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CrI.R.C.No.1820 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.11.2023

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THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CrI.R.C.No.1820 of 2023 and
CrI.M.P.No.17209 of 2023

Azhagan @ Prabhu

... Petitioner

Vs.

State rep. by:

The Inspector of Police,
Veeranam Police Station,
Salem District.

(Crime No.299 of 2013).

... Respondent

PRAYER: Criminal Revision Petition filed under Sections 397 r/w 401 of Criminal Procedure Code, to set aside the judgment passed by the III Additional District and Sessions Court, Salem in C.A.No.107 of 2019 dated 05.02.2020 thereby confirming the conviction and sentence passed by the Judicial Magistrate – IV, Salem, dated 13.09.2017 in C.C.No.118 of 2013.

For Petitioner	:	Mr.S.Jeyakumar
For Respondent	:	Mr.A.Damodaran, Additional Public Prosecutor

ORDER

The petitioner/A1 and A2 in C.C.No.118 of 2013 were convicted by the learned Judicial Magistrate No.IV, Salem, by judgment, dated 13.09.2017 and sentenced to undergo three years Rigorous Imprisonment each and to pay a fine of Rs.5,000/- each, in default to undergo three months Simple Imprisonment



each for offence under Section 457 of IPC and also sentenced to undergo three years Rigorous Imprisonment each and to pay a fine of Rs.5,000/- each, in default to undergo three months Simple Imprisonment each for offence under Section 380 of IPC. Both the sentences were ordered to run consecutively. Aggrieved over the same, the petitioner preferred an appeal before the learned III Additional District and Sessions Judge, Salem in C.A.No.107 of 2019 (lower appellate Court). The lower appellate Court, by judgment, dated 05.02.2020 confirmed the conviction and sentence of the trial Court. Challenging the same, the present Criminal Revision Case is filed.

2. Similarly, A2 also filed an appeal against the judgment of the trial Court, dated 13.09.2017 before the learned II Additional District and Sessions Judge, Salem in C.A.No.109 of 2018. The learned II Additional District and Sessions Judge, Salem by judgment, dated 17.09.2018 partly allowed the appeal modifying the sentence of the trial Court as to period already undergone by A2 and the sentence of both the offence under Sections 457 and 380 of IPC to run concurrently and A2 was ordered to be released if he is not required/detained in connection with any other case.



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3. The case of the prosecution is that on 27.07.2013, the defacto complainant/PW1 along with his wife/PW2 had gone to Tirupur to visit their son, they requested their neighbour/PW6 to take care of his house. On 05.08.2013, at early hours, PW5/wife of PW6 went to common toilet and found PW1's house main grill gate and door broke open and she informed her husband/PW6. PW6 came out and confirmed breaking open of the locks and informed PW1 immediately. PW1 along with wife/PW2 rushed back, found the bureau was lifted and jewels of two gold chains weighing 8 sovereigns, four bangles weighing 6 sovereigns, two gold rings weighing $\frac{1}{2}$ sovereign, gold coin weighing 8 grams, nose ring 2 pairs of stud, cash of Rs.4,500/-, silver articles and gas cylinder found missing. The articles valued around Rs.1.5 lakhs. Thereafter, PW1 lodged the complaint (Ex.P1) to the respondent Police on 05.08.2013. PW9, the Sub Inspector of Police, received the complaint (Ex.P1), registered FIR (Ex.P7), immediately informed PW10, the Investigating Officer and also PW8, the finger print expert. PW10 visited the scene of occurrence, in presence of PW3 and PW4 prepared Observation Mahazar (Ex.P2) and drawn Rough Sketch (Ex.P8). PW5 and PW6 are neighbours, their statements recorded. PW7, a known person to PW1 confirmed about the theft committed in the house of PW1. Thereafter, the service of PW8, the finger print expert



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4.PW8, finger print expert visited the scene of occurrence, collected seven finger prints in the bureau, out of which, four finger prints are of the inmates/family members of PW1 and one finger print tallied with the petitioner/A1 and another one tallied with A2. Since the accused were regular offender, their finger prints are available in another case which tallied. Thereafter, the accused arrested and on 14.08.2013, PW1 was informed about the arrest and recovery of articles. PW3 and PW4 are the witnesses for arrest and recovery. The valuable articles were recovered at the instance of the petitioner/A1 and A2 which identified by PW1 and PW2. The recovered articles marked as MO1 to MO5. PW10, the Investigating Officer on conclusion of investigation filed the charge sheet before the trial Court.

5.During trial, on the side of the prosecution, ten witnesses examined as PW1 to PW10 and thirteen documents marked as Exs.P1 to P13, five material objects marked as MO1 to MO5. On the side of the defence, no witness examined and no document marked.



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6.The learned counsel for the petitioner submitted that the petitioner's appeal in C.A.No.107 of 2019 was dismissed by the learned III Additional District and Sessions Judge, Salem confirming the judgment of the trial Court, dated 13.09.2017. On the other hand, the appeal of A2 in C.A.No.109 of 2018 was partly allowed by the learned II Additional District and Sessions Judge, Salem modifying both the sentence for offence under Sections 457 and 380 of IPC as to period already undergone by him and both the sentence to run concurrently and also ordered release of A2 if he is not detained in connection with any other case. Hence, the judgment suffers from disparity.

