

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.06.2014

CORAM:

THE HONOURABLE MR. JUSTICE P.N.PRAKASH

Criminal Appeal No.1024 of 2003

State by:

Inspector of Police,

C.B.C.I.D., Idol Theft Prevention Section,

Trichy.

(Crime No.495/90)

... Appellant

-Vs-

1.Jacob

2.Nagalingam

3.Selvaraj

4.Aswalt

5.Alexander @ Asan

6.Martin

7.Kanagasabai

8.Paulraj

9.Peter Francis

... Accused

This Criminal Appeal has been filed under Section 378 Cr.P.C. praying to allow the appeal and set aside the order of acquittal passed by the trial Court in

C.C.No.31 of 1999 on the file of the Additional District Judge-cum-Chief Judicial Magistrate, Kumbakonam and that the accused be convicted of the offence as charged.

For Appellant : Mr.S.Shunmugavelayutham
State Public Prosecutor
Assisted by
Mr.C.Ramesh,
Additional Public Prosecutor
Mrs.S.Prabha,
Government Advocate (Crl. side)

For Respondent: Mr.B.Jameel Arasu
2, 3 and 7
For Respondent: Mr.D.RAmesh Kumar
4,5,6 and 8
For Respondent: Mr.R.Senthilkumar
1

JUDGMENT

This appeal has been filed by the State, challenging the acquittal of the respondents/accused in C.C.No.31 of 1999 on 25.06.2002, by the learned Additional Chief Judicial Magistrate, Kumbakonam, for the offences under Sections 120(B), 457(2), 380(2) read with 109 IPC.

2.It is the case of the prosecution that on 17.12.1990, A.R.Swaminathan

[P.W.2] who is the Hereditary Trustee of Arulmighu Viswanathasamy Temple in Anaikudi Village, Kumbakonam [hereinafter referred to as ' The Temple'], opened the temple in the morning and found that the doors of the shrine were forcibly broken and seven idols were missing. He also found the idol of Lord Nataraja lying near southern side of the compound wall inside the campus. P.W. 2 went to the local HR & CE office and informed this to the Assistant Commissioner of the HR & CE Department who deputed one S.Sambandam [P.W. 3] Inspector of Temples to visit the temple. Accordingly S.Sambandam [P.W.3] visited the temple and together with P.W.2 they went to the Thirupanandal Police Station, where P.W.2 gave a written complaint [Ex.P6] giving the description of the seven idols based on which, a case in Thirupanandhal Police Station Cr.No.495/1990 under Sections 457 and 380 IPC was registered on the same day. For a pretty long time there was no break through in the investigation.

(a) On 03.04.1991, Maruthamuthu, [P.W.37] Inspector of Police attached to the Idol wing [CID] received credible intelligence that one Nadodi [A2] was in possession of an idol and so he searched the house of the said Nadodi @ Anbazhagan [A2] in Saakottai village in Thanjavur West District in the presence

of Ramanujam, V.A.O. [P.W.17] and one Ayyasamy [not examined]. During the search, the police recovered an idol of Lord Subramanya in two pieces, namely head portion [M.O.2] and body portion [M.O.1]. This was recovered under the cover of Mahazar [Ex.P10]. After recovery, A2 was arrested by Balasubramanian, Inspector of Police [P.W.36] and his confession statement was recorded. Thereafter, a case in Nachiarkoil Police Station Cr.No.229/91 under Sections 41 and 102 Cr.P.C. was registered against A2 for the purpose of further investigation. The printed FIR in Cr.No.229 of 1991 is Ex.P36.

(b) During the interrogation of A2, he revealed the theft of the idol from Sri Viswanathasami Temple, Anaikudi and came forward to identify and disclose the involvement of the other accused in the Anaikudi temple case. He took the police to Tirunageswaram and identified Nagalingam [A3] who was arrested around 7.30 p.m. on 03.04.1991. On the confession of Nagalingam [A3], the police discovered the idol of Goddess Valli which was broken into three parts, namely body part [M.O.3], head portion [M.O.4] and hand portion [M.O.5]. These three pieces were kept buried in the bank of a dry rivulet in the southern side of Thirunageswaram village. The place of discovery was shown by A3 and the police recovered the three pieces under the cover of Mahazar [Ex.P15] in the

presence of Sivanandan [P.W.20] and Mani [not examined].

(c) Nagalingam [A3] further came forward to identify one Selvaraj [A4], who was also allegedly involved in the Anaikudi temple theft. He took the police party to Thiruvudaimaruthur village where he identified Selvaraj [A4], who was arrested by the police on 6.30 a.m. on 04.04.1991. Selvaraj [A4] gave a confession statement to the police and the admissible portion of which is Ex.P16, wherein he told the police that he would take them to the place where he had hidden an idol. He took the police party across the field of one Shankar and showed the spot beneath a tamarind tree wherein he had buried the idol. The police party dug the spot and recovered the idol of Goddess Deivanai [M.O.6] under the cover of Mahazar [Ex.P17] in the presence of witnesses Veerasami [P.W.21] and T.S.Kannan [P.W.28].

(d) On 04.04.1991, Nadodi @ Anbazhagan [A2], Nagalingam [A3] and Selvaraj [A4] were produced before the Judicial Magistrate for remand and the police took Nagalingam [A3] into their custody for further investigation. While in the custody of the police, Nagalingam [A3] took the police party and identified Kanagasabai [A8] in Kuthalam. Kanagasabai [A8] was arrested by the

police at around 6.00 p.m. on 04.04.1991 and his confession statement was recorded. The admissible portion of his confession statement is Ex.P37. Based on the disclosure statement of Kanagasabai [A8], the police recovered the wrist portion of Lord Chandrasekara's idol [M.O.7], head portion of Goddess Sivakami idol [M.O.8], crown portion of Goddess Sivakami idol [M.O.9] and hand portion of Goddess Sivakami idol [M.O.10] under the cover of Mahazar [Ex.P38] in the presence of independent witnesses Deivakalyanasundaram [P.W.23] and Ravi [P.W.24]. Nagalingam [A3] and Kanagasabai [A8] identified Paulraj [A9] who was arrested in Kumbakonam at around 11.00 a.m. on 04.04.1991 and his confession statement was recorded, based on which the van TN-49-Z-2100 which was used in the commission of offence was seized under the cover of Mahazar [Ex.P32] in the presence of independent witnesses Sivagurunathan [P.W.32] and Mohammed Ali [died].

(e) On 05.04.1991, Nagalingam [A3] took the police party to Ammanpettai and identified Oswalt [A5] and Alexander @ Aasan [A6] who were allegedly involved in the Anaikudi temple case. A5 and A6 were arrested by the police at around 6.15 p.m. on 05.04.1991 and their confession statements were recorded. The admissible portion of the confession statement of Oswalt [A5] is Ex.P39 and

the admissible portion of confession statement of Alexander @ Aasan [A6] is Ex.P30. Oswalt [A5] took the police party to the spot where he had hidden an idol and when the police party dug that place, they recovered Lord Chandrasekaran's idol in two parts, namely body part [M.O.11] and head part [M.O.12] under the cover of Mahazar [Ex.P41] in the presence of witnesses Ramakrishnan [P.W.26] and Arulanandam [P.W.27]. Alexander @ Aasan [A6] took the police party to his house where he had hidden an idol in the granary of his house. From there the police recovered the idol of Goddess Chandrasekara Amman [M.O.13] and a round disc portion that adorned the crown of the idol [M.O.14] under the cover of Mahazar [Ex.P42] in the presence of independent witnesses Ramakrishnan [P.W.26] and Arulanandam [P.W.27]. Oswalt [A5], Alexander [A6] and Paulraj [A9] were produced before the Judicial Magistrate for remand and along with them, Nagalingam [A3] was also sent back for judicial remand.

