
(2015) ALLMR(Cri) 1678 : (2015) 2 BomCR(Cri) 233

Bombay High Court (Nagpur Bench)

Case No: Criminal Appeal No. 2 of 2012

Sanjay

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision: Feb. 17, 2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) - Section 2(h), 311-A, 313#Identification of Prisoners Act, 1920 - Section 2(a), 3, 4, 5#Penal Code, 1860 (IPC) - Section 396, 397, 412

Citation: (2015) ALLMR(Cri) 1678 : (2015) 2 BomCR(Cri) 233

Hon'ble Judges: A.B. Chaudhari, J; P.N. Deshmukh, J

Bench: Division Bench

Advocate: R.M. Daga, for the Appellant; T.H. Udeshi, APP, Advocates for the Respondent

Final Decision: Dismissed

Judgement

P.N. Deshmukh, J.

This appeal takes exception to the judgment and order dated 29th of November, 2011 passed by learned Extra Joint

(Ad hoc) Additional Sessions Judge, Chandrapur in Sessions Case No. 5 of 2010, thereby convicting the appellant/accused for the offence

punishable under section 396 read with section 397 of the Indian Penal Code and sentencing him to suffer imprisonment for life. In brief, it is the

case of prosecution that PW 3 Riddhishwar Warjekar, the complainant, was doing money lending business at village Mohadi, Tq. Nagbhid, Distt.

Chandrapur. On 3rd of November, 2003, he was at Nagpur with his family members leaving his mother Kasabai (deceased) and two servants

being PW 1 Kewalram Dadmal and PW 2 Yadav Dudhkute in the house at Mohadi. It is alleged that in the night intervening 3rd of November,

2003 and 4th of November, 2003 at about 1.00 am, 20 to 25 persons having armed with sticks and other weapons, in order to commit dacoity,

entered the house of complainant and killed Kasabai and injured PW 1 Kewalram and PW 2 Yadav, the servants. The dacoits ransacked the

house of the complainant and looted cash to the extent of Rs. 25,000/- by breaking almirahs and took away silver and gold ornaments and also

ornaments on the person of deceased. The total booty of loot was worth Rs. 20,85,000/-. One Ashok Khanorkar, brother-in-law of complainant

was informed by some persons from Mohadi about the information of dacoity in the house of complainant in the night. Accordingly, said

information was given to complainant who got it confirmed from one Shantaram Deshmukh.

2. Police Officials of Nagbhid Police Station also received the information and arrived on the spot by 3 am. Complainant also reached his house at

Mohadi and found that dacoity was committed in his house and the household articles were scattered and broken. On the basis of report lodged

by PW 3 Riddhishwar vide Exh. 22 offence came to be registered and was investigated.

3. During the course of investigation police inspected the spot and other places in the vicinity and seized some Bidi ends and some tickets of travels

from under the mango tree by the side of the road. On conducting inquest panchanama, dead body of Kasabai was sent for Post-Mortem and

clothes of PW 1 Kewalram, PW 2 Yadav, injured, were seized. Thereafter, police conducted raid on the tents situated at the bank of river

Chandan at village Bitli and apprehended five persons on suspicion including Sou. Meera @ Rekha Pawan Kale @ Pawar, wife of present

appellant, along with two women and recovered silver and gold ornaments and cash worth Rs. 5,74,055/- from them which came to be seized. It

is the case of prosecution that chance print of palm was found on the glass of Almirah which was obtained by the investigating agency and was

forwarded to PW 7 Jayant Rachalwar, fingerprint expert, which was certified by him to have matched with the impression of palm from the record

maintained in his office of accused person involved in decoity cases in Crime No. 64 of 1997 and Crime No. 143 of 1995 registered by Police

Station Sindhkhedraja and Police station Ladkhed, respectively. On the basis of such fingerprint expert's report, it revealed that appellant was

present at the time of commission of dacoity with murder and was absconding from the date of incident. Thus, police had filed charge-sheet against

other accused, who were arrested, showing present appellant as absconding. The trial of co-accused was held and concluded, vide Sessions Case

No. 22 of 2004.

4. The custody of present appellant was accordingly sought from the crime in which he was already arrested and on effecting his arrest in the

present Crime on completion of investigation, charge-sheet came to be filed against the appellant before the learned Judicial Magistrate (F.C.),

Nagbhid. During the course of time, case came to be committed for trial to the Court of Sessions. The palm print of both hands of appellant were

obtained before the Court and were sent to fingerprint expert for its comparison with the palm print found on the almirah of which photograph was

obtained by the fingerprint expert and was opined to be matching with that of appellant. The learned trial Court on considering the evidence on

record, convicted the appellant as aforesaid. Hence, this appeal.

