

(2011) 06 MAD CK 0369

In the Madras High Court

Case No : Criminal Appeal No. 474 of 2006

Thameem Ansai @ Ansari

APPELLANT

Vs

State by Inspector of Police

RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 211, 313, 428

Evidence Act, 1872 — Section 114, 145, 155

Penal Code, 1860 (IPC) — Section 109, 34, 342, 392, 397

Citation : (2011) 06 MAD CK 0369

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : N.R. Ilango for P. Pugalenth, in Criminal A. Nos. 474 and 331/06 and B. Nambiselvan, in Criminal A. No. 490/06, for the Appellant; A.N. Thambidurai, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.—The Appellant in CrI. A. No. 474 of 2006 is the 1st accused, the Appellants in CrI. A. No. 331 of 2006 are the 2nd and 3rd accused and the Appellant in CrI. A. No. 490 of 2006 is the 4th accused, in S.C. No. 626 of 2004 on the file of the Additional Sessions Judge, Poonamallee at Chennai. The accused 1 to 3 stand convicted for offences under Sections 342, 392 r/w 397 and 452 of I.P.C. and sentenced to undergo rigorous imprisonment for six months, for the offences u/s 342 of I.P.C., to undergo rigorous imprisonment for seven years for the offence u/s 392 r/w 397 of I.P.C., and to undergo rigorous imprisonment for two years for the offence u/s 452 of I.P.C. The 4th accused has been convicted under Sections 392 r/w 109 of I.P.C. and sentenced to undergo rigorous imprisonment for four years. Challenging the above conviction and sentence, the Appellants have come forward with these appeals.

2. The facts of the case in brief would be as follows:

(i) P.W.1 is a resident of the house bearing Door No. 28, North Road, West C.I.T.

Nagar, Chennai. P.W.2 is the brother of P.W.1. P.W.3 is the maid servant at the House of P.W.1. P.W.1's husband was working as a Teacher in a college and he used to leave the house at 12 noon every day. P.W.1 had a daughter who also used to go to the college in the morning. The 4th accused had worked as a driver with P.W.1 for some time before 5 to 6 years. In such a way, the 4th accused had the knowledge of the activities and the properties of P.W.1.

(ii) On 05.04.2004 at about 1.30 p.m., while P.W.1 and P.W.3 were at home, three persons came to the house. The watchman of the house was waiting outside. They told the watchman that they had come to meet the inmates of the house. The watchman entered into the house to inform the same. At that time, the three persons (later identified as A1 to A3) also followed him into the house. They attacked the watchman Muthu, pushed him into a room and closed the door.

(iii) P.W.1 on hearing the scream of the watchman, came to the hall of the house from the kitchen and found the accused 1 to 3 standing there. All the three accused had knives in their hands. P.W.3 also rushed towards the said place. All the three accused brandished the knives against P. Ws.1 and 3. They forced them to part with their properties including money. Out of fear, P. Ws.1 and 3 did not raise any alarm.

(iv) Then, the accused 1 to 3 opened the almirah and found nothing in the same. They put P. Ws.1 and 3 in a room and after sometime, the first accused took P.W.1 outside the room. He directed P.W.1 to part with her jewels. P.W.1 raised alarm. But, the first accused snatched away six gold bangles (each weighing 1.5 sovereigns), two gold chains weighing 5 sovereigns, a gold ring with stones and three ordinary rings without stones, all made of gold.

(v) The first accused collected all the jewels. The third accused was keeping P.W.3 and another maid under threat by brandishing the knife.

(vi) At that time, P.W.2 in the usual manner came to the house for lunch. He found the watchman not standing near the place earmarked for him. Near the main door of the house, A2 was standing and he was having a knife in his hand. P.W.2 developed a suspicion that some untoward incident was happening. Suddenly, the second accused attacked him and then he escaped. The first accused rushed outside the house and tried to cut P.W.2 on his face, but the blow fell on the nose and caused a serious injury (P.W.2 had to undergo plastic surgery to correct the cut nose).

(vii) The 4th accused Jebasekar was standing near a tea stall by the side of the house of P.W.1. When P.W.2 raised alarm, the accused 1 to 3 ran away. The 4th accused who was standing near the tea stall joined them and fled away from the scene of occurrence.