(f) P.W.36 continued the investigation by collecting the records in Thirupanandal Police Station Cr.No.495 of 1990. He collected from the temple authorities the basements of the idols for the purpose of tallying and correlating them with the idols that were recovered at the instances of the arrested

accused. The basements were collected on 10.04.1991 under a cover of Mahazar [Ex.P7] in the presence of witnesses Ramadoss [P.W.30]. The basements are M.O.Nos.15, 16 and 17.

(g) During the course of further investigation, P.W.36 arrested one Rajasekaran on 25.04.1991, whose name figured in the confession statements of the arrested accused. The admissible portion of the confession statement of Rajasekaran is Ex.P34. Rajasekaran took the police party to the banks of a river bed located in the south of Thirunageswaram village and showed the spot wherein he had hidden an idol. The police party dug the place and recovered Lord Sokkar idol [M.O.18] and Goddess Sivakami idol [M.O.19] under the cover of Mahazar Ex.P31 in the presence of independent witnesses Murthy [Ex.P31] and Kalidas [died]. Thereafter, Rajasekar was produced before the jurisdictional Magistrate, who remanded him to judicial custody.

(h) On 06.05.1991, Martin [A7] surrendered before the Judicial Magistrate, Myladuthurai. P.W.36 interrogated him in the prison itself and recorded his statement. Since Rajasekaran came forward to give a judicial confession, an application was made before the Chief Judicial Magistrate by the police for

recording the statement of Rajasekaran. On the directions of the learned Chief Judicial Magistrate, the 164 Cr.P.C. statement of Rajasekaran was recorded on 06.05.1991 and 07.05.1991 by the Judicial Magistrate-I, Kumbakonam. His confession statement is Ex.P45. As the police felt that they would need better evidence to prosecute the accused, an application was filed on 25.10.1991 before the Chief Judicial Magistrate for giving tender of pardon to Rajasekaran.

The learned Chief Judicial Magistrate by his proceedings dated 05.12.1991 [Ex.P51] tendered pardon to Rajasekaran under Section 306(1) Cr.P.C. and he was taken as an approver. The Investigating Officer [P.W.36] made necessary application before the jurisdictional Court to transfer the records of the case in Nachiarkoil Police Station Cr.No.229 of 1991 for clubbing the same with the records in Thirupanandhal Police Station Cr.No.495 of 1990 in the Court of the Judicial Magistrate No.II, Kumbakonam, which prayer was also allowed by the Court and the records were clubbed.

(i) The Investigating Officer completed the investigation on 05.03.1992 and filed a final report against 10 accused for offence under Sections 457, 380 read with 120(B) and 109 IPC. Jacob [A1] and Peter Francis [A10] surrendered before the trial Court on 10.03.1992.

(j) The Judicial Magistrate, Kumbakonam, took cognizance of the said offences in C.C.No.783 of 1992 and issued process to the respondents/accused herein for their appearance. When they appeared, the provisions of Section 207 Cr.P.C. were complied with and the approver was examined on 20.07.1999. The case was transferred to the Court of the Additional Chief Judicial Magistrate, Kumbakonam, who took the same on file as C.C.No.31 of 1999 and framed the following charges against the accused.

1. Against A1 to A10 for entering into a criminal conspiracy during September to December 1990 in order to commit theft of idols from Arulmighu Viswanathasami Temple in Anaikudi, punishable under Section 120(B) IPC.
2. Against A2, A4, A5 and A6 for trespassing into the temple during night hours, for the purpose of committing theft of idols punishable under Section 457[2] IPC [vide Tamil Nadu Amendment Act 28 of 1993]. In the opinion of this Court, a charge under Section 457(2) IPC cannot be framed based on the Tamil Nadu State Amendment to Section 457 IPC,

because the amendment came into force only in the year 1993, whereas, the offence was allegedly committed on 17.12.1990. Therefore, the accused could have been charged only in terms of Section 457 IPC and not under Section 457(2) IPC.

3. Against A1, A3, A7, A8 and A9 for abetting the commission of offence under Section 457(2) IPC. This is also not a correct charge for the same reason given above. Hence, A1, A3, A7, A8 and A9 could have been charged only under Section 457 read with 109 IPC and not under Section 457(2) read with 109 IPC.

4. Against A2, A4, A5 and A6 for committing theft of seven idols from Arulmighu Viswanathasami Temple punishable under Section 380(2) IPC [vide Tamil Nadu Amendment Act 28 of 1993]. In the opinion of this Court, this charge is also not maintainable because, Tamil Nadu Act 28 of 1993 was not in force when the offence was committed. Hence, A2, A4, A5 and A6 should have been charged only under Section 380 IPC and not under Section 380(2) IPC of the Tamil Nadu Amendment Act.

The aforesaid error in the charge is not very material so as to cause any prejudice to the accused and the proceedings are saved by Section 215 and Section 464 of Cr.P.C. 1973.

5. Against A3, A7, A8 and A9 for abetting the other accused for the commission of offence under Section 380(2) IPC [vide Tamil Nadu Act 28 of 1993]. This charge is also not maintainable for the reasons stated above. Hence the accused should have been charged under Section 380 r/w 109 IPC.

3. When the accused were questioned, Anbazhagan @ Nadodi [A2] pleaded guilty of the charge and he was sentenced to undergo three years Rigorous Imprisonment. The other accused denied the charges and so the prosecution examined 37 witnesses, marked 56 Exhibits and 22 Material Objects. When the accused were questioned under Section 313 Cr.P.C. they denied the charges. One witness was examined on behalf of the accused. The trial Court considered the evidence adduced by the prosecution and the defence and acquitted the accused on the following grounds.

Aggrieved by the acquittal, the State has preferred this appeal.

4.The law relating to appeal against acquittal has been succinctly restated by the Hon'ble Supreme Court in *Mookiah and another vs. State of Tamil Nadu* (unreported judgment dated 04.01.2013 in Crl.A.No.2085 of 2008) after extensively quoting *Chandrappa Vs. State of Karnataka (2007 4 SCC 415)*. The principles culled out by the Apex Court is as follows:

(1)An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2)The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3)Various expressions, such as, substantial and compelling reasons, good and sufficient grounds, very strong circumstances, distorted conclusions, glaring mistakes, etc. are not intended to curtail extensive powers of an appellate court in an appeal

against acquittal. Such phraseologies are more in the nature of flourishes of language to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

[pic](5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

5. The evidence in this case needs to be appreciated under four broad sub-headings, namely:

- (1) Loss of the idols from Arulmighu Viswanathasami temple
- (2) Arrest of the accused and recovery of the idols

(3) Whether the recovered idols belong to Arulmighu Viswanathasami temple

(4) Whether the accused in this case were the actual thieves or they were merely retainers of stolen properties.

