

Madras High Court  
Kumaresan vs State, Rep. By on 7 March, 2011  
DATED: 7.3.2011

CORAM:

THE HONOURABLE MS.JUSTICE R.MALA

Crl.R.C.Nos.1832 and 1882 of 2007

Kumaresan .. Petitioner in Crl.R.C.1832 of 2007/A2

Anbunathan .. Petitioner in Crl.R.C.1882 of 2007/A1

Vs.

State, rep. by

Sub-Inspector of Police,

Umrabath Police Station,

Vellore District. (Crime No.208 of 2002)

.. Respondent in both the Crl.R.Cs./Complainant

Criminal Revision Cases against the judgment of conviction and sentence dated 10.5.2007 in Crl.A.Nos.219 and 223 of 2006 respectively, on the file of the Additional District and Sessions Judge (Fast Track Court), Vellore, against the judgment of conviction and sentence dated 9.11.2006 in C.C.No.249 of 2002 on the file of the Additional District Munsif-cum-Judicial Magistrate's Court, Ambur. For petitioners : Mr.L.Baskaran

For respondent: Mr.S.Rajakumar, Government Advocate (Crl.Side)

ORDER

Both these Criminal Revision Cases arise out of the judgment of conviction and sentence dated 10.5.2007 in Crl.A.Nos.219 and 223 of 2006 respectively, on the file of the Additional District and Sessions Court (Fast Track Court), Vellore, confirming the judgment of conviction and sentence dated 9.11.2006 in C.C.No.249 of 2002 on the file of the Additional District Munsif-cum-Judicial Magistrate's Court, Ambur.

2. The petitioners/A1 and A2 were convicted for the offence under Section 341 IPC and each sentenced to fine of Rs.500/- in default, to undergo three months' simple imprisonment and also convicted for the offence under Section 394 IPC and each sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs.3,000/- each, in default, to undergo six months' simple imprisonment. They were acquitted of the charge under Section 506 (Part 2) IPC.

3. The case of the prosecution is as follows:

(a) On 17.3.2002 at 6 am, when P.W.1 Sigamani was proceeding from Gudiyatham Road and nearing Culvert Bridge, the revision petitioners/A1 and A2 wrongfully restrained P.W.1 who was proceeding in a cycle and snatched Rs.250/-, a wrist watch and half sovereign gold ring at the knife point and caused injury on his left wrist. Since P.W.1 made alarm, the public gathered and the revision petitioners/A1 and A2 threatened them at

the knife point and fled away from the place of occurrence, which was witnessed by P.W.2 Mani, P.W.3 Devendran and P.W.6 Umapathy. (b) P.W.1 immediately went to Umrabath Police Station and gave a complaint Ex.P-1 before P.W.10 Govindan, Sub-Inspector of Police and he received the complaint, in pursuance of which, a case was registered in Crime No.208 of 2002 for the offences under Sections 341, 394 and 506 (Part 2) IPC and the printed FIR is Ex.P-10. (c) Then P.W.10 Sub-Inspector of Police sent P.W.1 along with the medical memo to the Hospital, where P.W.8 Dr.Raichel Monika treated P.W.1 at 1 p.m. on 17.3.2002 and examined him and issued Ex.P-6 Accident Register / Wound Certificate. (d) The investigating officer took up the case for investigation. He went to the place of occurrence and prepared observation mahazar in the presence of P.W.4 Manokaran and P.W.7 Janakiraman. After arresting the accused in the presence of P.W.9 Anandan and P.W.5 Ramalingam, the investigating officer recorded the confession statement, in pursuance of which, he seized M.O.1 series of Rs.100/- notes, M.O.2 Rs.50/- note, M.O.3 Gold ring, M.O.4 Watch, M.O.5 Knife 1 and M.O.6 Knife 2. The accused were remanded to judicial custody. After conclusion of the investigation, he filed the charge sheet against the revision petitioners/accused for the offences under Sections 341, 394 and 506 (Part 2) IPC.

