SCC 581** and of this Court in ***Anandam Gundluru v. Inspector of Police*** in Criminal Appeal No. 118 of 2017, dated 1.9.2022, was relied upon.

- There was absolutely no material on the details of the service provider and to whom the mobile phone belonged, inspite of the phone calls and messages projected as the basis of the case of the prosecution and consequently, the mobile call details relied upon by the prosecution was never established.
- The fingerprint report marked as Ex.P19 through P.W-19 is totally in violation of Police Standing Order (PSO) 801 and it was not prepared as per law and hence, inadmissible.

To substantiate this ground, the judgment of the Apex Court in *Ashish Jain v. Markand Singh and Others* in Criminal Appeal No. 1980 of 2008, dated 14.1.2019 and *Prakash v.State of Karnataka* reported in (2014) 12 SCC 133 was relied upon.

- The fingerprint sample was not obtained in the presence of the Magistrate and hence, it cannot be relied upon. To substantiate the same, the judgment of the Apex Court in *Mohd. Aman and Another v. State of Rajasthan* reported in (1997) 10 SCC 44 and *Chandran @Surendran and Another v. State of Kerala* reported in 1991 Supp (1) SCC 39 were relied upon.
- The evidence of P.W-19 is questionable since this witness speaks about breaking open the lock and getting into the house for lifting the fingerprint and whereas, P.W-7 comes up with a version that he had the alternate key and the house was opened in his presence.
- The evidence of P.W-3 is not valid since the Trial Court did not ascertain the capacity of the child witness to

understand and depose and that apart, the witness was tutored by the parents and the police. To substantiate this ground, the judgment of the Apex Court in ***State of Assam v. Mafizuddin Ahmed*** reported in (1983) 2 SCC 14 was relied upon.

- The Test Identification parade is not conclusive insofar as identifying the accused persons is concerned when such identification was not properly done by the witnesses when they were in the witness box.
- The evidence of P.W-4 to P.W-7 does not in any way help the prosecution in identifying the accused persons.
- There are various contradictions in the evidence of P.W-1 and P.W-2 with regard to the driver of the car, arrest of A1 and the manner in which the child was handed over to the parents and their evidence is not wholly reliable.
- The manner in which the car was recovered is highly doubtful since P.W-2 states that the car keys were given and whereas P.W-1 says that the car was recovered and if really the boy was kidnapped in the car, there was no

reason why the fingerprints were not lifted from the car and the fingerprint of the boy was not taken.

- If really P.W-1 and P.W-2 had made Rs.70 Lakhs ready to be paid as ransom and were carrying it in a gunny bag, there was no reason why it was not produced and marked as a Material Object in this case.
- There was an exorbitant delay in sending the statement of witnesses to the Court. The statement was recorded on 17.8.2011 and whereas, it was sent to the Court only on 4.4.2012.
- There was absolutely no evidence to sustain the charge of criminal conspiracy under Section 120B of IPC.
- If really the victim boy was taken in the car to school, there was discrepancy in the name of the school and no one from the school was examined.
- If A1 and the victim boy were traced by the police party before they were handed over to the Investigation Officer, no one was examined from the police party to support the version of P.W-24.

18. The learned counsel appearing on behalf of A5 and A6 submitted that there was absolutely no material to rope in these two persons as accused in this case and none of the witnesses speak about the involvement of these two accused persons. P.W-8 and P.W-9, who were examined to rope in these two accused persons also did not support the case of the prosecution.

19. Per contra, the learned Additional Public Prosecutor made the following submissions:

- The evidence of P.W-3, who is the victim boy, is very clear and cogent and the said evidence is sufficient to convict A1 to A4.
- The involvement of A5 and A6 is substantiated through circumstantial evidence and they were the ones who were providing the information to the other accused persons on the movement of the police.
- The evidence of P.W-3 cannot be held to be inadmissible only on the ground that the Trial Court did not put questions to determine the understanding capability of

P.W-3. The same has to be ascertained only on an overall reading of the evidence of P.W-3. To substantiate the said submission, the learned counsel relied upon the judgement of this Court in *Ganesan v. State of Tamil Nadu* reported in MANU/TN/2145/2017.

- A1 to A4 were identified in the Test Identification parade by P.W-3 and they were also identified in the Court.
- The evidence of P.W-1, P.W-2, P.W-4 and P.W-5 clearly shows that A1 to A4 were seen in the car and they were involved in the commission of the offence.
- There is no contradiction in the evidence of P.W-1 and P.W-2 to the extent of dislodging the case of the prosecution and minor discrepancies should be disregarded.

20. This Court has carefully considered the submissions made on either side and the materials available on record.

21. This Court wants to analyse and appreciate the evidence under the following heads:

- a) The evidence of P.W-23, Nodal officer, on the call records marked as Ex.P24.
- b) The evidence of the fingerprint expert, P.W-19, through whom the report was marked as Ex.P19.
- c) The identification of the accused persons in the Test Identification parade and when the witnesses were in the dock qua the evidence of P.W-3 to P.W-7.
- d) The evidence of the victim boy P.W-3, whether there is infraction of Section 118 of the Indian Evidence Act.
- e) The evidence of P.W-1 and P.W-2, parents of P.W-3.
- f) The evidence of P.W-7, land broker, which was heavily relied upon by the prosecution.
- g) The role of the Investigation Officer in the present case and
- h) Whether the charges framed against each of the accused persons has been proved by the prosecution ?

22. The evidence of P.W-23, Nodal officer, on the call records marked as Ex.P24.

22.1) The case of the prosecution commences from the phone calls said to have been received in the mobile phone belonging to P.W-2. The mobile number of P.W-2 is 9942533301. According to the case of the prosecution, A1 is said to have called from his mobile number 9500830912 and informed the parents of P.W-3 that P.W-3 has been kidnapped and they demanded a ransom of Rs.5 Crores. P.W-23 is the Nodal Officer who was asked to collect the details of the phone calls/messages that were exchanged between the above two mobile numbers. Accordingly, P.W-23 had collected the call details for the period from 01.08.2011 to 17.08.2011 and it was handed over to the Investigation Officer under Ex.P24. P.W-23, in his evidence, has stated that P.W-2 had received an incoming call on 17.08.2011 at about 08.31 a.m. from the mobile number of A1. Yet another call was received at 10.42 a.m. and one more call was received at 09.36 p.m. Accordingly, three calls were received on 17.08.2011 by P.W-2 from A1 and there were no other outgoing calls on 17.08.2011. That apart, there were nearly 15 incoming calls from 9942533301 to 9500830912 on 17.08.2011 and there

were six incoming SMS messages received from the same number.