5. Heard Shri R.M. Daga, learned Counsel for the appellant and Mrs. T.H. Udeshi, learned Additional Public Prosecutor for the State.

6. To effectively evaluate the submissions advanced by learned Advocates for both the sides, with their assistance, we have scrutinized the oral and

documentary evidence on record.

7. Admittedly, the case of prosecution is based on circumstantial evidence. It is not disputed that victim Kasabai met with a homicidal death and

that the house of complainant was ransacked at the time of incident, causing injuries to PW 1 Kewalram and PW 2 Yadav. Learned Counsel has,

however, submitted that the only incriminating circumstance against the appellant was that his fingerprints were found on the glass of almirah which

was in the house of deceased and that by itself is not sufficient to establish involvement of appellant in the present Crime in the absence of other

convincing evidence. Per contra, learned Additional Public Prosecutor submitted that above piece of evidence in fact establishes presence of

appellant on the spot at the time of incident and no explanation is put forth on record by the appellant as to under what circumstance his palm

impression is available on the almirah, who is even other wise earlier involved in similar other offences and was arrested in those crimes. Learned

Counsel for both sides also relied upon the authorities which we have duly considered on scrutinizing the evidence on record.

8. From the evidence of PW 1 Kewalram it has come on record that on the fateful night he was sleeping in the house of complainant being his

servant along with PW 2 Yadav another servant while complainant's mother Kasabai was also present in the house when about 15 thieves entered

the house and after beating him and Yadav on their head and face by means of Ubharis assaulted Kasabai by a crowbar and committed dacoity in

respect of ornaments of the complainant. According to him, due to the assault he fell unconscious.

9. Similar is the evidence of PW 2 Yadav when he has stated that while he along with PW 1 Kewalram and Kasabai were present in the house at

night, about 10 thieves arrived in the house and committed assault on him by sticks and caused injuries over his hand and head and also assaulted

Kasabai and removed bangles from her hand due to which he ran out of the house.

Evidence of both these witnesses appears to be unchallenged

on material particulars as their presence at the place of incident at the time of incident is not challenged. On the contrary, in the cross-examination

of PW 1 it has come on record that he had identified seven dacoits in the Jail while it is simply suggested to PW 2 Yadav that he is having problem

of eye sight, however it is nowhere suggested that he cannot see due to weak eyesight.

10. Evidence of PW 3 Riddhishwar, complainant, is to the effect that while he was in Nagpur with his daughter and wife, on 4th of November,

2003 at 2.00 a.m. he was informed by Ashok, his relative from Nagpur, about the incident which fact was got confirmed by him on phone from

one Shantaram Deshmukh of Mohadi and accordingly reached his house at Mohadi at about 4 a.m. in the morning and found that his house was

ransacked and Safes in the house were broken and ornaments from both the Safes were looted. He further stated about one wooden Ubhari was

lying in the room of his mother. He also found blood stains on the floor and that all the household articles were scattered. He was informed about

carrying both the injured and his mother to the hospital, accordingly he visited Primary Health Centre, Nagbhid and found his mother to be dead

and noted that ornaments on her person were stolen. Accordingly, he lodged report (Exh. 22).

11. In his evidence it has further come on record that photographs of fingerprints on the articles in his house were taken by police and on account

of his doing money lending business, he was having silver and gold ornaments in the house which was pledged by the borrowers. According to his

evidence, about 10 days after the incident police had arrested the co-accused and had seized the articles stolen from his house which were

identified by him in the sessions case held against co-accused being Sessions Case No. 22 of 2004, arising out of this crime and has received

these ornaments on his Supratnama. Entire evidence of complainant, as aforesaid, goes unchallenged and thus can be acted upon. His evidence in

respect of identifying ornaments also goes unchallenged.