4. The trial Court (Additional District Munsif-cum-Judicial Magistrate, Ambur), after furnishing the copies of the case under Section 207 Cr.P.C., and framing necessary charges, and after examining P.Ws.1 to 10, marking Exs.P-1 to P-7 and producing M.Os.1 to 6, convicted and sentenced the revision petitioners/A1 and A2 as stated above, against which, the Criminal Appeals were filed before the appellate Court (Additional District and Sessions Judge (Fast Track Court) ), Vellore, and the appellate Court confirmed the judgment of conviction and sentence of the trial Court and dismissed the Criminal Appeals. Challenging the same, the present Criminal Revision Cases were filed by A.1 and A.2 respectively.

5. Challenging the conviction and sentence imposed by the Courts below, learned counsel for the revision petitioners/A1 and A2 put forth the following contentions:

- (i) The investigating officer has not been examined and his examination was dispensed with.
- (ii) P.Ws.2, 3 and 6 who are the eye-witnesses and P.W.5 one of the attestors to the confession statement, turned hostile.
- (iii) There is no corroboration for the oral evidence of P.W.1, who is the stock witness, doing work at Umrabath Police Station and having house opposite to the said Police Station and his evidence cannot be relied upon. (iv) The recovery of material objects under Section 27 of the Indian Evidence Act, has not been done in accordance with law.

The trial Court and the appellate Court did not consider all these aspects in proper perspective and hence, he prayed for the acquittal of the revision petitioners/A1 and A2 and for allowing the CrI.R.Cs.

6. Repudiating the said contentions, learned Government Advocate (CrI. Side) submitted that P.W.1 is the victim and his evidence corroborates the statement recorded under Section 161 Cr.P.C., and there is no reason for discarding his evidence. He further submitted that the trial Court and the appellate Court have given cogent reasons for relying upon the evidence of P.W.1 and so, the same does not warrant any interference. He fairly conceded that some witnesses turned hostile. He prayed for dismissal of the CrI.R.Cs.

7. Considering the rival submissions made by learned counsel on both sides, this Court has to decide as to whether the judgment of conviction and sentence passed by the Courts below, is sustainable ?

8. It is true that the prosecution examined ten witnesses, of whom, P.Ws.2, 3, 5 and 6 turned hostile. The investigating officer has not been examined before Court. Non-examination of the investigating officer is not fatal to the case of the prosecution. The attestors of the confession statement and seizure mahazar, turned hostile. To substantiate the arrest of the revision petitioners/A1 and A2, the confession statement and the

recovery under Section 27 of the Indian Evidence Act, no cogent evidence is available. No reason has been assigned as to why the investigating officer was not examined before the trial Court. The prosecution has not taken any steps to examine the person who is acquainted with the signatures and the writings by the investigating officer. So, I am of the view that non-examination of the investigating officer is fatal to the case of the prosecution.

9. Learned Government Advocate (Crl. Side) submitted that non-examination of the investigating officer has not caused any prejudice to the revision petitioners/A1 and A2 and it is not fatal to the case of the prosecution.

10. In this regard, it is worthwhile to notice the judgment of the Apex Court reported in 2000 (9) SCC 153 (Bahadur Naik Vs. State of Bihar), wherein, though the Supreme Court held that the non-examination of the investigating officer as a witness, is of no consequence, but learned Government Advocate (Crl. Side) submitted that it has not been shown as to what prejudice has been caused to the revision petitioners/accused. But it has to be noted that P.Ws.2,3,5 and 6 turned hostile. Further, there is no evidence for the arrest of the revision petitioners/A1 and A2 and the recovery under Section 27 of the Indian Evidence Act. The competent witness in this case to speak about the arrest, recovery and confession, is only the investigating officer. Considering the facts and circumstances of the case, non-examination of the investigating officer has caused prejudice to the revision petitioners/accused and it is fatal to the case of the prosecution.

