Madras High Court
K. Sulochana vs State Rep. By The on 28 January, 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28/01/2010

CORAM
THE HONOURABLE MR.JUSTICE C.T.SELVAM

Crl.A.Nos.172 of 2002
Crl.A.Nos. 173, 174, 192,
215 and 224 of 2002

Crl. A. No.172 of 2002:-

K. Sulochana ...Appellant/Accused- 3

vs.

State rep. by the
Inspector of Police
Vigilance and Anticorruption
Nagercoil. ...Respondent/Complainant

Prayer in Crl. A. No.172 of 2002

These Criminal Appeals are filed under
Section 374 of Cr.P.C. praying to set aside the judgment and conviction of the
appellants/ accused passed by the Chief Judicial Magistrate-cum-Special Judge,
Nagercoil in S.C.No.1 of 1991 dated 31.01.2002.

!For Appellants ...Sri.S. Ashok Kumar, Sr. Counsel
for M/s.S. Palanivelayutham
^For Respondent ...Sri.P. Rajendran, GA

:JUDGMENT

These appeals arise against the Judgment passed by the Chief Judicial Magistrate-cum-Special Judge, Nagercoil in S.C.No.1 of 1991 dated 31.01.2002.

2. Originally there were 9 accused in the case and of them two subsequently died. 7 accused stood trial in Spl.Case No.1 of 1991 on the file of the learned Chief Judicial Magistrate-cum-Special Judge, Nagercoil. They were charged as follows :

Accused Charges Sl.No.

A-1 120(b), 420, 471 r/w 467 of IPC 5(1)(d) r/w 5(2) of the Prevention of Corruption Act r/w 109 IPC A-2 120(b), 420 r/w 109 IPC, 467, 468 of IPC,5(1)(d)r/w 5(2) of the Prevention of Corruption Act r/w 109 IPC A-3 120(b), 420 r/w 109 IPC, 467, 468 of IPC,5(1)(d)r/w 5(2) of the Prevention of Corruption Act r/w 109 IPC A-4 120(b), 420, 471 r/w 109 of IPC, 467 [3 counts] of IPC 5(1)(d) r/w 5(2) of the Prevention of Corruption Act.

A-5 120(b), 420 r/w 109 IPC, 468 of IPC, 5(1)(d)r/w 5(2) of the Prevention of Corruption Act r/w 109 IPC A-6 120(b), 420 r/w 109 IPC, 467, 468 of IPC,5(1)(d)r/w 5(2) of the Prevention of Corruption Act r/w 109 IPC A-7 120(b), 420 r/w 109 of IPC, 467 [2 counts],468 of IPC [2 counts] 5(1)(d) r/w 5(2) of the Prevention of Corruption Act.

On conclusion of trial and vide judgment dated 31.01.2002 the accused stand convicted as follows :-

Accused Charges Sl.No.

A-1,2,5 120(B)IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI;

420 r/w 109 of IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI; 471 r/w 467 of IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI;

5(1)(e) r/w 5(2) of PC Act r/w 109 IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI;

A-3,4,6 120(B)IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of and 7 Rs.1000/- in default to undergo 6 months RI;

420 r/w 109 of IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI; 467 IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI;

468 IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI; and 5(1)(d) r/w 5(2)of PC Act r/w 109 IPC - to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 6 months RI;

These appeals are preferred against the above findings. The appellants in Crl.A.No.215/2002 are A-1 and A-2, the appellant in Crl.A.No.172/2002 is the third accused, the appellant in Crl.A.No.173/2002 is the fourth accused, the appellant in Crl.A.No.174/2002 is the fifth accused, the appellant in Crl.A.No.224/2002 is the sixth accused and A-7 is the appellant in Crl.A.No.192/2002.

