

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**CRIMINAL REVISION CASE No.2478 of 2017****ORDER:**

This Criminal Revision Case, under Sections 397 and 401 Cr.P.C., is filed questioning the propriety, legality and correctness of the conviction and sentence imposed in C.C.No.193 of 2016 passed by II Special Magistrate Court at Rajendra Nagar, Rangareddy District, finding the accused guilty for the offences under Sections 304-A and 338 IPC and sentenced him to undergo RI for a period of one year for the offence under Section 304-A IPC and RI for 6 months for the offence under Section 338 IPC, while ordering both the sentences shall run consecutively.

The Appellate Court in CrI.A.No.972 of 2016 by Calendar and Judgment dt. 03.07.2017, affirmed the conviction and sentence passed by the trial Court, finding the accused guilty for the said offences.

Aggrieved by the conviction and sentence passed by the trial Court, affirmed by the Appellate Court, the present revision is filed on the ground that the trial Court failed to establish the guilt of the accused beyond reasonable doubt, but the Appellate Court erroneously recorded a finding that the accused is the person, who drove the vehicle in rash and negligent manner at the time of accident and caused the accident by his act and committed an error in finding the accused guilty for the offences under Sections 304-A and 338 IPC.

The next contention raised in the grounds of revision is that no Test Identification Parade was conducted at the earliest possible time, but the trial Court accepted the contention that the petitioner was the driver of the crime vehicle at the time of accident and, therefore, in

the absence of test identification parade of the accused, the conviction and sentence passed against the accused for the offences under Sections 304-A and 338 IPC is an apparent error on the face of the record.

Finally, it is contended that except examination of the interested witnesses, no other witness was examined to establish the guilt of the accused driver for the offences stated above and committed an error in finding the accused guilty and requested this Court to set aside the conviction and sentence recorded by the trial Court, affirmed by the Appellate Court.

During hearing, Sri C.D.S.B.Venkata Rao, by over vehemence would contend that when no test identification parade was conducted, the accused cannot be found guilty for the offences punishable under Sections 304-A and 338 IPC since it is the requirement under law to establish that the accused was the driver of the vehicle at the time of the accident and apart from that the accused was arrested two days after the accident and therefore, it is a strong circumstance to disbelieve the case of the prosecution.

He also contended that except examining family members, no other independent persons is examined as a witness to establish the guilt of the accused for the above offences and those witnesses are highly interested and that the driver was holding learner's license and thereby, he cannot found guilty for the said offences and prayed to set aside the same.

In view of the specific grounds urged before this Court both in the grounds of revision and in argument, it is necessary to advert to the powers of this Court under Sections 397 and 401 IPC and decide the revision in accordance with law.

The jurisdiction of this Court under Sections 397 and 401 Cr.P.C. is limited. Section 401 Cr.P.C confers a kind of paternal and supervisory jurisdiction on the high Court, over all other criminal Courts established in the state in order to correct miscarriage of justice arising from a misconception of law, irregularity of procedure, neglect or apparent harshness of treatment which has on the other hand resulted in some injury to the due maintenance of law and order or, on the other hand, in some undeserved hardship to individuals. The revisional power conferred on the High Court by this Section is discretionary power, has to be exercised in the aid of justice and this Court will not exercise jurisdiction under this Section if there has been no failure of justice even though the proceedings of the lower Court suffer from irregularity or impropriety as held by Apex Court in *State of West Bengal v. Tulsidas*¹. The revisional jurisdiction conferred upon this Court by Section 401 Cr.P.C. has to be exercised only for the purpose of relieving persons who have not had a fair trial or whose convictions have been arrived at by non observance of material provisions of the law or by such mis-directions as must have occasioned a failure of justice, as held in *Prahlad v. Emporer*². Further, the High Court can, in exercise of its revisional powers, either *suo motu* on the basis of its own knowledge derived from any source whatsoever, or on an application by a complainant, exercise the powers of an appellate Court both with respect to acquittal and conviction. This revisional power is subject to the following three limitations:

Firstly, no order can be made to the prejudice of the accused or other person unless he had an opportunity of being heard personally or by a pleader in his own defence;

¹ (1964) 1 Cr.L.J.443 (SC)

² 48, Cr.L.J.173,174(pat)

Secondly, it cannot convert a finding of acquittal into one of conviction;

Thirdly, no revision can be entertained at the instance of a party who could have appealed under the Code and has not appealed.

Thus, the powers of the High Court are limited, this Court cannot interfere with the concurrent fact findings recorded by the Courts below. As a general rule, the High Court will not in revision interfere with a finding of fact and this is specially so, where there are concurrent findings of facts of the lower Courts. But in special and exceptional circumstances, the High Court is entitled to go into questions of fact and do justice, though the power should be rarely exercised as held by the Apex Court in *S.P.S. Jayam and Company V. Nehrusadan*³.

