(2010) 02 MAD CK 0177

Madras High Court

Case No: Criminal Appeal No''s. 665 of 2005 and 265 of 2006

Chandrappa and Another		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Feb. 26, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 311, 313
- Evidence Act, 1872 - Section 165, 25, 26, 27
- Penal Code, 1860 (IPC) - Section 376, 376(2), 379, 395, 397

Citation: (2010) CriLJ 4324 : (2011) 7 RCR(Criminal) 1744

Hon'ble Judges: S. Nagamuthu, J

Bench: Single Bench

Advocate: E.J. Ayyappan and P.M. Duraiswamy, for the Appellant; N.R. Elango, for the Respondent

Final Decision: Allowed

Judgement

S. Nagamuthu, J.

It all happened on 22.11.1995 at 2.30 a.m. in the outskirts of a very busy village, at the house of the victims, a lone house in that area. The inmates of the house were fast asleep as anybody else in the village. Repeated ringing of calling bell, awakened them. Sensing something untoward, they did not open the door. But, a gang of 8 assailants, covering their faces with masks, broke open the door of the house, attacked the sole adult male member of the family with deadly weapons, tied him to a fan hook in the roof, undressed him, took his wife to the kitchen, gang raped her, took his 17 years old daughter to the bed room, gang raped her, put his other two children in a room under fear of death, looted the properties from the house as well as from the person of the victims, remained in the house performing these ghastly acts for about 11/2 hours; and then fled away with looted articles unnoticed by anybody else. The victims were disabled from even screaming for help. For the

victims, it took some time to overcome the shock. This horror was executed in the land of "Mahatma" who respected the women with reverence.

2. If the culprits have been properly identified and offences have been proved beyond reasonable doubt in accordance with the principles of criminal jurisprudence, one can be sure, the culprits cannot escape without visiting very deterrent punishment. But, this Court finds that the poor victims have not been rendered justice as the Police, Additional Public Prosecutor and the trial Court were insensitive to rule of law.

3. Before further adverting to the facts of the case, let us once again read, with concern, the following painful observations made by the Hon''ble Supreme Court in what is commonly known as "Best Bakery Case" [Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, :

If one even cursorily glance through the records of the case, one gets a feeling that the justice-delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge.

The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime.

The Public Prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court.

The Court in turn appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice.

Those who are responsible for protecting life and property and ensuring that investigation is fair and proper seem to have shown no real anxiety.

4. These observations squarely apply on all fours to the facts of the instant case. This is yet another "Best Bakery Case" which depicts as to how the agencies involved in the task of criminal-justice delivery have shown utter indifference to the cry for justice resulting in failure of justice. This case illustrates as to how the rule of law can be taken for a ride and ridiculed by police and the prosecutor. The way in which the trial has been conducted demonstrates as to how the trial Judge remained as a mute spectator when justice was sacrificed at the altar of the temple of justice leaving the poor victims of gang rape and dacoity in perils. This Court is forced to make these painful remarks and the justification for such remarks can be seen as this judgment progresses.

5. At last, the trial Court convicted and sentenced the accused as follows:

(i) A1 to A6 have been convicted for the offence u/s 458 of IPC and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1,000/- in default to undergo rigorous imprisonment for further 6 months each;

(ii) A1 to A6 have been further convicted for the offence u/s 395 of IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,000/-in default to undergo rigorous imprisonment for further two years each;

(iii) A1 and A2 have been further convicted for the offence u/s 395 r/w 397 of IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,000/- in default to undergo rigorous imprisonment for further two years each;

(iv) A2 to A6 have been further convicted for the offence u/s 376(2)(g) of IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 2,000/- in default to undergo rigorous imprisonment for further two years each;

(v) A1, A3 to A6 have been further convicted for the offence u/s 376(2)(g) of IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 2,000/- in default to undergo rigorous imprisonment for further two years each.

6.1. Let us now have the facts in nutshell: P.W. 1 is the head of the family; P.W. 2 is his wife and was aged 42 years; P.W. 3 is his elder daughter, aged 17 years, then doing XII standard; P.W. 4 is his younger daughter; P.W. 5 is his son; and P.W. 6 is a tenant. P.W. 1 and his family members were peacefully living in their house at the village (name not required to be mentioned) in Krishnagiri District. P.W. 6 was a tenant residing in a different portion of the said house. He was a student doing I.T.I. Trade Course. That was a lone house in that area.

