

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE Nos.2430 and 2436 of 2017

COMMON ORDER:

These two criminal revision cases are filed by accused Nos.4 and 1 & 6 challenging the judgment of the XIII Additional District and Sessions Judge, Ranga Reddy District at L.B.Nagar in Criminal Appeal Nos.274 of 2012 and 192 of 2011 by calendar and judgments, dated 25.06.2017, whereby the conviction and sentence passed by the I Additional Assistant Sessions Judge, Cyberabad, Ranga Reddy District, in S.C.No.91 of 2011, dated 28.11.2011, was confirmed finding the accused guilty for the offences punishable under Section 395 IPC along with other accused.

2. It is a case of robbery of valuables, causing injuries on the body of the inmates of the house and stolen valuable gold, silver ornaments including cell phone from the house of the *de facto* complainant in the first week of July 2010 by all accused 1 to 7.

3. According to the prosecution, all the accused are family members except accused No.3, but he developed acquaintance with accused No.1 when both were lodged in Central Prison, Cherlapally. After releasing on bail, all accused were staying in a hut at the outskirts of Pillaipally Village, Pochampally Mandal of Nalgonda District. All accuse are close knit criminal gang, who involved in number of property offences, translating their plan to commit offences to gain money easily.

4. In pursuance of their plan, in the first week of July 2010, accused Nos.1 to 7 committed an offence of robbery, where they robbed gold, silver ornaments apart from one cell phone at the outskirts of Borragudem Village, within the limits of Begumpet Police Station, Medak District, which is registered as Crime No.29 of 2010 for the offence punishable under Section 392 IPC. In the second week of July 2010, all the accused committed an offence of theft of two wheeler at Jaikesaram Village, within the limits of Choutuppall Police Station, Nalgonda District, and stolen TVS XL two wheeler bearing No.AP 24/R 9708, which is subject matter of Crime No.171 of 2010 for the offence punishable under Section 379 IPC of Choutuppall Police Station.

5. At the same time, in pursuance of their pre-plan, during night of 17.07.2010 at about 2130 hours, accused No.6, known as Nune Sathyamma, knocked the door of PW.1. Immediately PW.1 opened the door. Accused No.6 with her pretence that her husband-accused No.4 was beating her and thus the offenders gained entry into the house, beat inmates with hands and sticks and committed robbery of one gold ring, two pairs of ear tops, two pairs of silver leg chains (silver anklets), some cash, wrist watch and two cell phones. Thereafter, the same offenders i.e., accused Nos.1 to 7 have gained entry into the house of PW.4-P.Mallesha, from whose house, they stolen gold chain, silver anklets, two pairs of gold ear tops and one motor cycle.

6. On receipt of the complaint, the police registered a case against these petitioners and others and issued F.I.R. During investigation, on 06.08.2010 on information, PW.12 proceeded to Medchal bus stop and found accused Nos.1 and 3, he arrested them and on interrogation, accused Nos.1 and 3 have confessed the commission of offences along with their associates-other accused and assured that they would produce the property stolen by them, accordingly they lead police party to the outskirts of Medchal, there PW.12 noticed accused Nos.4 to 6 in the hut and brought them to the Police Station, secured their presence of panch witnesses i.e., N. Sattiraju-LW.10 and PW.7, interrogated them, recorded their confessional statements and they have confessed about the commission of offences including the offences pertaining to Crime No.29 of 2010, registered for the offence punishable under Section 395 IPC of Begumpet Police Station and Crime No.171 of 2010, registered for the offence punishable under Section 397 IPC of Choutuppal Police Station of Nalgonda District. Pursuant to the confession made by the accused, they produced M.Os.2, 5, 6, 8 and 9, apart from one Nokia Cell Phone, gold ear ring (chevipogu) pertaining to Crime No.29 of 2010 of Begumpet Police Station, Medak District, and accused No.6 produced one pair of silver leg chains and a pair of gold ear studs pertaining to the present case.

7. On 02.12.2010 at 1700 hours, the police proceeded to Yadaram Village, Medchal Mandal, where accused No.2 was nabbed at the agricultural well of one Bhaskar Reddy and brought him to the

Shameerpet Police Station at 18:00 hours. On interrogation, accused No.2 confessed about the commission of offences along with other accused and in the presence of Nallapurraju Sathi Raju-LW.10 and PW.7, and he produced one gold chain, two pairs of gold ear tops pertaining to this case and silver kadium pertaining to Crime No.29 of 2010 for the offence punishable under Section 392 IPC of Begumpet Police Station, Medak District, and the same was seized under the cover of recovery panchanama. Thus, the police seized the property from the possession of the accused on the basis of their confession.

