HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CRIMINAL APPEAL Nos.1126 of 2008 and 248 of 2009

COMMON JUDGMENT:

Both the appeals are filed against the judgment dated 23.11.2007 passed in S.C.No.330 of 2007 on the file of the IX Additional Sessions Judge (FTC), Guntur. Criminal Appeal No.1126 of 2008 is filed by accused No.2 while Criminal Appeal No.248 of 2009 is filed by accused Nos.3 and 4.

The appellants along with seven others were tried on the following charges.

1. The first charge was under Section 458 IPC against accused Nos.1 to 6 and 8 to 10.
2. The second charge was under Section 397 IPC against accused Nos.1 to 4.
3. The third charge was under Section 497 read with 34 IPC against accused Nos.5, 6, 8, 9 and 10 and the fourth charge was under Section 302 IPC against accused No.2.

The gravemen of the charge against the accused is that on the intervening night of 10/11.10.2006 at about 2.30 a.m. near Paladri Canal, Anugoluvari Street, Nazerpet, Tenali, the accused trespassed into the house of Pratapagiri Murali Krishna (hereinafter referred to as "the deceased") and committed the offence of dacoity. During the said process they are alleged to have killed the deceased apart from committing theft of various gold ornaments. PW.1 is the wife, PW.2 is the son, PW.3 is the daughter, PW.4 is the brother, PW.5 is the brother-in-law of the deceased while PW.6 is nieghbour of the accused.

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

PW.1, who is the wife of the deceased stated that on 10.10.2006 at about 11.00 p.m. she along with her husband and children were sleeping in the house. At about 2.00 or 2.30 a.m. she heard some noise from her bed room. She tried to wake up her husband, but he did not turn up as he was in the habit of taking sleeping pills. In the mean time, she noticed two unknown persons standing near the cot. Both of them are alleged to have caught hold of her hands, dragged her into bed room, demanded for the keys of the safe. After handing over the keys the accused gave sedation by putting a cloth near her nose. While she was becoming drowsy she heard the cries of her husband. She identified the four persons who are alleged to have entered into the house on that day as accused Nos.1 to 4. Her evidence further shows that she woke up at 5.30 a.m. and noticed window door was opened in the bed room. On hearing her cries, neighbours came there and with great difficulty brought her outside the house. She deposed that before giving sedation, accused Nos.1 to 4 tied her and her children with a cloth to the bed. It was informed to her that her husband was killed and gold and silver articles were stolen. She also noticed that her husband was lying in a pool of blood in the hall. The neighbours and other relatives were present on the spot. Pursuant to the information given, the police arrived at the spot. She narrated the events to the best of her knowledge. Ex.P1 is the report. The said version of PW.1 is corroborated in all material particulars by PWs.2 and 3.

After receiving Ex.P1 report registered a case in Crime No.111 of 2006 for the offences punishable under Sections 458, 397 and 302 read with 34 IPC, PW.1, who is the Circule Inspector

of Police gave intimation to the clue team and the dog squad. Ex.P13 is the First Information Report. After receipt of a copy of the F.I.R., PW.13 proceeded to the scene of offence, prepared an observation report in the presence of PW.7 and others. Ex.P2 is the Observation Report. He also prepared a rough sketch of the scene which was marked as Ex.P16. He also got photographed the scene of offence through PW.8. Ex.P7 is the bunch of photographs with corresponding negatives. PW.13 observed the scene of offence in the presence of PW.7 and seized Mos.5 and 6. Later, he conducted inquest over the dead body of the deceased. Ex.P3 is the inquest report. PW.14 conducted Post Mortem Examination over the dead body of the deceased. Ex.P20 is the Post Mortem Examination Report.

PW.9 the then I Additional Junior Civil Judge, Tenali, conducted test identification parade on 01.12.2006 for identification of accused Nos.3 to 5 and 12 by PWs.1 to 3. On 08.12.2006 he conducted test identification parade to identify accused Nos.1,3 to 5 and 12 by PWs.1 to 3. Exs.P8 and P9 are the requisitions from the police to conduct test identification parade and Ex.P10 is the test identification parade proceedings. As per the test identification parade proceedings, PWs.1 and 2 identified accused Nos.1 to 4 and PW.3 identified accused Nos.1 to 3.

