

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CRIMINAL APPEAL Nos.737 of 2010 & 927 of 2010

COMMON JUDGMENT:

(Per Justice T. Sunil Chowdary)

1 The appellants are A1, A2, A3, A9 and A10 in Crime No.5 of 2007 of Chittoor Taluk Police Station registered for the offences under Sections 396 and 397 IPC. A9 and A10 preferred Criminal Appeal No.737 of 2010 whereas A1, A2 and A3 preferred Criminal Appeal No.927 of 2010. A1 to A3 faced trial in S.C. No.295 of 2008 while A9 and A10 faced trial in S.C. No.383 of 2008 on the file of the Court of VIII Additional District and Sessions Judge (Fast Track Court), Chittoor.

2 Since these two appeals arise out of a common judgment dated 28.04.2010 passed by the learned VIII Additional District & Sessions Judge, (FTC), Chittoor in S.C.No.295 of 2008 (*sic*, S.C.Nos.295 of 2008, 383 of 2008 and 181 of 2009), these two appeals are being disposed of by this common judgment, in order to avoid repetition of facts and evidence. From the record it appears that the trial Court has rendered judgment in S.C.No.295 of 2008 as all the three Sessions Cases were clubbed and evidence was let in S.C.No.295 of 2008. In these appeals, we are not concerned with S.C. No.181 of 2009 as the same pertains to A.11, who was acquitted by the trial Court.

3 For the sake of convenience, parties to these appeals will hereinafter be referred to as they are arrayed before the trial Court.

4 On receipt of a telephonic message, P.W.17 the A.S.I. of Police, Chittoor Taluk Police Station rushed the Lord Balaji Fuel Station, Gangasagaram village and recorded Ex.P.1 - statement of P.W.1. Basing on Ex.P.1, P.W.20 – K. Ravi Manoharachary, the Inspector of Police, Chittoor Rural East Circle (as he then was) registered a case in Cr.No.5 of 2007 of Chittoor Taluk police station under Sections 396 and 397 of IPC

and issued FIR - Ex.P.25. During the course of investigation it was revealed that on 19.01.2007 at about 1.30 AM, the accused armed with knives, sticks and spears entered into Lord Balaji Fuel Station at Gangasagaram village, which is on Chittoor – Vellore road and threatened P.Ws.1 and 2 at the point of knife and robbed cash of Rs.3,050/-. In that transaction, two of the accused stabbed one Kesava Raj (hereinafter referred to as 'the deceased'), which resulted in his spontaneous death. P.W.6 also received injuries in the hands of the accused. On 19.01.2007 P.W.20 conducted inquest over the dead body of the deceased in the presence of P.W.7 and prepared inquest panchanama-Ex.P.2. P.W.15 observed scene of offence and seized M.Os.1, 2, 4 and 5 in the presence of P.Ws.8 and 9 and prepared Ex.P.3 seizure report for M.O.4 and Ex.P.4 seizure report for M.Os.1, 2 and 5.

P.W.10 conducted autopsy over the dead body of the deceased and issued post-mortem examination report (Ex.P.6). P.W.11 examined P.W.6 and issued wound certificate (Ex.P.7). P.W.14 – finger print expert, collected chance finger prints at the scene of offence.

5 On 13.03.2007 A.1 was arrested by Nellore Rural police in connection with Cr.No.61 of 2007 under Sections 302 and 380 of IPC. The chance finger prints tallied with the finger prints of A.1. On 21.04.2007 A.1 was given to police custody. During the course of interrogation A.1 confessed that he committed the offence on 19.01.2007 at Lord Balaji Fuel Station along with A.2 to A.7. On 03.06.2007 A.2 to A.7 were taken into custody by the police, who also confessed that they committed the offence on 19.01.2007. On 23.06.2007 A.8 was arrested, who also confessed about the commission of the offence along with the other accused. On 7/8.1.2008 at 12.30 AM accused Nos.9 and 10 were arrested by the Inspector of Police, Krishna Raja Nagar Circle, Mysore District in Cr.No.4 of 2008 under Sections 399 and 402 of IPC. During the course of interrogation, they voluntarily confessed that they committed the offence on 19.01.2007 along with the other accused. In pursuance of

Ex.P.9—requisition made by the Inspector of Police and Ex.P.10 - Proceedings of the Chief Judicial Magistrate, Chittoor, on 03.11.2007 P.W.12—the then IV Additional Judicial First Class Magistrate, Nellore conducted test identification parade of A.1 to A.5 and A.7 at Central Prison, Nellore and prepared Ex.P.8 - Test Identification Proceedings.

Similarly, in pursuance of Ex.P.11 – memo filed by the Inspector of Police, and the Proceedings of the Chief Judicial Magistrate, Chittoor, on 15.02.2008, P.W.13 – the then I Additional Junior Civil Judge, Chittoor conducted test identification parade in respect of accused Nos.6 and 8 and prepared Ex.P.12 – Test Identification Proceedings. (It seems, by mistake in the appendix of evidence of the trial Court judgment, Ex.P.12 was shown as admissible portion of mahazar, dated 03.06.2007).