I - LOSS OF THE IDOLS FROM ARULMIGHU VISWANATHASAMY

TEMPLE:

6. In order to prove this fact, the prosecution examined A.R.Swaminathan [P.W.2], S.Sambandam [P.W.3], Ramakrishnan [P.W.5] and Ramantha Gurukkal [P.W.6]. P.W.2 and P.W.5 are brothers and P.W.2 is the Hereditary Trustee of the said temple. In his evidence he has stated that on 16.12.1990 after completing the last pooja in the night, he closed the temple and went home. The next day, i.e. on 17.12.1990 when he opened the temple, he found that the idol of Nataraja lying near the compound wall in the southern side and the doors of the various shrines were found open. He went inside and did not find the idols of Lord Sokkar, Goddess Sivakami, Lord Subramanyam, Goddess Valli, Lord Chandrasekaran, Goddess Deivanai and ChandrasekaraN Ammal. He immediately informed the HR & CE Department and also reported the matter to the Thirupanandhal police station by lodging a complaint [Ex.P6]. He further stated in his evidence that the police registered a case and in the course of

investigation on 10.04.1991, they recovered the idols and he identified the idols in the police station. He also stated that on 10.04.1991 the police came to the temple and took possession of the basements of the idols under the cover of a Mahazar [Ex.P7]. He also identified the seven idols which were marked as material objects in the open Court and they were all marked through him. He had handed over to the police the property register maintained by the Temple in which the description of the stolen idols have been given. In the cross examination, it was suggested to him that he has falsely stated that seven idols were stolen from the temple which he of-course denied. Apart from this, there is nothing much substantial in his cross examination. His evidence with regard to theft of the idols on 16-17.12.1990 from the temple has been corroborated by the evidence of S.Sambandam [P.W.3], Ramakrishnan [P.W.5] and Ramantha Gurukkal [P.W.6]. S.Sambandam [P.W.3] was working at that time as Inspector in the HR & CE Department.

7. In his evidence S.Sambandam [P.W.3] has stated that on 17.12.1990, P.W. 1 came to the HR & CE office and met the Assistant commissioner and informed him of the theft of 7 idols from the temple. On the directions of the Assistant Commissioner, P.W.3 went for spot inspection of the temple and found that the

Nataraja idol was lying near the compound wall of the temple and the doors and lock of the various shrines were found broken. Then he accompanied P.W.2 to the police station for lodging a complaint about the theft of 7 idols from the temple. He further stated in the evidence that photographs of the idols were taken and HR & CE Department has an album containing the photographs of the idols which was handed over to the police by the Department. In his cross examination, he stated that with the help of the photographs he can identify the stolen idols. He also further stated that there is no property register in the temple. This stray statement that there is no property register in the temple by P.W.3 has been one of the grounds for the trial Court to acquit the accused.

8. Ramakrishnan [P.W.5] the brother of P.W.2, stated in his evidence that his brother is the Hereditary Trustee of the temple and that on 16.12.1990 at around 7 o'clock after the evening poojas he was there alongwith his brother and Ramanadha Gurukkal [P.W.6] at the time of closing the temple and again on the next day, when they came to the temple they learnt that there had been a heist in the temple. He identified the Material Objects 1 to 19 in the open Court. In the cross examination it was suggested to him that no such incident had ever taken place in the temple and that he was falsely deposing, which was

denied by him.

9. Ramanadha Gurukkal [P.W.6] who performs the daily poojas in the temple stated in his evidence that on 16.12.1990 he along with the trustees locked the temple and left for their homes and again when he came on 17.12.1990, he was shocked to find that the doors of the shrine were open and the statue of Nataraja was lying over the compound wall of the temple. He also found that 7 idols were missing. He accompanied the trustees to the police station for lodging the complaint. He identified the idols in the open Court. In his cross examination, he stated that the lock was broken and the police also saw the broken lock. He stated that even finger print experts came to the temple. It was suggested to him that the idols in the Court do not belong to Arulmighu Viswanathasami temple, which he denied.

10. On a careful analysis of the evidence of these witnesses, I am unable to persuade myself to disagree with the prosecution version that there was a heist in the temple on 16-17.12.1990 and 7 idols were lost. On 17.12.1990 when P.W.2 opened the temple he found the Nataraja idol lying near the compound wall and the doors of the shrine were found open. Thus there were

telltale signs of someone breaking in and taking away the idols from the shrine. For reasons best known only to the accused, they were not able to carry the Nataraja idol and therefore, they had dropped it near the inner side of the compound wall. Except making a suggestion to the witnesses that no such incident had taken place, defence was not able to show as to why these witnesses should create a make believe story of a heist and what do they stand to gain by falsely lodging a complaint with the HR & CE Department and police that there was a theft in the temple.

11. Now let us examine the conduct of P.W.2-the Hereditary Trustee:

When he found that there was a theft in the temple, he straightaway went to the HR & CE Department and informed the Assistant Commissioner about it and after the visit of Inspector of HR & CE Department [P.W.3] to the temple after verification, they have all gone to the police and lodged a complaint. Thus the conduct of P.W.2, P.W.3, P.W.5 and P.W.6 is very natural and they are relevant under Section 8 of the Indian Evidence Act.

12. The defence contention is that when P.W.3 had stated that there is no Property Register in the temple, the marking of the Property Register [Ex.P12]

would go to show that the entire case has been concocted. This Court can take judicial notice of the fact that all temples under the HR & CE dispensation should have to necessarily maintain a Property Register, in which there should be description of the various properties including idols and jewellery. This Court perused Ex.P12 the Property Register and found that there was nothing suspicious in it for this Court to discard the same as a concocted piece of evidence. The defence suggested that the HR & CE officials have not affixed their seal or signature thereon and therefore, the register was created for the purpose of the case. It is common knowledge that under the Labour Laws also, shops and establishments should maintain muster roll registers etc., which will be checked and signed by the Labour Inspector as and when he makes an inspection. Just because in a particular shop the Labour Inspector had not visited for a long time, can it be said that the establishment will be absolved from maintaining the register or can it be said that such a register is not an authentic document? One can draw an adverse inference in the absence of a statutory document but on the contrary, the Courts cannot draw an inference that a statutory document is not genuine, just because the inspection authorities had not performed their duties properly by conducting periodical inspections and affixing their signatures in token of such inspections.

13. Apart from all this, P.W.2 is the Hereditary Trustee of the temple and P.W.6 is a Priest of the temple. Everyday they are performing poojas to the idols and they will easily know if any idol is missing from inside the shrine. The defence set up a plea that the idols marked in this case does not belong to Viswanthaswamy temple. For this, the prosecution has examined the hereditary trustee and the Priest whose evidence cannot be discarded lightly. The contention of the defence that the police had not seized the broken locks from the place of occurrence and they have not examined the Finger Print Expert who came to the spot, and therefore, the entire allegation is a make believe exercise, cannot be countenanced for the reason that, failure on the police to seize the broken locks cannot lead to the conclusion that there was no theft in the teeth of the other evidence like the displacement of Nataraja idol from inside the shrine to a place near the compound wall, etc. It is not the case of the Police that the Finger Print Experts were able to lift finger prints from the scene of occurrence. Just because they brought the Finger Print Expert to the place of crime as part of investigation process, it is not necessary to examine him in the Court to give evidence that he did not lift any finger prints from there. Negative evidence of a non existent fact is not essential unless it

becomes relevant under Section 11 of the Evidence Act. It would have been an ideal situation if the police had seized the lock also under a cover of Mahazar. But, unfortunately, our police do not act ideally at all times and that is why time and again the Apex Court has held that remiss in investigation *per se* cannot enure to the advantage of the accused unless the deficiency shakes the substratum of the prosecution case. [see *Karan Singh vs. State of Haryana (2013 (3) MLJ (Crl) 103 (SC))*]

14. In this case I find that the failure to recover the broken locks does not shake the testimony of P.W.2, P.W.3, P.W.5 and P.W.6.

15. In the result, I hold that the prosecution has established satisfactorily that there was a temple heist on 16-17.12.1990 in which 7 idols went missing.

I shall discuss whether it was 7 idols or 9 idols while dealing with evidence of the approver.

