

Jeyaraj. Vs. the State Rep. by

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Court : Chennai

Decided On : Jun-27-2012

Judge : S.Tamilvanan, J.

Acts : Indian Penal Code(IPC) - Sections 397, 401, 394 ; Arms Act - Section 25 (1) (c); Code of Criminal Procedure(CrPC) - Section 207, 397, 401;

Appeal No. : CrI.R.C.(MD).No.801 of 2010

Appellant : Jeyaraj

Respondent : The State Rep. by

Advocate for Def. : Mr.A.P.Balasubramanian, Adv

Advocate for Pet/Ap. : Mr.M.Ravi Shankar, Adv.

Judgement :

Revision preferred under Sections 397 & 401 of the Criminal Procedure Code against the Judgment, dated 04.06.2010 made in C.A.No.6 of 2009 on the file of the Additional Sessions Judge / FTC, Periyakulam, confirming the Judgment of conviction and sentence, dated 20.01.2010 made in S.C.No.131 of 2006 on the file of the Assistant Sessions Judge, Uthamapalayam.

ORDER

1. The criminal revision has been preferred under Section 397 r/w 401 IPC, challenging the conviction and sentence imposed in Judgment, dated 04.06.2010 made in C.A.No.6 of 2009 on the file of the Additional Sessions Judge / FTC, Periyakulam, whereby confirmed the Judgment of conviction and sentence, dated 20.01.2010 made in S.C.No.131 of 2006 on the file of the Assistant Sessions Judge, Uthamapalayam.

2. As per the prosecution case, on 21.02.1999 at about 2 a.m, the revision petitioner / accused, Jayaraj along with one Mariappan and Raja with an intention of committing robbery entered into the Forest Office (Lower camp), Gudaloor, covering their face with the mask, tied the hands and closed the mouth of Muniyandi, centry of the forest wing with cloth, threatened him with knife and took away two riffles, DBBL guns, riffle bullets 86 in number and other arms forcibly and thereby committed offence punishable under Section 394 r/w 397 IPC and under Section 25 (1) (c) of Arms Act. After the investigation, charge sheet was filed by the respondent herein.

3. It is seen from the Judgment of the trial court that copies of the documents relied on by the prosecution were furnished to the revision petitioner / accused, as per Section 207 Cr.P.C. After the committal order passed by the Judicial Magistrate, the case was made over to Assistant Sessions Court, Uthamapalayam by the District and Sessions Judge. The trial court, framed charges under Section 394 r/w 397 IPC and Section 25 (1) (a) of Arms Act. When the charges were read over and explained to the petitioner / accused, he pleaded not guilty, hence, the matter was posted for trial. In order to establish the guilt against the accused, P.Ws.1 to 15 were examined, Exs.P.1 to P.11 and M.Os.1 to 22 were marked by the prosecution. On the side of the petitioner / accused, no witness was examined and no exhibit or the material object was marked.

4. Considering the evidence available on record and the arguments advanced by both the learned counsel, the trial court convicted the accused under Section 394 r/w 397 IPC and sentenced him to undergo 7 years R.I and to pay a fine of Rs.100/- and in default to pay the fine amount, the petitioner / accused shall undergo a further period of 6 months R.I and he was also convicted under Section

25 (1) (a) of Arms Act and sentenced to undergo 3 years R.I and to pay a fine of Rs.100/- and in default, undergo further period of 6 months R.I. Aggrieved by which, appeal was preferred by the petitioner / accused.

5. On the appeal in C.A.No.6 of 2009, the Additional Sessions Judge / FTC, Periyakulam, by Judgment, dated 04.06.2010 confirmed the conviction and sentence imposed by the trial court and dismissed the appeal. Aggrieved by which, this criminal revision has been preferred by the petitioner / accused.