6.2. At about 2.30 a.m. P.W. 6 sensed the movement of some persons outside the house. They knocked at the doors of the portion where P.W. 6 was residing. When P.W. 6 Responded, they wanted him to open the doors. When he declined, they broke open the doors and pulled him out and attacked him. Then, they took P.W. 6 to the main door of the portion where P.W. 1 and his family members were residing. They directed P.W. 6 to call P.W. 1 and to open the doors. Out of fear, P.W. 6 did so. But, P.W. 1 did not open the doors and therefore, the culprits forced P.W. 6 into his room and bolted the same from outside. They repeatedly rang the calling bell of the house of P.W. 1. P.W. 1 switched on the light in the varanda. He found around 10 persons standing, all covering their faces with masks. They wanted P.W. 1 to open the doors, pretending as though they were police men who had come to enquire the son of P.W. 1 about a theft.P. Ws. 1 and 2 declined to open the doors. Then, the culprits broke open the windows. Even then P. Ws. 1 and 2 did not open the doors. Thereafter, with a big stone, they broke open the main door and barged into the house. Seven culprits forced their way into the house. They were all armed with deadly weapons like crowbar, koduval, soorikathi, etc. Some of the assailants caused injuries on P.W. 1. They pushed him into the last room of the house, tied both his hands together with a saree and tied the other end of the saree to the fan hook in the roof by keeping the hands of P.W. 1 in rising position. They tied the legs also and beaten him up as against his male genitalia with a stick. Then, they took P.W. 2, the 42 years old woman, a mother of three children to the kitchen and wanted her to

remove her jacket. When she refused, they threatened that, otherwise, they would kill her children. Then they pushed her down and raped her one after the other. They removed her jewels. They took P.W. 3, the 17 years old girl to the bed room and raped her one after the other. P.W. 4, the son of P. Ws. 1 & 2 and P.W. 5, the younger daughter of P. Ws. 1 and 2 could not rescue P. Ws. 1 to 3 as they were also kept under threat. P.W. 1 could hear P.W. 2 and P.W. 3 screaming in pain unable to bear the animal behaviour of the culprits. The culprits removed some more jewels and other articles and fled away after about 11/2 hours. After recovering from the shock, P.W. 2 moved to-wards her husband (P.W. 1) and untied him, and then consoled her daughter (P.W. 3). P.W. 1 in turn went out, opened the doors and rescued P.W. 6. The entire family was in sorrow and shock and so they could not go to the police station immediately. Thereafter, P.W. 1 went to the police station at 9.00 a.m. and gave a oral statement. P.W. 22, the then Sub Inspector of Police attached to Hosur Police Station reduced the same into writing, which is Ex.P. 1. Based on Ex.P. 1, P.W. 22 registered a case in Cr. No. 892 of 1995 for the offences under Sections 395, 397 and 376 of IPC. He forwarded the statement (Ex.P. 1) and FIR (Ex.P. 41) to the jurisdictional Court.

6.3. P.W. 19, the then Inspector of Police attached to Hudco Police Station took up the case for investigation. He proceeded to the place of occurrence, prepared an observation mahazar (Ex.P. 2) in the presence of P.W. 7 and another witness and also prepared rough sketch (Ex.P. 40). He recovered the broken remains of the doors, broken glass pieces, etc. under a mahazar - Ex.P. 3 in the presence of witnesses. Even before proceeding to the spot he had summoned the Finger Print Expert to the spot.

6.4. P.W. 8, the Finger Print Expert arrived at the spot (time not mentioned) and thoroughly examined the place of occurrence. He found 5 chance finger prints on the bureau in the house of P.W. 1. He marked the same as "A1, A2, A3, A4, A5" and photographed the same with the help of P.W. 18. On comparing the finger prints of the inmates of the victims of the house of P.W. 1, he found that the chance prints marked as "A3, A4 and A5" belonged to the inmates and the chance prints marked as "A1 and A2" were that of strangers.

6.5. P.W. 19, the Inspector of Police forwarded P. Ws. 1, 2, 3 and 6 to the hospital for examination. He also examined P. Ws. 1, 2, 3 and 6 and recorded their statements. On 23.11.1995, he handed over the investigation to P.W. 20.

6.6. P.W. 16 Dr. Anusuyamalathi attached to Hosur Government Hospital examined P. Ws. 1, 2 and 3 and found external injuries. She was of the opinion that P.W. 3 would have been subjected to sexual assault but, she could not offer any opinion regarding the sexual assault made on P.W. 2.