12. PW 4 Shriram, the spot panch, has stated about his visiting the spot after the dacoity and noticing that the plank of both the almirahs in different

rooms were found broken while the door of Safe was found open and bunch of keys was found lying near the Safe. He has proved spot

panchanama (Exh. 28) and has denied that no panchanama was prepared in his presence. He has further stated about his accompanying police

when police seized Bidi ends and other articles including bus tickets under panchanama (Exh. 29). It is material to note that PW 4 Shriram had

specifically stated in his evidence that photographs of fingerprints available on almirahs were obtained and has denied that no fingerprints expert

was called at the place of the incident. As such evidence of this witness coupled with spot panchanama (Exh. 28) clearly put forth the situation of

the place of incident after the occurrence of dacoity. Even otherwise it is no case of defence that no dacoity took place in the house of complainant

on the material night. Evidence of PW 6, Sanjay Khandekar, PSI, who has drawn the spot panchanama in the presence of PW 4 Shriram,

corroborates above evidence.

13. In view of specific case of prosecution involving appellant in the present crime mainly on the basis of availability of his fingerprints on the

almirah, we have minutely scrutinized the evidence of PW 7 Jayant Rachalwar, Fingerprint Expert and PW 8 Jivraj Dabhade, SDPO, the

Investigating Officer. From the evidence of PW 8 Jivraj, it has come on record that during the course of investigation he formed a team of officers

to detect the crime under Police Inspector Gautam who on 13th of November, 2003 suspected occupants of 2-3 tents which were erected near

the school at village Bithali near Rampaili which came to be raided and had apprehended three women and two men from said tents (cloth sheds)

while few others succeeded in running away. On enquiry with those who were apprehended, they disclosed their names and on obtaining their

personal search a huge quantify of gold and silver ornaments and weapons came to be seized under seizure panchanama (Exh. 34) in the presence

of PW 5 Rajendra, panch This witness has also corroborated the case of PW 8 Jivraj, the investigating Officer. Though PW 5 Rajendra is

suggested that the muddemal ornaments seized from the apprehended accused were not of silver or gold, we find that evidence of these witnesses

about apprehension of three women and two men and about recovery of ornaments from their possession goes unchallenged. Thus, what appears

to be disputed is only that the ornaments seized were not of gold and silver and it is accordingly suggested to PW 8 Jivraj that the persons

apprehended were involved in the business of selling artificial ornaments, which suggestion is denied by him. In that view of the matter, we find that

prosecution in fact has established beyond reasonable doubt that a huge quantity of gold and silver ornaments involved in this case were seized

from said co-accused out of which co-accused Meera Pawar is wife of present appellant as stated by the Investigating Officer. As such, from

above discussed evidence it is crystal clear that part of the ornaments involved in dacoity involved in this case were found in possession of co-

accused who were apprehended and were tried by the competent Court and are found guilty, while present appellant since was absconding is

subsequently arrested and later on tried and convicted.

14. Further evidence of PW 8 Jivraj, the Investigating Officer, reveals that appellant is husband of co-accused Meera Pawar who along with other

accused are already convicted in the same crime as charge-sheet against 25 accused was filed earlier wherein present accused was shown as

absconding accused at Sr. No. 18. It has further come on record from the evidence of Investigating Officer that in Session Case No. 22 of 2004

accused therein being accused No. 1 Meera Pawan Pawar, accused No. 2 Lakkhesingh, accused No. 3 Madhwarabai Jiwanlal Kumare,

accused No. 4 Bijli, accused No. 12 Harimishan were convicted for the offence punishable under section 412 of Indian Penal Code and the

accused Nos. 6, 7, 8, 9, 13, 15 and 16 were convicted and sentenced for the offence punishable under section 396 of the Indian Penal Code by

judgment and order dated 27th of February, 2007.

15. Further more, in the evidence of Investigating Officer PW 8 Jivraj it has come on record that he was visiting the place of incident from 4th of

November, 2003 to 7th of November, 2003 and has stated about his finding fingerprints on some articles on the spot, like silver pots and glass of

almirah, and therefore gave requisition to fingerprint expert to collect the chance prints, who accordingly visited the spot and took photographs of

finger prints available on above articles. From document (Exh. 66) and from further evidence of PW 8 Jivraj it reveals that he had sent the finger

prints of inmates of house of complainant to the expert to compare them with the chance prints collected from the spot and made further

correspondence with the fingerprint expert vide Exhs. 67 to 69, demanding the report of comparison. The fingerprint expert's report received by

police reveals that the fingerprints of appellant who was facing trial in Crime No. 64 of 1997 registered by Police Station Sindhkheda Raja and