II. ARREST OF THE ACCUSED AND RECOVERY OF THE IDOLS:

16. From 17.12.1990 to April 1991 the local police were not able to make

any substantial progress in the investigation of the case. The sleuths of the Idol Wing of CBCID who have their ears on the ground, obtained credible intelligence that one Nadodi @ Anbazhagan [A2] was in possession of an idol which prompted P.W.36 to conduct a search of his premises. The search was conducted in the presence of Ramanujam, the V.A.O [P.W.17] and Ayyasamy the Office Assistant. The search resulted in the seizure of M.O.1 and M.O.2 namely the idol of Lord Subramanyam in two parts from the house of A1. Ramanujam [P.W.17] in his evidence before the Court stated that, on 03.04.1991 the Crime Branch Police, called him to accompany them for searching the house of one Nadodi and that he along with Ayyasamy went with the police for the search. During the search the police found a gunny bag in the North West corner of the house and when it was opened, they found the statue of Lord Subramanya in two parts. The Mahazar [Ex.P10] for the recovery of M.O.1 and M.O.2 was proved by P.W.17. In the cross examination by the defence, he was asked whether he had informed his Tahsildar that he had accompanied the police for the search, for which the witness said that he sent a note to the Tahsildar about this. It was suggested to him that there was no search or seizure in the house of Anbazhagan and that the entire paper work was done only in the police station, which of course, the witness denied. It may be remembered that Nadodi [A2]

pleaded guilty to the charges when he was questioned by the Court and therefore, he was sentenced to imprisonment immediately. The defence were not able to shake the testimony of P.W.17 with regard to search of the house of Anbazhagan and seizure of M.O.1 and M.O.2 from there. On a careful scrutiny of the evidence of P.W.17 and the Investigating Officer [P.W.36], I find that there is no infirmity in their evidence so as to discard the same and hold that M.Os.1 and 2 were not seized from the house of A2.

17. On the identification of A2, Nagalingam [A3] was arrested on 03.04.1991 at 7.30 p.m. by the police in the presence of Sivanandan [P.W.20] and Mani [P.W.12] and his confession statement in the admissible portion of which is Ex.P14 was recorded by the police. Based on the disclosures made by Nagalingam he was taken to the place where he had hidden the idol. Sivanandan [P.W.20] in his evidence stated that during April 1991 the police came in a jeep with one Nadodi and he was asked to accompany them for identifying one Nagalingam. As the V.A.O. of that village, he knew Nagalingam [A3] well and Nagalingam [A3] was spotted near a laundry. He was arrested by the police and his confession statement was recorded. On the confession of Nagalingam [A3], the police discovered the idol of Goddess Valli which was

broken into three parts, namely body part [M.O.3], head portion [M.O.4] and hand portion [M.O.5]. These three pieces were kept buried in the bank of a dry rivulet in the southern side of Thirunageswaram village. In his cross examination of P.W.20 he was questioned about the topography of the village and also as to where the police had prepared the seizure mahazar. The witness stated that the police had prepared the seizure mahazar in the place of seizure itself and not in the police station. The defence suggested to him, he being a VAO he would need the services of the police and therefore, he was obligated to the police and that there was no recovery as stated by him in his evidence, which he denied. The evidence of this witness is adequately corroborated by the evidence of the Investigating Officer with regard to the seizure of M.Os.3 to 5 under the cover of Mahazar [Ex.P15]. It was contended by the defence that the police had failed to obtain the signature of the accused in the confession statement and therefore, the same cannot be relied upon. This argument was based on the ruling of the Apex Court in **Jaskaran Singh vs. State of Punjab [1995 CrI LJ 3992]**, which subsequently was reconsidered by the same Bench and a corrigendum was issued on 25.04.1996. This has been elaborately discussed by a Division Bench of our High Court in **Natarajan vs. Union Territory of Pondicherry [CDJ 2003 MHC 538]**. The law now

is, that the confession statement which is merely a species of the 161 statement need not contain the signature of the accused. The trial Court has also relied upon the former judgment for disbelieving the confession and the consequential seizure ignoring the corrigendum issued by the Supreme Court. In the light of the corrigendum of the Apex Court referred to above, it cannot be now said that the confession statement of the accused given to the police should contain the signature of the deponent. Therefore, I hold that the prosecution has proved the seizure of M.Os.3 to 5 at the instance of Nagalingam A3 beyond any reasonable doubt.

18. The trial Court has disbelieved the police confession of all the accused by relying upon Jaskaran Singh's case (a 1995 CrL.J. 3992) and has consequently held that the recoveries pursuant to an unsigned police confession is vitiated. This Court's discussion above will hold good for all the police confessions and recoveries that have been disbelieved by the trial Court on the ground that the signature of the accused was not obtained thereon.

19. From the evidence of the Investigating Officer it can be seen that based on the identification of Nagalingam [A3], Selvaraj, [A4] was arrested on

04.04.1991 at 6.30 a.m. The police recorded the confession statement of Selvaraj [A4] and the admissible portion of the same is Ex.P16, wherein he told the police that he would take to the place where he had hidden an idol. He took the police party across the field of one Shankar and showed the spot beneath a tamarind tree wherein he has buried the idol. The police party dug the spot and recovered the idol of Goddess Deivanai [M.O.6] under the cover of Mahazar [Ex.P17] in the presence of witnesses Veerasami [P.W.21] and T.S.Kannan [P.W.28].

20. Veerasamy [P.W.21] who was working as Village Administrative Officer in Thiruvidadimarudur Village stated in his evidence that he was called by the police to be present along with them at the time of identification of Selvaraj [A4] by Nagalingam [A3]. On being shown by Nagalingam [A3], Selvaraj [A4] was apprehended by the police in his house in Keezhathondranpet around 6.30 a.m. on 04.04.1991. He was arrested and his confession statement was recorded by the police, the admissible portion of which is marked as Ex.P16. P.W.21 further stated that Selvaraj took them behind his house and showed them a spot beneath a tamarind tree and when the place was dug, the police recovered the statue of Goddess Deivanai and Mahazar [Ex.P17] was prepared at that place

which was signed by Veerasamy [P.W.21] and T.S.Kannan [P.W.28]. In his cross examination he was asked to state the direction in which the house of A4 is located, for which he stated he does not remember now. When questioned about the location of other houses in the street, he stated in his cross examination that there are other houses in and around the house of A4. When questioned by the defence as to the place from where the statue is recovered, he stated that the statue was recovered from the northern side of the garden of the house. To the suggestion made by the defence that no idol was recovered from the place, he denied the same. T.S.Kannan [P.W.28] was examined for corroborating Veerasamy [P.W.21] who was declared hostile as he did not support the prosecution case. Thus from the evidence of the Investigating Officer [P.W.36] and Veerasamy [P.W.21], the prosecution was able to satisfactorily establish that the idol [M.O.6] was recovered from the garden behind the house of A4 on the disclosure made by him.

21. On 04.04.1991, Anbazhagan [A2], Nagalingam [A3] and Selvaraj [A4] were produced before the Judicial Magistrate for remand and the police took Nagalingam [A3] into their custody for further investigation. While in the custody of the police, Nagalingam [A3] took the police party and identified

Kanagasabai [A8] in Courtallam. Kanagasabai [A8] was arrested by the police at around 6.00 p.m. on 04.04.1991 and his confession statement was recorded. The admissible portion of his confession statement is Ex.P37. Based on the disclosure statement of Kanagasabai [A8], the police recovered the wrist portion of Lord Chandrasekara's idol [M.O.7], head portion of Goddess Sivakami idol [M.O.8], crown portion of Goddess Sivakami idol [M.O.9] and hand portion of Goddess Sivakami idol [M.O.10] under the cover of Mahazar [Ex.P38] in the presence of independent witnesses Deivakalyanasundaram [P.W.23] and Ravi [P.W.24].