6.7. P.W. 20, the then Inspector of Police attached to Hosur Police Station proceeded with the investigation from 23.11.1995 onwards. He claims that he had shown the

photograph of the old offenders to P. Ws. 2 and 3. He further claims that P. Ws. 2 and 3 identified the photograph of one "D.C. Perumal" as one of the culprits. Therefore, he arrested D.C. Perumal on 17.11.2006 at 3.00 p.m. and forwarded him to judicial remand on 18.01.1996.

6.8. On 29.01.1996 on the requisition made by the Inspector of Police, Hosur Police Station and as directed by the Chief Judicial Magistrate, Hosur, P.W. 15, the then Judicial Magistrate, Hosur conducted Test Identification Parade in respect of Perumal. [He was subsequently dropped from the case]. During the said test identification parade, P.W. 2 identified the said Perumal as one of the culprits, but P.W. 3 did not identify. [Ex.P. 23 is the record of the Test Identification Parade proceeding]. D.C. Perumal''s remand was periodically extended.

6.9. P.W. 20 made arrangements to forward the cloth of the victims for chemical examination. P.W. 20 could not make any further break through in the investigation. Therefore, the investigation was transferred to C.B.C.I.D., which is supposed to be one of the best wings of the police in the matter of crime detection.

6.10. P.W. 21, the then Inspector of Police, C.B.C.I.D., Dharmapuri District took up the case for investigation on 27.01.1996. He examined P. Ws. 3, 5 and 6 and few more witnesses and recorded their statements. He also could not make any break through in the investigation.

6.11. Finally, P.W. 23 the Inspector of Police, C.B.C.I.D., Dharmapuri District took up the investigation on 07.03.1996. He examined few witnesses and recorded their statements.

6.12. On 21.05.1996, P.W. 23 received a report from P.W. 8 that one of the chance finger prints lifted at the scene of occurrence tallied with the finger print of one Muniraj (A3). [It is not in evidence as to who took the sample finger print and who forwarded the same to P.W. 8, for comparison]. Based on the said report, P.W. 23 arrested A3-Muniraj on 22.05.1996 at 04.15 p.m. In the presence of P.W. 10 and another witness, A3 Muniraj gave a voluntary confession. In his confession, he told that he would identify the person to whom he had pledged the anklet. On the basis of the information furnished by A3-Muniraj, at about 6.15 p.m., A4-Ravi was arrested in the presence of the very same witnesses. He also gave a voluntary confession. He informed that he would identify the shop where he had pledged the jewels. Then, P.W. 23 arrested A-5 Madhu @ Tingu at 7.15 p.m. He also gave a voluntary confession, out of which a small nose screw was recovered from the aunt of A-5. At 10.00 p.m. he returned to the police station with the accused and the recovered articles. Then, he proceeded to Thenkanikottai and recovered the silver anklet from one Subramani. On 23.05.1996 at 9.30 a.m. on the basis of the confession of A-4 Ravi, he recovered one pair of ear studs from Sara Jewellery belonging to P.W. 13. Thereafter, the accused Nos. A3, A4 & A5 were forwarded to the Court for judicial remand.

6.13. On the same day at about 5.30 p.m. he arrested A2-Chinnaraj in the presence of two witnesses by name Chinnappa (P.W. 11) and Thirupathi (not examined). On such arrest, A-2 gave a voluntary confession. On the basis of the same, P.W. 23 recovered two gold coins from the wife of A2 (not examined). At 8.30 p.m. he arrested A6 Duraisamy. He also gave a voluntary confession. On that basis, P.W. 23 recovered two Thali (mangal sutra) from the wife of A6 (not examined). On 24.05.1996 at about 5.30 a.m. he arrested A1-Chandrappa. He gave a voluntary confession. On his confession, one Koduval kathi was seized in the presence of Chinnappa (P.W. 11) and another witness. Again on the basis of confession of A1, P.W. 23 recovered a gold thali, gold ear studs (one pair) from one Kaveri (P.W. 14). Thereafter, the accused were brought to the police station and then forwarded to the jurisdictional court for judicial remand. Then, P.W. 23 examined several witnesses (details not necessary). He searched for the two other culprits by name Ramesh and Murugan because their involvement came to light from out of his investigation, but he could not succeed.

6.14. P.W. 23 gave a requisition to the Chief Judicial Magistrate for holding Test Identification Parade in respect of A1 to A6. Accordingly on 31.05.1996, P.W. 15, the learned Judicial Magistrate, Hosur conducted Test Identification Parade.P. Ws. 1 to 5 participated in the same. P.W. 1 identified A1 to A5 alone and not A6. P.W. 2 identified A2 and A3 alone. P.W. 3 could not identify anybody. P.W. 4 identified A1 to A6. P.W. 5 identified A2 alone. P.W. 6 identified A5 alone. Ex.P. 23 is the record of the proceedings of the Test Identification Parade.