Crime No. 143 of 1995 registered by Police Station Ladkhed matched with the chance fingerprints collected from the almirah and thus it revealed

that appellant was present at the time of incident. According to further evidence of Investigating Officer, appellant is involved in many such cases

which are pending against him in the State of Maharashtra and uses different names, father's names and surnames. From the further evidence of

Investigating officer it has come on record that in view of fingerprint expert report and on police authorities coming to know that the appellant was

involved in this crime and was in Chhindwara (M.P.) District Prison, necessary steps were taken by the Investigating Agency to secure his

presence and on effecting his arrest, supplementary charge-sheet came to be filed against him. Nothing is brought on record to doubt his evidence,

except for suggesting that co-accused Meera is not wife of appellant and that as other crimes were pending against appellant he is falsely involved

in this crime, which is denied by him.

16. From the evidence of PW 7 Jayant, fingerprint expert, it has come on record that after receipt of requisition memo from Investigating Officer in

this crime and on direction of Superintendent of Police, Chandrapur on 4th of November, 2003 he visited the spot of incident i.e. house of

complainant, along with photographer which was found intact and nobody appeared to have touched the household articles. According to him, on

his minutely inspecting the spot, he checked the articles by sprinkling chemical powder thereon and found one palm impression and one finger

impression on the glass of almirah. He further found one finger impression on the handle of almirah and two finger impressions were found on the

silver plates of which he obtained photographs. On 7th of November, 2003 photographer gave the photo prints. He has also stated about his

receiving from the Investigating Officer finger prints of the inmates of the house along with that of suspected accused for comparing the same with

the fingerprints impression found on the spot and has stated that on his comparing the finger prints obtained from the place of incident with that of

the fingerprints received from Investigating Officer, he found that except for the fingerprint of palm found on the spot, other fingerprint impression

were found tallying with that of inmates of the house of complainant.

17. According to PW 7 Jayant, Fingerprint Expert, the print of palm found on the place of incident was thus compared by him with the impression

of palm prints maintained and available in his office in respect of accused persons involved in similar cases and found that the palm impression was

matching with the left palm impression of appellant who was arrested in crime No. 64 of 1997 by Police Station Sindhkhed Raja whose fingerprint

were sent to the, fingerprint expert, by State C.I.D., as appellant was then arrested in Crime No. 143 of 1995 by Ladkhed Police Station, Distt.

Yavatmal. Accordingly, fingerprint expert had given his opinion which was affirmed by Deputy Director of Fingerprints of which reports are on

record at Exhs. 72 and 73. Thus, from evidence of Investigating Officer, fingerprint expert, prosecution has established that fingerprints which were

found on the almirah matched with fingerprints of accused involved in similar cases record of which are in the office of PW 7. Accordingly on the

basis of above stated evidence accused came to be arrested.

18. Above stated fact can said to be established by prosecution beyond reasonable doubt as from further evidence of fingerprint expert it has also

come on record that there are two principles of fingerprint science (1) the fingerprint of one person does not tally with the fingerprint of another

person and (2) fingerprint does not change right from birth to death and does not change its characters (ridges). It has also come in his evidence

that if minimum eight points of fingerprints are tallied in relative position in that event only it can be said that those two fingerprints are of same

person. According to him, on his comparing the photographs of fingerprints found on the spot marked as Article "A" along with the photograph of

palm print of appellant marked as Article "B" he found more than eight points in relative position and has thus opined that both impressions are of

same person. The statement of reasoning is proved by fingerprint expert on record at Exh. 74.

19. From further evidence of fingerprint expert it has come on record that vide Exh. 75 he received from Superintendent of Police Chandrapur,

impression of both hands of appellant taken before the Court for comparison purpose. He marked left palm impression of appellant as Article "C"

and on his comparing it with palm impression of appellant found on the place of incident which is marked as Article "A", he found same to be

matching and has accordingly given his opinion at Exh. 76 along with the opinion of Deputy Director at Exh. 77 and statement of reason at Exh.

78.

Thus from above stated evidence, we find that the prosecution has established that the palm impression found on the spot is found matching with

that of the left palm impression of the appellant. In that view of the matter, there is nothing to disbelieve the presence of appellant on the spot at the

time of incident, more particularly when we find that the evidence of PW 7 Jayant, fingerprint expert, is not at all shattered in any manner. On the

contrary, it has come in his evidence that fingerprint of one person does not tally with the fingerprint of another person and as such we find that it

was necessary on the part of the appellant to give reasonable explanation about finding of his fingerprint impressions on the spot establishing his

presence in the house of complainant. However, no such explanation is found on record.