22.2) In the first place, the call detail records which was marked as Ex.P24 is inadmissible in evidence, since, it was marked without the mandatory certificate under Section 65-B(4) of the Evidence Act. Hence, no amount of oral evidence of P.W-3 will help the prosecution with regard to the call records. The law on this issue has been made very clear by the Apex Court in ***Ravinder Singh @ Kaku***, referred supra and the relevant portions in the judgment are extracted hereunder:

“21. Lastly, this appeal also raised an important substantive question of law that whether the call records produced by the prosecution would be admissible under Sections 65-A and 65-B of the Evidence Act, given the fact that the requirement of certification of electronic evidence has not been complied with as contemplated under the Act. The uncertainty of whether Anvar P.V. v. P.K. Basheer [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] occupies the filed in this area of law or whether Shafhi Mohammad v. State of H.P. [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] lays down the correct law in this regard has now been conclusively settled by this Court by a judgment dated

14-7-2020 in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal [Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 : (2020) 4 SCC (Civ) 1 : (2020) 3 SCC (Cri) 1 : (2020) 2 SCC (L&S) 587] wherein the Court has held that : (Arjun Panditrao Khotkar [ArjunPanditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 : (2020) 4 SCC (Civ) 1 : (2020) 3 SCC (Cri) 1 : (2020) 2 SCC (L&S) 587] , SCC pp. 56 & 62, paras 61 & 73)

“61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , and incorrectly “clarified” in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] . Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor [Taylor v. Taylor, (1875) LR 1 Ch D 426] , which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

73.1. Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in Tomaso Bruno [Tomaso Bruno v. State of U.P., (2015) 7 SCC

178 : (2015) 3 SCC (Cri) 54] , being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] and the judgment dated 3-4-2018 reported as Shafhi Mohammad v. State of H.P. [Shafhi Mohammad v. State of H.P., (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704] , do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4).”

(emphasis supplied)

22. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law.”

22.3) It is clear from the above judgment that oral evidence in the place of a certificate will not satisfy the mandatory requirement under Section 65-B(4) of the Evidence Act. Hence, the contents of Ex.P24 cannot be substantiated or proved through the evidence of P.W-23.

22.4) Except the *ipse dixit* of the Investigation Officer and P.W-23, there is no material to show that mobile number 9500830912 actually stood in the name of A1. The Investigation Officer and P.W-23 did not even bother to collect the particulars from the service provider pertaining to the above two mobile numbers. That apart, neither the mobile phone of A1 nor the mobile phone of P.W-2 was seized and sent for expert opinion. Atleast if this effort had been taken, there would have been no requirement to rely upon the certificate, since the very original document (mobile phone) itself is produced. Hence, the reference to the phone calls or the messages exchanged will be of no significance in this case since it has not been proved. Therefore, this Court holds that the evidence of P.W-23 on the call records marked as Ex.P24

does not help the case of the prosecution to prove the phone calls and messages exchanged between two mobile numbers.

23. The evidence of the fingerprint expert, P.W-19, through whom the report was marked as Ex.P19.

23.1) The fingerprint expert has deposed that he received a call from the police on 24.8.2011 and he went to the house where P.W-3 is said to have been kept in illegal custody. This witness states that the lock was broken open by the police and he collected seven fingerprints. He specifically states that it was photographed by the photographer belonging to the police department. Thereafter, the fingerprint prints of the accused persons was collected by the Investigation Officer on 27.08.2011 and it was sent to him. On the very same day, P.W-19 claims to have prepared a report and he had matched the fingerprints of A1 to A4 and a report was sent under Ex.P19 in this regard. Insofar as fingerprint is concerned, Police Standing Order 801 provides for the method of taking fingerprints and the person who is qualified to take such fingerprints. This Court in *K.Sulochana v. State*, reported in

(2010) 3 MLJ (CrI)625 dealt with the scope of Police Standing Order 801 and after considering the entire law on the issue, it was held that collection of an expert evidence has to adhere to Police Standing Order 801, failing which, it will not be appropriate to solely rely upon the expert opinion. For proper appreciation, the relevant portions in the judgment are extracted hereunder:

“8. In Shanmugayya v. State, 1992 (3) Crimes p.505, a Division Bench of this Court has held as follows : -

‘31. In this context, it would be worthwhile to refer to certain provisions of the Identification of Prisoners Act 1920 (Act No. 33 of 1920). The object of this Act was to authorise taking of measurements and photographs of convicts and others. The word “measurements” has been defined under Section 2(a) of the Act to include finger impressions and foot-print impressions and under Section 2(b), it is stated that ‘Police Officer’ means an Officer in charge of a police station, a police officer making an investigation under Chapter XIV of the Code of Criminal Procedure, 1898 (5 of 1898) or any other police officer not below the rank of Sub Inspector. Section 3 of the Act concerns itself with taking of measurements etc., of convicted persons. In the instant case we are not concerned with this section. Section 4 deals with taking of measurements or photographs of non-convicted persons, Section 4 reads as follows : -

“4. Taking of measurements of photographs of non-convicted persons,-

Any person - (a) who has been arrested

(i) Under section 55 of the Code of Criminal Procedure, 1898, or under section 4 of the Bombay Beggars Act, 1945;

(ii) In connection with an offence punishable under Section 122 of the Bombay Police Act, 1951, or under section 6 or 9 of the Bombay Beggars Act, 1945, or in connection with an offence punishable with rigorous imprisonment for a term of one year or uP.Wards, or

(b) in respect of whom a direction or order under section 55 or 56 of the Bombay Police Act, 1951, or under sub section (1) or (2) of section 23 of the Bombay Beggars Act, 1945, or under Section 2 of the Bombay Public Security Measures Act, 1947, has been made, shall, if so required by a Police Officer, allow his measurements or photograph to be taken in the prescribed manner.”

A look at Section 4 of the Act shows, that any person who had been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or uP.Wards (as far it is relevant to this case) shall, if so required by a police Officer allow his measurements or photograph to be taken in the prescribed manner.

32. Section 4 refers to taking of measurements etc. of habitual offenders against whom restriction order is made. We are not concerned with this section in the present appeal. Section 5 deals with the power of a Magistrate to order a person to be measured or photographed. Under this Section if a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may

be, by a Police Officer. Such an order can be made only by a Magistrate of First Class and further unless the person has at some time been arrested in connection with such investigation or proceeding. The Act does not say, that Section 5 refers to the prescribed manner spelt out in Section 4 of the Act. The power of the Magistrate under Section 5 of the Act does not seem to affect the power of a Police Officer, to take fingerprints or photographs of the persons arrested in connection with, the various facets referred to under Section 4 of the Act.

33. Section 6 takes in its fold permissibility of use of lawful means necessary to secure measurements or photographs when resistance is offered or refusal is indicated by the person concerned. Such resistance or refusal, according to Section 6 of the Act shall be deemed to be an offence punishable under Section 186 of the Indian Penal Code. We are not concerned with Section 7 of the Act.

