

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO

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CRIMINAL APPEAL No.1224 of 2014

JUDGMENT:

This appeal is filed by the State challenging the judgment dated 30.08.2007 in S.C No.187 of 2005 on the file of the Assistant Sessions Judge, Tanuku.

2. The respondents in this appeal are A-1, A-2, A-5 to A-7 and A-9. A-4 died and the appeal against A-4 has abated. The case was separated against A-3 and A-8.

3. The case of the prosecution was that the accused had committed the offence of Dacoity of a Cigarette laden lorry bearing No.AP 16/T 1809 belonging to PW.1 while it was being driven by PW.2. PW3 was the cleaner of the lorry.

4. The prosecution alleged that on 05.07.2002 PW.1 obtained a consignment for transport of 550 Cartons Cigarette Cartons from Vazir Sultan Tobacco Industries Limited, Hyderabad to Cuttack,; that all the accused are close associates and prepared to commit property offences to earn easy money; A-4 gathered A-2 and A-3 at Urvasi Lodge, Nidadavole; A-3 undertook to bring Five Rowdies from Khammam by car in support

of A-1 to A-4; A-1 to A-4 had a get together in Urvasi Lodge on 28.06.2002 where A-5 to A-8 joined them; they also shared a common intention to commit property offences on the road between Gundugolanu to Kovvur; on 06.07.2002, the accused had been to Gudugolanu and lurked in Ananthapalli centre during night time waiting for lorries with cigarette loads; the above lorry left Vijayawada traveling on the road from Gudugolanu to Kovvur and reached Ananthapalli center by 9.30 pm; the PW2 and 3 , the driver and cleaner had some refreshments there; when the lorry reached the outskirts of Ananthapalli, on the road, A-5, A-7 and A-8 stopped it and boarded into the cabin as if they were passengers to go to Kovvur carrying with them red-chilly powder, a knife, two clutch wires and one plaster bundle; A-1 and A-3 followed the lorry on a scooter and A-6 followed the lorry in an Ambassador Car bearing No.AP 11/H 3915 driven by Sarika Srinu (PW.10); they chased the lorry upto one Kilometer away from Ananthapalli towards Kovvur side; A-1 and A-3 suddenly kept their scooter across the lorry on the road and stopped it; they got into the cabin hurriedly, and the accused, who were present in the cabin pounced upon PW.2 and sprinkled red-chilly powder in his eyes, tied his hands and legs; they also fastened a plaster to his mouth and threatened to kill them if they

raise alarm. It is further contended that A-1 drove the lorry, A-4 and A-6 followed the lorry on their respective scooter and taxi; A-7 and A-8 threatened the cleaner PW3 with knife and tied clutch wire around his neck; the lorry with Cigarette Cartons load went to the house of A-1, and in his house (75) Cartons were concealed; the lorry was later driven to the house of A-2, and at that place 140 cartons were concealed; and ultimately it was driven to the house of A-9, and at that place 312 Cartons of Cigarettes were concealed. Subsequently, according to the prosecution, the lorry was taken to Dammennu bridge; the cleaner and driver were removed from the lorry and they were thrown into the canal water nearby; the empty lorry was taken by A-1 to A-4 to Khammam; and it was abandoned at Burghampahad in Khammam District.

4. It is alleged that on 07.07.2002, the driver and cleaner managed to free themselves, survive from Canal water and approached PW.1 and narrated him about the occurrence. Then, PW.1 approached the police and presented a report and ultimately on 08.07.2002 at 10.15 pm, he presented a written report at Undrajavaram Police Station.

5 . On 19.07.2002 during the course of investigation, PW.31 went to the house of elder brother

of A-1 along with PWs.24 and 25 and seized 75 cartons of Cigarettes, after identifying it to be a part of booty. On the confessional statement made by A-1, PW.31 along with the above mediators went to the house of A-2, arrested A-2 and seized 140 cartons of Cigarettes, after identifying them as part of stolen property; again led by A-1 and A-2, PW.31 along with said mediators went to the house of A-9, arrested A-3 and A-9 and seized 312 cartons of cigarettes. The mediators reports were exhibited as Ex.P9 to P11.

