



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 31.08.2019

CORAM:

**THE HONOURABLE MR.JUSTICE P.VELMURUGAN**

Criminal Appeal(MD)No.89 of 2009

... Appellant /Accused No.2

Jeeva @ Sivansamy

Vs.

The State represented by  
The Inspector of Police,  
Ayakudi Police Station,  
Dindugul District.  
(Crime No.236 of 1997)

... Respondent/Complainant

PRAYER : Criminal Appeal filed under Section 374 of Cr.P.C., to set aside the Judgment and Conviction of the appellant/2<sup>nd</sup> accused in S.C.No.129 of 2003 on the file of the Assistant Sessions Judge, Palani, Dindigul District, dated on 24.07.2008 and acquit the appellant.

For Appellant : Mr.J.Sulthan Basha  
Legal Aid Counsel.

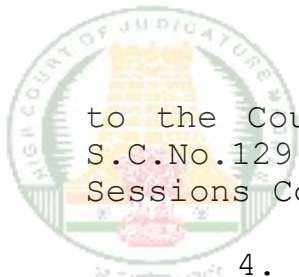
For Respondent : Mr.A.P.G.Ohm Chairma Prabhu,  
Government Advocate (Cr1.side)

### **J U D G M E N T**

The appellant was convicted for the offence under Section 395 r/w 398 of IPC and sentenced to undergo seven years rigorous imprisonment and also to pay a fine amount of Rs.1000/-, in default, to undergo six months rigorous imprisonment.

2. On 20.10.1997, after the defacto complainant's family had their meals in the night and went to sleep, at about 01.00 a.m., the accused persons entered into the house of the defacto complainant and threatened him to part with certain sum of money and jewels. Since the defacto complainant refused to do so, they assaulted defacto complainant's father and robbed jewels from his mother. Thereby, the defacto complainant P.W.1 gave a complaint before the respondent police. Based on the same, Crime No.236 of 1997 was registered for the offences under Sections 394 and 511 of IPC. Investigation was taken up and final report came to be laid before the Judicial Magistrate, Palani in P.R.C.No.27 of 1998.

3. The learned Judicial Magistrate, Palani, after completing the usual formalities, found that the offences are exclusively triable by the Sessions Court. Therefore, they committed the case



to the Court of Sessions, Dindigul District and taken on file in S.C.No.129 of 2003 and subsequently, transferred to the Assistant Sessions Court, Palani.

4. The learned Assistant Sessions Judge, Palani, after completing the usual formalities, framed charges against the accused including this present appellant for the offence under Section 395 r/w 398 of IPC. On the side of the prosecution, P.W.1 to P.W.9 were examined and Ex.P1 to Ex.P8 and M.O.1 were marked. After completing the prosecution witnesses, incriminating circumstances culled out from the prosecution evidence, were put to the accused. They denied as false. On the side of the defence, no evidence was adduced. Since the seventh accused died even during the pendency of the trial, the charge itself was abated against A7. The learned trial Judge convicted and sentenced the appellant as mentioned above. Challenging the Judgment of conviction, this appeal has been filed.

5. The learned legal aid counsel appearing for the appellant would vehemently contend that in the FIR, there are four named accused have been mentioned and subsequently, charge sheet was laid against the seven accused. When the Test Identification Parade was conducted by P.W.6, only five accused have been identified and the appellant herein was not identified. In the FIR, it is only found that the unknown four persons have been mentioned who are aged about 25 to 30 years. Therefore, the appellants are unknown persons to the defacto complainant and his name has also not been found in the FIR. He was not identified by P.W.1, who has identified all the other accused. The learned Assistant Sessions Judge has stated that the accused was identified in some other cases in Crime Nos.292 and 268 of 1997, before the Palani Taluk Police Station and not in this crime number.

6. The learned legal aid counsel further submitted that the prosecution has not established its case as to how the appellant herein involved in this case except the four persons came to his house and they were standing in the street. Even in this case, there is no confession statement obtained from any of the accused and marked before the Court. As far as this appellant is concerned, the prosecution has failed to prove its case beyond reasonable doubt.

7. The learned legal aid counsel would further submit that the alleged weapon aruval, has not been recovered. Even the recovered neem stick has not been sent for chemical analysis to find out as to whether the blood group found in the stick belongs to his blood group or not. Therefore, the prosecution has miserably failed to establish its case against this appellant. Except the fact that the accused was involved in the other case and convicted along with the other appellant, no other materials are available to link the



participated in the test identification parade and identified the five persons, but not this appellant. Therefore, the learned Sessions Judge, failed to consider the evidence available in this case and wrongly convicted the appellant and it requires interference.