34. Section 8 confers powers on the State Government to make rules for the purpose of carrying into effect the provisions of this Act. It was stated by the learned Public Prosecutor, that the State of Tamil Nadu had not framed any rules for the purpose of carrying into effect the provisions of the Act. After careful consideration of Sections 4 and 5 of the Act, we are unable to agree with Mr. N. Dinakar, that invariably during investigation a person arrested must be taken before a Magistrate and orders obtained before the fingerprints of such persons could be taken by a Police Officer. Sections 4 and 5 operate in different fields and obviously if the State Government had made any rules for the purpose of carrying into effect the provisions of this Act, the Investigating Officer, ought to have followed such rules which would fall within the ambit of “prescribed manner” contemplated under Section 4 of the Act. If the State Government has not made any rules under the Act, it will be

the duty of the Investigating Officer, to follow Police Standing Order 836. Police Standing Orders are in the nature of instructions given, to be followed by the Police force. Police Standing Order 836(3)(a) defines "fingerprints" as including prints of thumb and are either 'rolled' or 'plain'. P.S.O.836(3) (f) defines 'proficient' to be an Officer, who has been declared by a Superintendent of Police or in the City of Madras by the Commissioner of Police, to be qualified to take clear and well-rolled impressions. The method of taking fingerprints with reference to appliances, forms part of P.S.O. 836(4)(a). P.S.O. 836(4)(d) states that prints should invariably be taken on the authorised Finger-Print Slip (Form No. 141). It also states, that the headings of the slip are self-explanatory.

35. If Form No. 141 had been used in the instant case, the various infirmities we have pointed would in all possibility, not have occurred at all.

36. P.S.O. 836(4)(k) reads as follows : -

"Finger impressions shall be taken only by officers declared by a Superintendent or, in the City of Madras, by the Commissioner of Police, to be qualified to take clear and well-rolled impressions."

None of the provisions of Police Standing Order 836 had been followed by the investigating agency. Of course, it is possible to argue that Police Standing Orders do not have statutory force and therefore non-following of the Standing Order cannot be held in favour of the appellants. Even if the provisions of the Police Standing Orders had not been complied with and if the obtaining of fingerprints from the appellants in the manner spoken to by C.Ws.1 and 2, did inspire confidence, we would have still to consider if non-following of the procedure of the Police Standing Orders, was only irregular, which did not affect the fact of fingerprint impressions having been obtained by C.W.1 in the presence

of C.W.2, claimed by the former.

We have already pointed out several infirmities, which taint the whole process of obtaining of fingerprint impressions and probably less said it would be better for the prosecution. We think it necessary that the State Government must make rules under Section 8 of the Identification of Prisoners Act 1920 for the purpose of carrying into effect the provisions of this Act. Some of the State Governments have made rules. A proper procedure in obtaining fingerprints must be followed for otherwise, the sanctity of scientific evidence not only gets obliterated but also becomes an exercise in futility”.

In the case cited, the persons who had taken the finger prints were found wanting in the conduct of their task, while in the present case such person has not so much as been examined.

9. The present Tamil Nadu Police Standing Orders 801, corresponds to the old order 836 and here also PSO 801(3)(f) describes proficient as,

‘Proficient means an officer who has been declared by a Superintendent of Police or in the City of Madras by the Commissioner of Police to be competent to examine, classify and give expert opinion on finger impressions.

’and PSO 801(4)(k) informs that,

‘Finger Prints by whom to be taken - finger impressions shall be taken only by officers declared by a Superintendent or, in the City of Madras by the Commissioner of Police, to be qualified to take clear and well-rolled impressions’.

10. Again in case of K. Dhanasekaran v. State, 2003 (1) CTC 223, this Hon'ble Court has, after dealing with the aspect of obtaining finger prints, also dealt with the question of passing conviction, on the strength of the expert evidence. This Court has this to say; at p.2221 of MLJ (CrI)

“9. It is also argued that in the absence of any evidence to show that the specimen signatures were obtained as per the procedure laid down under Section 5 of the Identification of Prisoners Act, it is not safe to impose conviction merely on the basis of expert's opinion. In our case, I have already referred to the fact that the evidence of P.Ws.1, 3 and 4 are not reliable for the reasons stated above; accordingly in the absence of compliance of Section 5 of the Identification of Prisoners Act, now I shall consider whether the conviction can be based only on the expert's (P.W.8's) evidence. The following conclusion of the Supreme Court in S. Gopal Reddy v. State of A.P. 1996 SCC (CrI.) 792 is pressed into service : (para 28)

“28. Thus, the evidence of P.W.3 is not definite and cannot be said to be of clinching nature to connect the appellant with the disputed letters. The evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering ‘conclusive’ proof and therefore safe to rely upon the same without seeking independent and reliable corroboration. In Magan Bihari Lal v. State of Punjab, 1977 (2) SCC 210 : 1977 SCC (Cri.) 313, while dealing with the evidence of a handwriting expert, this Court opined : (SCC pp.213-14, para-7)

“... We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law. It was held by this Court in Ram Chandra v. State of U.P., AIR 1957 SC 381 : 1957 CrI LJ 559 that it is unsafe to

treat expert handwriting opinion as sufficient basis for conviction, but is may be relied upon when supported by other items of internal and external evidence. This Court again pointed out in Ishwari Prasad Misra v. Mohdn. Isa, AIR 1963 SC 1728 : 1963 BLJR 226 that expert evidence of handwriting can never be conclusive because it is, after all, opinion evidence, and this view was reiterated in Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529 where it was pointed out by this Court that expert's evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert opinion in regard to handwriting in Fakruddin v. State of M.P., AIR 1967 SC 1326 : 1967 (2) Andh LT 38 and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence, the court must always try to see whether it is corroborated by other evidence, direct or circumstantial.”

It is clear from the above judgment that it is not desirable to impose conviction solely on the evidence of expert without corroborative evidence either direct or circumstantial.”

11. This court finds itself in respectful agreement with the earlier decisions of this Court both on the question of the person by whom and the manner in which finger prints have to be obtained and also evidentiary value of the opinion of the finger print expert.”

23.2) In the instant case, the accused persons were arrested on 20.8.2011 and 21.8.2011 and the fingerprints were obtained from them only on 27.8.2011. Infact, the fingerprint expert had gone to the house only after the arrest i.e. on 24.8.2011 to lift the fingerprints. Under such circumstances, it would have been more safer to obtain the fingerprints in the presence of the Magistrate in order to make it more credible and to dispel any suspicion or eliminate the possibility of fabrication of evidence. Admittedly, in this case, no orders were obtained from the Magistrate nor the specimen fingerprints were taken in the presence of the Magistrate.

23.3) It will be relevant to take note of the judgment of the Apex Court in *Mohd. Aman v. State of Rajasthan* reported in (1997) 10 SCC 44 in this regard and the relevant portion is extracted hereunder:

“8....Apart from the above missing link and the suspicious circumstances surrounding the same, there is another circumstance which also casts a serious mistrust as to genuineness of the evidence. Even though the specimen

fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate.”