Similarly, in pursuance of Ex.P.22 – requisition filed by the Inspector of Police, and the Proceedings of the Chief Judicial Magistrate, Chittoor, on 15.3.2008 P.W.18 – III Additional Junior Civil Judge, Chittoor conducted test identification parade of A.9 and A.10 and prepared Ex.P.23 – Test Identification Proceedings. After completion of investigation, the investigating officer laid charge sheet before the IV Additional Junior Civil Judge, Chittoor, against A.1 to A.10 for the offences punishable under sections 396 and 397 of IPC.

6 The learned IV Additional Junior Civil Judge, Chittoor after receiving the charge sheet, numbered it as PRC No.30 of 2008. The case against A.6, A.8 and A.10 has been split up and was numbered as PRC No.43 of 2008. The learned Magistrate, after following the due procedure, committed the case against A.1 to A.5 i.e. PRC No.30 of 2008 to the District & Sessions Division, Chittoor under Section 209 Cr.P.C. The learned District and Sessions Judge, Chittoor has taken cognizance of the offences punishable under Sections 396 and 397 IPC and numbered it as S.C.No.383 of 2008 and made it over to the I Additional Sessions Judge, Chittoor. Later, the learned Magistrate also committed the case against A.6, A.8 and A.10 i.e. P.R.C.No.43 of 2008 to the District and

Sessions Division, Chittoor and the learned District & Sessions Judge has taken the case on file for the offences punishable under Sections 396 and 397 of IPC and numbered the same as S.C.No.295 of 2008 and made over it to the Additional Assistant Judge, Chittoor. Subsequently, by order dated 13.12.2008 in CrI.M.P.No.1758 of 2008 on the file of the Principal District & Sessions Judge, Chittoor, S.C.No.295 of 2008 has been withdrawn from the file of the Assistant Sessions Judge, Chittoor and transferred to the Court of the I Additional Sessions Judge, Chittoor. Thereafter, an additional charge sheet was filed against A.11 and it was numbered as PRC No.25 of 2009, which was also committed to the District and Sessions Division, Chittoor where it was numbered as S.C.No.181 of 2009 and was made over to the I Additional Sessions Judge, Chittoor.

7 The learned I Additional District & Sessions Judge, Chittoor framed charges against the accused for the offences under Sections 396 and 397 IPC, read over and explained to them in vernacular language, for which they pleaded not guilty and claimed to be tried. Subsequently all the cases were clubbed together and transferred to the Court of the VIII Additional District & Sessions Judge, (FTC), Chittoor for trial and disposal in accordance with law. During the pendency of the cases, A.6 and A.7 died and hence the case against them abated.

8 During the course of trial, on behalf of the prosecution P.Ws.1 to 20 were examined and Exs.P.1 to P.26 and M.Os.1 to 8 were marked. On behalf of the defence no witnesses were examined but Exs.D.1 and D.2 were marked.

9 Basing on the oral and documentary evidence available on record, the trial Court arrived at the conclusion that the prosecution proved the guilt of accused Nos.1 to 3, 9 and 10 for the offences punishable under sections 396 and 397 of IPC, convicted and sentenced them to suffer rigorous imprisonment for life for the offence under Section 396 IPC and

also to pay fine of Rs.100/-, in default to suffer simple imprisonment for two months and further sentenced to suffer rigorous imprisonment for seven years for the offence punishable under Section 397 IPC. The trial Court acquitted the accused Nos.4, 5, 8 and 11 for the offences punishable under sections 396 and 397 of IPC.

10 Aggrieved by the conviction and sentence A.9 and A.10 preferred Criminal Appeal No.737 of 2010 and A.1 to A.3 preferred Criminal Appeal No.927 of 2010.

11. **POINT:** Now the crucial question that arises for consideration is whether the prosecution has proved the guilt of the accused Nos.1 to 3, 9 and 10 beyond all reasonable doubt for the offences under Sections 396 and 397 IPC.

12 The learned counsel for all the appellants seriously attacked the judgment of the trial Court on the following grounds:

- a) The trial Court ought not to have placed reliance on the testimony of P.Ws.4 and 5 who are planted witnesses;
- b) The trial Court failed to appreciate that identification of the accused by P.Ws.1, 2, 4, 5 and 6 after lapse of a long time is unnatural and highly improbable;
- c) The trial Court miserably failed to appreciate the fact that A2 to A10 were implicated in this case basing on their alleged confessional statements made before the Police which are not admissible in law in view of under Sections 25 and 26 of the Indian Evidence Act and therefore, the prosecution does not stand against A2 to A10;
- d) When once the case against the other accused for the offences under Sections 396 and 397 is not proved, conviction of sole accused for the offence of murder is not maintainable; and
- e) The trial Court convicted and sentenced the accused basing on assumptions and presumptions in the absence of any evidence, much less legally admissible evidence.