6.15. P.W. 23, on completing the investigation laid the charge sheet on 03.01.1997 against 8 accused by name Ramesh (dead), Chandrappa (A1), Murugan (Dead), Chinnaraj @ Muniraj (A2), Muniraj (A3), Ravi (A4), Madhu @ Tingu (A5) & Duraisamy (A6).

7. On committal, the case was made over to the Assistant Sessions Judge, Hosur for trial. Strangely, the trial Court framed charges against all the 8 persons arrayed as accused in the final report including the accused Ramesh and Murugan, who were already dead. As per the memorandum of charges framed by the trial Court, the deceased Ramesh was shown as the 1st accused and the deceased Murugan was shown as the 3rd accused. The rest of the accused, who were alive including the Appellants herein denied the charges. They were rearranged as A1 to A6. During trial as many as 24 witnesses were examined and 53 documents were exhibited and M. Os. 1 to 17 were marked on the side of the prosecution.

8. When the accused were questioned u/s 313 of Code of Criminal Procedure in respect of the incriminating evidence, they denied the same. However, they did not examine any witness on their side. Having considered the above materials, the trial Court convicted the Appellants. Challenging the above conviction and sentence, A1 to A4 are before this Court. A5 Madhu @ Tingu and A6 Duraisamy have not preferred any appeal. But, since their case is inextricably linked with the others,

though they have not preferred any appeal, their case is also considered together with this appeal.

9. From the facts narrated above, it could be gathered that the prosecution relies on the following evidences and circumstances to establish the guilt of the accused:

(i) Eye-witness account of P. Ws. 1 to 6;

(ii) Test Identification Parade wherein the accused were identified by P. Ws. 1 to 6;

(iii) Chance finger prints lifted at the scene of occurrence tallied with the finger prints of A3 and A5;

(iv) The arrest of the accused and recoveries of stolen articles on the information furnished by them;

(v) medical evidence.

10. Now, let me analyse as to whether the prosecution has succeeded in establishing the alleged guilt of the accused.

11. At the outset, I have to point out that the learned Assistant Sessions Judge has committed a serious illegality in framing charges against the dead persons also. At page No. 1 of Volume I of the typed set of papers, the charges framed by the trial Court are found which show that the 1st charge is u/s 458 of IPC against all the 8 accused persons including the two deceased accused Ramesh and Murugan; the 2nd charge is u/s 395 of IPC and the same is also against 8 persons including the two deceased accused; the 3rd charge is u/s 395 r/w 397 of IPC as against deceased accused Ramesh, Chandrappa, deceased accused Murugan and Chinnaraj @ Muniraj; 4th charge is u/s 376(2)(g) of IPC against deceased accused Ramesh, deceased accused Murugan, Chinnaraj @ Muniraj, Muniraj, Ravi, Madhu @ Tingu and Duraisamy; the 5th charge is u/s 376(2)(g) of IPC against deceased accused Ramesh, deceased accused Murugan, Muniraj, Ravi, Madhu @ Tingu and Duraisamy. Thus, the charges are highly defective. However, with the above defective charges the, Court proceeded with the trial.

12. Next came the examination of witnesses. When an eye witness is examined, any one who has knowledge of elementary principles of criminal trial, would expect the public prosecutor to ask the witness to identify the assailants in Court. It is unfortunate that P. Ws. 1 to 6 were not asked to do so. Thus, there was no occasion for these witnesses to identify the real assailants in Court. The learned Assistant Sessions Judge was only a mute spectator. Why the power u/s 165 of the Evidence Act to get this valuable evidence from these eye witnesses was not exercised by the trial Court? It could be perceived that it is not as though the witnesses P. Ws. 1 to 6 were either reluctant or were unable to identify the accused. But, it was only due to sheer indifference on the part of the Additional Public Prosecutor and the Court. Thus, the very valuable evidence of identification of the accused in Court has been

omitted to be brought on record by the prosecution. The evidences of these eye witnesses are only to the effect that some 8 persons came; broke open the doors of the house; gained entry into the house, gang raped P.W. 2 and P.W. 3 and committed dacoity. Absolutely, there is no evidence from these witnesses to the effect that these accused are those culprits who indulged in the horrific crime. Thus, the evidences of P. Ws. 1 to 6 do not incriminate these accused in any manner in the commission of the crime.

