

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

**CRIMINAL APPEAL Nos.269 of 2009, 1195 of 2009 and 1291 of
2012**

COMMON JUDGMENT:

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All these appeals are preferred against the judgment dated 05.01.2009 passed in S.C.No.172 of 2008 on the file of the I Additional Sessions Judge, Ongole, Prakasham District. Criminal Appeal No.269 of 2009 is filed by accused Nos.3,4,5,7 and 10 while Criminal Appeal Nos.1195 of 2009 and 1291 of 2012 are filed by accused Nos.11 and 12 respectively.

The case against accused Nos.1,2, 13 and 14 was split up before committal while the case against accused No.8 was split up after framing of charges. The case against accused No.9 got abated as he died. Therefore, the appellants along with accused Nos.6 and 15 were tried on seven charges. The charges are as under:

Sl.No.	Charge under Section	Accused Nos.
1.	148 IPC	A3 to A8, A10 to A12 and A15
2.	396 IPC	A3 to A8, A10 to A12 and A15
3.	397 IPC	A3 to A8, A10 to A12 and A15
4.	398 IPC	A3 to A8, A10 to A12 and A15
5.	302 r/w 149 IPC	A3 to A8, A10 to A12 and A15
6.	326 r/w 34 IPC	A3 to A8, A10 to A12 and A15
7.	412 IPC	A3 to A8, A10 to A12 and A15

The gist of the prosecution case as culled out from the evidence of prosecution witnesses is as under:

On 30.07.2006 midnight the accused gained entry into the house of one Chakka Koteswara Rao (hereinafter referred to as "the deceased") by breaking open the main door of the house with crow bar committed theft of valuables. During the said process

the accused are alleged to have killed the deceased. PW.1 is the tenant of the deceased. PW.2 is the wife of the deceased and eye witness to the incident. PW.3 is the brother-in-law of PW.2, PW.4 is the maid servant working in the house of PW.2. PWs.5 and 6 are neighbours. The other witnesses are all official witnesses.

PW.2 stated that on 30.07.2006, her husband went to Vijayawada to drop their daughter and returned home at about 11.30 p.m. Thereafter, PW.2 and her husband slept. At about 2.00 a.m. PW.2 heard some sound in the house. She found accused No.5 on eastern side of the room along with two others. She deposed that other assailants, who are not present in the Court attacked her husband with an iron rod and thereafter beat on her head with iron rod. Both of them fell down un-conscious. PW.4, who is the maid servant, visited the house of PW.2 at 6.00 a.m. on 31.07.2016 and when she peeped through window found the husband of PW.2 with head injury and pool of blood in the bed. Immediately she informed the same to PWs.5 and 6 who are neighbours. Immediately they are called 108 ambulance and shifted the injured to the hospital with an intimation about the incident being passed on to PW.3 who is the brother-in-law of PW.2. PW.3 went to the house of the deceased and learnt that both the injured were shifted to Government Hospital, Ongole. He proceeded to the Government Hospital, Ongole and found his brother and sister-in-law un-conscious. At about 8.30 a.m. the deceased died in the Government Hospital, Ongole and thereafter, PW.2 was shifted to a private hospital at Ongole and from there to Peoples Trauma Hospital, Guntur. At about 9.00 a.m. PW.1 lodged a report which is marked as Ex.P1. Basing on Ex.P1, PW.12, the A.S.I. of Police registered a case in Crime No.130 of 2006 under Sections 307, 302 and 379 IPC. Ex.P8 is the F.I.R.

PW.17 the Inspector of Police took up further investigation from PW.12 and proceeded to Government Hospital, Ongole. Noticing the death of the deceased, he proceeded to the scene of offence. In the presence of PW.8 and others, he conducted scene of offence panchanama. PW.7 is said to have taken the photographs of the scene of offence. Ex.P2 is the photographs along with the corresponding negatives. Ex.P3 is the scene of offence panchanama. During the course of preparing the observation report, he noticed blood stained crow bar which was produced before the Court as M.O.5. From the scene of offence, PW.17 proceeded to the Mortuary of the Government Hospital and in the presence of PW.8 and others he conducted inquest over the dead body. Thereafter, the body was sent for post mortem examination. Ex.P4 is the inquest report. He again went back to the scene of offence, prepared rough sketch of the scene, which is marked as Ex.P12.

PW.11 the Civil Assistant Surgeon, District Head Quarters Hospital, Ongole, stated that he conducted autopsy over the dead body on 31.07.2006 at 3.30 p.m. Ex.P7 is the Post Mortem Examination Report. According to him, the cause of death was due to shock and hemorrhage due to head injuries.

