

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE P.KESHAHA RAO

CRIMINAL APPEAL No.734 of 2011

JUDGMENT : (per Hon' ble Sri Justice C.Praveen Kumar)

1) This Criminal Appeal is filed by the appellants/accused Nos.5 and 7, against the judgment dated 28.01.2010 passed in S.C.No.281 of 2009 on the file of the III Additional Sessions Judge, Tirupati. The learned Sessions Judge found accused No.5 guilty of the charges under sections 451, 302 and 376 (2) (g) of IPC and sentenced him to undergo rigorous imprisonment for life and to pay fine of Rs.500/- for an offence punishable under Section 302 IPC and also sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.500/- for an offence punishable under Section 376 (2) (g) of IPC. Accused No.5 was further sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.500/- for an offence punishable under Section 451 IPC. Accused No.7 was found guilty for an offence punishable under section 302 read with 34 IPC and 376 (2) (g) read with Section 109 IPC, and was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.500/- for an offence punishable under Section 302 read with 34 IPC and further sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.500/- for an offence punishable under Section 376 (2) (g) read with 109 IPC.

2) Originally charge sheet was filed against eight accused which was taken on file as P.R.C.No.5 of 2008. The case against accused Nos.5, 7 and 8 was split up and re-numbered as P.R.C.No.12 of 2008. The case against accused No.8 was split up and numbered as P.R.C.No. 10 of 2009. The case against accused Nos.1 to 4 and 6 was disposed of on 17.02.2009 vide S.C.No.121 of 2008.

3) The evidence adduced by the prosecution unveils the following facts.

PW.2 is the husband of PW.3. They are residents of Gopalakrishnapuram. PW.1 and one Chithondu Uha (hereinafter referred to as "the deceased") are their daughters. On 29.07.2007, PW.1 and the deceased slept on a cot in the hall of their incomplete house. At about 1.00 a.m. four persons criminally trespassed into the house from the open window, which has no frame or grill, gagged the mouth of PW.1 and the deceased, carried them out of the house through the window and committed murder of the deceased by throttling. Later they abandoned her at a distance of about 30 yards away from the house. The said persons carried PW.1 to a lonely place, made her nude and committed rape on her one after another. On hearing some sounds, they left the place. While leaving the place, they committed theft of a Hero Jet Cycle, which was kept in front of shop of PW.5. In the morning, PWs.2 and 3 found PW.1 and the deceased missing and searched for them. One T.Subbaiah

informed that the deceased was lying near a cart track. They rushed there and found the deceased dead and also found PW.1 lying near a cart track without any clothes and in unconscious state. PW.1 was shifted to Area Hospital, Srikalahasti, for treatment. On receiving the information from the hospital, Sub-Inspector of Police (LW.26) went to the hospital and recorded the statement of PW.1. Ex.P1 is the statement of PW.1. Basing on the said statement, he registered a case in Crime No.47 of 2007 for the offences punishable under Sections 448, 302 and 376 (2) (g) read with 34 IPC and issued First Information Report, which is marked as Ex.P13. Then, PW.13 took up investigation and examined PWs.1 and 2. He then held inquest over the dead body of the deceased in the presence of PW.6 and others. Ex.P3 is the Inquest Report. Then he proceeded to the scene of offence, prepared an observation report of scene of offence in the presence of PW.6 and another. Ex.P4 is the scene of offence panchanama. During the said process, he seized MOs.1 and 2. Thereafter, the body was sent to Government Area Hospital, Srikalahasti, for postmortem examination. PW.9-the Civil Assistant Surgeon in Government Area Hospital, Srikalahasti, conducted autopsy over the body and issued Ex.P9-the postmortem examination report. According to him, the cause of death was due to "asphyxia due to throttling". PW.10-the Civil Assistant Surgeon, Area Hospital, Srikalahasti treated PW.1 and issued Ex.P12-wound certificate. After collecting all the material,

PW.13 filed a charge sheet against all the accused, which came to be numbered as P.R.C.No.5 of 2008.

4) Subsequently, the case against accused Nos.5, 7 and 8 was split up as they are absconding and it was re-numbered as P.R.C.No.12 of 2008, which on committal came to be numbered as S.C.No.281 of 2009. Again the case against accused No.8 was split up and the same was re-numbered as P.R.C.No.10 of 2009.