13. Next comes the introduction of one Mr. Perumal as accused. Mr. Perumal was initially arrested as an accused in this case by P.W. 20, the then Inspector of Police, Hosur Police Station. According to P.W. 20, he arrested the said Perumal on the basis of the identification made by P. Ws. 2 and 3 from out of the photograph of the said Perumal shown to them. Had it been true, certainly, one would expect the Additional Public Prosecutor to elicit this fact from P. Ws. 2 and 3 and if they say that they did identify D.C. Perumal as one of the assailants, then to allow them to explain as to whether he was the real assailant or by mistake they identified him as one of the assailants. I find that no such opportunity was afforded to these witness.

14. The said accused Perumal was remanded to judicial custody by the Court and during Test Identification Parade held by P.W. 15, the then Judicial Magistrate, he was identified by P.W. 2. But, P.W. 3 did not identify him. Curiously, no question was put to P.W. 2 about the identification of the said Perumal made by her during Test Identification Parade. Had any opportunity been given to her to explain about the same, she would have certainly said either Mr. Perumal was one of the assailants or that for any other reason she had mistakenly identified him as one of the assailants. If D.C. Perumal was one of the real assailants as identified by P.W. 2, why was he dropped from the case?

15. P.W. 23, in his evidence, has stated that on his investigation he found that on the crucial date of occurrence Perumal was at his house and therefore, he would not have participated in the crime and so he dropped him from the case. When P.W. 2 claims that Perumal was one of the assailants and during test identification parade also she had identified him, would it not be the duty of the prosecution to examine those persons who spoke to the fact that Perumal was at his house on the crucial date and time. P.W. 23 has not even explained as to why did he prefer to believe Perumal and others who claimed that he was at his house and to disbelieve P. Ws. 2 and 3. This shows that P.W. 23 did not evince any sincerity while giving evidence before the Court. Thus, introduction of D.C. Perumal as one of the accused by one Investigation Officer and deletion of him by another Investigation Officer remains to be a mystery and the same has not been explained away properly.

16. The next material piece of evidence is the chance finger prints lifted by P.W. 8, the Finger Print Expert and photographed by P.W. 18. There were five chance finger prints lifted from the scene of occurrence. Out of 5 chance finger prints, 3 tallied with the inmates of the house and therefore, they were not incriminating. The other

two were that of strangers. According to P.W. 8, the finger print of one Muniraj (A3) tallied with the chance finger print which was marked as A2. He has stated that the finger print (Ex.P. 6) of Muniraj was received by him from Hosur Police Station. But, absolutely, there is no evidence from any of the Investigating Officers as to, from whom, by whom and on what date and time, such finger print was obtained for the purpose of comparison. From Ex.P. 6, it could be seen that it was obtained by one Police Constable (PC 223) of Krishnagiri Town PS. on 26.09.1994. The said police constable who obtained the finger print would be the competent witness to speak about the fact that Ex.P. 6 belongs to A3-Muniraj. Unfortunately, he has not been examined. Thus, absolutely, there is no evidence that Ex.P. 6 was obtained from A3. In the absence of such evidence, the report of P.W. 8 that one of the chance prints tallied with the finger impression found in Ex.P. 6 shall not go to prove that the said chance print was that of A3.

17. Here again, it is not understandable as to why P.W. 23 did not chose to examine the Police Constable (PC 223) and as to why the learned Additional Public Prosecutor did not make any endeavour to bring on record the evidence relating to the fact that the finger prints sent for comparison to P.W. 8 were obtained only from A3 Muniraj. It is quite unfortunate that the trial Judge has failed to discharge his judicial function to exercise his power conferred u/s 311 of Code of Criminal Procedure to summon the said police constable to prove that Ex.P. 6 was obtained only from A3.

18. The next material piece of evidence is yet another chance print lifted from the scene of occurrence marked by P.W. 8 as A1. According to P.W. 8 the said chance print tallied with the finger print (Ex.P. 7) of Madhu @ Tingu (A5). A5 was arrested by P.W. 23 on 22.05.1996 at 7.15 p.m. Then, he was sent for judicial remand at 11.00 a.m. on 23.05.1996. Nowhere P.W. 23, in his evidence, has stated that he obtained the finger print of A5 (Ex.P. 7) while he was in his custody for the purpose of comparison. Curiously, P.W. 8 would say that he received the finger prints of A5 Madhu @ Tingu (Ex.P. 7) on 27.05.1996 from Hosur P.S. When investigation was done by P.W. 23 the then Inspector of Police, C.B.C.I.D., Dharmapuri District, it is not explained as to how P.W. 8 could have received the sample finger print of A5 from Hosur P.S. for comparison. Further, a perusal of Ex.P. 7 would go to show that the sample finger prints of A5 Madhu @ Tingu were obtained on 24.05.1996 by one Grade I Police Constable (PC 536). It is not explained as to how this finger print could have been obtained from A5 while he was already in jail. Further, no endeavour has been made to examine the Grade I Police Constable (PC 536). Here again, not only the Additional Public Prosecutor has failed in his duty but the learned Assistant Sessions Judge also has failed to invoke his power u/s 311 of Code of Criminal Procedure to summon the Grade I Police Constable (PC 536) in this regard. It is the law that for the purpose of comparison, the finger prints of the arrested accused, to have authenticity, should be obtained only by following the provisions of Identification of Prisoners Act. It is deplorable that the finger prints of A3 and A5 were not obtained by following the said procedure.