6. Thereafter, the case was registered as PRC No.40 of 2002 and after hearing both sides, charges under Sections 341, 342, 328, 324, 397 r/w 34 I.P.C and 412 IPC were framed against accused.

7. The accused pleaded not guilty and claimed for trial. The prosecution examined Pws 1 to 35 and marked Ex.P1 to P26 and M.O.1 , the lorry.

8. After the prosecution evidence was closed, the accused were examined under Section 313 Cr.P.C. They denied all the incriminating material in the evidence of Prosecution witnesses. The accused examined four witnesses i.e., DWs.1 to 4 and marked Exs.D1 to D7.

9. By judgment dated 30.08.2007, the Court below

acquitted A-1, A-2, A-5 to A-7 and A-9 of the above mentioned charges.

10. Questioning the same, this appeal is filed by the State.

11. The learned Public Prosecutor contended that the judgment of the Court below is contrary to law and the Court below had not properly appreciated the evidence on record. He contended that the ingredients to constitute the offences punishable under the above provisions were proved against the accused but the Court below did not give weight to the prosecution witnesses and erroneously acquitted the accused. He further stated that the reasons given by the Court below for acquitting the accused are not sustainable.

12. The counsel for respondent on the other hand supported the judgment of the Court below and contended that it had rightly acquitted the accused of the offences alleged against them and that the said judgment did not warrant any interference by this Court in exercise of appeal jurisdiction under Section 378 Cr.P.C.

13. I have noted the submissions of both sides.

14. It would be convenient to split up the matter into three parts:

- 1) Preparation by the accused for commission of offence after having a plan of action.
- 2) The actual occurrence i.e., after waylaying the lorry and after causing hurt to PWs.2 and 3 and throwing them into the canal, the accused taking away the cigarette lorry and
- 3) Recovery of stolen property from the possession of A-1 to A-3 and A-9.

15. With regard to the aspect of preparation by the accused for commission of offence prosecution examined PWs.11 to 17. PW.11 is the owner of Prashanthi Lodge, Nidadavole. PW.14 is the owner of Srikantha Lodge. PW.12 is a clerk of Urvasi Lodge, Nidadavole and PWs.13, 15 to 17 are working in Urvasi Lodge and in the other lodges mentioned above.

16. The prosecution case is that the accused engaged rooms in the above lodges and planned to commit the offences. But it did not file the records of the lodges to prove that rooms in those lodges were engaged by accused and PW.31, Investigating Officer stated that he had not seized registers of the lodges.

17. PWs.15 to 17 did not support the case of the

prosecution and totally denied the prosecution version.

18. A test identification parade was conducted by PWs.27 & 28 in which some of the witnesses identified some of the accused. PW-11, the owner of Prashanthi Lodge at Nidadavole stated that he identified some persons in the Sub-Jail, Tanuku but due to lapse of time he was unable to identify the said persons in the Court now. He also stated that he was shown some persons by the police before conducting of the Test Identification Parade.

19. PW.12 stated that police showed four or five persons in the police station and the same persons were shown in Sub-jail and he was asked by police to identify the said persons before the Magistrate.

20. PW.13 stated that he was shown some persons in Tanuku Police Station and was asked to identify whether the same persons had occupied the rooms in their lodge and the same were shown to him in sub-jail.

21. PW.14 stated that he saw persons whom he identified at the police station and in the sub-jail, before the Identification Parade.

22. Thus PWs.11 to 14 stated that they were made to identify some persons in the sub-jail after

seeing some persons, and their photographs were also shown to them but none of these witnesses identified the accused in the Court.

23. Learned Public Prosecutor contended that even if the accused were not identified in Court, their identification in the Test Identification Parade is sufficient to convict them.