13 ***Per*** contra, learned Public Prosecutor submitted that the trial Court

has considered the oral and documentary evidence in right perspective, convicted and sentenced the accused accordingly. He further submitted that mere delay in conducting Test Identification Parade by itself is not a valid ground to disbelieve the version of the prosecution. It is his further contention that there is no legal impediment to convict some of the accused basing on the confession of a co-accused provided the material available on record proves the guilt of the accused. He further submitted that the Court can convict one of the accused for the offence of murder even though the Court acquitted the other accused for the offence under sections 396 and 397 of IPC.

14 As per the version of the prosecution, the offence took place on 19.01.2007 at about 1.30 AM at Balaji Fuel Station, Gangasagaram village. As seen from the testimony of P.W.17, on 19.01.2007 he received telephonic intimation about the incident and rushed to the place of offence which is at Balaji Fuel Station, Gangasagaram village and recorded Ex.P.1 statement of P.W.1. The testimony of P.W.20 reveals that basing on Ex.P.1, he registered a case in Cr.No.5 of 2007 under Sections 396 and 397 of IPC and issued Ex.P.25 - FIR. The testimony of P.Ws.1, 17 and 20 is corroborating with each other with regard to the happening of the incident, lodging of complaint and registration of the case.

15 The learned counsel for the appellants submitted that non-disclosure of the name of the informant casts a cloud with regard to registration of FIR, which causes prejudice to the accused. In this regard, the learned counsel for the accused Nos.1 to 3 has drawn my attention to the ratio laid down in **Rafiq Ahmed @ Rafi vs. State of U.P.**^[1] wherein the Hon'ble apex Court held at para Nos.20 and 21 as follows:

20. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. **The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope.** Once the accused is able to show that there is serious

prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the Court.

21. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof, i.e., the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The Courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the Court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication. Thus, wherever a plea of prejudice is raised by the accused, it must be examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the prosecution and benefit to the accused in accordance with law.

As per the principle enunciated in the decision cited above, when the plea of prejudice is raised by the accused with regard to the investigation and trial, the same shall be examined carefully. Suffice it to say that any person can set the criminal law into motion on coming to know about the commission of a cognizable offence. Once registration of the case itself is doubtful, the same may cut the very root of the case of the prosecution. However, in our opinion, non-disclosure of the name of the informant in this particular case no way caused prejudice to the accused. More over, the incident was reported to the police without any delay. Having regard to the facts and circumstances of the case, we are unable to accede to the contention of the learned counsel for the appellants and the decision relied upon by him, in this regard, is of no avail to the accused.

16 On 19.01.2007 P.W.20 conducted inquest over the dead body of the deceased in the presence of P.Ws.7 to 9 and prepared inquest panchanama Ex.P.2.

17 P.W.10 conducted autopsy over the dead body of the deceased on 19.01.2007 and issued the Post-mortem certificate - Ex.P.6. The oral testimony of P.W.10 coupled with Ex.P.6 clearly reveals that the deceased died of shock and haemorrhage due to multiple injuries on vital organs such as heart and kidneys and that the death occurred 24 hours prior to the conducting of Post-mortem examination. None of the defence

counsel has cross examined P.W.10.

18 By examining P.Ws.7 to 10 and 20 and marking Exs.P.2 and P.6, the prosecution clearly established that the death of the deceased was a homicide.

19 As per the version of the prosecution, the incident took place within the premises of Balaji Fuel Station. As per the testimony of P.Ws.8 and 9 on 19.01.2007 police observed the scene of offence and prepared mahazar - Ex.P.3. The testimony of P.W.20 reveals that he seized three small sized stones - M.O.6, plastic chair with blood stains - M.O.3, black colour Terri cotton pant - M.O.7 and a blood stained stick - M.O.8 at the scene of offence and that he prepared seizure report and obtained signatures of P.Ws.8 and 9 on it. By examining P.Ws.8, 9 and 20, and marking Exs.P.3, P.4 and M.Os.3, 6 to 8, the prosecution clearly established the place of offence.

20 Further, even in the absence of proof under Sections 396 and 397 IPC, conviction can be maintained under Section 302 IPC in view the decision of the Hon'ble apex Court in **Shyam Behari vs. State of U.P.**^[2] wherein it was held at para No.16 as follows:

16. We do not, therefore, think it necessary to express any definite opinion on the question of law mooted in the order of the High Court granting to the appellant certificate of fitness for appeal. Suffice it to say that even if the conviction of the appellant under section 396, Indian Penal Code be not perchance sustainable, the murder of Mendai having been committed after the dacoits had taken to their heels without collecting any booty, the case against the appellant in regard to the commission of the murder of Mendai has been proved beyond any shadow of doubt and under those circumstances we would convict the appellant of having committed the offence under section 302, Indian Penal Code.