22. Deivakalyanasundaram [P.W.23] was examined in the trial Court on 13.10.2000. In his evidence he stated that in the year 1991 the police called him one day to be a witness for the arrest of one Kanagasabai [A8]. He accompanied the police who arrested Kanagasabai [A8] and recorded the confession statement from him and on the disclosure made by the said Kanagasabai [A8], some idols were recovered from the residence of Kanagasabai [A8]. I find that the trial Court Public Prosecutor has marked Ex.Ps.18 and 19, the signatures of the witness in the confession statement and in the recovery Mahazar. The actual recovery mahazar was not proved through this witness. In

the cross examination by the defence, he candidly admitted that he does not remember the date on which the house of A8 was searched. He also stated that he does not remember as to how many idol pieces were recovered from there. He denied the suggestion made by the defence that no recovery was effected from the residence of A8. The other independent witness, namely Ravi [P.W.24] did not support the prosecution case and he was declared hostile. Therefore, we only have the evidence of the Investigating Officer with regard to the arrest of Kanagasabai [A8] and the recovery of 4 pieces of idol, namely M.Os.7 to 10 under the cover of Mahazar Ex.P38, which is generally corroborated by the evidence of Deivakalyanasundaram [P.W.23].

23. Nagalingam [A3] and Kanagasabai [A8] identified Paulraj [A9] who was arrested in Kumbakonam at around 11.00 a.m. on 04.04.1991 and his confession statement was recorded, based on which the van TN-49-Z-2100 which was used in the commission of offence was seized under the cover of Mahazar [Ex.P32] in the presence of independent witnesses Sivagurunathan [P.W.32] and Mohammed Ali [died]. I shall deal with the involvement of Paulraj [A9] while discussing the evidence of the approver.

24. Sivagurunathan [P.W.32] in his evidence before the Court stated that he was working as a driver in Ayyampettai and around 7 or 8 years back around one in the midnight, the CBCID police brought Paulraj [A9] to the village and recovered the vehicle TN-49-Z-2100 under the cover of Mahazar [Ex.P32]. In his cross examination he was asked about the name of the street in where he was standing when the police came, for which he replied that he was standing near Madagadi Bazar which has two streets, Big Bazar street and Small Bazar street, which has a lot of shops. He answered the questions with regard to topography of the area and ultimately it was suggested to him that he was deposing falsehood, which has been denied. He also stated in the cross examination that he knew that the owner of the vehicle is one Abdul Mohammed. Thus the Prosecution has satisfactorily established that the vehicle TN-49-Z-2100 was seized based on the disclosure statement of Paulraj [A9]. The learned defence counsels contended that the van TN 49-Z-2100 was not marked before the trial Court and therefore, the prosecution case fails. The van was produced before the trial Court after recovery and it was returned to the owner of the van by the Court under Section 451 Cr.P.C. The trial in this case was taken up only in the year 2000. The fact remains that the van has been produced before the trial Court immediately after seizure and just because it is not marked during trial, it

will not in any way weaken the prosecution case.

25. On 05.04.1991, Nagalingam [A3] took the police party to Ammanpettai and identified Oswalt [A5] and Alexander @ Aasan [A6] who were allegedly involved in the Anaikudi temple case. A5 and A6 were arrested by the police at around 6.15 p.m. on 05.04.1991 and their confession statements were recorded. The admissible portion of the confession statement of Oswalt is Ex.P39 and the admissible portion of confession statement of Alexander @ Aasan is Ex.P30. Oswalt [A5] took the police party to the spot where he had hidden the idol and when the police party dug the place, they recovered Lord Chandrasekaran's idol in two parts, namely body part [M.O.11] and head part [M.O.12] under the cover of Mahazar [Ex.P41] in the presence of witnesses Ramakrishnan [P.W.26] and Arulanandam [P.W.27]. Alexander @ Aasan [A6] took the police party to his house where he had hidden an idol in the granary of his house. From there the police recovered the idol of Goddess Chandrasekara Amman [M.O.13] and a round disc portion that adorned the crown of the idol [M.O.14] under the cover of Mahazar [Ex.P42] in the presence of independent witnesses Ramakrishnan [P.W.26] and Arulanandam [P.W.27].

26. Ramakrishnan [P.W.26] and Arulanandam [P.W.27] did not support the prosecution case. They were declared hostile. Therefore, we only have the evidence of the Investigating Officer [P.W.36] with regard to the arrest of Oswalt [A5] and Alexander @ Aasan [A6] and recovery of M.Os.11 and 12 under the cover of Mahazar [Ex.P41].

27. During the course of investigation, P.W.36 arrested one Rajasekaran on 25.04.1991, whose name figured in the confession statements of the arrested accused. The admissible portion of the confession statement of Rajasekaran is Ex.P34. Rajasekaran took the police party to the banks of a river bed located in the south of Thirunageswaram village and showed the spot wherein he had hidden an idol. The police party dug the place and recovered Lord Sokkar idol [M.O.18] and Goddess Sivakami idol [M.O.19] under the cover of Mahazar Ex.P31 in the presence of independent witnesses Murthy [Ex.P31] and Kalidas [died].

28. Murthy [P.W.31] who was working as Village Administrative Officer in Thirunageswaram village stated in his evidence that on 26.04.1991 at around 8.30 in the morning when policemen brought one Rajasekaran to the village and asked him to accompany them for recovering certain objects and accordingly,

Rajasekaran [approver] took them to banks of a river bed and showed a spot from where the idol of Lord Sokkar and a Goddess idol was recovered. He also stated that the hands and legs of Lord Sokkar idol were broken and the idols were recovered under the cover of Mahazar [Ex.P31]. In his cross examination he was asked whether he has a Movement Register and whether he intimated his superiors before accompanying the police for effecting the recoveries, he replied that he did not maintain a Movement Register and that he did not remember whether he has intimated his superiors. He was also asked as to where the seizure mahazar was written, for which he replied that it was written in the jeep. He stated in the cross examination that he does not remember the actual height and the weight of the two idols.

29. With regard to this seizure, apart from the evidence of the Investigating Officer and Murthy [P.W.31], we have the evidence of Rajasekaran himself before us. Rajasekaran [approver] in his evidence before the trial Court has spoken vividly about this recovery and he has not denied the same. I intend discussing his evidence at the latter part of this judgment and suffice to state that the prosecution has established this fact beyond any pale of doubt.

30. The defence strenuously contended that the prosecution had failed to prove the confession statements and the consequent recoveries set out above especially in seizures where the independent witnesses had turned hostile. The Supreme Court has been consistently holding that, just because mahazar witnesses turned hostile, it cannot be said that the Court should reject the evidence of the Investigating Officer and hold that the prosecution had failed to prove the factum of seizure.

a) *Akmal Ahmad vs. State of Delhi (1999 SCC (Crl) 425)*.

b) *P. P. Fathima vs. State of Kerala (2003 (8) Supreme 62)*

c) *G. L. Gupta vs. Assistant Collector, Customs (AIR 1971 SC 28)*

d) *Sahib Singh vs. State of Punjab [AIR 1997 SC 2417]*

In *Sahib Singh's* case (para 6) it was held as follows:

Before conducting a search the concerned police officer is required to call upon some independent and respectable people of the locality to witness the search. In a given case it may so happen that no such person is available or, even if available, is not willing to be a party to such search. It may also be that after joining the search, such persons later on turn hostile. In any of these eventualities the evidence of the police officers who

conducted the search cannot be disbelieved solely on the ground that no independent and respectable witness was examined to prove the search but if it is found - as in the present case - that no attempt was even made by the concerned police officer to join with him some persons of the locality who were admittedly available to witness the recovery, it would affect the weight of evidence of the Police Officer, though not its admissibility."

31. Tested on the touchstone of the aforesaid judgments, I am convinced that the prosecution has satisfactorily established the arrest and recoveries set out above beyond reasonable doubt.