PW.13, the Civil Assistant Surgeon, Government Hospital, Ongole, deposed that on 31.07.2016 at about 7.30 a.m. he examined PW.2 and found the following injuries:

1. An incised wound of 10 cm x 3 cm bony deep over left side of forehead.
2. Both eyes are black and bull eyes (swollen).
3. An incised wound of 10 cm x 1 cm x skin deep over right parietal region of scalp.

Ex.P9 is the Wound Certificate of PW.12. On 31.07.2006

itself PW.2 was shifted to a private hospital, where PW.15 examined PW.2 and issued Ex.P11 wound certificate. Thereafter, PW.2 was shifted to Peoples Trauma Hospital, Guntur. On 18.09.2006 PW.2 re-gained consciousness and referred to the articles which were stolen from her house ie. Two gold bangles, one pearl gold ring, gold tali chain, two pairs of gold ear studs, green stones ear studs one pair, wrist watch, gold chain, gold bracelet, one pearl gold rings and two gold rings worn by her husband.

On 07.11.2006 PW.16 arrested accused Nos.3 to 5 in the presence of PW.9 and recovered M.O.1-gold chain from accused No.3, M.O.2-gold ring studded with green stone was recovered from accused No.5 and another gold chain relating to other case from accused No.4 under Ex.P5 panchanama. On the same day, PW.17 arrested accused Nos.7 to 12 and recovered M.O.4 from the possession of accused No.7. The evidence on record further discloses that on 09.11.2016 he conducted test identification proceedings of the property in the presence of PW.10 wherein PW.2 identified Mos.1,2 and 4. Ex.P7 is the property identification panchanama. After collecting the material documents, PW.17 filed the charge sheet.

On appearance of the accused, charges under Sections 148, 396, 397, 398 and 302 read with 149, 326 and 412 IPC were framed, read over and explained to the accused in telugu, to which they pleaded not guilty and claimed to be tried.

In support of its case, the prosecution examined PWs.1 to 17 and got marked Exs.P1 to P14 and MOs.1 to 7.

After closure of the prosecution evidence, the accused were examined U/s. 313 Cr.P.C. wherein they denied the evidence

appearing against them. The accused examined DW.1 but however no documents were marked.

After hearing and perusing the material on record, the learned Sessions Judge found accused Nos.3 to 7 and 10 to 12 guilty for the offences punishable under Sections 396, 397 and 148 IPC. Accused Nos.3 to 7 and 10 to 12 were sentenced to undergo R.I. for a period of ten years and to pay fine of Rs.100/- each in default to undergo S.I. for a period of 15 days for an offence under Section 396 IPC and they were also sentenced to undergo R.I. for ten years each for the offence under Section 397 IPC and further sentenced to undergo R.I. for a period of three years each for an offence under Section 148 IPC. Accused No.15 was acquitted of all the charges. Challenging the same, the present appeals are filed.

Learned counsel for the appellants in CrI.A.No.269 of 2009 mainly submits that even accepting the evidence available on record, there is no evidence to connect the appellants for an offence punishable under Section 396 IPC. According to him, the entire case rests on the evidence of PW.2, who was not subjected to any test identification parade. Even during the trial she refers only to the presence of accused No.5 and categorically states that the persons, who assaulted her and her husband, are not present before the Court.

Learned counsels appearing for other accused reiterated the arguments advanced by the counsel appearing in CrI.A.No.269 of 2009. It is urged that in the absence of any material to show that these appellants have committed the offences, the counsels appearing for all the accused submits that convicting the accused for an offence punishable under Section 396 IPC is un-

sustainable. In any event it is stated that since the recoveries are from accused Nos.3 to 5, they can utmost be convicted under section 411 IPC. He further submits that all the accused are in jail from the date of arrest ie. 07.11.2006 which would mean that they have completed 10 years of sentence awarded by the trial Court and they may be directed to be set free, forth with if they are not required in any case.

Learned Public Prosecutor strongly objected to the arguments advanced by the learned counsel for the appellants. According to him, the evidence on record amply establishes the involvement of the appellants in the crime. He submits that the findings of the trial Court which is based on the evidence available on record warrants no interference.

In order to appreciate the rival arguments, it would be necessary to refer to the evidence available on record.

As seen from the record, PW.2 is the only an eye witness examined by the prosecution. The other witnesses namely PWs.1,3,4,5 and 6 came to the scene of offence on the next day morning pursuant to an information furnished by the maid servant, who was examined as PW.4.

It is now to be seen as to whether the evidence of PW.2 would help the prosecution in proving the guilt of the accused for an offence punishable under Section 396 IPC.