20. It is the case of appellant that his involvement is based only on fingerprints alleged to have been found on the glass of Almirah on the spot

which were found to have been matched with that of the specimen fingerprints of appellant obtained by the Investigating Officer. On this aspect,

learned Counsel has relied on the decisions of Hon"ble Apex Court in the case of Mohd. Aman, Babu Khan and another Vs. State of Rajasthan,

AIR 1997 SC 2960 : (1997) CriLJ 3567 : (1997) 5 JT 451 : (1997) 4 SCALE 134 : (1997) 10 SCC 44 : (1997) AIRSCW 2980 : (1997) 4

Supreme 635 and Mahmood Vs. State of U.P., AIR 1976 SC 69 : (1976) CriLJ 10 : (1976) 1 SCC 542 : (1976) SCC(Cri) 72 : (1975) 7 UJ

875 wherein though the specimen fingerprints of accused were obtained on number of occasions at the behest of Bureau, they were never taken

before or under the order of Magistrate in accordance with section 5 of the Identification of Prisoners Act, 1920. In the background of above

facts, in that case it is thus observed that-

It is true that under section 4 thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to

eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate.

21. In view of submission as aforesaid, on perusal of record we have noted that during the trial prosecution had filed application (Exh. 54) seeking

directions from the Court to accused to give his palm prints of his both hands for referring it to fingerprint expert for comparing it with the palm

print found on the cupboard which was already forwarded to the fingerprint expert. The learned trial Judge on hearing both sides and on obtaining

say of accused had allowed said application as per order below Exh. 54 dated 24th of May, 2011. Accordingly, it is found that palm print of

accused is obtained before the Court on 20th of June, 2011 which is marked as Article "C". The learned trial judge has endorsed on the specimen

of palm print of appellant as ""Before me"" which facts established that the palm print of the accused is obtained on this day before the Court.

Accordingly, it is further found that pursis to that effect was filed at Exh. 57 that in view of order of the Court, palm prints of accused are obtained

in the presence of Counsel of both the sides. In the background of above it is amply established that specimen palm print of appellant was obtained

before the trial Court. On considering spot panchnama (Exh. 28), we find that there is reference to three iron almirahs in the house of complainant,

where the incident had occurred. It is also established that the Investigating Officer had suspected fingerprints on these almirahs and other articles.

22. In view of above evidence and to counter the arguments advanced by learned Counsel for the appellant, learned Additional Public Prosecution

has relied upon the case of (Bhupendra Singh Vs. State), reported in 2011 Law Suit 2972 (Del.) and Munna Kumar Upadhyaya @ Munna

Upadhyaya Vs. The State of Andhra Pradesh Through Public Prosecutor, Hyderabad, Andhra Pradesh, AIR 2012 SC 2470 : (2012) CriLJ 3068

: (2012) 2 RCR(Criminal) 962 : (2012) 5 SCALE 501 : (2012) 6 SCC 174 : (2012) AIRSCW 3060 .

23. Before considering law as relied upon by the learned Counsel for both the sides, we have considered the relevant provisions of Identification of

Prisoners Act, 1920 (hereinafter referred to as the 1920 Act").

Section 2(a) defines ""measurements"" as follows:

(a) ""measurements"" include finger impressions and footprint impressions.

Section 3 provides for taking of measurements, etc., of convicted persons. It reads as follows:

Every person who has been,

(a) convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards, or of any offence which would render him

liable to enhanced punishment on a subsequent conviction; or

(b) ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure, 1898, shall, if so required, allow his

measurements and photograph to be taken by a police officer in the prescribed manner.

Section 4 stipulates taking of measurements, etc., of non-convicted persons. It is as follows:

4. Taking of measurement, etc., of non-convicted persons. Any person who has been arrested in connection with an offence punishable with

rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the

prescribed manner".