3. The case of the prosecution is as follows :

The first accused S. Nagarajan was a Medical Practioner, in-charge of the private Rajan Hospital at Nagercoil and the second accused was his Assistant therein. The accused 3 to 7 were public servants. Between February and March 1980, all the accused entered into a conspiracy and with criminal intent created false records of the conduct of family planning operations at Rajan Hospital, whereby the first accused was enabled to fraudulently receive government funds of a sum of Rs.3235/- with the complicity of the other accused. False records have been created of the conduct of family planning operations, false certificates have been issued in respect thereof and thumb impressions have falsely been affixed on receipts towards receipts of monies. Accordingly, the accused have been charged for offences under section 120(b), 420, 467, 468 as also for offences under section 5(1)(e) r/w 5(2) of the Prevention of Corruption Act. The prosecution examined 53 witnesses and marked 273 exhibits. The occurrence is of the year 1980. The First Information Report in the case was registered in 1983. The charge sheet was filed in 1991 i.e. about 12 years after the alleged occurrence. Shorn of unnecessary details, the case is that the Rajan Nursing Home was one of the Hospitals which had been approved for conducting family planning operations in the course of Government Family Planning drive. The person undergoing Tubectomy/ Vasectomy operations were give Rs.85/- and Rs.75/- respectively. The motivator was paid Rs.10/-. A payment of Rs.15/- was made towards the cost of drugs and dressing and a fee of Rs.5/- was paid as doctor's fee for conduct of operation. A sum of Rs.5/- was also paid for transport charges to the person undergoing operation and Rs.20/- was give to such person towards diet charges. It is through manipulation of records in respect of the above, that monies are said to have been siphoned-off by the first accused with the aid of the other accused. PW-44 who was the then Statistical Officer in the Public Welfare Department has spoken to having conducted an enquiry on the operations conducted at Rajan Nursing Home and other hospitals and deposed that the records reveal that 633 men and 274 women, totalling 907 had undergone Tubectomy/ Vasectomy operations and that enquiry was conducted in respect of 91 cases. Confirmation could not be had in respect of 87 persons since there were no such persons or their addresses were given wrongly. Of the remaining 4, 3 had denied of having undergone any operation while one had admitted thereto. He would state that his report Exh.P-82 did not inform who were the 91 persons or which were the addresses that were not found in the course of the enquiry, though such information had been furnished along with the report while submitting the same to the Directorate.

4. PW-48, who had worked as Cashier at the Panchayat Union and had been interrogated by the Investigating Officer with regard to the records pertaining to family planning for the Panchayat Union during the year 1979-1980 had, in cross examination, admitted that some of the records had gone missing from the office. PW-51, one of the Investigating Officers had admitted that it was the Block Development Officers who would disburse the cash under the family planning programme. Though he would deny that all the family planning records had not been examined, he would admit that he had examined the Block Development Officer at the Panchayat Union but had not recorded a statement since he considered the same unimportant. Making a turn around, he would depose that such Block Development Officers had not been examined by him. He would admit of not having been put in possession of the family planning records at the Panchayat Union and to lack of knowledge of whether the same was so given to the earlier investigating officer. PW-51 also admits of not having pointedly questioned PW- 44 about the persons examined by him. He also would admit of having seen the report of Dr. Abbas Bai and of not having examined such person.

5. In circumstances where PW-44 would admit that Exh.P-82 did not inform the exact nature of the enquiry conducted by him and the finding reported therein, where PW-48 would inform that records relating to family planning had gone missing, where PW-51 would be ambivalent about examination of the Block Development Officers, where PW-51 admits to not having been put in possession of the family planning records, where the Block Development Officers, who even as per the admission of PW-51 were the disbursing authority under the family planning programme has not been examined and where Dr. Abbas Bai who is said to have prepared a report in the matter has neither been examined nor been called as a witness, we find that the prosecution case rests merely on the evidence of the motivators involved in the family planning programme, the evidence of the Village Administrative Officers regarding the existence or non-existence of persons who had been operated upon and on the evidence of the finger print expert. PW-3 to PW-15, PW-45 and PW-46 are the motivators. Their evidence is that they had handed over sums received from the Panchayat Union and which were to be paid to the persons undergoing operations to A-1 and A-2. This runs contrary to the evidence of the investigating officer to the effect that it was the Block Development Officer who was to disburse payments.

6. PW-16 to PW-19, PW-21 to PW-27, PW-29 to PW-34 and PW-40 are the Village Administrative Officers. They had issued certificates informing that certain persons were not residents in the villages under their supervision. These Village Administrative Officers are not persons attached to the concerned villages at the time of occurrence and apart from their certificates there is nothing else to show the nature of enquiry conducted by them towards the issue of certificates. Their evidence is most wanting. In many a case, it is seen that they did not even know the names of the fathers of the persons whose existence or non-existence was to be certified by them or their addresses and are unable to deny that there were several persons under the same names. It is quite apparent that they have issued certificates merely on the request of the investigating officer.

7. PW-52 is the Investigating Officer who has obtained the finger prints of the accused persons. He would state that he submitted a letter to the Director, Anti-Corruption Bureau requesting that a finger print expert be sent to the Nagercoil Office for the purpose of comparison of finger prints on the documents with those that had been obtained by him. According to him, the finger print expert was at Nagercoil on 17.09.1984 and carried out the work of comparison and issued a preliminary report. Such expert had asked that the finger print impression be forwarded to the office at Chennai for detailed investigation. He would admit that the expert who issued the preliminary report was one Victor David and that such person had neither been examined as witness nor his report been produced. Further, PW-52 specifically admits that the finger print impressions of various accused persons were obtained by one Head Constable by name Mani. He would claim that the police department would train its personnel on lifting of finger prints even before they were made Head Constables. In the instant case, the said police constable Mani has not been examined as a witness.