In revision, the High Court usually accepts the findings on questions of facts recorded by a subordinate Court unless the finding is manifestly perverse or patently erroneous in view of the law declared by the Apex Court in *Bansilal v. Laxman*⁴.

The first and foremost ground urged before this Court is that the trial Court found the accused guilty for the offences under Sections 304-A and 338 IPC without conducting any test identification parade of the accused. Section 9 of Indian Evidence Act, the facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary

³ 1977 SC 1621

⁴ (1986) 3 SCC 445

for that purpose. Thus, the facts to establish the identify of any accused are relevant and test identification parade belongs to the stage of investigation and if adequate precautions are ensured, the evidence with regard to test identification parade may be used by the Court for the purpose of corroboration. The purpose of test identification parade is to test and strengthen trustworthiness of the substantive evidence of a witness in Court. It is for this reason that test identification parade is held under the supervision of a Magistrate to eliminate any suspicion or unfairness and to reduce the chances of testimonial error as Magistrate is expected to take all possible precautions, as held in *Ram Babu v. State of Uttar Pradesh*⁵. Therefore, the object of holding test identification parade is to test and strengthen the trustworthiness of the evidence before the Court by the witnesses and to establish the identity of the accused. When the accused fled away after the accident, it is for the prosecution to establish the identity of the driver of the vehicle.

But, in *Rabindra Kumar Pal @ Dara Singh v. Republic of India*⁶, the Apex Court held that it is settled principle that in the absence of any independent corroboration like TIP held by the Judicial Magistrate, the evidence of eye witness as to the identification of the appellants/accused for the first time before the trial Court generally cannot be accepted. Showing photographs of the miscreants and identification for the first time in the trial court without being corroborated by TIP held before a Magistrate or without any other material may not be helpful to the prosecution case. To put it clear, the evidence of witness given in the Court as to the identification may be accepted only if he identification of the accused during trial for the

⁵ AIR 2010 SC 2143

⁶ 2011(1) ALD (CrI) 925 (SC)

first time is inherently weak in character, as a safe rule of prudence, generally it is desirable to look for corroboration of the sworn testimony of witness in Court as to the identify of the accused who are strangers to them in the form of earlier TIP.

In the latter judgment of the Apex Court in *Ravi Kapur v. State of Rajasthan*⁷, a direct question of identity of the accused for the offences punishable under Sections 304-A and 338 IPC came up for consideration, the Apex Court held as follows:

“The whole idea of a Test Identification Parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

It is equally correct that the Code of Criminal Procedure does not oblige the investigating agency to necessarily hold the Test Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the Court for the first time. One of the views taken is that identification in Court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions.”

In *Sheo Shankar Singh Vs. State of Jharkhand and another*⁸, the Apex Court took an identical view and concluded that failure to hold test identification parade does not have effect of weakening evidence of identification in Court, as to what should be the weight attached to such an identification is a matter which Court will determine in peculiar facts and circumstances of each case. Version of two eye-witnesses that it was accused who had shot deceased. However, only one of witnesses associated with Test Identification Parade in which he identified accused. Failure of prosecution to offer

⁷ AIR 2013(1) ALD (CrI) 303 SC

⁸ AIR 2011 SC page 1403

an explanation for not holding Test Identification Parade for other witness will not *ipse jure* prove fatal to case of prosecution.

Thus, from the law declared by the Apex Court in the judgments referred above, conducting test identification parade is only to strengthen the memory of a witness and mere failure to conduct Test Identification Parade would not vitiate the entire investigation.

However, in *Syed Zammer v. State of Andhra Pradesh*⁹, the single Judge of this Court took a different view that when no identification parade for identification of accused, who is the driver of the vehicle in a crime for the offence punishable under Section 338 IPC and identification of accused for the first time by the witnesses in the Court without disclosing the name of accused in the FIR, conviction cannot be sustained.

But, this Principle is contrary to the law declared by the Apex Court in the above referred judgments.

In *Rabindra Kumar's* case (5 supra), the Apex Court took a contrary view, but in para No.41 of the Judgment, made it clear that conduct of absconding of accused, soon after incident and avoided arrest is relevant under Section 8 of Indian Evidence Act along with other evidence to prove the guilt.

The learned counsel for the petitioner contended that immediately after the accident, the owner of the vehicle came and produced the accused before the police station. This is a strong circumstance to conclude that the petitioner is the driver of the vehicle, otherwise, there is no need for the owner of the vehicle to produce him before the police station. Therefore, failure to hold test identification parade does not loose sanctity of oral evidence, in view

⁹ 2002 (1) ALD (CrI)903 (AP)

of production of the accused by the owner of the vehicle in the police station. However, the owner of the vehicle was not examined as a witness, but it was supported by PW.7-SI of Police in his evidence. Therefore, in view of production of accused before the Police Station, the contention of the petitioner before this Court is without any substance and on that ground of failure to conduct test identification parade, the accused cannot be acquitted for the offences under Sections 304-A and 338 IPC.