23.4) It will also be relevant to take note of the judgment of the Apex Court in ***Chandran @ Surendran and Another v. State of Kerala*** reported in **1991 Supp (1) SCC 39** and the relevant portions are extracted hereunder:

“21. PW 30, the fingerprint expert on receipt of a message from the Inspector of Police examined the articles lying scattered at the scene of the occurrence and found the two broken glass pieces (MOs 22 and 23) containing portion of finger and palm prints. He developed the fingerprints for comparison and kept them in the fingerprint bureau, Cannanore. It is in the evidence of PW 33 that on May 11, 1986 the fingerprint and palm print of A-1 and A-2 were taken by a police constable of Kumbala Police Station under his direction and they were sent to PW 30 on May 12, 1986 for comparison. PW 30 compared those two fingerprints which were developed from MOs 22 and 23 with the fingerprints of A-1 and A-2 (marked as Exs. P-21 and 20 respectively) sent by PW 33 and gave his opinion that one of the fingerprints found in one of the glass pieces was identical with the right palm print of A-2 and

the fingerprint found on the other glass piece tallying with the thumb impression of A-1. The explanation given by both the appellants in their statements recorded under Section 313 CrPC is that their fingerprints were obtained by the police on two glass pieces under coercion.

22. *It is very strange that only two broken glass pieces among others recovered from the scene of occurrence contained two fingerprints tallying with the fingerprints of A-1 and A-2 respectively. According to PW 33, he got information about the arrest of the appellants by Karnataka Police on February 28, 1986 and got the custody of the appellants on April 25, 1986 which was extended for some more days. Then he obtained the custody of the second appellant on May 2, 1986. Though both the appellants were in the police custody on or about May 2, 1986, PW 33 thought of taking their fingerprints only on May 11, 1986. The purpose for which the two appellants were taken to the police custody is not known. It seems that nothing has been recovered from any of the appellants after they have been taken to the police custody.*

23. *At the risk of repetition, we may state at this juncture that the explanation offered by the two appellants for the presence of the fingerprints on MOs 22 and 23 is that their fingerprints were taken on the two glass pieces under compulsion. The non-explanation for taking these two appellants into police custody long after their arrest leaves an impression that all was not well with the prosecution.*

24. *In passing, it may be mentioned that the photographer (Charge-Sheet Witness No. 40) who took the photographs of the fingerprints was not available for examination. Though the evidence of PW 30 by itself is free from any infirmity, we are*

unable to sustain the conviction of these two appellants on the opinion of PW 30 alone as we have entertained a lurking suspicion in our mind about the manner in which the evidence had been obtained as indicated above. Further it is highly hazardous to rely on these two scanty pieces of circumstantial evidence which are brought on record in a very unsatisfactory and loathsome manner and which lack guarantee to inspire confidence.”

23.5) This Court also wants to take note of the judgment of the Apex Court in *Ashish Jain v. Markand Singh and others* in Criminal Appeal No:1980 of 2008, dated 14.1.2019 and the relevant portions are extracted hereunder:

“34. Another incriminating factor as argued by the counsel for the complainant is that the fingerprints of Accused 1 were found upon the tea tumblers found at the scene of the crime. We do not agree with the conclusion of the High Court that the fingerprint samples of the accused (used for comparison with the fingerprints on the tumblers) were illegally obtained, being in contravention of the Identification of Prisoners Act, 1920, inasmuch as they were obtained without a Magisterial order. Importantly, Section 4 refers to the power of a police officer to direct taking of measurements, including fingerprints:

“4. Taking of measurements, etc., of non-convicted persons.—Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so

required by a police officer, allow his measurements to be taken in the prescribed manner.”

35. *Section 5 of this Act provides for the taking of such samples upon an order of a Magistrate, if the Magistrate is satisfied as to its expediency:*

“5. Power of Magistrate to order a person to be measured or photographed.—*If a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1898 (5 of 1898) it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:*

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class:

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.”

36. *However, as affirmed recently by this Court in Sonvir v. State (NCT of Delhi) [Sonvir v. State (NCT of Delhi), (2018) 8 SCC 24 : (2018) 3 SCC (Cri) 486] , Section 5 is not mandatory but is directory, and affirms the bona fides of the sample-taking and eliminates the possibility of fabrication of evidence. The Court also relied on various judgments on the point, including Shankaria v. State of*

Rajasthan [Shankaria v. State of Rajasthan, (1978) 3 SCC 435 : 1978 SCC (Cri) 439] , a three-Judge Bench decision of this Court to reach this conclusion. While discussing the decision of this Court in Mohd. Aman v. State of Rajasthan [Mohd. Aman v. State of Rajasthan, (1997) 10 SCC 44 : 1997 SCC (Cri) 777] , the Court observed at paras 60-62 as follows: (Sonvir case [Sonvir v. State (NCT of Delhi), (2018) 8 SCC 24 : (2018) 3 SCC (Cri) 486] , SCC pp. 45-46)

“60. This Court observed that the prosecution has failed to establish that the seized articles were not or could not be tampered with before it reached the Bureau for examination. Further the following was stated in para 8: (Mohd. Aman case [Mohd. Aman v. State of Rajasthan, (1997) 10 SCC 44 : 1997 SCC (Cri) 777] , SCC p. 49)

‘8. ... Apart from the above missing link and the suspicious circumstances surrounding the same, there is another circumstance which also casts a serious mistrust as to genuineness of the evidence. Even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. [Ed.: The matter between two asterisks has been emphasised in original.] It is true that under Section 4 thereof police is competent to take fingerprints of the accused [Ed.: The matter between two asterisks has been emphasised in original.] but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken

before or under the order of a Magistrate.’

61. The above observation although clearly mentions that under Section 4 police officer is competent to take fingerprints of the accused but to dispel as to its bona fide or to eliminate the fabrication of evidence it was eminently desirable that they were taken before or under the order of the Magistrate.

62. The observation cannot be read to mean that this Court held that under Section 4 police officers are not entitled to take fingerprints until the order is taken from the Magistrate. The observations were made that it is desirable to take the fingerprints before or under the order of the Magistrate to dispel any suspicion.”

(emphasis supplied)

37. Even otherwise, pursuant to Section 8 of the Identification of Prisoners Act, rules have been framed by the Madhya Pradesh Government for the purpose of carrying into effect the provisions of the said Act. The relevant rules for the matter on hand are Rules 3, 4 and 5, which are reproduced herein:

“3. Taking of photographs or measurements.—*Allow his photograph or measurements to be taken under Section 3 or Section 4, shall allow them to be taken under the directions of a police officer.*

4. Places at which measurements and photographs can be taken.—*(1) Measurements and photographs may be taken—*

(a) in jail, if the person whose photograph, or measurements are to be taken, is in jail;

(b) at a police station or at any other place at which the police officer may direct the taking of the measurements or photographs, if the person whose photograph or

measurements are to be taken is in police custody.