21 In **Rafiq Ahmed @ Rafi vs. State of U.P (1 supra)** the Hon'ble apex Court held at para Nos.70 to 72 as follows:

70. For the reasons afore-recorded, we are of the considered view that no prejudice has been caused to the Appellant by his conviction for an offence under Section 302 IPC though he was initially charged with an offence punishable under Section 396 IPC read with Section 201 IPC. Further, the nature of injuries namely three incised wounds, three abrasions and severing of the trachea, caused by a

sharp-edged weapon as noticed by the High Court in para 34 of its judgment, indicate that the accused knew that the injury inflicted would be sufficient in the ordinary course of nature to cause death.

71. The 'prejudice' has to be examined with reference to the rights and/or protections available to the accused. The incriminating evidence had been clearly put to the accused in his statement under Section [313](#) Code of Criminal Procedure. The circumstances which constitute an offence under Section [302](#) were literally put to him, as Section [302](#) IPC itself is an integral part of an offence punishable under Section [396](#) IPC. The learned Counsel appearing for the Appellant has not been able to demonstrate any prejudice which the Appellant has suffered in his right to defence, fair trial and in relation to the case of the prosecution.

72. Once the Appellant has not suffered any prejudice, much less a serious prejudice, then the conviction of the Appellant under Section [302](#) IPC cannot be set aside merely for want of framing of a specific/alternate charge for an offence punishable under Section [302](#) IPC. It is more so because the dimensions and facets of an offence under Section [302](#) are incorporated by specific language and are inbuilt in the offence punishable under Section [396](#) IPC. Thus, on the application of principle of 'cognate offences', there is no prejudice caused to the rights of the Appellant.

As per the principle enunciated in **Shyam Behari** (7 supra) and **Rafiq Ahmed** (1 supra), the Court can convict a person for the offence under Section 302 IPC even though the co-accused were acquitted for the offences punishable under Sections 396 and 397 IPC.

22 Let me consider the facts of the case on hand in the light of the above legal principle.

23 The genesis for complicity of accused No.1 in this case is that the chance finger prints collected at the scene of offence tallied with his right middle finger. A.2 to A.7 were arraigned in this case in pursuance of the confession made by A.1. Similarly, A.9 and A.10 were charged basing on the confession made by A.8 as well as the confession made by themselves before the police officer in Cr.No.4 of 2008 of Krishna Raja Nagar Circle, Mysore District. Sections 25 and 26 of the Indian Evidence Act mandate that any confession made by accused before the police officer is not admissible under law. Section 27 of the Indian Evidence Act is an exception to Sections 25 and 26 as any fact discovered in pursuance of the information given by the accused is admissible.

24 In **Mohd. Jamiludin Nasir vs. State of West Bengal**^[3] the Hon'ble apex Court held at para No.144 as follows:

144. Going by the above provisions, the relevance, efficacy and reliability of the confessional statement of Appellant Nasir when examined in the touchstone of Sections 10 and 30 of the Evidence Act, it will have to be stated that **the confession of a co-accused cannot be treated as substantive evidence to convict other than the person who made the confession on the evidentiary value of it.** It is, however, well established and reiterated in several decisions of this Court that based on the consideration of other evidence on record and if such evidence sufficiently supports the case of the Prosecution and if it requires further support, the confession of a co-accused can be pressed into service and reliance can be placed upon it. In other words if there are sufficient materials to reasonably believe that there was concert and connection between the persons charged with a commission of an offence based on a conspiracy, it is immaterial even if they were strangers to each other and were ignorant of the actual role played by them of such acts which they committed by joint effort. Going by Section 30 of the Evidence Act, when more than one person are being tried jointly for the same offence and a confession made by one of such persons is found to affect the maker as well as the co-accused and its stand sufficiently proved, the Court can take into consideration such confession as against other persons and also against the person who made such confession from the above proposition, we can make reference to the decisions of this Court in the case of **Natwarlal Shankarlal Modi v. State of Bombay** {(1961) B.L.R. 661} and **The Govt. of NCT of Delhi v. Jaspal Singh** {(2003) 5 SCC 589}.

As per the principle enunciated in the case cited supra, the confession of a co-accused is not a substantive piece of evidence. If the other evidence available on record sufficiently supports the prosecution case and if it requires further support, then the confession of co-accused can be pressed into service to prove the guilt of the accused. Even assuming, but not conceding, that A.1 made a confession before the police that he along with A.2 to A.7 committed the offence, the same is hit by Sections 25 and 26 of the Indian Evidence Act. Hence no legal sanctity can be attached to Ex.P.24 alleged confession of A.1. As per the version of the prosecution, A.9 and A.10 made confession before the Inspector of Police, Krishnaraja Nagar Circle, Mysore district and that the same is mentioned in Ex.P.26. The alleged confessional statements of A.9 and A.10 are not recorded by P.W.20. In such circumstances no reliance can be placed on the alleged confession of A.9 and A.10. The trial Court gave a specific finding that A.1 cannot be found guilty of the offences only on

the basis of evidence of P.W.14. This clearly indicates that the trial Court disbelieved the version of the prosecution that the chance finger prints collected at the scene of offence are tallying with the right hand middle finger of A.1. In view of the factual scenario of the case, the very foundation of the prosecution case itself gives scope for doubt and therefore, the Court has to scrutinise the other material available on record with great care and circumspection.

