
(2012) 01 MAD CK 0016

In the Madras High Court

Case No : Criminal A. No's. 1340 of 2003, 121 of 2004 and 270 of 2004

Raj @ Medical Raj @ Raj @ Marchchezian and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 27-01-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 25, 27, 9

Penal Code, 1860 (IPC) — Section 397

Citation : (2012) 3 MLJ 203

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : Prabakaran, N. Arunkumar, T. Gowthaman and D. Selvaraju, for the Appellant; C. Balasubramanian, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S. Palanivelu, J.—The following is the brief account of the prosecution case:

1(a) P.W. 1 lodged complaint Exhibit P-I with the respondent police stating that on 1.2.2001 at about 7.15 p.m. while he was standing in front of

the house of his daughter, all of a sudden six persons appeared in the scene, that one person assaulted him on his right elbow by means of wooden

log and another person by means of knife cut his grandson by name Sakthivel above the left ear on the head, that his daughter Seethalakshmi also

sustained blood injury on her left hand, that the assailants snatched jewels from his wife and daughter such as Thali chains, bangles, ear studs and

rings under threat and they also locked them in a room and also searched almiras and fled away from the scene and that the stolen properties

would weigh 30 sovereigns.

1(b) On receipt of the complaint P.W. 13 registered a case in Cr. No. 53 of 2001 u/s 397 I.P.C. and lodged F.I.R. Exhibit P-13 and sent the

same to the Court. He seized the torn white cotton shirt produced by P.W. 1 at 20.15 hours under Form 95. He also seized a banian with sleeves

at 20.30 hours belonging to Sakthivel under Form 95. They are M.Os.2 and 3. He sent both the clothes to Court. P.W. 14 took up the case for

investigation on the same day of occurrence at 9.00 p.m. He proceeded to the scene of crime, prepared Observation Mahazar Exhibit P-5 and

Rough Sketch Exhibit P-6. He examined the witnesses and recorded their statements. He searched the accused but he could not get any lead. He

referred the injured persons to the hospital for treatment.

1(c) P.W. 4 attached to Government Hospital, Avinasi, deposed that Dr. Balachandar attached to the same hospital treated P.Ws. 13 and 5

stating that P.W. 1 has 4 cm x 4 cm swelling at right upper arm; no bleeding and he has no other external injury; P.W. 3 has sustained incised

wound 1 x 1/2 x 1/2 cm at the Root of Left hand thumb and abrasion 1/2 cm semi circle around the neck from the right half back and left front

neck; P.W. 5 sustained incised wound 2 cm x 1/2 cm x 1/2 cm behind left ear; swelling 3 cm x 2 cm over left hip and bleeding present. Dr.

Balachander has given Exhibits P-2 to P-4 Accident Registers. All of them were treated as out patients.

1(d) P.W. 14 examined the doctor and recorded his statement. He also availed the services of finger print experts James Raj and Antony and

recorded their statements. P.W. 15, the Inspector of Police took up the case for further investigation. Acting on a tip-off, while he was searching

for the accused and the case properties involved in Cr. Nos. 266 of 2001, 163 of 2002 and 466 of 2002, on 5.5.2002 he proceeded to

Maruthachalapuram Main Road and in House No. 65 he found accused 3 to 7 and recorded confession statement of A4 at 22.15 hours in the

presence of witnesses Dhandapani and Duraisamy. In the statement, he has stated that if he was taken he would show the places where he had

stolen and that the stolen properties were given to Thangadurai Mani. The admissible portion in the confession statement is Exhibit P-14. 5th

Accused at 23.15 hours voluntarily gave confession statement and stated that if he was taken he would show the places where he had stolen and

also the house of Thangadurai mani. The admissible portion of the confession statement is Exhibit P-15.

1(e) On 6.5.2002 at 00.30 hours, 3rd accused gave confession statement voluntarily, in which he has reiterated the statement made by A5. The

admissible portion of the confession statement is Exhibit P-16. On 6.5.2002 at about 00.45 hours 7th accused gave confession statement, in which

Exhibit P-17 is the admissible portion. He has also stated as stated by A3 and A5. Likewise, 6th accused also gave a confession statement as

stated by A3, A5, A7 and A8. Exhibit P-18 is the admissible portion of the confession statement. (Exhibit P-14 to Exhibit P-18 are the copies of

the confession statements. Since the originals were produced in some other case, in this case, prosecution marked photo copies of the confession

statements and marking of the same was objected by the defence counsel before trial Court.)