24. I am not unable to agree with the said submissions.

25. The substantive evidence in a criminal trial is the evidence of identification in court. A test identification done during investigation is not substantive evidence. It is only used as corroborative of the statement in court. (See **Heera v. State of Rajasthan**^[1]). So, when the prosecution witnesses themselves did not identify the accused in the Court, the evidence of such witness is of no use and the prosecution cannot rely on the test identification evidence.

26. Also, if the accused have been shown to the prosecution witnesses while in the police station, the test identification parade loses its significance. (See **Rajoo and others vs State of Madhya Pradesh**^[2] and

Mahabir vs. State of Delhi^[3])

27. The absence of evidence in the form of records of the lodges where the accused are supposed to have stayed prior to the commission of offence also throws a doubt about the prosecution case and it can safely be held that the prosecution has failed to prove that the accused had made preparation prior to the occurrence of the offence in the lodges mentioned above and planned to commit the offence.

28. Coming to the second part of the case, only PWs.2 and 3 were examined to prove actual occurrence. They did not state the names of the accused and they did not identify any of the accused in Court. PW.2 identified five of the accused in the Test Identification Parade but he did not identify any of the accused in Court hall. PW.3 identified some of accused in test identification parade but did not identify them in the Court. He stated that the police showed some thing and on that they identified the persons and that now he cannot identify those persons. PW.3 at the time of his examination observed the accused in the court hall and stated that he could not identify the persons. The prosecution case was that P.Ws.2 and 3 were in the lorry when they were over-powered by the accused, their hands and legs were tied and plaster was

affixed on their mouths. They were later beaten and pushed into a canal. So they were with the assailants for a considerable period of time. But they were unable to give any special features, marks or other particulars of the assailants in their statements during investigation or in the Court. So their evidence is unreliable to prove that the accused are the persons who committed the dacoity.

29. Lastly, coming to the recovery of stolen property, prosecution case is that P.Ws.24 and 25 were the mediators who prepared Exs.P-9 to P-11 mediator reports of seizure of cigarette stocks from A-1, A-2, A-3 and A-9. But P.Ws.24 and 25 did not identify the accused except stating their names in the Court. The Door Number of the houses from where the stock was seized was mentioned in Exs.P-9 to P-11. But P.W.24 stated that he did not verify the door numbers of the respective houses at the time of the seizure and he had no knowledge about the contents of the mediator reports. He also stated that P.W.25 also did not verify the contents except signing on the report. He categorically stated that the police asked them to sign on the mediator reports in the police station and they signed; that the police also did not make any enquiry to know about the ownership of the houses and he did not

go inside the houses. He stated that the reports were not read over to him or to P.W.25 in his presence. Therefore, their evidence cannot be relied upon to hold that stolen property was seized from A-1 to A-3 and A-9.

30. The prosecution also relied on the evidence of P.W.10, the driver of the ambassador car in which the accused are said to have traveled and had contended that on the information furnished by him, the stolen property was seized from the above accused. He did not support the prosecution in his evidence and stated that he never went to Nidadavole or other places for any recovery and never showed any persons responsible for any offence.

31. Thus, merely on the evidence of the Investigating Officer P.W.31 that the stolen cartons of cigarette packets were seized from the possession of A-1 to A-3 and A-9, the accused cannot be convicted particularly when the houses where the property is alleged to have been seized did not belong to any of the accused and no connection of the accused with the said houses was established by the prosecution by examining the owners or neighbours of the said houses. D.Ws.1 to 4 were examined by the defence to prove that the houses from where the goods were

alleged to have seized belonged to them.

32. In view of the above infirmities in the prosecution case, the accused/respondents cannot be said to have committed the offence of dacoity as alleged by the prosecution. Therefore, the Court below did not commit any error in acquitting the respondents.

33. Therefore, I do not find any merit in the appeal and the same is accordingly dismissed.

34. Miscellaneous applications pending, if any, shall stand closed.

M.S.RAMACHANDRA RAO, J

Date: 03.03.2015
Knl/Vsv

[\[1\]](#) AIR 2007 SC 2425

[\[2\]](#) AIR 2009 SC 858

[\[3\]](#) AIR 2008 SC 2343