Section 5 deals with the power of magistrate to order a person to be measured or photographed. The said provision is as under:

5. Power of Magistrate to order a person to be measured or photographed. If a Magistrate is satisfied that, for the purpose of any investigation or

proceeding under the Code of Criminal Procedure, 1898 (5 of 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,

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class; provided further, that no

order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

In the case of Bhupendra Singh Vs. State cited supra, expressing doubt with regard to the correctness of the decisions in (Harpal Singh Vs. State),

Criminal Appeal No. 362/2008 decided on 25th May, 2010 and (Satyawar Vs. State), Criminal Appeal No. 34/2001 decided on 9th July, 2009

wherein the two Division Benches had ignored the part of the report of the hand-writing expert on the ground that the investigating officer had

taken specimen handwriting in violation of the provisions of the Act, the Division Bench that was hearing the Criminal Appeals No. 1005/2008

(Bhupendra Singh Vs. The State (Govt. of NCT of Delhi)), and No. 408/2007 (Drojan Singh Vs. The State (Govt. of NCT of Delhi)), referred

the following question to be adjudicated by a larger Bench:

Whether the sample finger prints given by the accused during investigation under section 4 of the Identification of Prisoners Act 1920 without prior

permission of the Magistrate under section 5 of the Act will be admissible or not?

While considering above question, reference is made to the case of (Sural. Kumar @ Sonu Vs. State of NCT of Delhi), Cri. A. No. 446 of 2005

of the learned Single Judge of the Apex Court where in para No. 26 of its judgment it is held thus-

26. It is true that the specimen finger print impressions of the appellants were taken by the IO directly and not through the Magistrate as provided

in section 5 of Identification of Prisoners Act. But, that, to my mind was not necessary because section 4 of Identification Prisoners Act specifically

provides that any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or

upwards shall, if so required by a police officer, allow this measurement to be taken in the prescribed manner. In view of the independent powers.

conferred upon a police officer under section 4 of the Act, it was not obligatory for him to approach the Magistrate under section 5 of the Act. He

would have approached the Magistrate, had the appellants refused to give Specimen Finger Print Impressions to him. Therefore, no illegality

attaches to the specimen finger print impressions taken by the Investigating Officer. The Court needs to appreciate that the very nature and

characteristic of material such as fingerprints renders it intrinsically and inherently impossible for anyone to fabricate them. If there is an attempt to

fabricate finger prints, that can certainly be exposed by the accused by offering to allow his finger prints to be taken so that the same could be

compared through the process of the Court. None of the appellants has come forward to the Court with a request to take his finger print

impressions in the Court and get them compared with the chance finger prints lifted by PW 1 from Car No. DL 2-CA 4116 on 21st December, 2000.

The Apex Court to appreciate the question raised, had an occasion to refer certain pronouncement of said Court in the context of the Identification

of the Prisoners Act of 1920 and in para No. 12 to 15 has observed thus-

[12] In *Shankaria Vs. State of Rajasthan*, AIR 1978 SC 1248 : (1978) CriLJ 1251 : (1978) 3 SCC 435 : (1978) SCC(Cri) 439 : (1978) 3 SCR

736 , a three Judge Bench of the Apex Court was dealing with sections 4 and 5 of the 1920 Act. In that context, their Lordships have held as

follows:

83. Mr. Gambhir next contends that in view of section 5 of the Identification of Prisoners Act, it was incumbent on the police to obtain the

specimen thumb impressions of the appellant before a Magistrate, and since this was not done, the opinion rendered by the Finger Print Expert,

Mr. Tankha, by using those illegally obtained specimen finger impressions, must be ruled out of evidence.

84. The contention appears to be misconceived because in the State of Rajasthan, the Police were competent under section 4 of the Identification

of Prisoners Act, to take the specimen fingerprints of the accused, and this they did, in the instant case, before the Superintendent of Police, Shri

K.P. Srivastava. It was not necessary for them to obtain an order from the Magistrate for obtaining such specimen fingerprints.

[13] In *Mohd. Aman, Babu Khan and another Vs. State of Rajasthan*, AIR 1997 SC 2960 : (1997) CriLJ 3567 : (1997) 5 JT 451 : (1997) 4

SCALE 134 : (1997) 10 SCC 44 : (1997) AIRSCW 2980 : (1997) 4 Supreme 635 , it has been held thus:

8. It is true that under section 4 thereof police is competent to take finger prints of the accused but to dispel any suspicion as to its bona fides or to

eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. The

other related infirmity from which the prosecution case suffers is that the brass jug, production of which would have been the best evidence in proof

of the claim of its seizure and subsequent examination by us Bureau, was not produced and exhibited during trial for reasons best known to the

prosecution and unknown to the Court. For the foregoing discussion we are unable to sustain the convictions of Mohd. Aman.

On a perusal of the aforesaid paragraph, it is clear as crystal that under section 4 of the 1920 Act, the police is competent to take fingerprints of

the accused and such evidence would not be inadmissible.