(viii) On hearing the alarm raised by P.W.2, the neighbours rushed towards the place of occurrence and chased the assailants, but they could not catch them as the assailants brandished the knives and managed to escape. However, an auto

driver and another person could be able to catch hold the 3rd accused alone.

(ix) Thereafter, P.W.2 went to the hospital for treatment. P.W.1 went to Saidapet Police Station and preferred a complaint in Ex.P1. P.W.15 was then working as Inspector of Police (Crime) at Saidapet Police Station. At about 02.00 p.m. on 05.04.2004, he received a wireless message from the control room about the untoward incident referred to above. He immediately rushed to the place of occurrence. There he found the third accused in the custody of the local people. Then, he proceeded to the house of P.W.1, where he recorded the statement from P.W.1 under Ex.P-1. On returning to the police station, he registered a case in Crime No. 252 of 2004 under Sections 342, 397 r/w 394, 451, 452, 506(2) r/w 34 of I.P.C. Ex.P-21 is the FIR. He then arrested the 3rd accused from the custody of the auto driver by name Natarajan and one Rajendran at 3.00 p.m. On such arrest, A3 produced the knife which he was holding. The same was recovered under Ex.P-3, Mahazar in the presence of P. Ws.5 and 12 and another witness. M.O.6 is the said knife. Then he proceeded to the place of occurrence and prepared an Observation Mahazar in the presence of P.W.12 and another witness. He also prepared a rough sketch under exhibit Ex.P-22. Then, he recovered another knife from the bed room of P.W.1, which had been left behind by the culprits. Ex.P-15 is the Mahazar for the recovery of the said knife. Then, he made a request to the fingerprint expert to examine the place of occurrence.

(x) On such request, P.W.6 came to the place of occurrence and examined the house. From the door of the inner room of the house, he found five chance prints. With the help of a photographer, he photographed all the said 5 chance prints. Then, he compared the same along with the fingerprints of the inmates of the house. Out of the 5 chance prints, two chance prints tallied with the fingerprints of one of the inmates of the house by name Selvi and the other three chance prints did not tally with the inmates.

(xi) After the arrest of the third accused, the fingerprints of the third accused were sent for examination for comparison. P.W.6 compared the same and found that the three chance prints photographed from the place of occurrence tallied with the fingerprints of the third accused. To that effect, P.W.6 submitted a reports which are marked as Exs.P.10 to P.12.

(xii) Continuing the investigation, P.W.15 examined the Doctor who treated P.W.2 and few more witnesses. Earlier, he recovered the bloodstained clothes (M. Os.6 to 9) from P.W.2 in the presence of two witnesses under Ex.P16 Mahazar.

(xiii) on 12.04.2004 at 5.00 p.m., P.W.15 arrested all the other three accused at Parsan Nagar. On such arrest, all the three accused gave individual confession statements one after the other. All the said statements were duly recorded in the presence of the witnesses P.W.5 and P.W.12.

(xiv) Out of the said confession, the first accused produced two gold bangles which were recovered under Exs.P3 to P5 in the presence of two witnesses P.W.5 and P.W.12 on 12.04.2004 at 5.45 p.m. On the same day at 6.45 p.m., the

second accused produced two gold bangles from his possession which were recovered under Ex.P4 in the presence of the very same witnesses. On the confession of the other accused, a dollar chain was recovered from one Anand with whom the accused had pledged. One gold ring was recovered from one Malaram and at 9.50 p.m., the other jewels numbering three viz., dollar chain and rings were recovered.

(xv) On returning to the Police Station along with the material objects and the accused, P.W.15 produced the accused for judicial remand.

(xvi) Thereafter, on 15.04.2004, he made a request to the learned Magistrate to conduct test identification parade. Accordingly, on 04.05.2004, the VI Metropolitan Magistrate (P.W.13) conducted test identification parade, in which, P.W.1 and P.W.2 identified the accused 1, 2 and 4.

(xvii) On completing the investigation, charge sheet was laid against the accused 1 to 3 for the offences under Sections 342, 392 r/w 397, 452, 506(ii) r/w 34 of I.P.C. and as against the 4th accused for the offence u/s 392 r/w 109 of I.P.C.

(xviii) Based on the above materials, the Trial Court framed appropriate charges and all the accused denied the same. Thereafter, the Trial Court went ahead with the trial.

3. On the side of the prosecution, as many as 15 witnesses were examined and 24 documents were exhibited, besides 10 material objects were marked.