On 07.11.2006 at about 7.30 a.m. PW.15 arrested accused Nos.2 to 4 in East Kammapalem, Ongole in the presence of PW10 and another. In pursuance of their confession, he also arrested accused Nos.5 to 10 at platform No.1 of Ongole Railway Station. A portion of stolen property was recovered in the presence of PW.10 under a cover of panchanama. Ex.P11 is the recovery panchanama. On 02.12.2006 PW.13 arrested accused No.1 and

seized Nokia Cell Phone, Airtel SIM Card, one silver coin, silver kumkum box, two gold bangles, one gold ring with gomedam stone, one plain gold ring, one pagadam gold ring, one steel folding knife, one big iron knife and one silver ring with 'S' mark from the possession of accused No.1. PW.1 identified the property in property identification parade. After completing the investigation the police filed the charge sheet.

On appearance of the accused, charges as indicated above 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 15 and got marked Exs.P1 to P21 and Mos.1 to 8.

After closure of the prosecution evidence, the accused were examined U/s. 313 Cr.P.C. wherein they denied the incriminating material appearing against them. No oral or documentary evidence was adduced on behalf of the accused.

After hearing and perusing the material on record, by its impugned Judgment dated 23.11.2007, the learned Sessions Judge found accused Nos.1 to 4 guilty for the offences under Sections 458 and 397 IPC and sentenced to undergo R.I. for a period of seven years and to pay fine of Rs.1,000/- each, in default S.I. for three months for the offence under Section 458 IPC and they were also sentenced to undergo R.I. for ten years each for the offence under Section 397 IPC. Accused No.10 was found guilty for an offence punishable under Section 411 IPC and sentenced to undergo S.I. for one year and to pay fine of Rs.500/- in default S.I. for two months. Accused No.2 was found not guilty for the offence punishable under Section 302 IPC and he is acquitted for the said charge. Accused Nos.5, 6, 8, 9 and 10 were

acquitted for the offences punishable under Sections 397 read with 34 IPC. Challenging the same the present appeals are filed by accused Nos.2 to 4.

Learned counsel for the appellants submits that the evidence of PWs.1 to 3 would show that the offenders entered into the house of the deceased with monkey caps. Hence, the identification of accused by PWs.1 to 3 cannot be believed. He further submits that all the accused are in jail from the date of their arrest, which would mean that they have completed 10 years of sentence awarded by the trial Court and they may be set free if not required in any case.

Learned Public Prosecutor strongly objected to the arguments advanced by the learned counsel for the appellants. According to him, there is enough material to show that these appellants along with accused No.1 entered into the house of the deceased and committed the ghastly incident.

Insofar as the argument of the counsel with regard to accused wearing monkey cap is concerned, it would be useful to refer to the evidence of PWs.1 to 3.

PW.1 in her evidence stated that when she heard some noise from her bed room, she got up and noticed two unknown persons standing nearby her cot. They caught hold of her, dragged her into bed room and asked for almyrah keys. Two other persons were already in bed room. They gave sedation by closing her nose with a cloth. They took her mangalasutram. She claims to identify the four persons who entered into the house and they are accused Nos.1 to 4.

PW.2 in his evidence deposed that he can identify accused

Nos.1 to 4. On 10.10.2006 after having dinner at about 11.00 p.m. himself, his sister and parents slept in the house. In the midnight on hearing some sound in the house, he woke up and found PW.1 being dragged by two unknown persons by catching hold of his hair. One person among four confined him and his sister in a bath room and bolted the door from outside. Since they knocked the doors continuously, they were given sedation. At about 5.30 to 6.30 a.m. they woke up and found himself, PW.1 and his sister tied up with clothes.

PW.3 also deposed on the same lines of PWs.1 and 2.

From the evidence adduced it is clear that it was only accused Nos.1 to 4 who have to be entered into the house, committed theft and also caused the death of the deceased. The fact of accused Nos.1 to 4 entering into the house and committing the offence gets corroboration from the test identification parade proceedings conducted by PW.9, wherein PWs.1 to 3, who are injured eye witnesses to the incident identified accused Nos.1 to 4. None of the witnesses speak about accused wearing monkey caps and covering their faces. It is also to be noted that in the earlier statement all the three witnesses gave descriptive particulars of accused Nos.1 to 4. Therefore, the argument of the counsel that PWs.1 to 3 could not have identified the accused cannot be accepted. Apart from that material on record also discloses recovery of part of stolen property from the accused. Therefore, the conviction and sentence imposed by the trial Court warrants no interference.

However, the learned counsel for the appellants mainly contended that since the appellants in the present appeals and the appellants in Criminal Appeal Nos.269 of 2009 are one and the

same, and the sentence in both the cases may be ordered to be run concurrently. He submits that the High Court can invoke its inherent power under Section 482 Cr.P.C. though such relief was not exercised by the trial Court under Section 427 (1) Cr.P.C.