1 (f) On further investigation, on 24.5.2002, P.W. 15 arrested A1 and A2 in the auto stand near Tiruppur new bus stand and recorded confession

statement from first accused in the presence of witnesses Manohar and Arafusa. The admissible portion in the confession statement is Exhibit P-11

in which he has stated that if he was taken, he would show the places where the stolen properties were sold and the persons who received the

stolen properties. The police took A1 and A2 to a shop by name Thangam Jewellers at Thisayanvilai Gandhiji Road on 25.5.2002, where accused

1 and 2 identified the shop owner Jayakumar, who produced 10 gold bangles weighing 105.900 gms and two gold rings weighing 7.100 gms each

and the same were seized under Mahazar Exhibit P-12 in the presence of witnesses. Thereafter, P.W. 15 sent both the accused to judicial

custody. He also sent the case properties to the Court under Form-95.

1(g) P.W. 16, the next incumbent of P.W. 15 has taken up the case for further investigation and found that the accused were under the custody in

Cr. No. 266 of 2001, 432 of 2002 and 594 of 2002 and since they were not remanded in this case, he filed a requisition to the Court to issue

orders to produce the accused under P.T.Warrant. He gave a requisition on 17.6.2002 to conduct test identification parade. P.W. 10 District

Munsif-cum-Judicial Magistrate, Palladam, conducted Test Identification Parade in Coimbatore Central Jail. P.W. 1 identified A1, A4 and A7 and

P.W. 2 identified Accused No. 1, 3, 6, 7. Exhibit P-9 is the Test Identification Parade report. On completion of the investigation, P.W. 16 laid charge sheet against the accused.

After the prosecution witnesses were examined, the trial Court questioned the accused u/s 313 Cr.P.C. as to the incriminating materials available against them in the prosecution evidence. They denied the complicity. They told that the witnesses identified them after seeing their photographs shown by the police. They neither examined any witness nor marked any document on their side.

1(a) After analyzing the evidence on record, the learned Additional District Sessions Judge, Fast Track Court No. 5, Coimbatore at Tiruppur, convicted the accused 1 to 7 u/s 397 I.P.C and sentenced them to undergo Rigorous imprisonment for 7 years. Among them A2, A4 and A5 have preferred the present appeal.

2. Point for consideration :

The point for consideration in this appeal is, "whether the prosecution has established the charges framed against the accused beyond all reasonable doubt?

Point:

3. The learned counsel appearing for the appellants would draw the attention of this Court to various discrepancies, improbabilities in the prosecution case and also the lapses on the part of the prosecution.

4. The learned counsel Mr. Selvaraj appearing for the appellant in Crl. A. No. 270 of 2004 filed by A2 would submit that there is no material nor

evidence available on record and the prosecution has not explained as to how they fixed this appellant as accused in this case, that in the evidence,

all the witnesses have been categorically stated that the accused were seen by them in the police station, that their photographs were also shown to

them, that apart had the witnesses not seen the accused in the police station earlier to the identification parade, they would not have identified them

in the parade, that requisition for conducting test identification parade was given on 17.6.2002 but only on 1.7.2002, it was conducted, after the

lapse of two weeks and the delay in conducting the Test Identification Parade would vitiate the proceedings, that accused No. 3 to 7 had given

confession statements in some other case and they could not be pressed into service in the present case, that the Mahazar witness P.W. 9 turned hostile to the prosecution, by whom the confession of A3 to A7 has to be proved, that since his evidence does not support the prosecution, the implication of A1 and A2 in this case is not legally sustainable and there is no nexus between offences and the Accused 1 and 2. The arrest of A3 to A7 has not established the arrest of A1 and A2 and the alleged recovery made from them stands unestablished and that the prosecution has failed to prove the case.

5. Mr. G. Prabakaran appearing for Mr. N. Arunkumar, who has filed appeal in Crl. A. No. 1340 of 2003 for A4 would submit that 4th accused

was not at all identified by any witness in the Test Identification Parade, that the rank of the 4th Accused has been mentioned in the request for

conducting the Test Identification Parade as A2, that P.W. 10 has mentioned in his report about the ranks of all the accused but he has not

mentioned the name of 4th accused as if he was identified by the witnesses, that his identification in this case is doubtful, that P.W. 3 and P.W. 5

also stated to have been in the scene of crime, claimed to be eye witnesses but they did not participate in the identification parade proceedings, that

P.W. 3 is an eye witness who can narrate the occurrence in detail, has failed to refer the absence of A4 in the occurrence, that P.W. 3 identified

4th accused for the first time in the Court, that the witnesses had not furnished the description or identification marks of the accused in the

complaint, that the identification parade is not sustainable, that there was no recovery from the 4th accused and that as far as A4 is concerned

there is no material to connect him with the offences.