25 The trial Court convicted and sentenced the accused on the sole ground that the prosecution witnesses identified the accused Nos.1, 2, 3, 9 and 10 in the test identification parade as well as before the Court. As per the prosecution version, P.Ws.1, 2, 4 and 5 are eyewitnesses to the incident, whereas P.W.6 is the eyewitness as well as the injured person. The incident took place at about 1.30 AM. As per the testimony of P.W.1, A.9 and A.10 threatened him and P.W.2 at the point of knife and robbed an amount of Rs.3,050/- from them. As per the testimony of P.W.2, A.9 and A.10 beat the deceased as well as P.W.6. There is no consistency in the testimony of P.Ws.1 and 2 with regard to the specific overt acts of A.9 and A.10. There is no whisper in the testimony of P.W.6 that A.9 and A.10 beat him and the deceased as spoken to by P.W.2. If really A.9 and A.10 beat P.W.6, it is not known what prevented him from identifying them in the test identification parade and deposing before the Court accordingly.

26 As per the prosecution version, on 19.01.2007 at about 1.00 AM P.Ws.4 and 5 started at Vellore to go to Gangasagaram village on a scooter that they stopped the vehicle at the Balaji Fuel Station for filling petrol and that A.3 and A.10 told them that there was no petrol in the bunk. The specific stance of the defence is that P.Ws.4 and 5 are planted witnesses and therefore, their testimony is not worthy of consideration.

27 P.Ws.1, 2 and 6 were present in the petrol bunk from the commencement till completion of the incident. As per the testimony of P.W.1, during the incident one lorry and one bus came to the bunk, but the

accused gestured to them that there was no fuel. As per the testimony of P.W.2, one lorry and one two wheeler came to the bunk for petrol but the accused told them that there was no petrol. As per the testimony of P.W.6, one trialer came to the petrol bunk for petrol and the accused sent them away saying that there was no petrol. As can be seen from this evidence, there is no consistency in the testimony of P.Ws.1, 2 and 6 with regard to the correct description of the vehicles which came to the bunk for fuel during the incident. If the testimony of P.Ws.1 and 6 is taken into consideration, no scooterist came to the petrol bunk for petrol. P.W.2 did not disclose the description of the two wheeler who came for petrol i.e. scooter or motorbike. P.Ws.1, 2 and 6 have given different versions with regard to the nature of the vehicles which came to the petrol bunk. There is no whisper in the testimony of P.Ws.1, 2 and 6 that P.Ws.4 and 5 came to the petrol bunk on a scooter for petrol. We are very much conscious that the Court cannot magnify the insignificant omissions and inconsistencies to disbelieve the version of the prosecution. However, the Court shall not lose sight of material inconsistencies in the testimony of eyewitnesses while appreciating the evidence. In the chief examination P.W.6 categorically stated that on the date of incident P.Ws.1 and 2 were sitting in the petrol bunk. But during the cross examination P.W.6 categorically deposed that he did not see P.Ws.1 and 2 after he came out from the bathroom on hearing the galata. If the testimony of P.W.6 is taken into consideration, the presence of P.Ws.1 and 2 till completion of incident is some what doubtful. As per the testimony of P.W.2, A.1 stabbed the deceased as well as P.W.6. There is no whisper in the testimony of P.W.6 that A.1 stabbed him. There is no whisper in the testimony of P.W.1 that A.1 stabbed the deceased as well as P.W.6. If really A.1 stabbed P.W.6, he would have identified A.1 in the test identification parade or before the trial Court. There are number of petrol bunks nearby the place of incident even as per the testimony of P.Ws.1 and 2 in Gangasagaram village. There are petrol bunks in between Vellore and Gangasagaram villages even as per the testimony of P.Ws.1,

2, 4 and 5. In such circumstances, it is not known what made P.Ws.4 and 5 to go to the scene of offence, that too, at odd hours for petrol. The police examined and recorded the statements of P.Ws.4 and 5 on 22.01.2007 and that of P.W.6 on 17.05.2007. P.Ws.4 and 5 have given different versions and timings with regard to recording of their statements by the investigating officer. The Court shall not lose sight of the factum of recording of the statements of P.Ws.4 and 5 three days after the incident. In the chief examination itself P.W.6 in unequivocal terms deposed that the Magistrate visited the hospital on 19.01.2007 and enquired his particulars. He further stated that he was in conscious state of mind when the Magistrate visited the hospital. For one reason or the other, the Magistrate did not record the statement of P.W.6. As per the version of the prosecution, the investigating officer recorded the statement of P.W.6 on 17.05.2007 i.e. four months after the incident. When P.W.6 was in a fit condition to narrate the incident, what prevented the investigating officer to record his statement on 19.01.2007 itself, is not properly explained by the prosecution. The prosecution failed to put forth reasons, much less cogent and valid reasons for non-examination of P.W.6 for a period of four months after the incident even though he was capable of giving statement on 19.01.2007.

