IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF JULY, 2022

BEFORE

THE HON'BLE Dr. JUSTICE H.B. PRABHAKARA SASTRY

CRIMINAL REVISION PETITION No.155 OF 2012

BETWEEN:

Parveez Pasha

..Petitioner

(By Sri. Prabhugoud B. Tumbigi, *Amicus Curiae*)

AND:

The State by Tilak Park
Police Tumkur through
State Public Prosecutor
High Court of Karnataka
Bangalore.

.. Respondent

(By Sri. K. Nageshwarappa, High Court Govt. Pleader)

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This Criminal Revision Petition is filed under Section 397 and 401 of the Code of Criminal Procedure, 1973, with the following prayer:

" 1) That the lower court's records of C.C.No.2617/2006, from the 3rd Additional Civil Judge (Jr. Div.) and JMFC Court Tumkur, as well as records of Cri.Appeal No.51/2008 from the Fast Track Court-III Tumkur may please be called for;

2) That the judgment and Order dated 16-09-2011 of confirmation of conviction of petitioner passed in Criminal Appeal No.51/2008 of Fast Track Court-III Tumkur may please be set aside to meet the ends of justice and equity.

3) that any other relief for which the petitioner is entitled may also be granted."

This Criminal Revision Petition coming on for Final Hearing, through Physical Hearing/Video Conferencing Hearing this day, the Court made the following:

O R D E R

The present petitioner was accused in C.C.No.2617/2006, in the Court of the III Additional Civil Judge (Jr.Dn.) and Judicial Magistrate First Class, at Tumakuru, (hereinafter for brevity referred to as "the Trial Court"), who, by the judgment of conviction and order on sentence dated 04-03-2008 of the Trial Court, was convicted for the offence punishable under Section 380 of the Indian Penal Code, 1860 (hereinafter for brevity referred to as "the IPC") and was sentenced accordingly.

Aggrieved by the same, the accused preferred an appeal in Criminal Appeal No.51/2008, in the Court of the Fast Track Court-III at Tumkur, (hereinafter for brevity referred to as

the "the Sessions Judge's Court"), which, after hearing both side, dismissed the appeal, confirming the impugned judgment of conviction and order on sentence passed by the Trial Court in C.C.No.2617/2006. It is challenging the judgments of conviction and order on sentence passed by both the Trial Court as well the learned Sessions Judge's Court, the accused/petitioner herein has preferred the present revision petition.

2. The summary of the case of the prosecution in the Trial Court was that, on the date 06-06-2006, when PW-1 (CW-1) had kept his golden chain in his house at Sadashivanagara, within the limits of the complainant Police Station and had gone to take bath, he noticed that the said chain was found missing when he finished his bath and saw to it. He searched for the said chain in his house and thereafter, kept quiet for some time without proceeding further in the matter. After some time, through Newspaper, he came to

know that the complainant Police had recovered some quantity of stolen articles including a golden chain, as such, he went to the Police Station on the date 17-08-2006. On finding his stolen chain in the Police Station and identifying the same, he lodged a complaint with the Police. According to the him (complainant), after registering the complaint, the Police visited the spot and drew a scene of offence panchanama. After completing the investigation, the Police filed charge sheet against the accused for the offence punishable under Section 380 of the IPC.

3. The accused appeared in the Trial Court and contested the matter through his counsel. The accused pleaded not guilty. As such, in order to prove the alleged guilt against the accused, the prosecution got examined in all five (5) witnesses from PW-1 to PW-5, got marked documents from Exs.P-1 to P-4(b) and produced onr Material Object at

MO-1. However, neither any witness was examined nor any documents were got marked on behalf of the accused.

4. The respondent - State is being represented by the learned High Court Government Pleader.

5. The Trial Court and the learned Sessions Judge's Court's records were called for and the same are placed before this Court.

6. In view of the fact that the learned counsel for the revision petitioner (accused) failed to appear before this Court on several dates of hearing, this Court by its reasoned order dated 16-06-2022, appointed learned counsel - Sri. Prabhugoud B. Tumbigi, as *Amicus Curiae* for the petitioner/accused, to represent him in this case.

7. Learned *Amicus Curiae* for the accused/revision petitioner and learned High Court Government Pleader for the respondent - State are physically appearing in the Court.