19. The chance finger prints lifted from the place of occurrence were compared to by P.W. 8, the Finger Print Expert only on 21.05.1996. Why it took about 6 months for the police to send the finger print of A3-Muniraj which was already in their hands for comparison. From Ex.P. 6, it could be seen that the finger prints of A-3 were taken on 26.09.1994 itself in connection with crime No. 1191 of 1994 of Krishnagiri Town P.S. for an offence u/s 379 of IPC. Had this material piece of evidence been used for comparison within a few days of occurrence, certainly, it would have given a clue at the earliest point of time to make a break through. This delay has also not been explained away by any one of the police officers, who were involved in the investigation.

20. The next material evidence is the arrest of the accused, their voluntary confession statements made to the police, consequential recoveries of stolen articles and weapon allegedly used in the commission of crime.M. Os. 3 to 9 viz., jewels were identified as stolen articles by P.W. 1. The other witnesses namely, P. Ws. 2 to 5 have not identified these jewels because, they were not asked to identify them. According to the charge, the properties stolen away from the witnesses are thanga thali (gold mangal sutra), one pair of ear studs belonging to P.W. 2, one pair of covering ear studs, one pair of gold ear studs and one pair of nose screw belonging to P.W. 3, 3 Nos. of wrist watches, one pair of silver chain, calculator, one charge battery, polyester dothi, cash of Rs. 6500/- from the house of P.W. 1 and one tape recorder, electronic watch from witness (P.W. 6) Balamani''s house and one Delhi set tape recorder from the house of one Chidambaram.M. Os. 2 to 9 did not tally with the properties mentioned in the charge. It is not explained to the Court as to why the properties stolen away from P.W. 2 were not even shown to P.W. 2 thereby allowing her to identify and similarly, it is not explained as to why the properties stolen away from P.W. 3 were not shown to her to enable her to identify. Further, it is also not explained as to what had happened to the properties stolen away from the house of P.W. 6. P.W. 23, the Investigating Officer has not at all stated anything about the above discrepancies. This would again go to show that P.W. 23 either did not conduct proper investigation or failed to depose properly before the Court. Curiously, the properties were also not identified by P.W. 23 in his evidence. It is also not explained as to why one Chidambaram from whose house a Delhi set tape recorder was stolen away has not been examined. In respect of the properties stolen away from the house of P.W. 6 also nothing was elicited from him.

21. Coming to the witnesses for the recoveries of these material objects, let me take, at first, the evidence of P.W. 12 to whom A3 Muniraj had allegedly given silver anklet stolen away from the house of P.W. 1. His evidence runs to hardly 8 lines in a very vague manner. The evidence of P.W. 12 reads thus "7 to 8 years before one Muniraj came and told me that he wanted to make a different jewel by melting a silver anklet. Thereafter, he did not turn up." He has not stated that the silver anklet was either given by Muniraj to him or the same was handed over by him to the police. But, P.W. 12 has not been treated as hostile and cross examined by the prosecuting

agency. He has neither identified A3 as the one who approached him with the jewel nor identified the jewel. He has simply stated that the said Muniraj is in Court. But, there are two persons in the same name of Muniraj viz., A2 and A3. At least, at this juncture, the learned Assistant Sessions Judge should have been vigilant to use his power u/s 165 of the Evidence Act to ascertain as to whether he referred to A2 or A3. The learned Assistant Sessions Judge has failed to do that exercise. Thus, the evidence of P.W. 12 has also not been properly elicited to establish the crime.