11. It is relevant to notice the following decisions:

(a) 2004 Cri.L.J. 2255 (Division Bench of Karnataka High Court) (State Vs. Peddahanumappa):

"3. The serious infirmity that has been recorded by the trial Court is that the Investigating Officer was not examined. Some other officer, who was to a limited extent dealing with this investigation, has been examined and certain reasons have been set out on behalf of the State as to why this had happened. Since the full facts are not before us, we do not desire to make any comments with regard to the non-examination of the Investigating Officer beyond pointing out that the trial Court was right when it recorded a finding to the effect that the non-examination of the Investigating Officer is fatal to the prosecution. One of the submissions canvassed on behalf of the State is that in this case the other officer was examined and therefore, if the proving of any omissions or contradictions was to be done that this was feasible through the officer who has been examined and secondly what is contended is that the examination of the Investigating Officer in the majority of instances is only a formality. We are unable to accept this last submission because the Investigating Officer is the principal architect and executor of the entire investigation. He is a crucial witness for purposes of establishing that there are omissions and contradictions but more importantly, it is always open to the defence to question the honesty and calibre of the entire process of investigation. It is well settled law that where an investigation is defective, insufficient or dishonest that these factors prove fatal to the prosecution. In the given instance, the accused was totally precluded from any opportunity of being able to establish the infirmities in the prosecution case and on this ground alone the Order of acquittal will have to be confirmed."

(b) 2004 Cri.L.J. 3584 (G.D.Mariswamy Vs. State of Karnataka):

"The non-examination of the Investigating Officer does not take away the case of the prosecution. But in the offences arising under the Prevention of Corruption Act, the case itself starts from the Investigating Officer by preparing the entrustment mahazar and ends after the trap is completed by preparing the trap mahazar. Unless both the preparing of the entrustment mahazar and the trap mahazar are proved with cogent and corroborative evidence, the Court cannot act only on the testimony of prosecution witnesses in the instant case. Moreso the testimony of prosecution witnesses being full of inconsistencies, they being not trustworthy and credible cannot be relied upon so as to come to the conclusion that the accused demanded any bribe or accepted it. The testimony of prosecution witnesses being unsatisfactory regarding the manner in which the Investigating Officer tried to lay the trap does not inspire confidence. Thus the case of the prosecution being

full of doubts, the benefit of doubt can be extended in favour of the accused."

12. P.W.10 Govindan who is the Sub-Inspector of Police deposed that he has received the complaint from P.W.1 and registered the case and prepared Ex.P-10 FIR. Except that, he has not stated anything. It is pertinent to note that P.Ws.2, 3, 5 and 6 turned hostile. It is the duty of the prosecution to prove each and every ingredients of Section 394 IPC.

13. Section 394 IPC reads as follows:

"394: Voluntarily causing hurt in committing robbery.--If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

14. Now, this Court has to decide as to whether the ingredients of Section 394 IPC have been proved by the prosecution.

15. It is pertinent to note that it is not the case of the prosecution that the revision petitioners/A1 and A2 were caught red-handed at the time of commission of the offences. There is no evidence to show as to when the revision petitioners/A1 and A2 were arrested and when the confession statements were recorded and on what basis, the recovery under Section 27 of the Indian Evidence Act was made. The available evidence is P.W.5 Ramalingam, who also turned hostile and only through him, his signature in the confession was marked as Ex.P-3. As per the procedure in criminal jurisprudence, if any witness turned hostile, the person-investigating officer who has recorded the statement under Section 161 Cr.P.C., of the witnesses, must be examined and through him, relevant portion has to be put forth. In this case, as already stated, the investigating officer was not examined and no reason has been assigned as to why he was not examined before Court, which caused prejudice to the revision petitioners/A1 and A2. P.W.5 Ramalingam in his chief examination stated that the signature in the confession statement is his signature and the signature in the confession and in the mahazar is marked as Exs.P-3 and P-4. Nothing has been elicited from his evidence regarding the occurrence. There is no evidence for arrest, recording of confession statement and the recovery made under Section 27 of the Indian Evidence Act.