28 The Court has to ensure the credibility of the testimony of eyewitnesses so as to place reliance on it. P.Ws.1, 2, 4, 5 and 6 are stated to be eyewitnesses to the incident. However, as can be seen from the evidence on record, it is evident that P.Ws.4 and 5 did not witness the incident. They only spoke about their identifying A.3 and A.10 only, who told them that there was no fuel in the bunk. Each witness has given a different version with regard to the role played by each accused. There are a number of material inconsistencies in the testimony of eyewitnesses. The trial Court has not considered these aspects in right perspective.

29 The next question that falls for consideration is whether there is

any possibility of identification of accused Nos.1, 2, 3, 9 and 10 by P.Ws.1, 2,4, 5 and 6.

30 In **Subash and Shiv Shankar vs. State of U.P.** ^[4] the Hon'ble apex

Court held at para Nos.8 and 9 as follows:

8. Apart from this infirmity we further find that Shiv Shankar was not put up for test identification parade promptly. The identification parade has been held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. There is, therefore, room for doubt as to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features.

9. Over and above all these things there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Exhibit Kha I nor in their statements during investigation, the eye witnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had 'sallow' complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then. Thus in the absence of any descriptive particulars of Shiv Shankar in Exhibit Kha 1 or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and hold that he was one of the assailants of Ram Babu. As pointed out in *Muthu Swami v. State of Madras* {AIR1954 SC 4} where an identification parade is held about 2-1/2 months after the occurrence it would not be safe to place reliance on the identification of the accused by the eye witnesses. In another case *Mohd. Abdul Hafeez v. State of Andhra Pradesh* {1983 CriLJ 693} it was held that **where the witnesses had not given any description of the accused in the First Information Report, their identification of the accused at the Sessions trial cannot be safely accepted by the court for awarding conviction to the accused**. In the present case there was a long interval of nearly 4 months before the test identification parade was held and it is difficult to accept that in spite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade.

31 In **Dana Yadav Alias Dahu And Ors. Vs. State of Bihar** ^[5] the Hon'ble apex Court held that identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable despatch for the purpose of enabling

the witnesses to identify either the properties which are subject-matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

32 In **Pramod Mandal vs. State of Bihar** ^[6] the Hon'ble apex Court held at para No.17 as follows:

17. Learned counsel for the appellant also relied upon the decision of this Court in {(1982) 3 SCC 368 *Soni vs. State of Uttar Pradesh*. The said judgment is a brief judgment where on the facts of the case the court doubted the identification by the witnesses in view of the delay in holding of the Test Identification Parade. However, this judgment does not lay down any principle of law which may be applied to the facts of the present case. It is a decision on the facts of the case and cannot be treated as a binding precedent. In fact the said judgment was noticed by this Court in {2003 CriLJ1524} *Anil Kumar vs. State of Uttar Pradesh* and this Court after extracting the relevant part of the judgment observed :-

"It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal."

33 In **Iqbal v. State of Uttar Pradesh** ^[7] the Hon'ble apex Court observed at Para Nos.12 and 19 as follows:

12. When the witnesses in a panicky state and standing at a distance of three and half yards and five-six yards, it is doubtful whether the witnesses would have gained enduring impression of the identity of the accused. In the commission of offence of dacoity, identification becomes susceptible to errors and miscarriage of justice. In *Hari Nath and Anr. v. State of U.P.* {(1988) 1 SCC 14}, this Court held as under:

16...The conduct of an identification parade belongs to the realm, and is part of the investigation. The evidence of test identification is admissible Under Section 9 of the Evidence Act. But the value of the test identification, apart altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself, detracts from the credibility of the test.

17. The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. Indeed Prof. Borchard's *Convicting the Innocent* records several criminal convictions in which the

accused was subsequently proved innocent. The major source of the error is to be found in the identification of the accused by the victim of the crime. Indeed the learned author refers to the source of mistaken identification thus:

The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally--the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused.

18. Glanville Williams in *The Proof of Guilt*-(Hamlyn Lectures)--refers to the errors of recognition breeding an invincible assurance in the witnesses, highly deceptive for those who are not forewarned of such possibilities, and excerpts Gorphe's results of a continental investigation, thus:

There is no difference from the subjective point of view, between true and false recognition, so far as their intrinsic qualities are concerned, and there are no objective signs to distinguish one from the other..... The witness's certainty may not be immediate, without this delay being necessarily a sign of error. *Nevertheless, error is more frequent when recognition comes some time after seeing....*

The act of recognition is very open to suggestion in all its forms....