8. During investigation, after arrest of accused Nos.1 to 6, a Test Identification Parade (T.I. Parade) was held on the requisition of the Investigating Officer by the Magistrate and recorded the proceedings. As accused No.7 found absconding and some more properties are to be recovered by the date of filing charge sheet, the police laid charge sheet against accused Nos.1 to 6, for the offence punishable under Section 395 IPC before the VI Metropolitan Magistrate, Cyberabad, and in turn, the Magistrate after following necessary procedure, committed the case under Section 209 Cr.P.C. to the Sessions Division and in turn, the Sessions Judge, made over the case to the I Additional Assistant Sessions Judge, Ranga Reddy District, for disposal in accordance with law.

9. After securing the presence of the accused, complying under Section 207 Cr.P.C., framed charge against accused Nos.1 to 6 for the

offence punishable under Section 395 IPC, read over and explained to them in Telugu, they pleaded not guilty and claimed to be tried.

10. During trial, on behalf of prosecution, PWs.1 to 12 were examined and marked Exs.P.1 to P.16 and Mos.1 to 11. After closure of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. explaining the incriminating material that appeared against them in the testimony of the prosecution witnesses, they denied the same and reported no defence.

11. Upon hearing argument of both the counsel, the trial Court based on the evidence available on record, concluded that these petitioners committed the offence punishable under Section 395 IPC, convicted and sentenced them to undergo imprisonment for a period of seven years and to pay a fine of Rs.500/- with default sentence.

12. Aggrieved by the conviction and sentence under the impugned calendar and judgment in S.C.No.91 of 2011, accused No.4 filed Crl.A.No.274 of 2012 and accused Nos.1, 3 and 6 filed a separate Crl.A.No.192 of 2011, both the appeals were dismissed on 25.07.2017 confirming the conviction and sentence imposed against the appellants therein.

13. The present revisions are filed raising several contentions with regard to the appreciation of evidence by the Court below and contended that the accused were found guilty for such serious offence punishable under Section 395 IPC based on testimony of PWs.1 to 12 ignoring the discrepancies, is an error committed by both the Courts.

14. Both the Courts erred in convicting the accused without noticing that there are certain discrepancies in the testimony of PWs.1 and 2 and without insisting the prosecution for any independent corroboration, the prosecution miserably failed to establish the ingredients of the offence punishable under Section 395 IPC and committed grave error in finding the accused guilty for the offence punishable under Section 395 IPC.

15. During hearing, Sri Y.Ram Reddy, learned counsel for the petitioners, reiterated the grounds urged in the revisions and requested this Court to reappraise the entire evidence with reference to record and to come to an independent conclusion.

16. Whereas, the learned Public Prosecutor for the State of Telangana, supported the conviction and sentence passed by the Courts below finding the accused guilty for the offence punishable under Section 395 IPC.

17. Taking into consideration of the contentions raised by the counsel for the petitioners, the point that arises for consideration is:

Whether accused Nos.1 to 6 committed theft of M.Os.1 to 11 and other items from the houses of PWs.1 and 4, causing injuries on their body with deadly weapons, if so, the conviction and sentence passed by the Courts below is liable to be set aside?

POINT :

18. Before deciding the issue, it is appropriate to advert the scope of jurisdiction of this court under Sections 397 and 401 Cr.P.C. The jurisdiction of this Court under Sections 397 and 401 Cr.P.C. is

limited and Court interfere unless the concurrent fact findings of both the Courts below are manifestly perverse or patently erroneous. 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

¹ (1964) 1 Crl.L.J.443 (SC)

² 48, Crl.L.J.173,174(pat)

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;

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.

19. 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 matter of routine. 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.

20. Normally, this Court will not interfere with the concurrent fact findings recorded by both the Courts unless the fact finding is manifestly perverse or patently erroneous in view of the law declared by the Apex Court in *Bansilal v. Laxman*⁴.

21. In view of the law declared by the Apex Courts stated above, unless the fact findings are manifestly perverse or patently erroneous,

³ 1977 SC 1621

⁴ (1986) 3 SCC 445

this Court shall not interfere while exercising with such orders jurisdiction under Sections 397 and 401 Cr.P.C.

