

**(2011) 06 MAD CK 0353**

**Madras High Court**

**Case No:** Criminal Appeal No. 301 of 2005

Santhi, Kasthuri and  
Sabarinathan

APPELLANT

Vs

State by Inspector of Police

RESPONDENT

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**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

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### **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 Sentil 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 leaned 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 chose 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 chose 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