7.The learned counsel further submitted that admittedly in this case, there is no eye witness for the occurrence. On perusal of the evidence of PW1 and complaint (Ex.P1), it is seen that PW1 gives exaggerated version including very many articles missing. The trial Court gives an explanation that later, PW1 in his evidence admitted the discrepancy, hence, it cannot be considered as contradiction, is not proper. PW2, the wife of PW1 admits that she does not know details of missing articles. PW3 and PW4 are the witnesses for Observation Mahazar (Ex.P2) as well as for arrest and confession. They admit that the accused shown to them in the Police station on a later day and the



accused were identified by the Police. PW5 and PW6 are the neighbours, who state about PW1's house grill gate and door broke open. PW7 is a known person to PW1. None of the witnesses have seen the petitioner and the other accused/A2 near the scene of occurrence. In view of PW3 and PW4's admission that the accused were identified by the Police, the identification of accused, confession and recovery not proved.

8.He further submitted that PW8, the finger print expert admits that he had not produced the photographs of the finger print lifted from the scene of occurrence and further, states about the finger print of the petitioner and A2 tallied with Crime Nos.1417 & 1429 of 2009 on the file of Pallapatti Police Station, but that report not produced. He further submitted that when the identification, arrest and confession becomes doubtful, the recovery becomes doubtful and cannot be concluded as proved. The trial Court failed to consider all these aspects as well as the lower appellate Court not independently considering the appeal, but in the appeal, it had recorded as though A2 not preferred any appeal against the judgment of the trial Court, hence, it is dismissed the appeal, is not proper. Assailing the above points, prays for setting aside the judgments of the Courts below.



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9. The learned Additional Public Prosecutor appearing for the respondent Police on the other hand filed counter submitting that the prosecution to prove the case examined ten witnesses, marked thirteen exhibits and five material objects. PW1 and PW2 are the inmates of the house, whose properties (MO1 to MO5) were thieved by the petitioner and A2. PW3 and PW4 are the mahazar witnesses and witnesses for arrest, confession and recovery. PW5 and PW6 are the neighbours, who had first seen PW1's house main door and grill gate broke and informed PW1. Thereafter, PW1 along with his wife/PW2 rushed back, found the house broke open as well as bureau and missing of the articles. Thereafter, he lodged the complaint to PW9, the Sub Inspector of Police. PW7 is the another neighbour, who confirms about breaking of house and missing of articles. The articles (MO1 to MO5) identified by PW1 to PW4 and the same were recovered and seized on the confession of the petitioner/A1 and A2. PW8 is the finger print expert, who confirms two finger prints which is of the petitioner/A1 and one of A2 in the scene of occurrence. Further, the petitioner is a regular offender whose finger print was available in Crime Nos.1417 & 1429 of 2009 on the file of Pallapatti Police Station. From the District Crime Record Bureau, it was found tallied. PW8 gave his report Ex.P12. On completion of investigation and collection of materials, PW10 filed the charge



sheet before the trial Court. After ful-fledged trial, the trial Court rightly convicted the petitioner/A1 and A2.

10.The learned Additional Public Prosecutor fairly submitted that A2 preferred an appeal in C.A.N.109 of 2018 before the learned II Additional District and Session Judge, Salem and the learned Judge, Salem by judgment, dated 17.09.2018 partly allowed the appeal modifying the sentence of the trial Court to the effect that the sentence of A2 for offence under Sections 457 and 380 of IPC to run concurrently and reduced to the period already undergone by him and he was ordered to be released if he is not detained in connection with any other case.

11.At this juncture, the learned counsel for the petitioner submitted that though very many grounds raised by him, he prays for modification of the sentence of the petitioner/A1 as that of co-accused A2, whose sentence has been modified as to period already undergone and to run concurrently, by the learned II Additional District and Sessions Judge, Salem in C.A.No.109 of 2018.



12.Considering the submissions and on perusal of the materials, it is not in dispute that the petitioner/A1 and A2 were convicted by the trial Court by judgment, dated 13.09.2017 in C.C.No.118 of 2013 as stated above. It is also to be seen that the co-accused/A2 preferred appeal in C.A.No.109 of 2018 before the learned II Additional District and Sessions Judge, Salem. The learned Judge, by judgment, dated 17.09.2018 allowed the appeal in part with modification as stated above.

13.The petitioner's appeal in C.A.No.107 of 2019 was dismissed by the learned III Additional District and Sessions Judge, Salem on 05.02.2020 confirming the conviction of the trial Court. It is seen that the lower appellate Court in its judgment, dated 05.02.2020 recorded that A2 not preferred any appeal against his conviction, is not correct. In this case, the Courts below had given a consecutive judgment without any reason.

14.In view of the co-accused/A2's sentence modified as to period already undergone and also made to run concurrently, this Court is inclined to grant same relief to the petitioner.



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15. Accordingly, the conviction of the Courts below against the petitioner/A1 is modified, the sentence for both the offence under Sections 457 and 380 of IPC is to run concurrently and for the period already undergone.

16. With the above modification, this Criminal Revision Case is partly allowed. The petitioner is directed to be released forthwith if he is not required or detained in connection with any other case. Consequently, the connected Miscellaneous Petition is closed.

17.11.2023

Speaking Order/Non Speaking Order

Index : Yes/No

Internet : Yes/No

Neutral Citation: Yes/No

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To

1. The III Additional District and Sessions Court,
Salem.

2. The Judicial Magistrate Court No.IV,
Salem.

3. The Inspector of Police,
Veeranam Police Station,
Salem District.

4. The Superintendent of Central Prison,



Salem.

5. The Public Prosecutor,
High Court, Madras.



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