6. Mr.M.Ravi Shankar, learned counsel appearing for the revision petitioner submitted that as per the prosecution case, one Muniyandi is said to be the only eyewitness and also victim in the alleged occurrence, however, he was not examined as prosecution witness for the reasons best known to the prosecution. According to him, Courts below have not considered the vital aspect, which creates serious doubt on the prosecution case. He has further stated that P.W.1 to P.W.5 have deposed only hearsay evidence, though the same is inadmissible under the Indian Evidence Act, which would not be basis for convicting the revision petitioner / accused. According to him, Ex.P.2 is the statement given by the alleged eyewitness Muniyandi and the said witness was not examined, hence, the findings of the courts below is contrary to law and justice. P.W.9, Mahazar witness has admitted that he signed in Ex.P.4, observation mahazar only at the police station, similarly, the courts below have failed to weigh the evidenciary value of P.W.10 and P.W.11 as stock witnesses. P.W.12 has deposed that the alleged eyewitness Muniyandi was treated as inpatient and as per Ex.A.7, AR copy, the accused was an unknown person to the said Muniyandi, however, identification parade was not properly conducted by the respondent. Though there was delay in conducting identification parade, that was not properly explained by the prosecution. As per the prosecution case, the petitioner / accused was arrested on 20.03.1999, but the test identification parade was conducted by P.W.13 only on 09.04.1999 after the expiry of the first remand of the petitioner / accused, that would probablise that the accused could easily be identified by any witness and further, the alleged eyewitness, said to have identified the petitioner / accused was not examined by the prosecution.

7. According to the learned counsel appearing for the petitioner / accused, only considering the evidence of P.W.13, Judicial Magistrate, who conducted identification parade and Ex.P.8, the report of the Magistrate, the Courts below have convicted the accused, which is against law and justice. He has further submitted that P.Ws.1 to 7 were not eyewitness for the occurrence. As per the evidence of P.W.1, Forest Ranger, on 21.02.1999 at about 2.30 a.m, while he was sleeping at his residence, two watchers came to his residence and wake him up saying that there was robbery committed at the forest office, then he along with watchers, proceed to the office in a lorry, driven by Ganesan, P.W.6. When they reached the office, they found that the office door was found to be opened and the room was found broken, where four riffles kept were found missing along with bullets etc., and when P.W.1 enquired the centry Muniyandi, explained him about the occurrence. Then P.W.1 went along with Muniyandi, watcher Ramasamy and Driver Ganesan to Kumuli Police station and gave a complaint at about 4.30 a.m and at about 6 'O' clock, police visited the scene of occurrence. The complaint given by P.W.1 was marked as Ex.P.1. It is an admitted fact that P.W.2, Swamidoss, P.W.3, Veerabadhran, P.W.4, Ponraj, P.W.5, Subbaiya were not stated as eyewitness for the occurrence. As per the evidence of P.Ws. 1 to 5, they went to the scene of occurrence only after the occurrence. P.W.6, Driver Ganesan, P.W.7, Ramasamy, watcher had deposed only similar evidence as that of P.W.1 and admittedly, they were also not eyewitness.

8. Learned Government Advocate has not disputed that as per the complaint, the revision petitioner / accused was not a named accused and as per the complaint, Ex.P.1, Muniyandi was the only eyewitness and the victim in the occurrence that had taken place on 21.02.1999 at about 2 a.m. Hence, the said Muniyandi could be the proper person to identify the accused, who actually committed the offence, however, for the reasons best known to the prosecution, the said Muniyandi was not examined as witness. It is seen that P.W.8, Muthukamatchi and P.W.9, Thiruvengadam are only the witnesses to the observation mahazar, Ex.P.3.

9. P.W.10, Surulivel has deposed that on 20.03.1999 at about 12 noon, he was taken to a place called Kombai sukku sulimedu by Inspector of Police, Rayappanpatti police station, where the revision petitioner / accused, Jeyaraj was

examined by the Inspector and that the petitioner / accused gave confession statement to hand over riffles - 4, bullets-155, pillow cover-1, towel-1, pants- 3, shirts-2 and two iron rods and that was recovered under Ex.P.6. the admissible portion of the confession statement was marked as Ex.P.5. As per the evidence of P.W.11, VAO, Kombai (west) village, he was also a witness for the recovery of the aforesaid material objects from the revision petitioner / accused. P.W.12, Dr.Selvam has stated that on 21.02.1999, he examined Muniyandi at about 7 a.m and he told him that he had been attacked by a known person and two unknown persons at about 2 a.m by hands and legs. When he examined that person, a contusion 3 x 2 cm was found on his left forehead and according to him, it was a simple injury, for which he issued Ex.P.7, Wound Certificate. As per the evidence, the Doctor, P.W.12, the said injured Muniyandi did not say anything whether he had been the said persons. According to P.W.12, the said persons attacked him by their legs and hands.