WEB COPY

8.The learned Government Advocate (Crl.side) appearing for the State would submit that initially, the police registered an FIR against the four unidentified persons and even subsequently, they were arrested and Test Identification Parade was also conducted. P.W.1 identified all the persons and the defence side has not cross-examined the other witnesses except P.W.1. P.W.1 has clearly stated that he participated in the test identification parade and identified the persons. But the appellant was arrested only just 14 days prior to the test identification parade. Therefore, the delay in conducting the test identification parade is not a ground to disbelieve the case of the prosecution. This appellant had involved in the other cases and in one of the cases, he was convicted for the offence under Section 394 of IPC. Therefore, the prosecution has proved its case. The appellant was identified in the other case in Crime No.292 of 1998 on the file of the Palani Taluk Police Station by one Palaniswamy. Therefore, the order of the Court below does not call for any interference.

9.Heard the rival submissions made on both sides and perused the available records.

10. In order to prove the case of the prosecution, nine witnesses were examined. Out of the nine witnesses, one of the witnesses is an injured witness and he was admitted in the Hospital. They have stated that four unknown persons were attacked at about 01.00 a.m., and FIR was registered against these persons. In the evidence of P.W.1, he has stated that out of the seven persons, four persons were entered into their house and also searched things. Since they could not find out any things, they attacked the father and mother of the defacto complainant and they sustained injury and three persons were standing in the street. Therefore, all the seven persons were present in the place of occurrence. When the identification parade was conducted, he was able to identify only five persons. Though the other witnesses have not identified the other persons, in the FIR, the appellant's name has not been mentioned and the FIR entry shows that unknown persons had attacked and the test identification parade was conducted by P.W.6. P.W.6 in his evidence, has clearly stated that P.W.1 identified only five persons and out of the five persons, the name of the appellant, has not been mentioned. P.W.1 has not named the appellant and P.W.2, P.W.3 and P.W.4 have also not named the appellant. Nowhere, the name of the appellant has been mentioned in the present case on hand by any of the prosecution witnesses, except the Investigating Officer. Since he was arrested and convicted in the other case along with the other accused, he was arrested on that day by the

<https://hcservicescourts.gov.in/hcservices/>



11. The learned Assistant Sessions Judge has not stated that as to how the appellant involved in this case, except the fact that, the appellant was convicted in the other case along with other accused. Therefore, in the absence of any material to show that the appellant has involved in this case and in the absence of mentioning his name in the FIR during identification parade the witnesses could not identify the appellant and there is no cogent evidence to show that appellant involved in this case, except the fact that the appellant was convicted in some other cases along with other appellants, I hold that the prosecution has failed to prove its case beyond reasonable doubt and the learned Assistant Sessions Judge has not given a clear finding that the prosecution has placed the materials to prove the fact that the appellant has involved in this case. Though the learned Government Advocate (Crl. side) appearing for the respondent would submit that all the other accused have completed the sentence, the learned Assistant Sessions Judge failed to consider the materials placed in the present case on record and based on the conviction imposed on the appellant in the other case, he was implicated in this case and it warrants interference.

12. In view of the above and also considering the fact that the prosecution has not proved the involvement of the appellant in this case for the offences under Sections 395 r/w 398 of IPC, this Criminal Appeal is allowed and the conviction and sentence passed in Sessions Case No.129 of 2003 by the Assistant Sessions Judge, Palani, Dindugul District, are set aside. The appellant/accused No.2 is acquitted. The fine amount paid by him, if any, is ordered to be refunded forthwith. This criminal appeal is allowed. Consequently, connected miscellaneous petition is closed. The legal aid counsel is entitled for fees as per rules.

Sd/-

Assistant Registrar (w)

// True Copy //

Sub Assistant Registrar(CS)

rmi

To

1. The Assistant Sessions Judge, Palani, Dindigul District.
2. The Tamil Nadu Legal Services Authority, Madurai.



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

4. The Superintendent,  
Central Prison, Madurai

5. The Inspector of Police,  
Ayakudi Police Station,  
Dindugul District.

+1 CC to M/s.J. SULTHANBASHA, Advocate ( SR-84916[F] dated  
03/09/2019 )

Criminal Appeal (MD) No.89 of 2009  
31.08.2019

KK/SAR/05.12.2019/5P-7C/