[14] In State of M.P. Vs. Davendra, AIR 2009 SC 3009 : (2009) CriLJ 4130 : (2009) 13 JT 679 : (2009) 8 SCALE 816 : (2009) 14 SCC 80 :

(2009) 8 SCR 98 : (2009) AIRSCW 4840 , a three Judge Bench of the Apex Court, analyzing the anatomy of sections 3, 4 and 5 of the 1920

Act, has held thus:

10. Section 3 deals with taking of measurements of the convicted persons. The photographs and measurements and photographs can be taken by

the Police Officer in the manner prescribed. Section 4 deals with taking of measurement, etc. of non-convicted persons. It is taken if the police

officer so requires it and it has to be done in the prescribed manner.

11. So far as section 5 of concerned, it deals with the power of the Magistrate to direct any person for measurements or photographs to be taken

if he is satisfied that for the purpose of any investigation or proceedings under the Court the same is necessary.

14. Needless to say, the directions are subject to provisions of the Act, the Regulations and the Code. In case of conflict statute itself prevails. In

case of complainant as well as witnesses, where the prosecution wants to protect the identity, the reasons, therefore, must be recorded. In case of

rape victims, photographs should not be taken." The aforesaid pronouncement clearly lays down that sections 4 and 5 deal with different spheres.

Section 4 of the 1920 Act deals with taking of measurements, etc., of non-convicted persons and that is taken if the police officer so requires it

and it has to be done in the prescribed manner. As far as section 5 is concerned, it deals with the power of Magistrate to direct any person to be

measured or photographed if he is satisfied that for the purpose of an investigation or proceeding under the Court, the same is necessary. Thus,

their Lordships have carved out two different compartments.

[15] In *Manickam Vs. State by the Inspector of Police*, (2009) 5 CTC 316, it has been held that there is no law which prohibits the investigating

officer from lifting the finger prints of the accused for comparison during the course of investigation of the case. Section 5 of the 1920 Act and

section 311-A of the Code of Criminal Procedure, as inserted by Act 25 of 2005 with effect from 23.6.2006, speak only about the powers of the

Judicial Magistrate when he is approached by the Investigating Officer for the purpose of issuance of a suitable direction to the accused to

cooperate by giving his finger prints or signature or sample handwriting, as the case may be. Needless to emphasise, neither section 5 nor section

311-A put any embargo on the Investigating Officer for acting on his own for taking the finger prints, signature or handwriting of the accused during

the course of investigation. It has been held in the said case that there is no mandatory provision under the 1920 Act to obtain the permission of the

Magistrate.

In view of above consideration, it came to be concluded that-

(1) An accused person cannot be said to have been, compelled to be a witness against himself simply because he made a statement while in police

custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made

would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in

conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the

accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be

incriminatory, is not "compulsion".

(3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or

written statements but also production of documents or giving material which may be relevant at a trial to determine the guilt or innocence of the

accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification

are not included in the expression "to be a witness".

(5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court

or otherwise.

(6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal

interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of

an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused

person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.

The Apex Court in this context in para No. 19 of the judgment has also considered the scope of investigation as defined in section 2(h) of the

Code of Criminal Procedure Code, which is reproduced as under:

19. In this context, we may also refer to the concept of investigation as defined in section 2(h) of the Cr.P.C. which clearly stipulates that

investigation includes all the proceedings under the Code for collection of evidence conducted by a police officer or by any person other than a

Magistrate who is authorized by the Magistrate in this behalf. In Directorate of Enforcement Vs. Deepak Mahajan and another, AIR 1994 SC

1775 : (1995) 82 CompCas 103 : (1994) CriLJ 2269 : (1994) 1 Crimes 892 : (1994) 46 ECC 255 : (1994) 70 ELT 12 : (1994) 1 JT 290 :

(1994) 1 SCALE 294 : (1994) 3 SCC 440 : (1994) 1 SCR 445 , it has been opined that the term investigation as defined in Cr.P.C. has an

inclusive definition. In fact, investigation includes all efforts of a police officer for collection of evidence, namely, proceeding to the spot,

ascertaining facts and circumstances, discovery and arrest of the suspected offender, collection of evidence relating to commission of offence which

may consist of examination of various persons including the accused and taking of their statements in writing and the search of places or seizure of

things which are considered essential for investigation and to be produced at the trial. It is worth noting that in Pooran Mal Vs. The Director of