16. P.W.9 Anandan in his evidence stated that under the seizure mahazar, the knife (patta kathi), currency notes and watch have been recovered. He further stated that the signature in the confession statement belongs to him. His evidence is as follows: @ehd; jw;ngHJ flhk;g{hpy; Chpy; trpf;fpnwd;/ 3 tUlK; Kd;g[ nghyPrhh; kfrhpy; gl;lhf;fj;jp xd;W. U:gHa; nehl;Lf;fs;. ifg;gw;wpdhh;f;s;/ fofhuk; xd;iw ifg;gw;wpdhh;fs;/ kfrhpy; ifbahg;gk; bra;njd;/ kfrh; rh/M./7?y; cs;s ifbahg;gk; vd;DilaJ/ xg;g[jypy; cs;s ifbahg;gk; rh/M/8.9 ifbahg;gk; vd;DilaJ/ @

17. Therefore, I am of the view that the prosecution has not taken steps to prove the arrest of the accused and the confession recorded and the seizure made. Since Section 394 IPC is for committing robbery voluntarily by causing hurt, as already stated, the revision petitioners/A1 and A2 were not caught red-handed by the public while committing robbery from P.W.1. In such circumstances, the arrest, confession statement and recover play vital role. These aspects have not been proved by the prosecution in accordance with law and that factum has not been considered by the Courts below. It is fatal to the case of the prosecution, which is one of the grounds for vitiating the conviction and sentenced passed by the Courts below.

18. As already stated in the earlier paragraph, non-examination of the investigating officer who investigated the case, is also fatal to the case of the prosecution. I do not know as to why both the Courts below have not considered this aspect.

19. Learned Government Advocate contended that the prosecution has proved that P.W.1 is the victim, as also the eye-witness and his evidence is trustworthy and reliable. Now, this Court has to decide as to whether P.W.1's evidence is trustworthy and reliable. While perusing his evidence, in cross-examination, he fairly conceded that his house is opposite to the Police Station and he has been doing some work in the Police Station, and that the occurrence had taken place at 6 a.m on 17.3.2002 and he was treated by P.W.8 Doctor on the same day at 1 p.m. In Ex.P-6 accident register/wound certificate, it is stated that P.W.1 was alleged to have been assaulted by unknown persons near the Bridge at 6 a.m. on 17.3.2002 with pen-knife. He sustained only abrasion on the left wrist.

20. At this juncture, it is appropriate to consider the oral evidence of P.W.1, who in his chief examination stated that, A-2 Kumaresan assaulted him on his left hand, whereas, there is no blood injury or cut injury. The injury sustained by him was neither laceration nor a cut injury and it is only an abrasion and it is possible when a person falls down on the ground as per the evidence of P.W.8 Doctor. In such circumstances, there is no evidence to show that the revision petitioners/A1 and A2 have caused injury while committing the offence.

21. As already stated, there is no evidence to show that the revision petitioners/A1 and A2 have wrongfully restrained P.W.1 and at that time, committed robbery of Rs.250/-, watch, gold ring, etc., i.e.M.Os.1 to 4 and caused injury on him. The trial Court and the appellate Court have not considered this aspect in proper circumspection. Since the prosecution has not proved that the revision petitioners/A1 and A2 were guilty under Sections 341 and 394 IPC beyond reasonable doubt, the benefit of doubt has to be given in favour of the revision petitioners/A1 and A2. Hence, the conviction and sentence imposed on the revision petitioners/A1 and A2 are liable to be set aside.

22. Accordingly:

- (a) The Criminal Revision Cases are allowed.
- (b) The conviction and sentence imposed on the revision petitioners/A1 and A2 are set aside.
- (c) The revision petitioners/A1 and A2 are acquitted of the charges.
- (d) The bail bond if any executed by them shall stand cancelled.
- (e) The fine amounts if paid by the revision petitioners/A1 and A2 shall be refunded.

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To

- 1. The Additional District and Sessions Judge (Fast Track Court), Vellore.
- 2. The Additional District Munsif-cum-Judicial Magistrate, Ambur, Vellore District.
- 3. Sub-Inspector of Police,  
Umrabath Police Station,  
Vellore District. (Crime No.208 of 2002)
- 4. The Public Prosecutor, High Court,

Madras