(2) If the person whose photograph or measurements are to be taken has been released from jail before his measurements or photographs have been taken or is not in police custody, he shall on receipt of an order in writing from an officer in charge of a police station attend at such place as may be specified in such order, on the date and at the time stated therein, for the purpose of having his measurements or photograph taken.

5. Measurements how to be taken.—(1) *Measurements of the whole or of any part of the body may be taken.*

(2) The measurements of a woman shall be taken by another woman with strict regard to decency.”

A bare reading of these Rules makes it amply clear that a police officer is permitted to take the photographs and measurements of the accused. Fingerprints can be taken under the directions of the police officer.

38. *As held by this Court in Sonvir [Sonvir v. State (NCT of Delhi), (2018) 8 SCC 24 : (2018) 3 SCC (Cri) 486] , although Section 4 mentions that the police officer is competent to take measurements of the accused, but to dispel doubts as to its bona fides and to rule out the fabrication of evidence, it is eminently desirable that they were taken before or under the order of a Magistrate. However, the aforesaid observations cannot be held to mean that this Court observed that under Section 4, police officers are not entitled to take fingerprints until the order is taken from a Magistrate. If certain suspicious circumstances do arise from a particular case relating to lifting of fingerprints, in order to dispel or ward off such suspicious circumstances, it would be in the interest of justice to get orders from the Magistrate. Thus, there cannot be any hard-and-fast rule that in every case, there*

should be a Magisterial order for lifting the fingerprints of the accused. Thus, it cannot be held that the fingerprint evidence was illegally obtained merely due to the absence of a Magisterial order authorising the same.

39. *At the same time, we find that in the current facts and circumstances, the absence of a Magisterial order casts doubts on the credibility of the fingerprint evidence, especially with respect to the packing and sealing of the tumblers on which the fingerprints were allegedly found, given that the attesting witnesses were not independent witnesses, being the family members of the deceased. Thus, we cannot rule out the possibility of tampering and post-facto addition of fingerprints, and concur with the High Court in discarding the fingerprint evidence.”*

23.6) A combined reading of all the above judgments consistently points out that a police officer is competent to take the fingerprints of the accused. However, in order to dispel or ward off suspicious circumstances, it would be in the interest of justice to get the orders from the Magistrate or atleast to take the specimen fingerprints in the presence of the Magistrate. Even though this is not an absolute rule, it is more by way of a caution in order to bring credibility to the report of the fingerprint expert and to dispel any suspicion as to its bonafides or eliminate the possibility of fabrication

of evidence. In the present case, the specimen fingerprint was taken after the accused persons came into the custody of police and the fingerprints were lifted from the house after the accused persons were arrested and hence, the Investigation Officer ought to have obtained the orders of the Magistrate or atleast should have taken the specimen fingerprints in the presence of Magistrate. Since the same was not done, it will not be desirable to rely upon the fingerprint report marked as Ex.P19 through P.W-19.

23.7) Apart from the above reason, the report of P.W-19 does not explain as to how the fingerprints of A1 to A4 matches the fingerprints that were lifted from the house. The analyst is expected to compare the qualities such as the general shape of the prints, the shape and depth of the ridges in the print and the length of each ridge. This analysis must form part of the report and it is completely absent in this case. This report has been prepared in a very hasty manner on the very same day when the specimen fingerprint was given by the police on 27.08.2011. That apart, there is

no explanation as to why the photographs of the fingerprints were not marked, particularly, when according to P.W-19, photographer was present inside the house when the fingerprints were lifted and he took photos.

23.8) There is yet another fact that assumes significance in this case. It is the admitted case of the prosecution that A1 to A4 travelled in the car (M.O.11) along with P.W-3. Therefore, the fingerprints of A1 to A4 and P.W-3 must be sufficiently available in the car which was recovered on 20.08.2011 at 5.15 p.m. under Exhibits A7 and A26. If the fingerprints had been lifted from the car (M.O.11) and the specimen fingerprints of A1 to A4 and P.W-3 had been collected in the presence of the Magistrate or after obtaining the orders of the Magistrate, the prosecution could have clinched the case by matching the fingerprints. For reasons best known to the Investigation Officer, he chose not to follow this straight forward procedure and he took the effort of lifting fingerprints from the house and when that was done, the Investigation Officer did not even care to match

the fingerprint of P.W-3,since the boy is said to have been kept in illegal detention in the house.

23.9) In view of the above discussion, this Court holds that the report of the fingerprint expert cannot be relied upon to support the case of the prosecution.

24. The identification of the accused persons in the Test Identification parade and when the witnesses were in the dock qua the evidence of P.W-3 to P.W-7.

24.1) The Test Identification parade becomes necessary for the Investigation Officer where the accused persons are not previously known to the witnesses. Such a process is undertaken so that the substantive evidence in the Court, which is held after a fairly long period, could get corroboration from the Identification parade. The evidence of Test Identification is only a supporting evidence and it is not a substantive evidence. The Identification parade is not primarily meant for the Court and it is only meant for investigation purposes to enable the witnesses to satisfy

themselves that the accused, whom they suspect, is really the one who was seen by them at the time of commission of the crime and to enable the Investigation Officer to satisfy himself that the suspect is the real person whom the witnesses have seen at the time of the occurrence. The real test of identification must take place when the witness is in the dock and that is what is relevant and substantive for the Court to act upon and to satisfy itself that the persons shown as accused are properly identified in the Court.

24.2) In the present case, P.W-3 to P.W-7 are the witnesses who identified the accused persons during the Test Identification parade. The Test Identification parade report has been marked as Ex.P22. A1 to A4 alone were identified during the Test Identification parade.

24.3) Insofar as the identification of the accused persons in the Court, P.W-3 in his evidence has identified A1 to A4 in the Court. P.W-4 was not able to identify any of the accused persons except A1. P.W-5 was not able to identify any

accused person in the Court. P.W-6 generally states that four accused persons are present in the Court and he does not specifically pinpoint the concerned accused persons with their names or their rank. Insofar as P.W-7 is concerned, he identified A2 and A3 in the Court.

24.4) P.W-1 and P.W-2 have identified A1 and A2 in the Court by stating that they were working as drivers.

24.5) It is clear from the above that A5 and A6 have not been identified by anyone, both in the Test Identification parade as well as in the Court. Insofar as A1 to A4 are concerned, the most important evidence is that of P.W-3. The extent to which the evidence of P.W-3 is going to be acted upon will be discussed at the later part of this judgment.

25. The evidence of the victim boy, P.W-3, whether there is infraction of Section 118 of the Indian Evidence Act.

25.1) The victim boy in this case was aged about 4 years at

the time of the incident and he was studying in UKG. This boy was produced before the Judicial Magistrate for recording Section 164 statement and the Magistrate, after putting a lot of questions, came to a conclusion that he was not capable of understanding the questions and answering the same and he was not even able to understand the answers recorded and explained to him. For almost all the questions, he was either referring to the source of information from his parents or from the police. Therefore, ultimately the Magistrate decided not to record his statement under Section 164 of Cr.P.C and the same is evident from Ex.P20.