Inspection (Investigation), New Delhi and Others, AIR 1974 SC 348 : (1974) 93 ITR 505 : (1974) 1 SCC 345 : (1974) 2 SCR 704 , it has been

held that evidence obtained on an illegal search cannot be excluded. In State of Karnataka Vs. K. Yarappa Reddy, AIR 2000 SC 185 : (2000)

CriLJ 400 : (1999) 3 Crimes 171 : (1999) 8 JT 10 : (1999) 6 SCALE 330 : (1999) 8 SCC 715 : (1999) 3 SCR 359 Supp : (1999) AIRSCW

4276 : (1999) 8 Supreme 496 , it has also been held that criminal justice should not be allowed to become casualty for the wrongs committed by

the Investigating Officers.

Accordingly, on considering as such, the view expressed in the case of Sunil Kumar was upheld to be the correct view wherein the specimen

fingerprint impressions of the accused were obtained by Investigation Officer directly and not through the Magistrate as provided in section 5 of the

Act and on considering the independent powers conferred by the Police Officer under section 4 of the Act, it was held that it was not obligatory

for the police to approach the Magistrate under section 5 of the Act and police could have approached the Magistrate had the accused refused to

give the specimen fingerprints impressions to them. Thus, it was noted that, no illegality could be attached to the specimen fingerprint impressions

taken by the Investigating Officer.

24. In the case of Munna Kumar Upadhyaya, reported supra, relied by prosecution and was based on circumstantial evidence, one of the

contentions for appellant was that ""The High Court has entirely based its order of conviction on the finger prints found at the place of occurrence

and there is no evidence as to how the finger prints of the accused persons were collected by the police and how they were dispatched to the

forensic laboratory for the purposes of comparison. The vital link in the evidence relating to finger prints is missing and as such, the judgment of the

High Court is liable to be set aside."" In that case, fingerprint expert had visited the site and lifted some chance fingerprints on the steel almirahs from

near the inner lock door and another set of finger prints from the rear side of the bathroom. During the course of investigation, the Investigating

Officer, with the leave of the Court, had taken the sample finger prints of all the accused. These fingerprints were sent to the forensic laboratory to

be compared with the chance fingerprints that had been lifted by the expert. Those were examined and the report was submitted to the Court

wherein it was clearly stated that the chance fingerprints matched with finger prints of the accused. The expert was examined in the Court. In his

statement, he clearly stated that he collected the fingerprints from the inner lock door of steel almirah and the back door of the house which

matched with the fingerprints of accused. Considering above piece of evidence, appeal came to be dismissed.

25. In view of above referred decision of the Apex Court, as evidence of PW 8, the Investigating Officer, along with order of learned trial Court

passed below Exh. 54 establish that the Investigating Officer obtained fingerprints impressions of the accused with the leave of the Court; we do

not find any reason to discard evidence to that effect on record which palm print on being compared with the chance finger print collected from

spot, and with the palm print of accused involved in similar offences maintained in the office of PW 7, the Hand Writing Expert, are found

matching, and thus, establishing involvement of appellant. In the light of above, we have no hesitation in rejecting the contention of the appellant to

not to rely upon said piece of evidence for not obtaining fingerprints of accused before or under the order of Magistrate in accordance with section

5 of the Act. The prosecution has, in fact, from the evidence discussed above, clearly been able to establish the fact of presence of appellant at the

time of incident and his physical contact with the articles on the spot. In the facts and circumstances of the present case and more importantly facts

of recovery of incriminating articles i.e. cash and jewellery belonging to the complainant and having found fingerprints of appellant on the articles on

the spot, unequivocally established the involvement of appellant in the present crime. Besides all these material evidence, another very significant

aspect of the case is that appellant had failed to offer any explanation during recording of his statement under section 313 of Cr.P.C. as to under

what circumstance his fingerprints are found on the almirah, as except for his simple denial, he stated nothing more. In fact, it was expected of the

accused to render proper explanation on above aspects, however, he adopted only to deny the same. As per settled law if the accused gives

incorrect or false answers during his examination under section 313 of Cr.P.C., the Court can draw an adverse inference against him. In the

present case we are thus of the considered opinion that prosecution has established involvement of appellant beyond reasonable doubt. As such

we see no infirmity in the judgment under appeal. Resultantly, we pass the following order.

ORDER

Criminal Appeal No. 2 of 2012 is dismissed.