4. As stated earlier, P. Ws.1 to 3 are the eye witnesses who have spoken to about the participation of the accused in the crime. P.W.4 is the Doctor, who treated P.W.2, who has vividly spoken to about the injuries sustained by P.W.2. P.W.5 has spoken to about the arrest of accused 1, 2 and 4 and consequent recovery of the jewels. P.W.12 is yet another witness, who has spoken to about the arrest of A3 and subsequent recovery and the other facts. P.W.13 is the learned Magistrate, who has spoken to about the test identification parade and P.W.6 is the fingerprint expert.

5. When all the incriminating materials were put to the accused u/s 313 Code of Criminal Procedure., they denied the same as false. The second accused took a plea that he was arrested by the police as early as 05.04.2004 itself, the police kept him under illegal custody and thereafter, produced him before the learned Magistrate as though he was arrested on 12.04.2004. A2 would further state that his arrest was witnessed by D.W.1, who happened to be his friend. On his side, he has examined D.W.1 who has spoken to about the fact that on 05.04.2001, when the second accused was in the company of D.W.1, he was arrested and taken into illegal custody. Thereafter, on the information passed on by D.W.1, the mother of the second accused filed a Habeas Corpus Petition in H.C.P. No. 461 of 2004 before this Court for the release of the second accused from the alleged illegal custody. The affidavit was sworn to by the mother of A2. The said H.C.P. has been exhibited as Ex.D3. Ex.D2 is the order of the learned Magistrate dated

13.04.2004. All the accused denied their involvement in the crime.

6. Having considered the above materials, the trial court found them guilty and accordingly, punished them as narrated in the first paragraph of this judgment. That is how the Appellants are before this Court with these appeals.

7. I have heard the learned Counsel for the Appellants and the learned Counsel appearing for the State and also perused the records carefully.

8. Mr. N.R. Ilango, the learned senior counsel appearing for the second accused would submit that the charges framed in this case are highly defective, which has caused very serious prejudice to the accused in their defence and on that score, the Appellants are entitled for acquittal. In order to appreciate the said contention, I have gone through the charges framed in this case. It shows that there is an omnibus statement wherein at the end of the statement, the learned Judge has mentioned the penal provisions viz., 342, 392 r/w 397 and 452 of I.P.C. In my considered opinion too, the charges framed in this case are defective in the sense, the same do not satisfy the requirements of Section 211 of Code of Criminal Procedure. It is needless to point out that as per the said provision, each charge should contain a statement that every legal condition required by law and constituting the offence are made. Apart from that, the charges should contain the law and Section of law against which the offences are said to have been committed. These are some of the basic requirements of a valid charge u/s 211 of Code of Criminal Procedure. In this case, as I have already stated, these requirements have not been satisfied.

9. Now the question is, on this score, whether the accused are entitled for acquittal. In my considered opinion, it is not so. For this purpose, we may refer to Section 464 of Code of Criminal Procedure which states that:

No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of Justice has in fact been occasioned thereby

In this case, the learned senior counsel appearing for the Appellant is not in a position to point out that such failure of justice has occasioned because of the above defects pointed out by him in the charges.

10. Nextly, We may also refer to Section 465(2) of the Code of Criminal Procedure which reads as follows:

Section 465. Finding or sentence when reversible by reason of error, omission or irregularity:

(1)....

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution

has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

11. Indisputably, in this case, at the earliest point of time, objection was not raised by the accused in respect of the above defects in the charges. This means, the accused was fully aware of the allegations against them which constituted the charges. Therefore, in view of the provisions contained u/s 464(1) and Section 465(2) of the Code of Criminal Procedure., the conviction of the accused in this case cannot be interfered with on the ground of mere defects in the charges.