8. Heard the learned counsels from both side. Perused the materials placed before this Court including the impugned judgments passed by both the Courts and also the Trial Court and Sessions Judge's Court's records.

9. For the sake of convenience, the parties would be henceforth referred to as per their rankings before the Trial Court.

10. After hearing the learned counsels for the parties, the only point that arise for my consideration in this revision petition is:

> *Whether the concurrent finding recorded by the Trial Court as well as the Sessions Judge's Court that, the accused has committed the alleged offence under Section 380 of the Indian Penal Code, 1860, warrants any interference at the hands of this Court?*

11. Learned *Amicus Curiae* for the petitioner (accused) in his brief argument submitted that, there is an inordinate delay in lodging the complaint which has not been

satisfactorily explained by the complainant. With more emphasis, he submitted that the Investigating Officer who is said to have conducted the investigation in this matter has not been examined by the prosecution which is fatal to the case of the prosecution. He also submitted that, due to non-examination of the Investigating Officer, the alleged recovery of the alleged stolen articles at the alleged instance of the accused also has not been proved. However, both the Trial Court and the Sessions Judge's Court have erroneously held the accused guilty of the alleged offence punishable under Section 380 of the IPC.

12. Learned High Court Government Pleader for the respondent-State in his argument submitted that, the delay in lodging the complaint has been satisfactorily explained by the complainant in his complaint itself. He further submitted that the non-examination of the Investigating Officer is not fatal to the case of the prosecution. He also submitted that, since the

recovery at the instance of the accused has been proved by the other material witnesses examined by the prosecution, the non-examination of the Investigating Officer would not, in any manner, weaken the case of the prosecution, as such, both the Trial Court and the Sessions Judge's Court since have appreciated the evidence placed before them in their proper perspective and rightly convicted the accused for the alleged guilt, interference in the impugned judgments is not warranted.

13. Among the five witnesses examined by the prosecution, PW-1 is the complainant, who, in his examination-in-chief has reiterated the contentions taken up by him in his complaint, which complaint he has identified and got marked as Ex.P-1. He has stated that though his chain was found lost on the date 06-06-2006, however, he kept quiet. Subsequently, based upon a Newspaper report about the recovery of some golden ornaments by the Police, he went

to the complainant Police Station, where, after seeing his lost chain and identifying the same, lodged the complaint. He has also stated that the Police had drawn a scene of offence panchanama on the spot shown by him as per Ex.P-2. Further, the witness has stated that some days afterwards, the Police had brought the accused to his house, who stated before the Police that, he had stolen the golden chain from the said house, in which regard also, a panchanama was drawn, which this witness has identified at Ex.P-3.

Thus, according to the evidence of PW-1, before he could lodge his complaint on 17-08-2006, there was already the alleged recovery of the golden chain, which, according to the prosecution, was at the instance of the accused. Therefore, it could not be the case of the prosecution that after the complaint dated 17-08-2006, they apprehended the accused and recovered the stolen golden chain at MO-1 at the instance of the accused under a panchanama. However, according to the learned High Court Government Pleader for

the respondent, the seizure of the articles was not only at the instance of the accused, but also it was under a seizure panchanama as per Ex.P-4.

With great emphasis, learned High Court Government Pleader for the respondent State submitted that, the recovery of the stolen article i.e. MO-1 was made on 21-08-2006, at the instance of the accused, to which act, PW-2 was present as a pancha and has witnessed the incident by subscribing his signature as a witness to the seizure panchanama at Ex.P-4.

14. A reading of the evidence of PW-2 (CW-2) - Yateesh would go to show that, he has stated that, about one and a half years prior to the date of his evidence i.e. on 24-01-2008, the Police had summoned him to the Police Station and in the Police Station, the accused No.3 was present. In the very next breath, the said witness has stated that since his chain was also stolen, he had been to the Police Station to lodge a complaint. Thus, in his very opening statement itself, he has

made two contradictory statements, in as much as, initially stating that the Police had summoned him to the Police Station and subsequently stating that he himself had been to the Police Station to lodge a complaint regarding his missing golden chain.