22. The next evidence is that of P.W. 13. His evidence is also very vague. His evidence in chief examination is only to the following effect "one of the accused in Court came to his shop and wanted to pledge the ear studs. For that he gave Rs. 350/-. Four months thereafter, C.B.C.I.D., police came to the shop and recovered the same". It is not explained as to whether any receipt was prepared for such pledging and if so what had happened to the receipt. The Additional Public Prosecutor has not even shown the material object to P.W. 13 and asked him anything to prove through him that the said jewel was the one which was pledged with him by one of the accused. It is unfortunate that even the learned Assistant Sessions Judge did not ask him to identify the person who gave the jewel and also to identify the same. Thus, P.W. 13 has neither identified any accused nor the jewel. It is surprising as to how the Additional Public Prosecutor and the Court were satisfied with his evidence when he said "one of the accused pledged the jewel".

23. Coming to the evidence of P.W. 14, her chief examination runs to only 4 lines. It is to the effect that Chandrappa gave a pair of ear studs and wanted Rs. 600/-. It has not been further elicited from her whether A1 gave any jewel to her; whether A1 received Rs. 600/- and on what date the jewel was recovered by the police and the other details. She has neither identified A1 nor the jewel. She has not been treated as hostile. Here again, the Additional Public Prosecutor as well as the Court have failed in their respective duties.

24. It is not the case where materials in respect of the arrest of the accused, information furnished by each accused and the consequential recoveries of material objects were not available. As a matter of fact, there were sufficient materials collected during investigation, but they were not properly placed by way of evidence during trial, for which the Police, Additional Public Prosecutor and the learned Assistant Sessions Judge alone are responsible.

25. Now, coming to the Test Identification Parade, it is yet another irony. Let me now, at first, take up the evidence of P.W. 15, the learned Judicial Magistrate. According to the case of the prosecution, one person by name D.C. Perumal was put up for identification on 29.01.1996, in which, P. Ws. 2 and 3 participated. The accused in the instant case were arrested only either on 22.05.1996 or 23.05.1996. Therefore, these accused were put up for identification parade only on 31.05.1996. But, P.W. 15 the learned Judicial Magistrate has deposed that these accused were also put up for identification even on 21.03.1996 itself and he has further stated that

P. Ws. 2 and 3 identified all these accused, except A6, on 21.03.1996. He has further deposed that Ex.P. 23 is the report prepared by him for the same. Shockingly, Ex.P. 23 relates to the identification parade only in respect of Perumal. When A1 to A6 were arrested only either on 22.03.1996 or 23.03.1996, it is obviously wrong on the part of the learned Magistrate to say that these accused, except A6, were identified by P. Ws. 2 and 3 on 21.03.1996 itself. Here, it is explicit that the learned Magistrate while giving evidence in the Court, was not diligent to look into Ex.P. 23 and then to give evidence properly. If his evidence given in chief examination that these accused, except A6, were identified by P. Ws. 2 and 3 even on 21.03.1996 is to be believed, then, the entire case of the prosecution regarding the arrest of these accused and consequent recoveries of stolen articles and weapon should be held to be false. But, as I have already stated, these accused were not put up for identification parade, which was held on 21.03.1996 and Ex.P. 23 relates only to the test identification in respect of Perumal. Therefore, the evidence of P.W. 15 in this regard shows a gross negligence on his part. It also shows that the learned Assistant Sessions Judge did not at all concentrate into the recording of the evidence and he never participated actively in the trial.

26. When these accused (A1 to A6) were put up for test identification parade, as I have already narrated, A1 to A5 were identified by some witnesses. Some have identified only some of the accused and not all During examination of these witnesses, not even any witness was asked to identify the persons, who were identified by them during test identification parade. Thus, absolutely, no attempt has been made to ask the witness to identify the real assailants in Court and also to identify the persons, who were identified during test identification parade.

27. Turning to the medical evidence, the smears taken from P. Ws. 2 and 3 were sent for chemical examination. But, it was found that there were no spermatozoa found on the same. It might probably be due to bath or due to wash made by these witnesses namely, P. Ws. 2 and 3. A perusal of the Accident Register would go to show that they told the Doctor that they had wash. But, the said statement found in the accident register cannot be treated as substantive evidence. It should have been elicited from P. Ws. 2 and 3 as to whether they had washed before going to the hospital. This is a very material fact. When it is said that several persons gang raped P.W. 2 and P.W. 3, certainly, there would have been spermatozoa found on the private parts of the ladies. The absence of the same will certainly create certain amount of doubt in the case of the prosecution, unless it is explained properly. It is very obvious that no opportunity was afforded to these witnesses to explain.