Resemblance is a matter of relativity. For a white person, all negroes are like each other, and conversely. A person can much better distinguish those of his own age and condition than those of different ages and condition. Uniform is a cause of fallacious resemblance, above all for those who do not wear it.

(Emphasis supplied)

19. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identify....

19. Courts below based the verdict of conviction solely on the oral testimony of PW1 to PW3 and the identification of the Appellants and other non-appealing accused in the test identification parade. As discussed earlier, in the absence of any other evidence like recovery of stolen jewellery or other articles strengthening the prosecution case, conviction cannot be based solely on the identification of the accused in the test identification parade. Serious doubts arise as regards identification of the accused regarding complicity of the Appellants in the commission of dacoity and their identification by the witnesses and the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and in our view, the conviction of the Appellants Under Section 396 Indian Penal Code cannot be sustained and is liable to be set aside. (underlined by me)

As per the principle enunciated in the cases cited supra, there is no straight jacket formula to attach credibility to the Test Identification

Parade. The credibility to be attached to the Test Identification Parade has to be decided basing on the facts and circumstances of each particular case.

34 P.Ws.1, 2, 4, 5 and 6 have no acquaintance with the accused Nos.1 to 3, 9 and 10 prior to the incident. As per the prosecution version, A.9 and A.10 threatened P.Ws.1 and 2 at point of knife. If the version of the prosecution is true and correct, P.Ws.1, 2 and 6 might have been in a panic condition due to the ghastly incident that took place in their presence. In such circumstances, is it possible for any person to identify the accused after such a long gap of ten months, however excellent his memory power may be? P.Ws.4 and 5 might have spent less than five minutes in the petrol bunk. They have identified A.3 and A.10 fifteen months after the incident. Is it possible for P.Ws.1, 2, 4, 5 and 6 to sustain enduring impression of the accused for such long period of time? Remembering a particular incident is some thing different from that of reminiscing the face of an unfamiliar person. As per the testimony of P.W.6, A.2 demanded him to give his ring. P.W.1 identified A.4 in the test identification parade but failed to identify him in the Court. P.Ws.2 identified A.8 in the test identification parade but failed to identify him in the Court. P.W.5 identified A.9 as one of the culprits but failed to identify him in the Court. P.W.6 identified A.7 in the test identification parade but failed to identify him in the Court. Except P.W.4, none of the prosecution witnesses commonly identified the accused in the test identification parade as well as in the open Court.

35 It is needless to say suspicion however strong shall not take the place of proof. No doubt, sharpness in remembrance of the face of unacquainted person may vary from individual to individual. The intellectual faculty of two individuals may not be the same in all aspects. The Court cannot expect pig iron reaction from all eyewitnesses. Appreciation of evidence is nothing but consideration of the material available on record taking into consideration the human conduct and

behaviour. The only test to be applied is how an ordinary man will act and react in the facts and circumstances of that particular case. The very purpose of cross-examination of the witnesses is to elicit truth thereby improbabilise the stand of the prosecution. Appreciation of evidence does not mean that the Court should glibly swallow whatever deposed by the prosecution witnesses without testing whether the same would withstand judicial scrutiny or not.

36 The Court has to take into consideration the memory power of an average person. Without pressing into service this test, it may not be possible for the Court to come to a correct conclusion. Human behaviour and conduct form an integral part of appreciation of evidence apart from application of legal principle. If these two aspects would not coincide, it may not be possible for the Court to unravel the truth which is an indispensable or basic guiding principle of administration of criminal justice.

37 The accused categorically stated to P.Ws.12, 13 and 18 that police have shown them to the witnesses. They further stated that the police have taken their photos. In almost all the cases the accused may take this defence. In Ex.P.1 complaint, P.W.1 did not describe the physical features of the persons who committed the offence. P.Ws.1, 2, 4, 5 and 6 did not state the physical features of the culprits at the time of recording their statements by P.W.20. P.Ws.12, 13 and 18 in unequivocal terms deposed that none of the prosecution witnesses have disclosed the physical features, complexion, height or any other peculiar features of the accused. If P.Ws.1, 2, 4, 5 and 6 have memory power of such magnitude, certainly they might have disclosed the physical features of the accused to the investigating officer as well as the learned Magistrates. P.Ws.1, 2, 5 and 6 identified A.9 and A.10 on 15.3.2008. P.W.2 identified A.1 on 03.11.2007. P.Ws.4 and 5 identified A.3 and A.10 on 03.11.2007 and 15.03.2008 respectively. The prosecution witnesses identified A.9 and A.10 almost one year after the incident. The trial Court believed the

version of the prosecution on the sole ground that the witnesses have identified the accused in the test identification parades as well as before the Court. Believing or non-believing of the testimony of the witnesses will depend upon various aspects. The trial Court has not considered in right perspective how the prosecution witnesses identified the accused in the test identification parades after lapse of such a long time. The identification of A.3 and A.10 by P.Ws.4 and 5 is highly improbable and unbelievable. The trial Court has not considered the discrepancy in the testimony of these witnesses with regard to the role played by each accused. Hence we are of the considered view that in order to strengthen the version of the prosecution, the possibility of pressing into service P.Ws.4 and 5 by the investigating agency cannot be ruled out completely.

