

## Santhi, Kasthuri and Sabarinathan Vs State by Inspector of Police

**Court:** Madras High Court

**Date of Decision:** June 6, 2011

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) & Section 193  
Penal Code, 1860 (IPC) & Section 193

**Hon'ble Judges:** S. Nagamuthu, J

**Bench:** Single Bench

**Advocate:** K.V. Sridharan, for the Appellant; A.N. Thambidurai, Additional Public Prosecutor, for the Respondent

**Final Decision:** Allowed

### Judgement

S. Nagamuthu, J.

Since these appeals arise out of a common order passed by the learned I Additional Sessions Judge, Salem and since on

account of the said judgment a common complaint has been filed against them in C.C. No. 206 of 2005 before the Judicial Magistrate No. III,

Salem these appeals are heard jointly and they are disposed of by means of this common judgment.

2. The background facts of the case are as follows:

The first Appellant in C.A. No. 301 of 2005 by name Mrs. Santhi is the wife of the deceased Kalitha Padayachi and they had a son by name

Senthil Kumar. The second Appellant in C.A. No. 301 of 2005 by name Mrs. Kasturi is the wife of Mr. Senthil Kumar and the other Appellant Mr.

Sabarinathan in C.A. No. 301 of 2005 is their relative.

3. The sole Appellant in C.A. No. 303 of 2005 hails from the same village. The Inspector of Police, Valapadi police Station filed a charge sheet in

Crime No. 71 of 2003 against Mr. Senthil Kumar for offence u/s 302 of I.P.C. on the allegation that on 31.01.2003 at 8.30 a.m. the accused

Senthil Kumar attacked Kalitha Padayachi with a knife and he was taken to the Salem Government hospital, where he had undergone surgery. On

13.02.2003 at about 5.00 am he died in the hospital due to the effects of the injuries.

4. On those allegations, a charge was framed against Senthil Kumar u/s 302 of I.P.C. in Sessions No. 62 of 2002 on the file of the learned I

Additional Sessions Judge, Salem. The Appellants in C.A. No. 301 of 2005 were cited as prosecution witnesses. The first Appellant, Santhi was

examined as P.W.1 in the said case. In her deposition, she told the Court that the deceased was attacked only by P.W.5 with a view of ward off

the sexual assault attempted to be made by the deceased. However, the prosecution did not treat her as hostile so as to cross examine her to

contradict her in respect of her earlier statement. The second Appellant Mrs. Kasthuri was examined as P.W.5, in the said case. She also told that

at the time of occurrence, the deceased made an attempt on her sexually and in order to ward off the same, she attacked the deceased with a

knife. She was also not treated as hostile so as to cross examine her and to contradict with her earlier statements.

5. The third Appellant was examined as P.W.6, in the said case. He was examined to speak about the observation mahazar. However, during

cross examination by the accused, he has stated that blood stained earth was taken from the house of the deceased whereas, according to the case

of the prosecution, it was taken from the place of occurrence.

6. In the said case, the accused Senthil Kumar had taken a defence that he did not attack the deceased at all as alleged in the charge. His defence

was that the deceased was attacked only by P.W.5 in an attempt to ward off the sexual assault made on her by the deceased. In order to establish

the above defense, the accused examined the Appellant in C.A. No. 303 of 2005 one Mr. Ammasi as defence witness [D.W.1]. D.W.1 in his

evidence has stated that immediately after the occurrence he had an occasion to see the deceased. At that time, the deceased was conscious and

he told him that he was attacked by his daughter-in-law [P.W.5].

7. It is also pertinent to mention that while the deceased was in the hospital, a dying declaration was recorded by the learned Judicial Magistrate,

wherein, he has stated that he was attacked only by his son Senthil Kumar. Earlier, the Head Constable attached to Valapadi police station

recorded his statement while he was in the hospital wherein also he has stated that he was attacked by Senthil Kumar.

8. Having considered the above materials, the Trial Court found the accused Senthil Kumar guilty u/s 304(ii) of I.P.C. based on the dying

declaration given by the deceased to the learned Judicial Magistrate and on the basis of the dying declaration recorded by the Head Constable by

way of complaint.

9. The Trial Court rejected the evidence of these Appellants, who were examined as P. Ws.1, 5 & 6 and D.W.1. While convicting the accused

Senthil Kumar, the Trial Court found that these Appellants have falsely deposed before the Court. On such conclusion, in paragraph 28 of the said

Judgment, the Trial Court directed launching of prosecution against these Appellants. The Trial Court thereafter, laid a complaint before the learned

Judicial Magistrate No. III, Salem against these four Appellants for offence u/s 193 of I.P.C. The learned Judicial Magistrate No. III, Salem has

taken cognizance of the offence on the said complaint in C.C. No. 206 of 2005 and the trial is now pending.

10. In these circumstances, the Appellants have come up with these appeals challenging the said finding of the Trial Court and the consequent

complaint preferred.