III WHETHER THE RECOVERED IDOLS BELONG TO ARULMIGHU VISWANATHASAMY TEMPLE:

32. In order to prove this fact the prosecution relied upon the testimony of Saminathan [P.W.2] the Trustee of the temple, Ramakrishnan [P.W.5] and Ramanatha Gurukkal [P.W.6], who have all identified the idols as belonging to Arulmighu Viswanathasamy temple.

33. Coming to the Property Registers [Exs.P12 and 13], about which I have discussed in detail in para 11 above, I hold that the same has been properly maintained. Notwithstanding all these, the photo album [Ex.P20] was proved through the evidence of Gangadaran [P.W.4]. Gangadaran [P.W.4] in his evidence stated that he is working as Inspector in the HR & CE Department and during 1983 he was working in Kumbakonam North Zone and at that time he was entrusted with the task of taking photographs of the idols in Arulmighu Viswanathasamy temple in Anaikudi. Accordingly, he had taken 47 photographs of the idols in the temple and prepared an album for the same and had submitted the same to the Assistant Commissioner, HR & CE Department, Kumbakonam circle. This photo album was marked through him as M.O.No.20. In his cross examination he was asked whether he has any written authority to take photographs, for which he has stated that he was given authority in writing. He further stated that he did not handover the photo album to the police. He also stated that the album does not have the signature and seal of the Assistant Commissioner of HR & CE. He admitted that except in the wrapper of the photo album, there is nothing to show that the photo album pertains to the idol in Arulmighu Viswanathasamy temple. Based on this admission, the defence strenuously contended before me that this album does not relate to Arulmighu

Viswanathasamy temple.

34. Therefore, I carefully perused the photo album and I found on the wrapper it is clearly written that it pertains to Arulmighu Viswanathasamy temple. Beneath each photograph the description of the idol has been given. I fail to understand as to what more particulars the defence requires to be written on the album? Absence of seal and signature of the Assistant Commissioner of HR & CE in the photo album, cannot lead to the conclusion that the entire album was a concocted piece of evidence.

35. In order to satisfy myself, I directed the trial Court to cause production of all the seized idols together with the mutilated pieces [M.O.Nos.1 to 19] before me and accordingly, they were produced on 15.04.2014 I inspected the same in the open Court in the presence of the learned Public Prosecutor and the defence counsel and correlated the idols with the photographs in the album.

M.O.Nos.1 and 2	-	Photo No.5
M.O.Nos.3,4 & 5	-	Photo No.6
M.O.No.6	-	Photo No.7

M.O.No.7	-	Photo No.2
M.O.Nos.8,9 & 10	-	Photo No.3
M.O.Nos.11 and 12	-	Photo No.2
M.O.Nos.13 and 14	-	Photo No.3
M.O.No.18	-	Photo Nos.29 and 30
M.O.No.19	-	Photo No.34

36. It is not the defence case either in the cross examination of witnesses or in their 313 Cr.P.C. statements, that the idols belong to them or were manufactured by the police for foisting a false case against them. In the absence of any such defence by the accused and in the teeth of the positive evidence, namely the identification of the idols as belonging to Arulmighu Viswanathasamy temple by P.W.2, P.W.5 and P.W.6, I have no hesitation in my mind to hold that the idols M.O.Nos.1 to 19 belong to Arulmighu Viswanathasamy temple.

**IV - WHETHER THE ACCUSED IN THIS CASE WERE THE
ACTUAL THIEVES OR WERE THEY MERELY RETAINERS OF
STOLEN PROPERTIES:**

37. In order to prove this fact, the prosecution relied upon the evidence

of Rajasekaran [P.W.1- approver]. The approver in his evidence before the Court has stated that he came into contact with Maria Jacob [A1] through one R.Krishnamurthy; in November 1990 Maria Jacob [A1] gave him the idea of making lakhs of rupees if they steal temple idols and sell them through one K.S.Mani and Thirunavukkarasu of Kumbakonam; A1 asked the approver if he could enlist the help of others known to him, for which the approver introduced Nadodi [A2] and Nagalingam [A3]. Nagalingam [A3] appears to have asked A1 if it is not a sin to steal idols from temples for which A1 seems to have said "rich people in the country have earned only by doing wrong things, so it is not wrong to steal idols from temples"; A1 and approver took the horoscope of A1's son to an astrologer/Ganesan [P.W.14] who is the brother of Kanagasabai [A8]; there A1 has asked the astrologer whether would it be profitable for him to undertake business in artistic objects and statues, for which the astrologer [P.W. 14] had told him that he cannot say that after seeing the horoscope of A1's son and that he needed A1's horoscope for that; during this meeting with the astrologer, Jacob [A1] and approver enlisted Kanagasabai [A8] into the conspiracy; Jacob [A1] brought Selvaraj [A4] to the house of the approver where they discussed their further plans; Selvaraj [A4] gave details about idols in various temples like Killukudi, Karaikanda Sathanur, Vepathur and other places;

Jacob [A1], Selvaraj A4 and the approver went to the temple at Killukudi and conducted a reconnaissance; they found that people were sleeping in the temple even in the night hours and so they went to Karaikanda Sathanur temple and Sivan temple at Vepathur; there also the situation was not congenial; A1 then said about Viswanathsamy temple in Anaikudi and he took Nagalingam [A3] , Selvaraj [A4] and the approver to that temple; except A1, the other three went inside the temple and noted the topography and the place where the uutsava idols were kept; they returned and informed A1 about this; A1 also brought Oswalt [A5], Alexander @ Aasan [A6] and his brother Martin [A7] to join the enterprise.

38. Now coming to the way the operation was carried out it may be appropriate to extract the evidence of the approver verbatim: [Translated from Tamil]

"We reached the compound wall through the tree located at the corner of the wall at the southern side of the temple through the coconut plantation located at the northern side of the mud road, which is at the southern side of the temple. We went down through the laid wooden blocks of the front tower through the top of the compound wall. Selvaraj [A4], Nadodi @ Anbazhagan [A2], Asan [A6],

Oswalt [A5] and myself [Approver] entered into the temple. There were bars in the twin door in the temple. Asan and myself cut off the lock which was twined by the chain. We cut it with the Axe-saw blade. There was a wooden twin door adjacent to the door made up of iron rods and we cut off the lock which was in the wooden door, opened the door and went inside the temple. There, in the front sanctum, a tube light was switched on. At the northern side of the sanctum, the wooden twin door with rods was locked with a chain around it. Asan, Selvaraj and myself cut off the lock of Natarajar Sannidhi. Selvaraj kept the three locks which were cut, in the gunny bag. Five of us lifted the Natarajar statue which was kept in the Natarajar Sannadhi. We were unable to lift it. We took the pole lying there and joined it with the thiruvatchi and the five of us lifted it and kept it at the northern side of the flag post located outside the sanctum sanctorum. Then we took the idols of Sokkar, Murugan, Valli, Deivanai, Chandrasekarar, its Amman (small statues) and kept them at the corner of the compound wall. We took 9 small statues totally. Then, four of us, except Selvaraj climbed on the compound wall. Selvaraj, standing down, fastened each of the statues with a rope and lifted them up. We received and kept them up. Then, as stated by Jacob,[A1], Selvaraj sprinkled Chilli powder at the places, where the idols were taken, the place

where the locks were cut off, and on the way through which they returned, and came up with the instruments. Then Asan and Oswald got down through the tree. Three of us, fastened the statues with a rope and passed it down. Asan and Oswald received and kept them down. Then, we also got down and kept all the 9 statues at the side of the mud road on the northern side of the temple and sent Asan to bring the van. In a short while, Asan [A6], Martin [A7], Jacob [A1], Kanagasabai [A8] and Nagalingam [A3] came in the van. All of them got down, kept the statues in the van, returned through the same way through Srinivasanallur to Nattaru Line Shore and got down. After hiding them in the pit dug for the purpose of laying a canal in my plantain grove, located on the other side of Nattaru, myself, Jacob and Nagalingam, three of us, came to the house. We sent the remaining persons through the van. It was around 4.30. Jacob stayed in my house and went to his house in the morning. Two days later, Jacob came to my house. Jacob said that, the Police of Thirupanandhal are seriously making search regarding the theft of statues in Anakkudi temple, and told not to talk about this matter for 2 to 3 months. Around 2 months later, Kanagasabai came to my house. He said that he wanted to test the statue to know whether there is gold in it. I told Jacob the information stated by Kanagasabai. Jacob asked to sever the hand portion of the