12. Now, let me turn to the facts of the case. The foremost contention of the learned senior counsel for the accused is that the arrest of the second accused on 12.04.2004, as projected by the prosecution and the consequential recovery of the stolen articles from the accused cannot be believed. For this purpose, the learned senior counsel would contend that the second accused was arrested on 05.04.2004 itself, he was kept in illegal custody and thereafter produced before the Court making record as though he was arrested only on 12.04.2004. In order to substantiate this contention, the learned senior counsel would rely on the affidavit filed by the mother of the second accused in the Habeas Corpus Petition filed by her for his release. The said Habeas Corpus Petition came to be filed before a Division Bench of this Court by the mother of the second accused alleging that the second accused was in illegal custody of the Respondents from 05.04.2004 onwards. In my considered opinion, the said argument cannot be countenanced for the simple reason that the said affidavit cannot be treated as a substantive evidence in proof of the contents of the same. It is after all a former statement of the mother of the second accused. In order to prove the contents of the affidavit, it is absolutely necessary, in law, that she should be examined. The said statement, being a former statement can be either used to corroborate her evidence given in court or to contradict the same or for both and for nothing else. But in this case, the mother of the second accused was not at all examined either as a prosecution witness or as a defence witness. The said affidavit has been marked through D.W.1 who is a friend of the second accused. Had the mother of the second accused been examined, the prosecution would have been afforded an opportunity either to challenge the correctness of the contents of the affidavit or to admit the same. Since she was not examined, the contents of the affidavit shall not stand proved and therefore the reliance placed on the same by the learned senior counsel to the effect that the second accused was arrested as early as on 05.04.2004 itself cannot be accepted at all. Therefore, this argument is rejected.

13. Nextly, the learned senior counsel would rely on the evidence of D.W.1. D.W.1 has deposed that on 05.04.2004, while he was in the company of the second accused, the police took the second accused into custody. He has further stated that he informed the same to the mother of the second accused and it

was on such information, the mother of the second accused filed the Habeas Corpus Petition before this Court. A close scrutiny of the evidence of D.W.1 would go to show that it does not help the accused in any manner. He has admitted that some police took the second accused into custody on 05.04.2004 and he could not say as to whether it was the Respondent police or some other police. Had it been his evidence that it was the Respondent police who had taken the second accused into custody on 05.04.2004, then some credence could have been attached to his evidence. Since he did not know as to which police took the second accused into custody on 05.04.2004, it cannot be concluded that the second accused was in illegal custody from 05.04.2004 onwards. Thus on the basis of the evidence of D.W.2 also the defence could not even probabilise that the second accused was arrested by the Respondent police on 05.04.2004.

14. Nextly, the learned senior counsel would assail the identification parade held by the learned Judicial Magistrate. According to him, immediately on the arrest of the second accused, he was shown to P. Ws.1 and 2 at the police station and therefore the identification of this accused made by P. Ws.1 and 2 during the test identification parade has lost its significance and weight age. In order to substantiate the said contention, the learned senior counsel would submit that P.W.15, the Investigating Officer, during cross examination, has stated that P. Ws.1 and 2 told him during investigation in their respective statements recorded u/s 161 of Code of Criminal Procedure that they identified the said accused at the police station as soon as his arrest. But it is strange to note that the above statements of P. Ws.1 and 2 made u/s 161 of Code of Criminal Procedure were not used to contradict P. Ws.1 and 2 as provided u/s 145 of the Evidence Act. When that be so, in my considered opinion, placing reliance on the evidence of P.W.15, the Investigating Officer, in this regard, will only tantamount to treating the statements of P. Ws.1 and 2 made u/s 161 Code of Criminal Procedure as substantive evidence. The said course is certainly illegal. It is needless to point out that the statement made u/s 161 Code of Criminal Procedure by a witness is not a substantive evidence for any purpose. It can be used only for contradicting the maker of the said statement, provided, he is examined as a prosecution witness. It cannot be used even for corroboration (vide 162 of Code of Criminal Procedure.). If any contradictory version is found in the statement recorded u/s 161 of Code of Criminal Procedure., the maker of the said statement, while examined as a prosecution witness, should be confronted with the said statement as provided u/s 145 of the Evidence Act. The purpose of doing so is to afford an opportunity to the said witness either to admit the contradictory statement or to deny or to make his explanation regarding the said contradiction. Thereafter, it is for the Court to appreciate as to whether because of such contradiction his evidence gets impeached as provided u/s 155 of the Evidence Act. Despite such contradiction in a given case, the Court may hold that the credibility of the evidence of the said witness does not get impeached. Without resorting to Section 145 of the Evidence Act, an adverse party, cannot, in law, try to make use of the contradictory portion found in the statement made by the said witness

u/s 161 of Code of Criminal Procedure This is the elementary principal of criminal law. In the case on hand, as I have already pointed out, the contradictory portion found in the respective statements of P. Ws.1 and 2 made u/s 161 of Code of Criminal Procedure were not used to confront the respective witnesses and therefore the argument of the learned senior counsel that in the statements made u/s 161 of Code of Criminal Procedure by the above witnesses, they have stated that they identified the second accused at the police station immediately after the arrest cannot be taken into account at all. Thus, the defence has not shown that the second accused was shown to P. Ws.1 and 2 immediately after the arrest i.e., before the identification parade.