10. P.W.13 was the Judicial Magistrate, Bodinayakanur, who conducted the identification parade. P.W.14, Sub-Inspector of Police had received the complaint on 21.02.1999 at about 4.30 a.m from P.W.1 and registered the case in Crime No.3/99 under Sections 394, 397 IPC and Section 25 (1) (a) of Arms Act on the file of the Kumuli police station and he sent the injured to the Government Hospital, Cumbum. P.W.15 was the Inspector of Police, Rayappanpatti police station, on 21.02.1999, who took the investigation, visited the scene of occurrence at 6 a.m on the same day, prepared observation mahazar, rough sketch, Ex.P.10, examined the prosecution witnesses. On 20.03.1999 at about 13 hrs, they arrested the revision petitioner / accused at sukku chulimedu nearby Cumbum in the presence of Surulivel, P.W.10 and Ramamoorthy, P.W.11. In the cross-examination, the Investigating Officer has stated that he arrested the revision petitioner / accused on intimation. Before arresting the accused, he brought the witnesses to a place called Sukku Chulimedu.

11. Learned counsel appearing for the revision petitioner submitted that as per the prosecution case, the only eye witness, who can identify the revision petitioner / accused was only Muniyandi but he was not examined by the prosecution. Though the Government Advocate has submitted that Muniyandi had identified the revision

petitioner / accused in the prison, the prosecution has not established the identification parade by examining the said eyewitness, Muniyandi. Only the Judicial Magistrate was examined, who cannot speak about the occurrence and the involvement of the revision petitioner / accused in the alleged occurrence, hence, the conviction is unsustainable in law.

12. In *Budhsen vs. State of U.P.*, reported in AIR 1970 SC 1321, the Hon'ble Apex Court has held as follows : "7...The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence, in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding..." The ruling of the Apex Court further reads as follows : 7...Identification proceedings in their legal effect amount simply to this, that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially govern by Section 162, Criminal Procedure Code..."

13. A Full Bench of the Hon'ble Supreme Court in *C.P.Fernandes vs. Union Territory, Goa*, reported in AIR 1977 SC 135 has ruled that in the case of identification parade being conducted, there must be reasonable opportunity for the accused to cross-examine the witness, who identified the accused, otherwise the same would suffer serious infirmity, which cannot be accepted. The ruling of the Apex Court reads as follows :

"8...Ordinarily, the person who is supposed to have identified the assailants at the test identification parade must himself give evidence in regard to the identification.

If he does not himself give such evidence in regard to the identification parade to do so, the defence would be deprived of an opportunity of cross-examination for the purpose of showing that the witness had an opportunity of seeing the accused before they were brought for identification. In any event, the evidence in regard to identification at the test identification parade is at the highest corroborative piece of evidence and if the evidence of Xavier suffers from serious infirmities and cannot be accepted, the evidence in regard to identification by him at the test identification parade cannot improve the situation."

14. In the light of the decisions referred to above, it has been made clear that when a person is not a named accused, as per the complaint and the FIR, without conducting proper identification parade and without establishing the identity of the person, it won't be possible for the Court to convict the accused. As per the prosecution case, centry Muniyandi was attacked by one identifiable person and two unidentifiable persons and the said Muniyandi was tied in the the forest office, various arms like riffles and bullets were taken away from the custody of the said Muniyandi by them. It cannot be disputed that the alleged occurrence is a very serious offence and the occurrence was known only to the centry Muniyandi. As per the evidence of the Doctor, P.W.12, Muniyandi had sustained only simple injury, a contusion 3 x 2 cms on his left forehead and he was also conscious. According to P.W.12, the said Muniyandi told him that he had been attacked by one identified and two unidentified persons by hands and legs. As he was said to be the affected person and also the eyewitness, conscious to lodge the complaint, it is not understandable as to how the complaint was not given by the said Muniyandi, but P.W.1, who came to the place of occurrence, subsequently after the occurrence, making hearsay averments about the occurrence.