statues to test it. Then, he said that we would go to Kuttralam, the next day. I took Kanagasabai to my plantain grove where the statues were hidden and took the statues by digging and severed the right hand of Valli, right hand of Murugan, left hand of Chandrasekaran, the hand holding the deer, its Amman's hand, Sokkar's right hand along with shoulder, right leg and left calf and gave it to Kanagasabai. Kanagasabai took them and went to Kuttralam. Only after hiding the remaining statues, we sent him. The next day, Jacob and I went to the house of Kanagasabai. Kanagasabai tested the statues which were brought, by pouring acid over it. It was fuming. Since it was fuming, he said that it was not gold. Jacob severed a small portion of it and gave it to K.S.Mani and Thirunavukkarasu, who were at the back side of Jaganatha Pillaiyar temple at Kumbakonam, for testing. At that time, Thirunavukkarasu and Mani asked as to where they got these statues from. He said that he will tell them later regarding that and asked to test it. They tested and said that it is not gold. Then Kanagasabai came home. He said that the hand portion was tested and nothing was found."

39. It is clear from the evidence of the approver that, initially they thought that the idols will contain gold and that is why they had unnecessarily

cut certain parts of the idols to test for the presence of the gold. Unfortunately, the idols were made of Panchaloga and they were disappointed that it did not contain gold. This explains as to why the idols marked in the Court were not in the full form but mutilated.

40. In the cross-examination of P.W.1 he was mainly confronted with certain omissions in his police statement in order to show that he was not speaking the truth. It must be remembered that P.W.1 was arrested by the police on 25.04.1991 and he was examined in chief before the trial Court on 02.10.1999 which is almost eight years later. In his chief examination he has added a few facts which were not found in his police statement. For instance Jacob (A1) seems to have advised the accused to wear only underpant while getting into the temple. This was not spoken to by P.W.1 to the police. Similarly in his evidence before the Court P.W.1 has stated that A3 had asked A1 if it is not a sin to steal temple idols. This does not find place in the police statement. In my opinion these are not contradictions but are mere omissions. An omission can sometimes become a contradiction also but in this case all these omissions do not in any way contradict the evidence of P.W.1 with regard to the conspiracy, actual operation and how they dealt with idols thereafter. Hence the

denfence were not able to demolish the evidence of P.W.1.

41. The evidence of an approver requires corroboration and therefore, this Court looked out for corroborative materials. In this regard, it is not necessary that the approver's evidence should be corroborated minutely on every aspect. What was required is general corroboration. The Supreme Court in ***Narayan Chetanram Vs. State of Maharashtra (AIR 2000 SC 3352)*** has held that the Court must look at the broad spectrum of the approver's version and see whether it is generally corroborated. In ***K. Hasim vs. State of Tamil Nadu (2004 AIR SC W 6372)*** the Supreme Court has very clearly held that corroboration is a rule of prudence and it is not necessary that every fact stated by the approver in his evidence needs to be corroborated. What has to be seen is whether the story of the accomplice is true and is reasonably safe to be acted upon.

42. The 146 confession statement (Ex.P45) of the approver is a previous statement which substantially corroborates his evidence in the Court. That is why in the cross examination of P.W.1 the defence did not put any questions with reference to Ex.P45 in order to contradict the approver.

43. The approver in his evidence has stated, which idol was given to whom. The recovery of the idols from each of the accused by the police tallies with the evidence of the approver on two aspect.

44. The learned counsels for the defence strenuously attacked the judicial confession that was given by the approver before the Magistrate. They contended that the Magistrate did not ascertain from the approver whether he was giving the confession voluntarily. I am unable to agree with this submission because, the confession of the approver that is given prior to the tender of pardon is not a substantive piece of evidence. A judicial confession is a substantive piece of evidence only against the maker if he has been arrayed as an accused. When once tender of pardon is given to a person, he becomes a witness for the prosecution and only his evidence in the open Court during trial is substantive evidence and not the confession. The judicial confession becomes a previous statement which can be used to corroborate or contradict the witness whilst he is in the witness box. In this case, the confession of P.W.1 was recorded by the Magistrate on 07.05.1991. He was given tender of pardon by the competent Court subsequently on 05.12.1991. He was examined as a

witness in the trial court nearly after eight years on 02.10.1999. He did not turn hostile to the prosecution case and supported the prosecution case by identifying the accused, identifying the material objects and describing the role played by each one of the conspirators vividly.

45. It has been established by the prosecution that the Nataraja statue was lying outside the sanctum sanctorum. The approver in his evidence has explained that they were not able to carry the Nataraja statue and so they were not able to lift it across the compound wall. Hence they left it inside the temple campus. This is one piece of corroboration. Ramakrishnan [P.W.5] and the temple Priest [P.W.6] in their evidence have stated that they found chilly powder sprinkled all over the place, which piece of evidence corroborates the evidence of the approver that chilly powder was used to distract the sniffer dogs.

46. The defence counsels contended that P.W.1 has stated that they had stolen 9 idols, but whereas, the compliant has been given only in respect of 7 idols by the temple authorities and therefore, the evidence of the approver deserves to be rejected. It is true that the approver [P.W.1] has stated in his evidence before the Court in more than two places that, 9 idols were stolen by

them and whereas only 7 idols were found to be missing by the temple authorities. Just because the prosecution was not able to explain as to what the three extra idols were, this Court cannot reject the entire prosecution case when there is sufficient materials with regard to the theft and recovery of seven idols from various accused.

47. The defence very seriously attacked the advance search intimation [Ex.P35] that was given by the police to the Court. The defence showed to this Court that there is a correction in the date in Ex.P35, namely the date 03.04.1991 has some corrections and beneath the signature of the Investigating Officer in Ex.P35, he has given the date as 03.03.1991. Similarly they also pointed out the corrections in the date in the police confession of A2. This Court carefully scrutinised those materials and found that Ex.P35 has reached the Magistrate at 1.30 p.m. on 03.04.1991. This Court will construe the date endorsed by the Magistrate on Ex.P35 as the relevant date and not the corrections made by the Investigating Officer in the body of the document. When the Investigating Officer was questioned by the defence counsel in the cross examination about these corrections, he candidly admitted that he had mistakenly written the date and therefore, he had to correct it. Therefore, this

Court cannot reject his explanation and attribute motives to the investigation on such clerical errors, especially in the light of the fact that the advance intimation has reached the hands of the Magistrate on 03.04.1991 at 1.30 p.m.

48. The learned counsels further argued that the Investigating Officer in his cross examination has admitted that he went to Viswanathasamy temple in Anaikudi on 05.04.1991 after arresting A3 on 03.04.1991, but he took over the case from Thirupanandal Police Station only on 10.04.1991 and therefore, there is remiss in the investigation. This cannot be a serious flaw because, an Inspector of Police of one wing cannot *suo motu* take over the investigation of a case that is registered by another police station without getting appropriate orders from the superior officers. Therefore, I find nothing wrong in the Investigating Office taking up the Thirupanandal Police Station investigation on 10.04.1991 even though he had visited the temple on 05.04.1991.