15. Next comes the arrest of the first accused. The learned Counsel would contend that though P.W.5 was examined, to spoke about the arrest of the first accused and the consequential recovery of Material Objects, he has not stated anything about the same in his evidence. But he has stated about the other facts which he was expected to speak about. A perusal of the Mahazar would show that he was a witness to the recovery of the material objects from the first accused. However, the Investigating Officer has spoken to about the first accused and the consequential recoveries. Thus, from the evidence of the Investigating Officer, I hold that the prosecution has proved the arrest of the first accused and the consequential recovery of the stolen properties.

16. Since the accused 1 to 3 were found in possession of the stolen articles within a reasonable time after the occurrence, the presumption u/s 114(a) of the Evidence Act will have to be necessarily drawn against them. Of course the said presumption is irrebutable. But the defence has not brought on record any materials to rebut the said presumption. Thus, the prosecution has proved the arrest of the accused 1 to 3 and the consequential recoveries of the stolen articles from their custody. They have been duly identified by P. Ws.1 and 2 also. From these evidences, I hold that the prosecution has proved the guilt of the accused 1 to 3.

17. Now turning to the case against the 4th accused, according to P. Ws.1 and 2, they found the 4th accused at the time of occurrence somewhere near the place of occurrence and they also found him joining the rest of the accused when they fled away from the scene of occurrence after completing the task. But this fact was not spoken to by them in their respective statement made to the police during investigation. This has been established by the accused. Thus, this is only an afterthought and therefore this part of the evidence of P. Ws.1 and 2 as against the 4th accused cannot be given any weight age. P.W.3 has not stated anything about the presence of A4. Thus the prosecution has failed to prove that the 4th accused participated in the occurrence.

18. Now, what remains against the 4th accused is the evidence regarding his arrest on 12.04.2004 and the consequential recovery of the stolen articles from his possession. The prosecution has proved this fact by concrete evidence. For this, the 4th accused cannot be convicted under Sections 392 r/w 109 of I.P.C.

but instead he can be convicted only u/s 411 of I.P.C.

19. At his juncture, it is not out of place to point out that it is the positive case of the prosecution itself that the 4th accused was working as a driver at the house of P.W.1 for quite some time and thus he was well known to P. Ws.1 and 2. But strangely, the 4th accused was also put for identification in the test identification parade in which P. Ws. 1 and 2 were made to identify. I do not understand the purpose behind the said exercise.

20. In view of the foregoing discussions, I hold that the prosecution has proved the guilt of the accused 1 to 3 under Sections 342, 392 r/w 397 and 452 of I.P.C. and the 4th accused guilty u/s 411 of I.P.C.

21. Now turning to the quantum of sentence, the punishment imposed by the Trial Court against the accused 1 to 3 cannot be stated to be on the higher side. Therefore, the same is liable to be confirmed. In respect of the 4th accused for the offence u/s 411 of I.P.C., I am of the view that imposing rigorous imprisonment for three years will be the sufficient punishment.

22. In the result,

(i) the appeals in Crl. A. Nos. 474 and 331 of 2006 are dismissed and the conviction and sentence imposed on the accused 1 to 3 are confirmed. The above sentences are ordered to run concurrently and the period of sentence already undergone by the Appellants in both these appeals are directed to be set off u/s 428 Code of Criminal Procedure In all other respects, these criminal appeals stand dismissed. The trial Court shall take appropriate steps to secure the presence of these Appellants and to commit them to prison to serve the remaining period of sentence, if any.

(ii) The appeal in Crl. A. No. 490 of 2006 is partly allowed; the conviction of the Appellant (4th accused) u/s 392 r/w 109 I.P.C. is set aside and instead, the he is convicted u/s 411 of I.P.C. for which, he is sentenced to undergo rigorous imprisonment for three years. In all other respects, this criminal appeal stands dismissed. The period of sentence already undergone shall be set off u/s 498 of Code of Criminal Procedure The trial Court shall take appropriate steps to secure the presence of the Appellant to commit him to prison to serve the remaining period of sentence, if any.