6. Mr. T. Gowthaman, who has filed Crl. A. No. 121 of 2004 for A5 would contend that the concept of Test identification Parade is that the

witnesses should not have an earlier opportunity to see the accused persons before they are brought to the test identification parade and in this

case it is not followed, that very many reasons are available in this case, to disbelieve the observations in the Test Identification Parade Report, that

A5 is not present in the scene of crime, that the witnesses have also stated that 5th accused was not available in the scene of crime and that A5 is

not connected to any recovery and that P.W. 2 has stated specifically that A1, A3,

A6 and A7 were present in the scene of crime and the Court below has consciously omitted to consider the absence of A5 in the occurrence place and that insofar as A5 is concerned, the benefit of doubt could be extended to him.

7. This Court has gone through the submissions placed by the learned counsel as above with rapt attention.

8. The learned counsel for the 2nd accused would submit that when there is no substantive evidence connecting the accused with the alleged offence, there is no justification on the part of the police to fix the appellant as accused in this case. Accused Nos. 3 to 7 were arrested in other cases and confession statements were also recorded by the investigating officer in those cases. But in this case, the prosecution has taken the aid of those confession statements and attempted to connect the accused with the case by producing photo copies of confession statements which were objected by the defence side at the time of marking.

9. P.W. 12 mahazar witness in the above said confession statements turned hostile to the prosecution. His evidence was expected to be an essential one by the prosecution to connect A1 and A2 as well as A3 to A7 in this case. He would say in the chief examination that he does not know the reason for calling him to the Court. Further, he, in his cross examination, disowns the signature by stating that the signature found as M.

Duraisamy does not belong to him, so also in the other confession statement. The prosecution has not examined other mahazar witnesses mentioned in the confession statements. Since the evidence of P.W. 12 is out of focus, there is no material to show the nexus between these accused and the occurrence. In these circumstances, the recovery u/s 27 of the Evidence Act also fails. Secondly, the arrests made by the police in

this case is also unsustainable. The learned counsel for the second accused would draw the attention of this Court to an earlier decision of this

Court in *In re: Elukuri Seshapani Chetti* AIR 1937 Mad 209 wherein it is held that the whole spirit of Section 25 of the Evidence Act, is to exclude

confessions to the police and the moment a statement is found to amount to a confession, it matters not in the slightest of what crime it is said to be

a confession. Hence, a confession made to the police in the course of investigating crime A although it relates to another crime B is equally

admissible. The Court has also referred and accepted the view taken by this Court in another earlier decision in *Kodangi v. Emperor* AIR 1932

Mad 24.

10. The next disturbing feature available in this case is the oral evidence from the prosecution witnesses revealing that photographs of the accused

were shown to the witnesses and they were physically shown to the witnesses anterior to the conducting of Test Identification Parade. P.Ws. 1 and

2 have consciously spoken to a fact that the accused were seen by them. P.W. 1 in his cross examination would say that when he had gone to the

Court to get the jewels, he saw the accused in Tiruppur North police station after the occurrence for the first time. Further, the police also showed

photographs of the accused. P.W. 2 in his cross examination would depose that the accused were shown to him in the police station by the police.

While he was cross examined by A3 he also says that the accused were shown in the police station and their photographs were also given to him

and there after he went to the Central Jail, Coimbatore and participated the identification parade. He has further clarified this fact while he was

cross examined on behalf of 6th and 7th accused that all the 6 accused were in the police custody, the police asked him to show the identity of the

accused then only he could identify them in the Central Prison, Coimbatore.

11. In this context, the learned counsel appearing for 4th accused placed reliance upon a Full Bench decision of the Honourable Supreme Court

Mohanlal Gangaram Gehani Vs. State of Maharashtra, wherein it is held that when the accused was shown to victim by police before trial, his

identification before the Court is valueless and cannot be relied upon. In the said decision the Apex Court has laid down law as follows:

Mr. U.R. Lalit, learned counsel for Shiv Shankar further contended that Shiv Shankar had certain distinctive features like scars on the face, reddish

lips etc., and these marks of identification should have been furnished to the witnesses before they were called upon to identify Shiv Shankar at the

identification parade. We do not think it necessary to go into the merits of this argument in the light of our conclusion already reached. As the

conviction of Shiv Shankar is based solely with reference to his identification at the identification parade, he has to be given the benefit of doubt

and acquitted in the light of our finding. Accordingly, Shiv Shankar's appeal has

to succeed.