49. The defence examined one Krishnamurthy in order to impeach the evidence of the approver [P.W.1]. The approver in his evidence has stated that he was introduced to Jacob [A1] by one R.K.Krishnamurthy. In order to falsify this, the defence examined one R.K.Krishnamurthy as D.W.1 who stated in the

chief examination itself that he knows both P.W.1 and Jacob [A1]. He merely denied that he introduced A1 to the approver. In the cross examination D.W.1 stated that, he is a very close friend of A1 and after realising the mistake, he corrected himself and stated that A1 is casually known to him. On a complete reading of his evidence, it does not inspire the confidence of this Court.

50. The learned counsels for A5 and A6 contended that since P.W.26 and P.W.27 turned hostile to the prosecution case, the recovery from A5 and A6 has not been satisfactorily proved. The supreme Court has very clearly held that, even if the independent witness to a search and seizure turn hostile, the Court can rely upon the evidence of the Investigating Officer if it inspires its confidence. In this case, the approver has clearly narrated the role of A5 and A6 and further the evidence of the Investigating Officer with regard to seizure of idols from them does inspire the confidence of this Court.

51. As regards Martin [A7], the learned counsel contended that there was no recovery effected from him. Martin [A7] absconded and he surrendered before the Judicial Magistrate, Myladuthurai only on 06.05.1991. His role has been clearly spoken to by the approver and therefore, the argument that there

was no recovery from him will have no bearing.

52. On behalf of A3 it was contended that he did not enter the temple and therefore, he deserves to be acquitted. The fact remains that all the accused entered into a criminal conspiracy, pursuant to which some of them entered the temple and the others waited outside to receive the stolen goods from those who entered the temple. The involvement of A3 in the conspiracy as well as recovery from him has also been established beyond a pale of doubt. "They also serve who stand and wait". [see *Barendra Kumar Ghosh vs. The King Emperor (AIR 1925 Privy Council 1)*]

53. The learned counsel relied upon the judgment of the Supreme Court in the case of **State of Rajasthan vs. Talevar and another [(2011) 11 SCC 666]**, wherein, in para 19, the Supreme Court has held that no adverse inference can be drawn on the basis of recoveries made by the police on the disclosure statement of the accused, in order to connect them with the commission of the crime. In the same paragraph, the Hon'ble Supreme Court has held that:

"19. More so, recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a fact situation, we reach the inescapable conclusion that no presumption can be drawn against the said two Respondent accused under Section 114 Illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of the crime."

54. In this case, the recoveries are not some ordinary articles of common usage, but are idols which were in the possession of the accused. The recovery of the idols should be seen in the background of the evidence of the approver. Therefore, on the facts of this case, the judgment relied upon by the defence will not be of much assistance to the accused.

55. The learned defence counsel submitted that the trial Court had rejected the confession statement given by the approver before the Magistrate and also had found the evidence of the approver to be reliable. This Court examined the trial Court judgment and found that the trial Judge has not given satisfactory reasons for rejecting the evidence of the approver. As stated by me

earlier, even if the confession statement is excluded, the evidence of the approver before the Court which is substantive evidence in this case, has not been impeached by the defence.

56. It was contended on behalf of A5, A6 and A7 that they were not physically present with A1 and the approver during the conspiracy. It is not necessary for all the accused to be physically present for hatching the conspiracy, because conspiracy is an inchoate offence, where the conspirators act with *consensus ad idem* as could be seen in this case. Therefore, their physical presence with A1 and the approver at the time of deciding to steal temple idols cannot be a reason to hold that they are not members of the conspiracy. The fact that A5 and A6 scaled the wall and entered the temple has been graphically explained by the approver in his evidence.

57. Coming to the role of Paulraj [A9], the approver in his evidence has stated that at the instance of A1, he went out looking out for a vehicle and he met one Basha [not examined] and asked him to provide a van. Basha took him to Paulraj [A9] and introduced him to the approver. The approver engaged Paulraj [A9] to transport some goods from the house of his friend Maria Jacob

[A1]. Paulraj [A9] accepted the assignment and went along with the approver. As the event proceeded, Paulraj [A9] realised that the accused were into some mischief, by which time it was too late and he was forced into driving the van by the accused. Therefore, I hold that Paulraj [A9] was not a member of the conspiracy and he cannot be convicted.

58. In the result, the appeal is partly allowed. The acquittal of Jacob [A1], Nagalingam [A3], Selvaraj [A4], Oswalt [A5], Alexander [A6], Martin [A7] and Kanagasabai [A8] is set aside. The acquittal of Paulraj (A9) is confirmed.

59. After pronouncing the conviction in the open Court, all the accused, who were present in the Court were questioned about the sentence and they stated as follows:-

(i) A1-Jacob stated that he is a cancer patient, aged about 75 years and hence, pleaded for leniency;

(ii) A3-Nagalingam stated that this is the only case against him and that his wife is very sick and hence, prayed for leniency;

(iii) A4-Selvaraj stated that he has poor eye sight and

hence, prayed for leniency;

(iv) A5-Oswalt stated that his brother had died and he has to take care of his deceased brother's two girl children and further stated that his sister's husband had also died and he has to take care of her family also, and hence, prayed for leniency;

(v) A6-Alexandar stated that he is a widower and has to take care of his two girl children, who are studying in XI Standard and IX Standard and hence, prayed for leniency;

(vi) A7-Martin stated that he is a widower and got one male child, who is aged about 10 years and he has to take care of him and hence, prayed for leniency; and

(vi) A8-Kanagasabai stated that his wife is a heart patient and hence, pleaded for leniency.

60. Learned counsel for the accused submitted that the trial Court had acquitted them in the year 2002 and since then they were all available without absconding and they also appeared before this Court to submit themselves to the process of law. In view of their subsequent conduct, the learned counsels

pleaded for lenient sentence. The learned counsel for the accused further submitted that for the last 10 years they have been living with the damocles sword hanging over their heads under the fear of conviction and this circumstance may also be taken into consideration by this Court while deciding the quantum of sentence.

61. In the result,

(i) A1, A3, A4, A5, A6, A7 and A8 are convicted for the offence under Section 120-B of IPC for conspiring to commit the theft of Idols from Sri Viswanathaswamy Temple, Anaikudi, and sentenced to undergo two years rigorous imprisonment.

(ii) A4, A5 and A6 are convicted for the offence under Section 457 IPC and sentenced to undergo two years rigorous imprisonment.

(iii) A1, A3, A7 and A8 are convicted for the offence punishable under Section 457 r/w. Section 109 of IPC and sentenced to undergo two years rigorous imprisonment.

(iv) A4, A5 and A6 are convicted for the offence punishable under Section 380 IPC and sentenced to undergo three years rigorous imprisonment and liable to pay a fine of Rs.5,000/-, in default, to undergo three months rigorous imprisonment.

(v) A1, A3, A7 and A8 are convicted for the offence punishable under Section 380 r/w. Section 109 of IPC and sentenced to undergo three years rigorous imprisonment and liable to pay a fine of Rs.5,000/-, in default, to undergo three months rigorous imprisonment.

All the aforesaid sentences shall run concurrently. The periods already undergone by them will be set off under Section 428 of Cr.P.C. The period of judicial custody they have undergone pursuant to the orders of this Court in this Appeal under Section 390 of Cr.P.C., should also be set off.

The Registry is directed to issue free copy of the Judgment to each of the accused.

26.06.2014

Index : Yes
Internet : Yes
gms/srm

P.N.PRAKASH, J.

gms/srm

To

1.The Inspector of Police,
C.B.C.I.D., Idol Theft Prevention Section,
Trichy.

2.The Additional District Judge-cum-
Chief Judicial Magistrate,
Kumbakonam.

Judgment in
CrI.A.(Md)No.1024 of 2003

26..06..2014