In ***Shersingh v. State of Madhya Pradesh***[1] a Full Bench of Madhya Pradesh High Court while dealing with the issue as to whether the inherent power of High Court under Section 482 Cr.P.C. is fettered by the provisions of Section 427 (1) Cr.P.C. held as under:

> "5. The consensus of judicial opinion of different High Courts seems to be that inherent powers of the High Court can be invoked under section 482 even if the trial court or the appellate or revisional court has not exercised its discretion under Section 427(1) of the Code. The inherent powers of the High Court is not in any way fettered by the provisions of Section 427(1) and it can be invoked at any stage even if there is no such order passed under Section 427(1) by the trial Court or appellate or revisional court and even though the conviction has become final.
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> A Division Bench of the Calcutta High Court in J. K. Banerjee v. The State[2], has held "with regard to sentences passed on different dates in respect of different convictions of the accused by Courts other than the High Court, the High Court has power under Section 561-A to order that they may run concurrently." Section 561-A of the old Code of 1898 is identical to Section 482 of the present Code.
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> The Andhra Pradesh High Court in Venkanna v. State of Andhra Pradesh[3] , has held that High Court can order sentences to run concurrently in two different cases against the same accused by invoking inherent powers under section 561A read with Section 435 and 397(1) of the Code.
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> A Full Bench of the Allahabad High Court in Mulaim

Singh v. State[4] held that High Court is competent under Section 561-A to direct that the sentence of imprisonment under a subsequent conviction shall run concurrently with a previous sentence.

A Division Bench of this Court in A. S. Naidu v. State of M.P.[5] has held that the power to make the two sentences run concurrently under Section 397(1) of the old Code (S. 427 of the present Code) could, be exercised at any time when the matter was brought to the notice of the Court by an application or otherwise, since no modification of the judgment itself was involved, in the exercise of such a power, though it further held that the question of exercising the power under its inherent jurisdiction in such a case does not arise, meaning thereby that power under Section 427(1) could be exercised at any time and not necessarily while deciding the case on merits as the Court does not become functus officio."

Further, a learned Single Judge of this Court in ***Bandamedi Shankar and others v. State of Andhra Pradesh***[6] had an occasion to deal with the issue as to whether subsequent sentence can be directed to run concurrently with previous sentence. It was a case where 31 persons were arrayed as an accused in different session cases. Judgments were pronounced on different dates and in some cases the accused were either convicted or acquitted in appeals. Having found that there is enough material to convict the accused for an offence of dacoity, directed all the sentences to run concurrently.

In ***V.Venkateswarlu v. State of A.P.,***[7] a Division Bench of this Court had an occasion to consider the power and parameters of the Court in directing the sentences to run concurrently. After an exhaustive review of the case law on the subject, this Court held as under:

> "It must be remembered that Sec. 427 Cr.P.C. provides for directing the sentence awarded in the subsequent case to run concurrently with the previous sentence. It may be that the subsequent convicting Court was not apprised about the existence of the previous sentence. At any rate ordering of sentence to run concurrently does not amount to altering the finding. It may be noted that Section 31 Cr.P.C. provides for ordering the sentences to run concurrently in a given case. Likewise, under Section 427 Cr.P.C. while awarding a sentence in a subsequent case in respect of the person who is already undergoing sentence in a previous case, a discretion is given to the subsequent convicting Court to give such a direction and order the sentence to run concurrently with the previous sentence. As laid down in the above decision, even after such a sentence has become final, nothing prevents the High Court to exercise its *suo motu* revisional jurisdiction or entertain an application under Section 482 Cr.P.C. and give the necessary directions as provided under Section 427 Cr.P.C."

In view of the procedure adopted by the Apex Court and taking into consideration the observations made by this Court in Bandamedi Shankar case (6 supra), it would be just and proper to order that the sentence against the appellants sentence imposed against the appellants in Crl.A.No.269 of 2009 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 Crl.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.

Accordingly, both the appeals are disposed of. As a sequel thereto, Miscellaneous Petitions, if any, pending shall stand closed.

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C. PRAVEEN KUMAR, J

10.06.2016
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[1] (1989) Crl.L.J. 632 (1)

[2] AIR 1955 Cal. 632

[3] (1964) 2 Crl.L.J. 377

[4] (1974) Crl.L.J. 1397

[5] (1975) Crl.L.J. 498

[6] (2003) 2 ALT (Crl.) 266 (A.P.)

[7] 1987 Crl.L.J. 1621