He has further stated that at that time, the accused No.3, who, according to him was the accused present in the Court, was also present. Whether the accused in the instant case was the accused No.3, or was he a sole accused is not clear. Thus, this witness calling the present accused as the third accused is also not the case of the prosecution as the case of the prosecution is that the present petitioner was the sole accused in the alleged commission of the crime in the instant case.

The said witness, i.e. PW-2 has further stated that, after he seeing the accused in the Police Station, the accused stated that it was him who had stolen the chain of PW-2 and also revealed about he committing theft of several other articles at different places and that he would show those

articles if he is taken to his house at Poorus Colony. Accordingly, he led them to his house at Poorus Colony.

By stating as above, PW-2 has given more emphasis about the accused producing the alleged stolen chain of this witness, rather than the alleged stolen chain of PW-1 the complainant.

PW-2 has further stated that the accused led them to his house and from inside of his house, he brought and produced Tape Recorder, batteries and golden chains. The Police drew a seizure panchanama in his presence and the witness has identified the said panchanama and his signature therein at Exs.P-4 and P-4(a) respectively.

It is relying upon the said evidence of PW-2 and alleged seizure panchanama at Ex.P-4, learned High Court Government Pleader vehemently submitted that the recovery at the instance of the accused has been proved beyond reasonable doubt and the recovery has been established by

the oral evidence of PW-2 coupled with the documentary evidence at Ex.P-4.

15. A careful perusal of the documentary evidence at Ex.P-4 would go to show that the said Mahazar is shown to have been drawn on the date 21-08-2006. Even according to PW-1 the complainant, by the time he went to the Police Station on the date 17-08-2006, his alleged stolen article was already there in the Police Station, as such, it is after identifying his lost chain in the Police Station, he proceeded to lodge a complaint. That means, at least four days prior to the alleged seizure panchanama at Ex.P-4, the alleged stolen article of the complainant which is at MO-1 was already there before the Police in the Police station. Therefore, it cannot be deduced that the stolen article at MO-1, as identified by PW-1 was seized under a panchanama at Ex.P-4.

In addition to the above, a careful reading of the document at Ex.P-4 also would go to show that, nowhere in

the said panchanama, it is mentioned that the golden chain said to have been stolen from the house of PW-1 was the one among other items said to have been produced by the accused under the said panchanama at Ex.P-4.

On the other hand, a combined reading of the evidence of PW-2 with the documentary evidence at Ex.P-4 would go to show that, PW-2 was intended to say and has stated that, since his chain aiso was stolen and accused was alleged to have revealed in the Police Station before him that he would produce the stolen articles and the accused led them to his house and produced certain articles which appears to have included the alleged stolen chain of PW-2 but not of PW-1, which is the subject matter of the present case. Therefore, Ex.P-4, is, in no way, connected to the alleged seizure panchanama or recovery said to have been made by the Police in the instant case.

This is further more supported by the evidence of none else than PW-2 himself, who, in his very same evidence, has

further stated that, the accused produced the chain at MO-1 in the Police Station itself. Stating so, PW-2 has identified the chain at MO-1 in the Court. That categorical statement made by none else than PW-2 who is said to be the pancha to Ex.P-4 would further make it clear that, the alleged seizure shown to have been made in Ex.P-2 was with respect to some other articles, but not with MO-1 and that if at all MO-1 was secured/traced by the Police, that was not in the Police Station, but anywhere outside. Therefore, the argument of the learned High Court Government Pleader that the evidence of PW-2 corroborated by the documentary evidence at Ex.P-4 would establish the recovery made at the instance of the accused, is not acceptable.

16. The above finding further gets corroboration in the evidence of PW-3 and PW-5. According to PW-3, he is one more pancha to the alleged seizure panchanama at Ex.P-4. The said witness has stated that, the accused led them to his

house at Poorus Colony and from his house produced golden chain, Tape Recorder and batteries which the Police seized by drawing a seizure panchanama as per Ex.P-4. Except stating this, the witness has not stated that the said golden chain alleged to have been produced by the accused in his house was the very same golden chain which was at MO-1. Therefore, the golden chain said to have been produced by the accused from his house and said to have been seized under Ex.P-4 cannot be the chain at MO-1.