8. In Shanmugayya & Ors. v. State, 1992 (3) Crimes p.505, a Division Bench of this Court has held as follows:-

'31. In this context, it would be worthwhile to refer to certain provisions of the Identification of Prisoners Act 1920 (Act No.33 of 1920). The object of this Act was to authorise taking of

measurements and photographs of convicts and others. The word "measurements" has been defined under Section 2(a) of the Act to include finger impressions and foot-print impressions and under Section 2(b), it is stated that 'Police Officer' means an Officer in charge of a police station, a police officer making an investigation under Chapter XIV of the Code of Criminal Procedure,1898 (5 of 1898) or any other police officer not below the rank of Sub Inspector. Section 3 of the Act concerns itself with taking of measurements etc., of convicted persons. In the instant case we are not concerned with this section. Section 4 deals with taking of measurements or photographs of non-convicted persons, Section 4 reads as follows :-

"4. Taking of measurements of photographs of non-convicted persons,-

Any person - (a) who has been arreste
-
(i)Under section 55 of the Code of Criminal Procedure, 1898, or under section 4 of the Bombay Beggars Act, 1945;

(ii)In connection with an offence punishable under Section 122 of the Bombay Police Act, 1951, or under section 6 or 9 of the Bombay Beggars Act, 1945, or in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards, or

(b) in respect of whom a direction or order under section 55 or 56 of the Bombay Police Act, 1951, or under sub section (1) or (2) of section 23 of the Bombay Beggars Act, 1945, or under Section 2 of the Bombay Public Security Measures Act, 1947, has been made, shall, if so required by a Police Officer, allow his measurements or photograph to be taken in the prescribed manner." A look at Section 4 of the Act shows, that any person who had been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards (as far it is relevant to this case) shall, if so required by a police Officer allow his measurements or photograph to be taken in the prescribed manner.

32. Section 4 refers to taking of measurements etc. of habitual offenders against whom restriction order is made. We are not concerned with this section in the present appeal. Section 5 deals with the power of a Magistrate to order a person to be measured or photographed. Under this Section if a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a Police Officer. Such an order can be made only by a Magistrate of First Class and further unless the person has at some time been arrested in connection with such investigation or proceeding. The Act does not say, that Section 5 refers to the prescribed manner spelt out in Section 4 of the Act. The power of the Magistrate under Section 5 of the Act does not seem to affect the power of a Police Officer, to take finger prints or photographs of the persons arrested in connection with, the various facets referred to under Section 4 of the Act.

33. Section 6 takes in its fold permissibility of use of lawful means necessary to secure measurements or photographs when resistance is offered or refusal is indicated by the person concerned. Such resistance or refusal, according to Section 6 of the Act shall be deemed to be an offence punishable under Section 186 of the Indian Penal Code. We are not concerned with Section 7 of the Act.

34. Section 8 confers powers on the State Government to make rules for the purpose of carrying into effect the provisions of this Act. It was stated by the learned Public Prosecutor, that the State of Tamil Nadu had not framed any rules for the purpose of carrying into effect the provisions of the Act. After careful consideration of Sections 4 and 5 of the Act, we are unable to agree with Mr.N.Dinakar, that invariably during investigation a person arrested must be taken before a Magistrate and orders obtained before the finger prints of such persons could be taken by a Police Officer. Sections 4 and 5 operate in different fields and obviously if the State Government had made any rules for the purpose of carrying into effect the provisions of this Act, the Investigating Officer, ought to have followed such rules which would fall within the ambit of "prescribed manner" contemplated under Section 4 of the Act. If the State Government has not made any rules under the Act, it will be the duty of the Investigating Officer, to follow Police Standing Order 836. Police Standing Orders are in the nature of instructions given, to be followed by the Police force. Police Standing Order 836 (3) (a) defines "finger prints" as including prints of thumb and are either 'rolled' or 'plain'. P.S.O.836(3) (f) defines 'proficient' to be an Officer, who has been declared by a Superintendent of Police or in the City of Madras by the Commissioner of Police, to be qualified to take clear and well-rolled impressions. The method of taking finger prints with reference to appliances, forms part of P.S.O. 836 (4) (a). P.S.O. 836(4) (d) states that prints should invariably be taken on the authorised Finger-Print Slip (Form No.141). It also states, that the headings of the slip are self-explanatory.

35. If Form No.141 had been used in the instant case, the various infirmities we have pointed would in all possibility, not have occurred at all.