25.....In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the

Court, in the absence of a test identification parade the evidence of P.W. 3 was valueless and could not be relied upon as held by this Court in V.

C. Shukla v. State (Delhi Administration) (1) Where this Court made the following observations:

Moreover, the identification of Tripathi by the witness for the first time in the Court without being tested by a prior test identification parade was

valueless.

26. Same view was taken in a Federal Court decision in AIR 1944 38 (Federal Court) .

12. He also garners support from a decision of the Supreme Court in Kanan and Others Vs. State of Kerala, in which the Apex Court has held as

follows:

Where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has

been a previous T.I.parade to set his powers of observations. The idea of holding Test Identification parade u/s 9 is to test the veracity of the

witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no Test Identification parade is

held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.

13. In view of the above said decisions, when the witnesses had already an occasion to identify the accused earlier to the Test Identification

parade, even if he identifies the accused in the parade and if he identifies the accused before the Court on the strength of his knowledge of

identification on seeing the accused in the police station the same cannot be made as a basis for conviction. The evidence adduced by the

prosecution witnesses as discussed above, would crucify the prosecution case.

14. It is further argued by the learned counsel appearing for A4 that if the victim does not furnish the identification marks and description of the

accused in the complaint, even he identifies a person in the identification parade, it could not be relied upon and conviction cannot be based solely

on such identification. In support of his contention, he placed much reliance upon

a decision of Supreme Court in Subash and Shiv Shankar Vs.

State of U.P., in which it is observed as follows:

Mr. U.R. Lalit, learned counsel for Shiv Shankar further contended that Shiv Shankar had certain distinctive features like scars on the face, reddish

lips etc., and these marks of identification should have been furnished to the witnesses before they were called upon to identify Shiv Shankar at the

identification parade. We do not think it necessary to go into the merits of this argument in the light of our conclusion already reached. As the

conviction of Shiv Shankar is based solely with reference to his identification at the identification parade, he has to be given the benefit of doubt

and acquitted in the light of our finding. Accordingly, Shiv Shankar's appeal has to succeed.

15. Yet another remarkable feature available in this case in favour of the defence is the delay in conducting Test Identification parade. The learned

counsel for A2 would submit that after the arrest of the accused, if there were any remarkable delay in conducting the identification parade, it

would vitiate the entire identification parade proceedings and the Court cannot base its conclusion on such identification parade. To stress this

proposition, he is relying upon a decision in Bali Ahir and Others Vs. State of Bihar, . In this case, it is observed that identification of two of the

appellants took place after a gap of four days after their arrest, without explaining the cause for the delay, speaks for itself.

16. One another decision on this point is in State of Andhra Pradesh Vs. Dr. M.V. Ramana Reddy and others, wherein the Apex Court has held

that when there is no valid explanation for the delay in holding identification parade, the identification by the witnesses is not absolutely reliable. In

the said case, the accused surrendered on 13.5.1975 and the requisition was received by the Court on 17.5.1975 and the identification parade

was conducted on 23.5.1975. Considering the particulars as to the above said dates the observation of the Supreme Court go thus:-

That takes us to the question of the involvement of accused Nos. 3 and 5. The evidence of P.W. 1 is that when she heard the cries of her father

she woke up and saw accused No. 1 and six or seven others be labouring him. This means that she did not know and could not identify the

companions of accused No. 1. However, when she tried to raise an alarm three of

the assailants approached her and pinned her down to the bed, and one of them threatened to stab her. He did carry out his threat as is evident from the injuries sustained by her. She was able to identify two of them "at the identification parade held on 23.5.1975. This is proved through the "evidence of P.W. 14 who conducted the test identification parades- Now accused Nos. 3 and 5 had surrendered before the Court on 13.5.1975. P.W. 14 received the requisition for arranging a test identification parade on 17.5.1975. The identification parade was actually held on 23.5.1975. There is no valid explanation tendered by the prosecution for the delay in holding the. identification parades. The defence has suggested in the cross-examination of P.W. 1 and P.W. 25 that in the meantime the accused who were in custody were shown to the witnesses and the police had secured a group photograph in which accused Nos. 3 and 5 figured to facilitate their identification. The High Court was, however, reluctant to place absolute reliance. On the evidence of P.W. 1 regarding the identity of accused Nos. 3 and 5. In the absence of a valid explanation for the delay, we do not think that this approach of the High Court can be said to be manifestly wrong to call for our intervention.