28. Coming to the questioning of accused u/s 313 of Code of Criminal Procedure, the role of the trial Court leaves much to be desired. Though the Hon''ble Supreme Court has been repeatedly impressing upon the trial Courts that questioning of accused u/s 313 of Code of Criminal Procedure should not be treated as an empty formality as it is an important facet of criminal trial in this case, it has been followed

only in breach. If a particular incriminating material is not put to the accused calling upon him either to admit or to deny or to explain the same, it can never be used against the accused. In this case, the said legal duty has not been properly discharged by the trial Court. The entire chief examination of P.W. 1 has been put compositely by a single question. Similarly, the other witnesses too. To illustrate, P.W. 1 has spoken to about various facts. But, the trial Court has not put separate questions in respect of each incriminating evidence spoken to by P.W. 1 as well as the other witnesses. Similarly, an omnibus, single question in respect of the entire evidence of P.W. 23 has been put comprehensively. P.W. 8 is the Finger Print Expert. He has also spoken to about the fact that the finger prints of A3 & A5 alone tallied with the chance prints found at the place of occurrence. But, the question put to the accused is, as though the finger prints of all these accused tallied with the chance finger prints. Regarding the material objects seized on the basis of the confessions of these accused also not even a single question was put to the accused. The jewels M. Os. 2 to 9 were identified by P.W. 1. But, in respect of the said incriminating evidence, there was no question put to any of the accused. Thus, now it is very difficult to use the evidence relating to the fact of recovery of the material objects from out of the information furnished by these accused in any manner against the accused since they were not put to the accused u/s 313 of Code of Criminal Procedure Even while questioning the accused in respect of the evidence of P.W. 23, the Investigating Officer, nothing has been put to any of the accused about the material objects with specific reference to their numbers.

29. Lastly, I have to state something about the proof of confession said to have been made by these accused on their arrest. Undoubtedly, even a student of law would be knowing the law laid down in Pulukuri Kottaya and Ors. v. Emperor, AIR 1947 PC 67, wherein the Privy Council has elaborately dealt with the word "distinctly" as found in Section 27 of the Evidence Act to say that the information which distinctly leads to the discovery of a fact alone is relevant. But, in this case, the trial Court has admitted in evidence the confessions of the accused unmindful of the term "distinctly" as interpreted in the case cited supra. This is evident from Exs.P. 8, P.9, P. 10, P.14, P.16 and P.18. Not stopping with that, the confessions, which are barred from being admitted in evidence u/s 25 of the Evidence Act, have been used as a relevant evidence by the trial Court even when the accused were questioned u/s 313 of Code of Criminal Procedure and conviction has been recorded based on that also. Thus, it shows the poor understanding of the provisions of Sections 25, 26 and 27 of the Evidence Act.

30. With all these flaws, infirmities and inconsistencies in the case of the prosecution in store, now the question is, would it be safe to sustain the conviction of these accused? The answer is an emphatic No. It is not as though there were paucity of materials collected during investigation for the purpose of proving the guilt of the accused. As I have elaborated supra, the records would only go to show that the materials collected during investigation were not properly brought on record by way

of evidence. For the said flaw, the trial Court, the learned Additional Public Prosecutor and the police have equally contributed. Demonstrably, the trial has been reduced to a mock trial. The agencies, who are the stake holders in the criminal justice delivery system have miserably failed to discharge their functions. Thus, based on the evidence brought on record, it is difficult to convict any of the Accused. As held in Best Bakery Case, though it is a fit case for ordering retrial, I am of the view that it may not be conducive at this length of time to do so. The occurrence was in the year 1995 and the accused have been continuously in jail for about 10 years. Some of the accused have undergone the entire period of sentence and they have been let off. This Court is informed that P.W. 3 is now married and leads a peaceful life. In view of the said factual position, such retrial may not be in the interest of the victims also. Having regard to all these aspects and circumstances, I find it difficult to order for retrial.

31. In the result, the criminal appeals are allowed; the conviction and sentence imposed by the learned Assistant Sessions Judge, Hosur in S.C. No. 29 of 2000 by judgment dated 20.07.2004 against all the accused [including A5-Madhu @ Tingu and A6-Duraisamy, who have not preferred any appeal] is set aside and they [A1 to A6] are acquitted. Fine amount paid, if any, shall be refunded to them.

32. Before parting with this judgment, having regard to the agony suffered by P.W. 2 & P.W. 3, I deem it appropriate to recommend to the Government of Tamil Nadu to consider to pay a sum of Rs. 1,00,000/- each to P.W. 2 and P.W. 3 as solatium.

33. In the interest of the victims, the press and electronic media are directed not to publish the names and other identities of the victims in this case.

Appeal allowed.