36. P.S.O. 836(4) (k) reads as follows:-

" Finger impressions shall be taken only by officers declared by a Superintendent or, in the City of Madras, by the Commissioner of Police, to be qualified to take clear and well-rolled impressions." None of the provisions of Police Standing Order 836 had been followed by the investigating agency. Of course, it is possible to argue that Police Standing Orders do not have statutory force and therefore non-following of the Standing Order cannot be held in favour of the appellants. Even if the provisions of the Police Standing Orders had not been complied with and if the obtaining of finger prints from the appellants in the manner spoken to by C.Ws. 1 and 2, did inspire confidence, we would have still to consider if non- following of the procedure of the Police Standing Orders, was only irregular, which did not affect the fact of finger print impressions having been obtained by C.W.1 in the presence of C.W.2, claimed by the former.

We have already pointed out several infirmities, which taint the whole process of obtaining of finger print impressions and probably less said it would be better for the prosecution. We think it

necessary that the State Government must make rules under Section 8 of the Identification of Prisoners Act 1920 for the purpose of carrying into effect the provisions of this Act. Some of the State Governments have made rules. A proper procedure in obtaining finger prints must be followed for otherwise, the sanctity of scientific evidence not only gets obliterated but also becomes an exercise in futility".

In the case cited, the persons who had taken the finger prints were found wanting in the conduct of their task, while in the present case such person has not so much as been examined.

9. The present Tamil Nadu Police Standing Orders 801, corresponds to the old order 836 and here also PSO 801(3)(f) describes proficient as, 'Proficient means an officer who has been declared by a Superintendent of Police or in the City of Madras by the Commissioner of Police to be competent to examine, classify and give expert opinion on finger impressions'. and PSO 801(4)(k) informs that, 'Finger Prints by whom to be taken - finger impressions shall be taken only by officers declared by a Superintendent or, in the City of Madras by the Commissioner of Police, to be qualified to take clear and well-rolled impressions'.

10. Again in case of K.Dhanasekaran v. State, 2003 (1) CTC 223, this Hon'ble Court has, after dealing with the aspect of obtaining finger prints, also dealt with the question of passing conviction, on the strength of the expert evidence. This Court has this to say;

" 9. It is also argued that in the absence of any evidence to show that the specimen signatures were obtained as per the procedure laid down under Section 5 of the Identification of Prisoners Act, it is not safe to impose conviction merely on the basis of expert's opinion. In our case, I have already referred to the fact that the evidence of Pws.1,3 and 4 are not reliable for the reasons stated above; accordingly in the absence of compliance of Section 5 of the Identification of Prisoners Act, now I shall consider whether the conviction can be based only on the expert's (P.W.8's) evidence. The following conclusion of the Supreme Court in S.Gopal Reddy v. State of A.P. 1996 SCC (Crl.) 792 is pressed into service: (para 28) "28. Thus, the evidence of PW.3 is not definite and cannot be said to be of clinching nature to connect the appellant with the disputed letters. The evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering 'conclusive' proof and therefore safe to rely upon the same without seeking independent and reliable corroboration. In Magan Bihari Lal v.State of Punjab, 1977 (2) SCC 210: 1977 SCC (Cri.) 313, while dealing with the evidence of a handwriting expert, this Court opined : (SCC pp.213-14, para-7) "... We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law. It was held by this Court in Ram Chandra v. State of U.P., AIR 1957 SC 381 : 1957 Crl LJ 559 that it is unsafe to treat expert handwriting opinion as sufficient basis for conviction, but is may be relied upon when supported by other items of internal and external evidence. This Court again pointed out in Ishwari Prasad Misra v. Mohdn. Isa, AIR 1963 SC 1728 : 1963 BLJR 226 that expert evidence of handwriting can never be

conclusive because it is, after all, opinion evidence, and this view was reiterated in Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529 where it was pointed out by this Court that expert's evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert opinion in regard to handwriting in Fakruddin v. State of M.P., AIR 1967 SC 1326 : 1967 (2) Andh LT 38 and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence, the court must always try to see whether it is corroborated by other evidence,direct or circumstantial."

It is clear from the above judgment that it is not desirable to impose conviction solely on the evidence of expert without corroborative evidence either direct or circumstantial."

11. This court finds itself in respectful agreement with the earlier decisions of this Court both on the question of the person by whom and the manner in which finger prints have to be obtained and also evidentiary value of the opinion of the finger print expert.

12. For all the reasons stated above, this Court finds no merit in the prosecution case and accordingly these appeals shall stand allowed. The fine amount paid by the appellants shall be refunded.

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1. Inspector of Police Vigilance and Anticorruption Nagercoil.

2. The District Chief Judicial Magistrate-cum-Special Judge, Nagercoil.

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