17. In the case on hand, A1 and A2 were arrested on 24.5.2002 A3, A4 and A5 were arrested on 5.5.2002 and A6 and A7 were arrested on 6.5.2002. Requisition for conducting identification parade was given by the investigating agency on 17.6.2002 and on 1.7.2002 parade was conducted by P. W. 10. While considering the above said dates, it comes to light that there is an unexplained delay in submitting the requisition for conducting the test identification parade. In this case, the delay in holding the identification parade remains unexplained. In view of the legal proposition laid down by the Supreme Court, the said unexplained delay is fatal to the prosecution.

18. It is also argued by the learned counsel for the appellants that how the investigating agency came to know the confession statements made by some of the accused in other cases. The learned counsel for A4 would contend that A4 was not identified in the identification parade by the witnesses by touching and identifying. In the requisition given by the Investigating Officer, the 4th accused was shown as A2 and on that basis, the Judicial Magistrate proceeded to mention in his report about the rank of the

accused. He has stated in his report that at the time of parade A1, A3, A4, A6 and A7 alone were identified by the witnesses. In fact, even though 4th accused is stated to have been identified by the witnesses, he is not A4 in this case. The necessary corollary is that, A4 was not identified in the test identification parade. This observation is recorded on the consideration of mentioning of names of the accused by P.W. 10 in his report.

19. The learned counsel for A4 has enlisted the reasons for which the evidence of P.W. 3 could not be believed. He is described to be an eye witness by the prosecution, since he has narrated all the events occurred during the occurrence. But, P.W. 1 and P.W. 2 alone were made to participate in the identification parade but not P.W. 3. Since, P.W. 3 is knowing well about the occurrence with reference to the identification of the accused as per his evidence, his exclusion in the identification parade would make the case doubtful.

20. P.Ws. 3 and 5 are well aware of the occurrence. They would say that they have no knowledge about the presence of light in the occurrence place. The occurrence has taken place at 7.15 p.m. The learned counsel would say that in the month of January at about 6 "o" clock, no sufficient sunlight would be available enabling a person to identify another and since the key witnesses deposed that they were not aware of the presence of light, it would lead to lay suspicion on their evidence. I see considerable force in this argument. Further, even though P.W. 3 has detailed about the occurrence, he has not spoken about A4. His evidence does not divulge whether A4 was present in the scene of crime. P.W. 5 did not identify A4 in the Court also. There was no recovery from A4.

21. The learned counsel for A5 would indicate relevant parts of evidence of the prosecution witnesses as to the presence of A5 in the scene of crime. P.W. 1 in his examination by A2, says that at the time of occurrence, only 6 persons came. But in the Court, 7 accused were present. He also says that excepting 5th accused Sivasubramanian, he identified the other accused in the parade conducted by the Judicial Magistrate. While P.W. 1 was cross examined on behalf of A6 and A7, he would state that on the date of occurrence, 5th accused Sivasubramanian did not enter into the house, that he did not see him and that he does not know how the police registered the case against 7 accused. P.W. 5 has also stated that

5th accused did not come to the house, that excepting him other 6 accused came. Since, P.W. 1 did not say anything about the 5th accused, he was not cross examined on behalf of the 5th accused. P.W. 3 in her chief examination would say that 2nd accused caught hold of her hand, showed knife at her and asked her to give the almirah key and at that time A1, A3, A6, A7 were there. She does not refer to the presence of A5 in her evidence. The learned counsel says that A5 has been specifically left out by P.W. 3 which shows that A5 did not participate in the commission of alleged offences. It is also his contention that A5 is not at all connected to recovery of any material object.

22. A combined effect of the above said events and circumstances would show that the prosecution has failed to establish its case. The Test

Identification Parade is vitiated by so many factors. It does not stand for a minute's scrutiny. While the aspects which have been discussed earlier

would show that there was a delay in conducting identification parade and description of the accused has not been stated in the complaint, the

arrest of the accused and recovery of jewels are far from acceptance. A4 and A5 were not identified by the witnesses in the identification parade,

so also in their oral evidence.

23. In view of the above said observations, this Court is of the considered view that the prosecution has failed to establish the charges framed

against the accused and there is no clinching material to infer the nexus between the accused and the occurrence. Very many doubts have surfaced

in this case and the accused are entitled for the benefit of doubt. Therefore, the judgment of conviction and sentence passed by the trial Court is

liable to be set aside and it is accordingly set aside. This point is answered accordingly. In the result, the appeals are allowed setting aside the

conviction and sentence recorded by the trial Court. The disposal of the material objects shall be in accordance with the directions of the trial

Court. The bail bond executed by the appellants, if any, shall stand cancelled.