25.2) The ground that was raised by the counsel appearing on behalf of the appellants was that the Court, while recording the evidence of P.W-3, did not determine the capacity of P.W-3 to understand and give his reply and that P.W-3 was parroting what was drilled into his head by the parents or by the police.

25.3) It is clear from the evidence of P.W-3 that the Trial Judge has straight away concluded that P.W-3 is capable of giving his answers with clarity. It is not known as to how the Trial Judge came to such a conclusion, more particularly, when recording of Section 164 statement of the boy ended in a failure due to the incapability of the boy to understand and to express himself clearly. In view of the same, the important question to be addressed is as to whether such non-determination by the Trial Judge in understanding the capability of P.W-3 to depose in Court, can result in disregarding the entire evidence of P.W-3.

25.4) The above question is no longer *res integra* and this Court considered the same in detail in ***Ganesan v. State of Tamil Nadu***, reported in MANU/TN/2145/2017. The relevant portions in the judgment are extracted hereunder:

“15. *The Learned counsel appearing for the appellant would submit that the evidence of P.W.2 cannot be considered at all for any purpose, because the competence of P.W.2 was not at all examined by the trial court. He has taken us through the evidence of P.W.2. A*

perusal of the deposition of P.W.2 would go to show that P.W.2 was hardly seven years old at the time of giving evidence. The learned Sessions Judge did not make any endeavour to test her competence, as required under Section 118 of the Indian Evidence Act. In a mechanical fashion, the learned Sessions had administered oath on P.W.2, even without examining as to whether she was able to understand its nature. Thus, according to the learned counsel, the evidence of P.W.2 should be rejected in toto. But, the learned Additional Public Prosecutor would submit that of course it is true that the learned Sessions Judge had miserably failed to examine the competence of P.W.2 to be a witness and to test as to whether P.W.2 was able to understand the nature of the oath which was administered on her. But, on that score, according to the learned Additional Public Prosecutor, the evidence of P.W.2 cannot be rejected. He would submit that from the narration of events by P.W.2 before the Court, it could be presumed that P.W.2 was competent, in terms of Section 118 of the Indian Evidence Act, to be a witness.

16. *In order to resolve the above legal tangle, we may, first, refer to the proviso to Section 5 of the Indian Oaths Act, 1873, which reads as under:*

"Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that though he understands the duty of speaking the truth he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of S.6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

The said proviso to Section 5 of the Indian Oaths Act, 1873, should be read along with Section 118 of the Indian Evidence Act, upon which reliance is made by the learned counsel for the appellant. Section 118 of the Indian Evidence Act reads as follows:

"118. Who may testify.--*All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years,*

extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.--A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

17. *These two provisions came to be considered by the Hon'ble Supreme Court in **Rameshwar, S/o.Kalyan Singh v. The State of Rajasthan**, reported in **AIR 1952 SC 54**, wherein, speaking for the Bench, **Justice Vivian Bose** held that an omission to administer, an oath, even to an adult, goes only to the credibility of the witness and not his competency. Thus, according to the Hon'ble Supreme Court, Section 5 of the Indian Oaths Act is all about the credibility of the witness and not of the competency of the said witness. As per the proviso to Section 5 of the Indian Oaths Act, in the case of a child below the age of 12 years, the Court has to form its own opinion that though the witness may understand the duty of speaking the truth, he may not understand the nature of the oath or affirmation. If the court finds that the child is capable of understanding the nature of the oath or affirmation, then only oath can be administered on the child.*

18. *In this case, unfortunately, the learned Sessions Judge, without examining as to whether P.W.2 was capable of understanding the nature of the oath had, in a mechanical fashion, administered oath on P.W.2. In our considered view, since it relates only to the credibility of the witness, on the ground that the learned Sessions Judge had failed to examine the capability of P.W.2 to understand the nature of the oath, we cannot hold that the evidence of P.W.2 is inadmissible. Therefore, in our considered view, mere administration of oath on P.W.2 by the trial court, in a mechanical fashion, would not render the evidence of P.W.2 as inadmissible. It only leads to a further examination as to whether the evidence of P.W.2 is credible or not.*

19. *Competence of a witness is dealt with in Section 118 of the Indian Evidence Act. It is too well settled that every witness is competent unless the court considers that he is prevented from understanding the questions put to him or from giving rational answers by reason of tender age, extreme old age, disease, whether of body or mind, or any other cause of the same kind. From a plain reading of Section 118 of the Indian Evidence Act, as it has been consistently held by the Hon'ble*

*Supreme Court, unless the Court considers otherwise, the witness is always competent. Since Indian Oaths Act has not added any additional ground of incompetency, Section 118 of the Indian Evidence Act must prevail and therefore the witness should pass the test of Section 118 of the Indian Evidence Act. In the above said judgment, the Hon'ble Supreme Court, while dealing with Section 118 of the Indian Evidence Act, referred to the Privy Council Judgment in **Mohamed Sugale Sav. The King** reported in **A.I.R.(33) 1946 P.C. 3** and held in paragraph 11 of the judgment as follows:*

"11. I would add however that it is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate. In the present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness does not understand the

nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused, who was represented by counsel, did not object. Had he raised the point the Judge would doubtless have made good the omission. I am of the opinion that Mr.Purni was a competent witness and that her evidence is admissible.”

20. *From the above judgment of the Hon'ble Supreme Court, it is crystal clear that mere omission by the trial judge to record a formal certificate that the witness was competent to be a witness would not result in an irresistible conclusion that she was incompetent. As we have already pointed out, a witness is always presumed to be competent. As held by the Hon'ble Supreme Court, had there been an objection raised by the learned counsel for the accused at the appropriate stage when P.W.2 was examined questioning her competency, the learned trial judge would have examined the same in further detail and then recorded a formal certificate. Learned counsel did not do so. Learned Trial Judge, from the various answers given by the witness, both during chief examination as well as during cross- examination, was of the view that the child was competent. This*

was in tune with the presumption, as provided under Section 118 of the Indian Evidence Act. To satisfy our judicial conscience, we have gone through the evidence of P.W.2 which runs to four pages. The narration of facts by her, with perfect cogency, the language of the witness and the quick flow of words without any break would all go to show that the presumption that she is competent to be a witness remains un- rebutted. In other words, we are fully convinced that P.W.2 was competent to be a witness. Though she was administered oath without examining the question as to whether she was capable of understanding the oath administered on her, on that score, we cannot reject the evidence of P.W.2, because her evidence, in our considered view, inspires the fullest confidence of this Court. Nothing has been brought on record to doubt the credibility P.W.2.”

25.5) It is clear from the above judgment that the omission of the Trial Judge to record a formal certificate that the witness was competent, does not automatically result in discarding the evidence of a child witness, if, ultimately, a reading of the entire evidence inspires the confidence of the Court and the Court is satisfied that the child witness was a

competent witness.