11. At the outset, the learned Counsel appearing for the Appellants would submit that u/s 340 of the Code of Criminal Procedure before giving a

finding, that the Appellants have committed an offence punishable u/s 193 of IPC the Trial Court ought to have held a preliminary enquiry. But in

this case, according to the learned counsel, no such preliminary enquiry was held at all by the Trial Court. The learned Counsel would further submit

that the prosecution itself did not choose to cross examine the witnesses viz., P. Ws.1, 5 and 6 by treating them as hostile. Thus, when the

prosecution itself has not stated that these witnesses have falsely deposed, it is not legally correct on the part of the Trial Court to launch

prosecution.

12. The learned Counsel representing the State, would however oppose these appeals. According to him, preliminary enquiry as contemplated u/s

340 of the Code of Criminal Procedure has been dispensed with by the Trial Court in this case because even from the evidence, the Trial Court

has found that these Appellants are liable for prosecution for offences u/s 193 of I.P.C. He would further submit that though it is true that the

learned Public Prosecutor who conducted the case before the trial Court did not choose to cross examine P. Ws.1, 5 & 6 in the case (the

Appellants herein) that by itself cannot be a ground to allow these appeals.

13. I have considered the above submissions.

14. At this juncture, before proceeding further, it should be mentioned that as against the conviction imposed on Senthil Kumar an appeal was

preferred by him in C.A. No. 160 of 2005. Today, the said appeal has been allowed by this Court, thereby setting aside the conviction and

sentence imposed on him.

15. With the above background, let me now analyze the grounds raised by the learned Counsel appearing for the Appellants. A perusal of

paragraph 28 of the judgment of the Trial Court would go to show that according to the learned Judge, no preliminary enquiry as contemplated u/s

340 of the Code of Criminal Procedure was conducted as according to him it is not mandatory. In my considered opinion, the Trial Court is not

right in holding so. Holding a preliminary enquiry as provided u/s 340 of the Code of Criminal Procedure is to afford an opportunity to the

witnesses against whom it is proposed to launch prosecution for the offenses u/s 193 Code of Criminal Procedure to make their explanation. This

is an indispensable right of the individual. The said right though emanates from the Statute, basically, it goes in conformity with the principles of

natural justice which has been recognised as a part of fundamental right. But in this case, no such opportunity was given at all to these Appellants.

Thus, these Appellants have been deprived of their valuable right to place before the Court that they had not deposed falsely in the Court in the

case against Mr. Senthil Kumar. In my considered opinion, non compliance of the said provision itself would vitiate the entire proceedings.

16. Next, coming to the factual aspects of the matter, the case of the prosecution as found in the charge sheet filed against Mr. Senthil Kumar is

that the deceased Kalitha Padayachi was attacked only by the accused. In the dying declaration, even on two occasions, the deceased has stated

that he was attacked only by Mr. Senthil Kumar. But in evidence, the Appellants 1 & 2 in C.A. No. 301 of 2005, who have been examined as P.

Ws.1 & 5 have stated that P.W.5 had attacked the deceased when a sexual assault was attempted to be made on her by the deceased.

17. If it is the case of the prosecution that their earlier versions were different, then nothing would have prevented the learned Public Prosecutor

who was in charge of the case to cross examine those two persons and contradict them with reference to their earlier statements. Having failed to

do so and having failed to cross examine those witnesses to suggest that they were falsely deposing and their evidence should not be relied

upon, it is not at all legally correct to contend that the depositions made by these Appellants before the Trial Court in the case against Mr. Senthil

Kumar are false.

18. In respect of the third Appellant in C.A. No. 301 of 2005 he has only stated during cross examination that blood stained earth was recovered

from the house of the deceased also. In order to come to a prima facie conclusion that this part of the evidence of the said witness is false, I do not

find any material on record.

19. Similarly, the Appellant in C.A. No. 303 of 2005, as defence witness has deposed that the deceased told him that he was attacked by his

daughter-in-law. Absolutely there is no material to show that what was stated by him is false even prima facie. Therefore, the Trial Court was not

right in giving a factual finding in paragraph 28 of its judgment that their evidence are prima facie false.

20. When the findings are not legally sustainable, then as provided u/s 341 of the Code of Criminal Procedure., this Court is bound to direct the

learned Sessions Judge to withdraw the prosecution launched against these Appellants in C.C. No. 206 of 2005. In view of all the above, I hold

that these appeals deserve to be allowed.

21. In the result, the appeals are allowed and the findings of the learned Sessions Judge in paragraph 28 of the judgment in S.C. No. 62 of 2004

dated 13.01.2005, are set aside and the learned Sessions Judge is directed to withdraw the complaint in C.C. No. 206 of 2005 on the file of the

learned Judicial Magistrate No. III, Salem forthwith as provided u/s 341 of Code of Criminal Procedure