5) On appearance of the appellants/ accused Nos.5 and 7, charges under Sections 143, 451, 302 and 376 (2) (g) of C.P.C. were framed against accused No.5 and charges under Sections 143, 302 read with 34 and 376 (2) (g) of IPC against accused No.7, which were read over and explained to them. The plea of the accused is one of total denial.

6) To substantiate their case, the prosecution examined PWs.1 to 13 and got marked Exs.P1 to P15 and MOs.1 to 6. After the closure of evidence, the accused were examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against them, in the evidence of the prosecution witnesses, to which they denied. No oral or documentary evidence was adduced on their behalf, in support of their defence.

7) After considering the oral and documentary evidence on record, the learned Sessions Judge convicted the

appellants/ accused Nos.5 and 7 in the manner referred to above. Challenging the same, the present appeal is filed.

8) The main ground urged by the learned counsel for the appellants is that in view of the acquittal of accused Nos.1 to 4 by this Court and accused No.6 by the Sessions Judge and as the case of the appellants stands on the same footing as that of them, they are also entitled for the same benefit. The said fact is not seriously disputed by the learned Public Prosecutor.

9) In [Megh Singh v. State of Punjab](#)¹ the Apex court held that “the acquittal of the co-accused does not by itself entitle the other accused in the same case to acquittal as a single significant detail may alter the entire aspect. It may be noticed that the co-accused was acquitted in the same trial still it was held that, that by itself is not a reason to acquit the other accused.”

10) In [Gorle Section Naidu v. State of A.P.](#)² referring to [Section 3](#) of the Evidence Act and credibility of evidence, the Apex Court held that “mere acquittal of large number of co-accused does not per se entitle others to acquittal.”

11) In view of the judgments referred to above, the argument of the learned counsel for the appellants that the appellants are entitled for acquittal since the other accused were acquitted by this Court, cannot be accepted. The Court has to independently seen the evidence and then decides the issue.

¹ 2004 SCC (CrI.) 58

² AIR 2004 SC 1169

12) Coming to the merits of the case, as seen from the record, PW.1 is the only eye witness to the incident. In her evidence, she stated that she saw the accused in moon light. She also stated that she identified the accused in the test identification parade conducted by the Magistrate in the month of November, 2007. PWs.2 to 4 are not eye witnesses to the incident as such their evidence is in no way helpful to the prosecution case, to identify the accused, who are alleged to have committed the offence, as PWs.1 to 3 categorically stated that the accused are strangers. The incident happened on a dark rainy night. Hence, the identification of the accused by PW.1 in the test identification parade assumes greater importance. Admittedly, the offence took place on 29.07.2007 and the test identification parade was conducted on 17.11.2007. The prosecution failed to explain as to why they have taken three months time for conducting the test identification parade, when the accused were arrested in the month of August and September itself. Further, the prosecution failed to prove that there was a light at the scene of offence. It is no doubt true that PW.1 deposed that she was subjected to rape and that her deceased sister was throttled to death on that night by the assailant, but as stated above the alleged offence took place during the midnight. The appellants had no previous acquaintance with PW.1. The occurrence happened in a dark rainy night and the assailants are strangers to PW.1, hence the identification of the accused persons assumes greater importance. The entire case depends upon the

identification of the appellants and the identifications was based solely on the test identification parade which was taken three months after the incident. PW.1 stated that the rape was committed on PW.1 at a distance of ½ km. from her house, in a lonely place in the hands of strangers. Therefore, PW.1 seeing the accused in the moon light and identifying them in the test identification parade cannot be believed. Basing on the evidence of PWs.1 to 5, the prosecution failed to prove that the appellants committed the offence. Hence, we feel that the evidence on record is not sufficient to convict the accused for the offences with which they are charged.

13) Accordingly, the Criminal Appeal is allowed by setting aside the conviction and sentence passed in S.C.No.281 of 2009 on the file of the III Additional Sessions Judge, Tirupati and the appellants are acquitted. Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

JUSTICE P. KESHA RAO

25.10.2017
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