25.6) The above law enunciated must be kept in mind while dealing with the evidence of P.W-3.

25.7) A note of caution has been given by the Apex Court in ***State of Assam, v. Mafizuddin Ahmed*** reported in **(1983) 2 SCC 14** in cases of a tutored child witness. It will be hazardous to rely upon the testimony of a child witness where there is a possibility of coaching and tutoring the child. The child witness, due to his tender age, is a pliable witness. He can be tutored easily, either by threat, coercion or even inducement. Therefore, the Court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone. The Court can act upon the evidence of a child witness only if it comes to a conclusion that the child is not tutored and that his evidence has a ring of truth. As a matter of prudence, it will always be safe to look for corroboration for the evidence of a child witness from the other evidence available on record.

25.8) When P.W-3 was examined before the Trial Court, he was hardly 7 years. Between the time when Section 164 statement was attempted to be recorded and P.W-3 stood as a witness in the present case, there was a lapse of nearly 1 year and 4 months. A careful reading of the evidence of P.W-3 shows that he was sufficiently trained/coached/tutored by the parents and the police. The father of P.W-3 and the police seem to have spoken about the incident to P.W-3 repeatedly and by the time P.W-3 gave evidence in this case, he became confident and the facts, as projected by his parents and the police was deeply etched in his mind.

25.9) Unfortunately, the Trial Court has recorded the evidence of P.W-3 like the evidence of an adult is recorded. The best way to record the evidence of a child witness is to record it in question and answer format. Only then the Court can ascertain as to whether the child understood the question and gave the answer. The capability of the child to

understand can be ascertained only by recording the evidence in question and answer format. The Trial Court, while appreciating the evidence of P.W-3, does not even speak about the demeanour of the witness and it has been considered in a very casual manner. The Trial Court should have borne in mind that the very same child witness was found incapable of giving answers, while an attempt was made to record Section 164 statement of the child.

25.10) The identification of A1 to A4 by P.W-3 in the Court does not come as a surprise since the child was so well acquainted by the time he got into the witness box and was sufficiently tutored by then. This Court, therefore, is of the considered view that it will be unsafe to determine the guilt of the accused persons only based on the evidence of P.W-3 and this Court has to necessarily look for corroboration.

26. The evidence of P.W-1 and P.W-2, parents of P.W-3.

26.1) P.W-1 is the father of the victim boy. He states that his son P.W-3 was studying in UKG in SRC school. This

statement made by P.W-1 runs contrary to the evidence of P.W-2 who states that the victim boy was studying in Vikas School (Visakha School). No school authorities were examined in this case to resolve this confusion. P.W-1 further states in his evidence that A2 was the car driver on 17.8.2011 and he only took P.W-3 in the car to the school. He further states that phone call was received in the mobile phone belonging to his wife(P.W-2) and there was demand for a ransom of a sum of RS.5 Crores. P.W-1 claims that the car (M.O.11) was recovered on 18.8.2011 near Thiruchendur and whereas, this statement runs contrary to the evidence of P.W-10 and Exhibits P2, P3 and P26 where it has been stated that the vehicle was seized on 20.8.2011.

26.2) This witness further states that the victim boy was handed over in the office of the Superintendent of Police and the Superintendent of Police was also present when the boy was handed over to him on 18.8.2011. This statement runs contrary to the evidence of the Investigation Officer (P.W-24), who states that the victim boy was handed over

directly to the parents. One very important statement that was made by P.W-1 in the witness box is that he had arranged for Rs.70 Lakhs and had put it in a gunny bag and he was moving around with this gunny bag. There is absolutely no material to show as to when this amount was arranged and if really it was arranged, why it was not made as a material object in this case. That apart, P.W-2, his wife states that Rs.40 Lakhs was arranged. He states that the gunny bag was dropped under the bridge at Pudukkottai. Even here, there is a contradiction between the evidence of P.W-1 and P.W-2. P.W-2 in her evidence states that the gunny bag was dropped after returning from KTC Nagar.

26.3) In so far as P.W-2, mother of the victim boy, she states that she received the phone call from the mobile number of A1 and whereas, P.W-1 has stated that the phone call was received from the mobile number of A2. She also states that she has given the alternate key for taking the car from Thiruchendur and this runs contrary to the recovery said to have been made on the confession made by A1. Both

P.W-1 and P.W-2 talk about a police personnel accompanying in Mufti while dropping the ransom money. No police officer was examined in this regard and no one speaks as to where and when the so called gunny bag was dropped on the alleged demand made by the accused persons. P.W-24, in his evidence, does not talk about the presence of P.W-1 and P.W-2 when the gunny bag was dropped and were waiting. P.W-18 and P.W-21, who are the employees of P.W-1, do not speak anything about the arrangement made for the ransom money and dropping the gunny bag. P.W-1 and P.W-2 admit that they were in serious financial problem since they suffered a loss in producing a movie. Under such circumstances, it is not known as to whether they really arranged for Rs.70 lakhs (Rs.40 Lakhs as per P.W-2) as claimed by them. Surprisingly, P.W-2 also states in the evidence that the accused were arrested on 19.8.2011 and they were kept in the police station when P.W-1 and P.W-2 were called to the police station. This statement once again goes against the evidence of the Investigation Officer, P.W-24, who talks

about the arrest taking place only on 20.8.2011.

26.4) The statement made by P.W-1 and P.W-2 about they receiving phone calls from the accused persons has not been substantiated in this case, since, the call details have already been held to be inadmissible and the mobile phone of P.W-2 or A1 was not even recovered in the course of investigation. If really A1 and A2 were working as car drivers for P.W-1, there must be some material to substantiate the said claim and there is not even a scrap of evidence in this regard except the *ipse dixit* of P.W-1 and P.W-2. In any case, the so called threat and demand for ransom, pales into insignificance, since, ultimately, A1 and the victim boy (P.W-3) were found together by the police party on 18.8.2011 at about 9.30 p.m.

26.5) The overall evidence of P.W-1 and P.W-2 does not really clarify a lot of questions raised in this case and it does not really help the case of the prosecution in a substantial way. Their evidence only gives rise to more questions than providing any answers.

27. The evidence of P.W-7, land broker, which was heavily relied upon by the prosecution.

27.1) P.W-7 is said to be a land broker who was approached by A2 and A3 between 5.8.2011 and 10.8.2011 and this witness had shown the house at Muthu Krishna Nagar, 3rd Street. This witness also identified A2 and A3 during Test Identification parade. He also stated that A2 and A3 were present in the Court. During the course of investigation, Section 164 statement was recorded from P.W-7 and it was marked as Ex. P21. This witness had shown the house to the Investigation Officer and he states that he opened the door with an alternate key and M.O.1 to M.O.4 were recovered from the said house.

27.2) In the considered view of this Court, the identification of the house by P.W-7 and the identification of A2 and A3, does not take the case anywhere, since there is no evidence from any witness to prove that the accused persons were staying in that house while detaining P.W-3.