38 P.Ws.1 and 2 have attributed some overt acts to the accused and in that process they have identified the accused. But the trial Court failed to consider the inconsistency and discrepancy in the testimony of these witnesses. No two witnesses spoke on same lines with regard to the role played by the accused. Of course, there is consistency in the testimony of P.Ws.4 and 5 with regard to the role played by A.3 and A.10. The evidence of P.Ws.1, 2 and 6 is not consistent so far as the role played by A.3 and A.10 in the commission of the offence. A.1 was arrested on 13.03.2007, A.2 to A.7 were arrested on 03.06.2007 and A.9 and A.10 were arrested on 17.08.2007. There is a gap of eight months between the date of arrest of A.1 and conducting of test identification parade. A.2 to A.7 were arrested on 03.06.2007 whereas the test identification parade was conducted on 03.11.2007 i.e. five months after their arrest. A.9 and A.10 were arrested on 17.08.2007 whereas the test identification parade was conducted on 15.03.2008 i.e. seven months after their arrest. In the above said gap period, the accused might have been produced before the concerned court for the purpose of remand. The prosecution has not assigned reasons much less cogent and valid reasons for non-conducting of test identification parade within a reasonable time from the date of

arrest of the accused. This also gives scope to doubt the version of the prosecution with regard to the identification of the accused by the prosecution witnesses. These are the vital aspects to be considered by the Court while appreciating the evidence of the witnesses.

39 The Court has to consider how the prosecution has dealt with the case since the date of commission of the offence till the date of filing of the charge sheet. As observed earlier, the very basis of the prosecution i.e. tallying of chance finger prints with that of A.1 was disbelieved by the trial Court. Like wise, the trial Court disbelieved the version of the prosecution in seizing the material objects in pursuance of the information given by A.2 to A.7. These are the two vital aspects which cracks the foundation of the prosecution case.

40 As per the prosecution version, M.Os1, 2 and 5 are seized in pursuance of the information given by A.2 to A.7. This is one of the circumstances on which the prosecution relied on to prove the guilt of the accused. The trial Court in para No.20 of the judgment discussed about these recoveries and made the following observation.

“For all these reasons I hold that the prosecution has failed to prove that M.Os.1, 2 and 5 are seized at the instance of A.2 to A.7.”

41 The finding of the trial Court on the above two aspects became final in view of non-filing of appeal by the prosecution. The basis for implication of A.2 to A.7 in this case was disbelieved by the trial Court. Therefore the prosecution failed to establish that it has recovered material objects in this case. The prosecution failed to explain what happened to Rs.80,000/-, missed from the petrol bunk on that date as deposed by P.W.6. As per the principle enunciated in **Iqbal** case (6 supra) conviction of the accused basing on the identification of the accused in the absence of other evidence like recovery of stolen jewellery is not sustainable.

42 Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, we are of the considered view that identification of the accused by the prosecution

witnesses is highly improbable and unbelievable. The finding of the trial Court that the prosecution witnesses identified the accused in the test identification parades as well as before the Court is not sustainable either on facts or in law. Hence we are of the considered view that the prosecution failed to prove the guilt of the accused /appellants for the offences punishable under Sections 396 and 397 of IPC beyond all reasonable doubt.

43 On the strength of the above discussion, these two appeals are allowed. The common judgment passed by the learned VIII Additional District & Sessions Judge, (FTC), Chittoor in S.C.No.295 of 2008 (sic, S.C.Nos.295 of 2008 and 383 of 2008), in so far as the appellants who are accused Nos.1, 2, 3, 9 and 10 herein are concerned, is hereby set aside. The appellants are found not guilty of the offences punishable under Sections 396 and 397 of IPC and they are acquitted of the said offences. The appellants are hereby directed to be set at liberty forthwith if they are not required in any other crime. Consequent upon the allowing of these appeals, miscellaneous petitions, if any, pending in these two appeals, shall stand closed.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE T. SUNIL CHOWDARY

Date 22nd July, 2016

Kvsn

[\[1\]](#) 2012 (1) ALD (CrI.) 246 (SC)

[\[2\]](#) AIR 1957 SUPREME COURT 320

[\[3\]](#) (2014) 7 SCC 443

[\[4\]](#) (1987) 3 SCC 331

[\[5\]](#) (2002) 7 SCC 295

[\[6\]](#) (2004) 13 SCC 150

[\[7\]](#) (2015) 6 SCC 623