The other contention of the learned counsel for the petitioner is that except family members of the deceased, no independent witness was examined to corroborate the testimony of Pw.1. No doubt, most of the direct witnesses were the family members of the deceased and the accident was occurred on 29.02.2015 when a family consists of A. Phanindra, aged about 17 years, Narsigma Murthy, aged about 50 yrs, A. Jayalakshmi, aged about 45 years, A. Krishna Murthy, aged about 78 years and Samalamma was proceeding in a Vagana-R Car bearing No. TS 07 EA 2109 being driven by Narasimha Murthy and on the way when it reached within the limits of Thondupally Village on ORR Road at 07.00 pm, an Indigo Car bearing No. AP 02 AC 7012 being driven by the accused in a rash and negligent manner took the car in reverse direction on ORR, which was totally unexpected for Narsihma Murthy, who was driving the Vaganar Car bearing No. TS 07 EA 2109, which resulted in causing instantaneous death of inmate of the car while causing injuries to other inmates of the Car. Reversing the vehicle without observing the vehicles proceeding on the road is sheer negligence on the part of the driver and it is nothing but failure to take reasonable care and caution while driving the vehicle as an ordinary prudent driver. Therefore, nothing more is required to establish that

the accident was occurred due to rash and negligent act of the accused driver.

Normally on Outer Ring Road, no independent witness is expected to be present. But, the injured witnesses in the accident are the natural witnesses and the testimony of the injured must be given credence in view of the Judgment reported in *Brahm Swaroop and another v. State of Uttar Pradesh*¹⁰.

Even according to the principle laid down in the judgment, an injured may not venture to foist a false case against any one and sustaining injuries in the accident is guarantee of his presence at the time of accident. Therefore, basing on the principle laid down in *Brahm Swaroop's case*, insisting upon independent witness to establish the guilt of the petitioner is not acceptable. While appreciating evidence of any witness, the Court, more particularly, ignore the contradictions or inconsistencies, which are minor, the Court can overlook the minor inconsistencies. A minor inconsistency of trivial in nature and are certainly not of such a magnitude that may materially affect core of the prosecution case. Credibility of a witness, witness in examination in chief stating that she did not understand the right from wrong, nor what an oath was held, rightly disregarded by the trial Court, as held in *State of M.P. v. Ramesh*¹¹.

According to direct evidence of witnesses, one person died and four other persons sustained injuries in the accident due to rash and negligent act of the petitioner and this fact is substantiated by oral testimony of Dr.M. Sowmya and Dr. Satish Kumar, who conducted autopsy over the dead body of the deceased and who treated the injured and issued PM and Wound Certificates respectively vide Exs.

¹⁰ (2011) 6 SCC 288

¹¹ 2011(4) SCC 786-C

P.4 to P.7. Therefore, death of one person and sustaining injuries by four other persons was proved by satisfactory evidence, the Report of MVI vide Ex.P.9, established that the accident was not occurred due to mechanical defect of the vehicle. Therefore, the cumulative effect of the entire material on record is that the accident was occurred due to rash and negligent driving of the accused, as he failed to take reasonable care and caution while reversing the vehicle at the time of accident. Therefore, non examination of any independent witness is not fatal to the case of the prosecution to acquit the accused for the offences punishable under Sections 304-A and 338 IPC.

Learned counsel for the petitioner though requested the Court to reappraise the entire evidence, but it is impermissible under law and this Court cannot reappraise the entire evidence while exercising power under Sections 397 and 401 Cr.P.C. This Court can interfere with the concurrent fact findings recorded by the Courts below unless they are manifestly perverse or apparent erroneous. But, no such manifest perversity or apparent error is brought to notice of this Court to reverse the findings recorded by the trial Court, confirmed by the Appellate Court, except appreciation of evidence. Therefore, in view of the limited questions raised before this Court, I need not re-appraise the entire evidence to find that there is manifest perversity or apparent error in the findings of the Courts below and hence, I find no ground to interfere with the findings recorded by the Courts below.

The trial Court found the accused guilty for the offences under Sections 304-A and 388 IPC and convicted to undergo RI for a period of one year and RI for 6 months while ordering that those punishments shall run consequently. But, in view of Section 427(2) Cr.P.C when the petitioner committed another offence in the same incident, benefit of Section 427 Cr.P.C. must be extended to the accused/petitioner.

Hence, by applying Section 427(2) Cr.P.C, both sentences imposed by the trial Court is directed to be run concurrently, instead of consecutively.

With the above modification, this Criminal Revision Case is disposed of.

As a sequel to it, miscellaneous petitions, if any pending in this appeal, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 10.10.2017

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THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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Dt.10.10.2017

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