28. The role of the Investigation Officer in the present case.

28.1) This is one of those cases where the Investigation has to be termed as slipshod. It is quite unfortunate that the Investigation Officer in this case did not even know how to investigate the case involving a kidnap of a minor boy. The minimum that was expected from the Investigation Officer was:

- a. To collect the call details by getting a proper certificate;
- b. To collect the mobile phone from P.W-2 and to recover the mobile phone of A1 and A2;
- c. After recovering the car (M.O.11), to lift the fingerprints from the car and to get the specimen fingerprints of the accused persons and P.W-3;
- d. To take the statement of anyone from the police party who found A1 and P.W-3 together on 18.8.2011 at 9.30 p.m.;
- e. To have made the gunny bag with the money, which is said to have been dropped under the bridge, as a Material Object;
- f. To have taken the statement of at least one school authority to establish the school in which P.W-3 was studying and to clarify whether he went to the school on that day or he was absent on the date of occurrence.

28.2) What has been stated above are bare minimum efforts that should have been taken by P.W-24 and even if one or two of what has been indicated above had been properly done, it would have clearly clinched the case of the prosecution. Either the Investigation Officer is not fit to conduct an investigation or he has tried to project a false case and hence, he chose not to follow any of the steps indicated hereinabove.

28.3) Recovering the two wheeler belonging to the accused persons is of no significance in this case. In fact in his cross examination, P.W-24 gives reckless answers to the effect that he does not even remember as to when and where he handed over P.W-3 to his parents. This is a textbook case on how an investigation should not be conducted. At the time of hearing, the Investigation Officer was present and this Court posed various queries by pointing out to the lapses and the Investigation Officer was not even able to give any convincing answer.

28.4) A general impression is given as if serious crimes end

in acquittal because of the leniency shown by the Courts. However, not many realise that it is due to the slipshod investigation that takes place, the Court is left in a helpless situation resulting in acquittal.

28.5) It would be better if future investigations into any criminal case is not handed over to P.W-24 and an enquiry shall be conducted by the higher officials on the fatal lapses that were committed by P.W-24 in this case.

29. Whether the charges framed against each of the accused persons has been proved by the prosecution?

29.1) The main charge against the accused persons is criminal conspiracy under Section 120B of IPC and the charge of kidnapping for ransom under Section 364A of IPC. The other charges are minor.

29.2) The prosecution has attempted to prove the charge of conspiracy on the ground that A1 had driven the car in the guise of dropping P.W-3 in the school and midway, A2 to

A4 got into the car and they took the victim boy to the house that was rented out with the help of P.W-7 and kept him in illegal custody for two days. Insofar as A5 and A6 are concerned, they are said to have watched the movement of the police and informed the same to the other accused persons.

29.3) In the considered view of this Court, the charge of conspiracy has not been proved by the prosecution. This is in view of the fact that the evidence of P.W-3 is not entirely believable and there is no corroboration available to establish the involvement of A2 to A6 in this case. That apart, the slipshod investigation has resulted in the scientific evidence becoming completely inadmissible.

29.4) Even in so far as A1 is concerned, P.W-3 states that the other accused persons had beaten A1 also inside the car. A1 was the suspect in the complaint and when A1 is said to have been seen along with P.W-3 by the police party on 18.8.2011 at about 9.30 p.m., he was brought to the police

station and he was let out by P.W-24. If really A1 is involved and is a main suspect in this case, there is absolutely no reason to let out A1 on 18.8.2011 and thereafter, arrest him on 20.8.2011. P.W-3 does not even state that A1 had threatened or ill-treated P.W-3. Even from the evidence of P.W-1 and P.W-2, it is not clear as to whether A1 or A2 was the driver on the day when P.W-3 was taken in the car.

29.5) Insofar as A2 to A6 are concerned, unless a strong case is made out by the prosecution establishing that A1 started the act of kidnap and later the other accused persons joined, the offence of criminal conspiracy cannot be assumed. This Court has to necessarily come to a conclusion that the charge of criminal conspiracy has not been established by the prosecution.

29.6) Insofar as the offence of kidnapping for ransom, the prosecution has not made out a case. To make out this offence, the prosecution must prove that the accused persons

had kidnapped or abducted a person and kept the person in detention and after such kidnapping, have demanded for a ransom. The kidnapping of P.W-3 itself is highly doubtful and it has not been established by the prosecution. There is absolutely no material to prove that any ransom was demanded by the accused persons. In the present case, if really A2 had driven the car, it is not known as to why his name did not even figure in the complaint and it is only the name of A1 which was shown as a suspect. These are fundamental facts where there should be no confusion and it gains more significance where the prosecution has miserably failed to prove any of the subsequent events like threatening calls, demand for ransom, arranging Rs.70 Lakhs (Rs. 40 Lakhs) in a gunny bag and dropping it under the bridge, etc.

29.7) It is quite unfortunate that A5 and A6 have been roped in this case without a scrap of material against them. None of the witnesses speak about the involvement of A5 and A6 and only two witnesses viz., P.W-8 and P.W-9, who were relied upon by the prosecution had turned hostile.

29.8) Looking at the case from any angle, this Court comes to a categorical conclusion that the prosecution failed to prove the charges against the accused persons beyond reasonable doubts and there were serious lapses in the investigation which was not able to be answered and hence, the benefit of doubt has to go in favour of the accused persons. The gaping holes in the investigation was never plugged and it is now proving to be fatal to sustain the charges against the accused persons. The Trial Court seems to have been swayed by the seriousness of the charges and it went to the extent of relying upon Section 161 statements recorded by the Investigation Officer.

29.9) The upshot of the above discussion leads to the only conclusion that all the accused persons must be acquitted from all the charges and the judgment of the Court below convicting and sentencing the accused persons is liable to be interfered by this Court.

30. In the result,

(i) These Criminal Appeals are allowed.

(ii) The conviction and sentence passed by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Court), Tuticorin, in S.C.No.233 of 2012, dated 13.08.2019, is set aside. The appellants are acquitted from all the charges.

(iii) Since the appellant/A1 in Crl.A(MD)No.60 of 2020 is in jail, he is directed to be released forthwith, if his custody is not required in any other case.

(iv) The bail bond executed by the appellants in Crl.A(MD)Nos. 451, 458, 479, 482 & 498 of 2019 shall stand terminated and fine amount, if any, paid by them shall be refunded to them.

[J.N.B., J.] [N.A.V., J.]
23.09.2022

Index : Yes/No
Internet : Yes
PJJ

To
1. The Sessions Judge,
Mahalir Neethimandram (Fast Track Court),
Tuticorin.

2.The Inspector of Police,
Tuticorin South Police Station,
Tuticorin.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

J.NISHA BANU,J.

and

N.ANAND VENKATESH, J.

PJL

**Pre-delivery Judgment made in
CrI.A.(MD)Nos.451, 458, 479,
482&498 of 2019 and 60 of 2020**

23.09.2022