15. As decided by the Hon'ble Apex Court when identification parade is a vital aspect, there could be reasonable opportunity for the accused to cross- examine the identifying witness, otherwise the identification parade would serious infirmity, based on which, conviction cannot be imposed on the accused.

16. In the instant case, only the Judicial Magistrate, who conducted the identification parade alone was examined to establish the identification parade.

The only eyewitness and the alleged victim, Muniyandi was not examined for the reasons best known to the prosecution. The learned Magistrate, P.W.13 has deposed in his evidence that after the identification parade, when he enquired, the petitioner / accused told him that he had been kept at the police station, Cumbam, where he was identified to the identifying witness and the Forest Ranger. It cannot be disputed that P.W.13 could not be construed as a proper witness to establish the identification parade, without examining the identifying witness. P.W.1, who gave the complaint, Ex.P.1, has stated that he was informed by Muniyandi that on 21.02.1999 at about 2 a.m., three persons entered into the Forest Ranger Office, out of the three, two persons had covered their face with yellow colour cloth. As the alleged eyewitness and the victim in the occurrence was conscious and alive, it is erroneous on the part of P.W.1, for lodging the complaint with hearsay statement, which is not personally known to him. As per the evidence of the Doctor, P.W.12, Muniyandi told him that one identifiable person and two unidentifiable persons had entered into the office and attacked him by hands and legs, where as P.W.1 by way of his hearsay evidence has deposed that the said Muniyandi had told him that three persons entered into the office, tied his hands, closed his mouth and took away rifles and bullets. It is a common sense that complaint should be given by person, who had direct knowledge about the occurrence and that too in a case of robbery, when such person was conscious and available to the police.

17. In the instant case, robbery has been alleged against the revision petitioner and others. Even as per the prosecution case, the only person, who had direct knowledge about the occurrence and victim in the occurrence is said to be the centry Muniyandi, however, he was not the defacto-complainant and he was not even examined as a prosecution witness, though he was also the identifying witness. There is no satisfactory explanation from the prosecution for the non-examination of Muniyandi. P.W.1, who went to the scene of occurrence, after the occurrence, gave the complaint and it is seen that the vital portion of the complaint is only a hearsay statement to the defacto- complainant, P.W.1 and even according to him, he was informed by Muniyandi, who was also available there.

18. As contended by the learned counsel appearing for the revision petitioner / accused, the non-examination of Muniyandi to establish the alleged occurrence and to establish the identification of the revision petitioner / accused would show that the prosecution has not established the guilt against the revision petitioner / accused.

19. The Hon'ble Supreme Court in Dilawar Singh vs. State of Delhi, reported in AIR 2007 SC 3234 has highlighted the essential ingredients, which are needed to establish an offence under Section 397 IPC as laid down in Mohd. Yousuf vs. Afaq Jahan, reported in 2006 (1) SCC 627 as follows :

"22. The essential ingredients of Section 397 IPC are as follows: 1. Accused committed robbery. 2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person. 3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused."

20. In the instant case, this Court is of the view that the prosecution has not established the alleged offence under Section 394 r/w 397 IPC and Section 25 (1) (a) of Arms Act against the revision petitioner / accused. The evidence adduced by mahazar witnesses and the evidence of the witnesses for the alleged recovery of material objects would not be sufficient to establish the guilt against the revision petitioner / accused, however, the Courts below have not considered the evidenciary value of the witness, in the light of the decisions rendered by the Hon'ble Apex Court referred to above and therefore, I am of the view that the criminal revision has to be allowed, to meet the ends of justice.

21. In the result, this criminal revision is allowed and the Judgment of Conviction and Sentenced imposed by the Courts below are set aside. The petitioner / accused is ordered to be released forthwith, if he is not required in connected with

any other case. The fine amount, if any paid by the petitioner shall be refunded, as per procedure.

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