As stated earlier, PW.2 fell down un-conscious after receiving an injury, at the time of alleged incident ie. on the intervening night of 30/31.07.2006. She regained consciousness on 18.09.2006 while undergoing treatment at Peoples Trauma Hospital, Guntur ie. nearly one and half month after the incident. It

is not in dispute that the prosecution did not conduct any test identification parade after the arrest of the accused. The evidence of PW.2 goes to show that on the date of incident while herself along with her husband were sleeping, she got up on hearing some sound. According to her, she found accused No.5 on the eastern side of the bed room while others, who were not present before the Court on the date of giving evidence, are alleged to have attacked her with iron rod and also beat her husband with the said rod. Though PW.2 refers to number of articles are loot but identified only MOs.1 to 4 alleged to have been recovered from accused Nos.3 to 5.

In the cross examination, PW.2 admits identifying Mos.1 to 4 on 09.11.2006, but however states that she cannot give descriptive particulars of the mediators. She admits that she is not having any bills relating to M.Os.1 to 4. She further admits that in 161 Cr.P.C. statement she did not mention about the loss of Rs.70,000/-. To a suggestion that accused No.5 was already shown to her was denied. The said evidence of PW.2 with regard to identification of few of some of articles, said to have been recovered from accused Nos.3 to 5, gets corroboration from PW.9 the mediator who was one of the panchas present at the time of arrest and recovery of Mos.1 to 4 from accused Nos.3 to 5.

From the evidence referred to above, two things emerge out namely (1) PW.2, who is the sole eye witness to the incident and in whose house the incident took place was not subjected to test identification parade when the accused were strangers to her and (2) though PW.2 in her evidence speaks about loss of number of gold articles belonging to her and also her husband, identifies only three articles recovered from the possession of accused Nos.3 to

5.

From the above two circumstances can it be said that all the accused are responsible for the offences punishable under Sections 396 and 397 IPC or whether they are liable for an offence punishable under section 411 IPC.

In Dana Yadav @ Dahu & Ors vs State Of Bihar^[1], the Apex Court while dealing with the Test Identification Parade held as under:

In view of the law analysed above, we conclude thus:-

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not

be accepted. But in case either prayer is not granted or granted but no test Identification parade held, the same ipso facto can not be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

(d) 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.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form

basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first Information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.

It is an admitted fact that all the accused are strangers to PW.2. Neither in 161 Cr.P.C. statement nor before the Court, PW.2 made any effort to give descriptive particulars of any of the accused. Therefore, the participation of all the accused except accused No.5 in the commission of offence becomes doubtful, since there is no other evidence on record except the evidence of PW.2. As stated earlier, PW.2 was not subjected to identify the culprits. Having regard to the judgment of the Apex Court referred to above with regard to failure on the part of the prosecution in conducting test identification parade when the accused are strangers, benefit of doubt can be extended to accused No.5 for the offences punishable under Sections 396 and 397 IPC. Even believing the evidence of PW.2 with regard to presence and participation of accused No.5 in the commission of offence, it is brought to the notice of the Court that accused No.5 was almost

served out his sentence. Accordingly, the appellants are acquitted for the offences punishable under Sections 396 and 397 IPC.

Coming to an offence under Section 411 IPC is concerned the property was alleged to have been recovered from accused Nos.3 to 5 on 07.11.2006, in the presence of PW.9. Nothing useful was elicited through PW.9 to discard his testimony with regard to arrest and recovery of Mos.1 to 4 from accused Nos.3 to 5 and 7. After regaining consciousness on 09.11.2006 PW.2 is alleged to have identified three gold ornaments recovered from accused Nos.3 to 5 and 7 as belonging to her. Hence, accused Nos.3 to 5 and 7 are convicted for an offence punishable under Section 411 IPC.

Insofar as the offence under Section 148 IPC is concerned, there is no material to show that all the appellants were present at the scene of offence. As stated earlier, even the presence of accused No.5 cannot be accepted in the absence of any test identification parade. Hence, the conviction under Section 148 IPC also needs to be set- aside.

Accordingly, the appeals are allowed in part and accused Nos.3 to 5 and 7 are convicted for an offence punishable under section 411 IPC and sentenced to undergo R.I. for three years.

The sentence imposed against the appellants in CrI.A.No.269 of 2009, 1195 of 2009 and 1291 of 2012 arising out of S.C.No.172 of 2008 on the file of the I Additional Sessions Judge, Ongole shall run concurrently with the sentence imposed against them in CrI.A.Nos.1126 of 2008 and 248 of 2009 arising out of S.C.No.330 of 2007 on the file of the IX Additional Sessions Judge (FTC), Guntur

As a sequel thereto, Miscellaneous Petitions, if any,
pending shall stand closed.

C. PRAVEEN KUMAR, J

10.06.2016
gkv

[\[1\]](#) (2002) SCC (Cr.) 1698