Admittedly, PW-5 is a Police Constable working in the compiainant Police Station. He has stated that on the date 21-08-2006, which is admittedly, four days after the registration of the complaint in the instant case, the Police Inspector accompanied by this witness and panchas, based on suspicion, apprehended the accused who was moving near

Caltex Circle, B.H. Road. After apprehending him, he produced him before the Police Sub-Inspector in the Police Station. There, in the Police Station, at the enquiry of the Police Inspector, the accused produced a chain, which was in his possession, in front of the Police Inspector and then he led them to his house and from the house produced five batteries, six Tape Recorders and two golden chains, which the Police Inspector seized by drawing a seizure panchanama as per Ex.P-4. Thus, according to PW-5, the first golden chain said to have been recovered at the instance of the accused was not at his house, but in the Police Station. The said recovery was not on 17-08-2006 i.e. when the complainant went to the Police Station and identified his lost chain in the Station, but it was four days thereafter, that was on 21-08-2006, as such, the chain alleged to have been produced by the accused in the Police Station cannot be the one at MO-1. Further, it is also not the evidence of PW-5 the Police Constable that, the remaining two chains said to have been produced by the

accused from his house also included the chain at MO-1. Therefore, the alleged production of the articles from the house of the accused which were said to have been seized under Ex.P-4 cannot include the chain at MO-1. For this reason also, the alleged recovery of the chain at MO-1, which according to the learned High Court Government Pleader was under a panchanama at Ex.P-4, has not stood proved.

17. It is in the above circumstance, it was very much necessary for the prosecution to examine the Investigating Officer who is said to have recorded the voluntary statement of the accused and is said to have seized, if any, of golden chains, more particularly, MO-1, at the instance or from the possession of the accused. Therefore, though it cannot be held that, in ail cases, necessarily the Investigating Officer must be examined, however, in those cases where in order to prove the alleged guilt of the accused beyond all reasonable doubts, the circumstances warrants that the Investigating

Officer should necessarily be examined, in such cases he has to be necessarily examined. The instant case is one such case where since the evidence of other prosecution witnesses including the alleged pancha to the seizure panchanama could not able to establish the alleged seizure of the article or the alleged recovery at the instance of the accused, it was very much necessary for the prosecution to examine the Investigating Officer.

Admittedly, in the instant case, the Investigating Officer has not been examined. Further, as analysed above, the evidence of neither PW-2 nor PW-3, in any manner, inspires confidence to believe their version as true. The evidence of PW-2 is full of major contradictions within itself and the evidence of PW-4 and PW-5 also gives a different picture than what the prosecution's case is, whereas both the Trial Court as well the Sessions Judge's Court, without appreciating the evidence placed before them in their proper perspective, have merely embraced the statement of PW-2

that at the instance of the accused, a seizure panchanama was made as per Ex.P-4 and after seeing that, the complainant has identified the chain at MO-1, have hastily jumped to a conclusion that, the prosecution has proved the alleged guilt against the accused beyond all reasonable doubts. Since the said finding of the Trial Court is now proved to be a perverse and an erroneous finding, the same warrants interference at the hands of this Court.

Accordingly, I proceed to pass the following:

O R D E R

[i] The Criminal Revision Petition stands **allowed.**

[ii] The impugned judgment of conviction and order on sentence dated 04-03-2008, passed by the III Additional Civil Judge (Jr.Dn.) and Judicial Magistrate First Class, at Tumakuru, in C.C.No.2617/2006, holding the accused guilty of the offence punishable under Section 380 of the

Indian Penal Code, 1860, which was further confirmed by the judgment and order dated 16-09-2011, passed by the Court of the Fast Track Court-III, at Tumkur, in Criminal Appeal No.51/2008, are hereby set aside;

[iii] The revision petitioner (accused) – Parveez Pasha, S/o. Firoz Pasha, age 24 years, Resident of 2nd Cross, P.H. Colony, Tumkur, stands acquitted of the offence punishable under Section 380 of the Indian Penal Code, 1860.

However, the order passed by the Trial Court, with respect to MO-1 remains un-altered.

The Court, while acknowledging the services rendered by the learned *Amicus Curiae* for the revision petitioner - Sri. Prabhugoud B. Tumbigi, recommends honorarium of a sum of not less than ₹4,000/- payable to him by the Registry.

Registry to transmit a copy of this order to both the Trial Court and also the learned Sessions Judge's Court along with their respective records, immediately.

Sd/-
JUDGE

BMV*