22. The main ground urged before this Court in the revisions is with regard to the appreciation of evidence. But, this Court cannot undertake re-appreciation of evidence, unless the counsel for the petitioners is able to show the manifest perversity or apparent error in the concurrent fact findings recorded by the Court below or the fact findings were recorded without any evidence.

23. It is the consistent case of the prosecution from the beginning that during night on 17.07.2010 at 2130 hours i.e., at 9.30 p.m., accused No.6 knocked the door of PW.1 and on its opening, accused No.6 with her pretences that her husband-accused No.4 was beating her and all the offenders have gained entry into the house, beat the inmates with hands and sticks and robbed various gold, silver items, wrist watch and cell phones. Similarly, from the house of PW.4, the accused robbed gold chain, silver anklets, two pairs of gold ear tops and one motor cycle. The incident took place at 9.30 p.m. and it is not dark night. Therefore, there is every possibility of identifying the accused during night when they suddenly gained entry into the house on the pretence of accused No.4 beating accused No.6 since it was not too late in the night and apart from that the arrest of the accused and recovery of various items of gold and silver items pertaining to the various crimes on the confession made by the accused and its

identification before the Court by PWs.1, 2 and 4 is sufficient to conclude that they were found in possession of stolen articles.

24. After arrest of accused and on receipt of requisition from the police, the Magistrate held T.I. Parade of the accused by following the necessary procedure and Ex.P.5, 6, 7 are the T.I. Parade proceedings, dated 04.09.2010, 20.08.2010 and 20.12.2010. All the three proceedings coupled with the evidence of PWs.9 and 10 (Magistrates), who conducted T.I. Parade, for identification of accused Nos.1 and 3 to 6. In the said T.I. Parade, the witnesses identified accused Nos.1 and 3 to 6. No T.I. Parade was conducted for identifying accused No.2. Therefore, identification of accused during T.I. Parade and in the Court by the witnesses is another strong piece of evidence, though not substantiate piece of evidence.

25. Apart from the above documents and evidence of the Magistrates (PWs.9 and 10) who conducted T.I. Parade, the witnesses PWs.1 to 6-the complainant, eye witnesses and injured witnesses testified about the incident of theft of gold and silver ornaments, cash, cell phones etc., which are marked as M.Os.1 to 11, and recovered from the possession of accused Nos.1 to 6 under the cover of panchanamas, which are marked as Exs.P.11 to P.15 in the presence of PWs.7 and 8. The panch witness PW.7 in whose presence confession leading to discovery was recorded, it is relevant under Section 27 of the Evidence Act and recovered M.Os.1 to 11, base on their confessional statement leading to discovery. Though the

confession made before the police is not admissible in view of Section 25 of the Evidence Act, it is admissible under Section 27 of the Evidence Act. Section 27 of the Evidence Act is an exception to it. If any information is collected leading to discovery and such statement or that part of statement is admissible in evidence, but it is not a substantive piece of evidence. However, it is a corroborative piece of evidence to the oral evidence of the direct witnesses. Therefore, the evidence of PWs.1 to 6 coupled with recovery and seizure of M.Os.1 to 11 under the cover of Exs.P11 to P.16, concludes that these petitioners have committed such serious offence, were found in possession of the stolen articles or robbed the articles from the houses of PWs.1 and 4.

26. Yet, another strong circumstances relied on by the prosecution is sustaining injuries by PWs.1 and 2. PWs.1 and 2 are the eye witnesses and received injuries in the same incident and they were examined by PW.11-Dr.A.Mohan Reddy, who issued Ex.P.8 and P.9-wound certificates of PWs.1 and 2 respectively, dated 28.07.2011. The evidence of PW.1 coupled with Exs.P.8 and 9 clinchingly established that they received injuries in the said incident of robbery by accused Nos.1 to 6 and he allegedly caused injuries with sticks, which is a dangerous weapon. Therefore, sustaining injuries in the incident is a strong circumstance and apart from that they have no enmity with these petitioners to implicate them in such serious crime as they are not acquainted with each other. Therefore, the evidence of

eye witnesses and injured witnesses cannot be brushed aside easily since there is no possibility of implicating the accused, who are almost foreigners to them, does not arise in normal course of evidence. The Apex Court in **Brahm Swaroop and another v. State of Uttar Pradesh**⁵, while dealing with conviction based on testimony of injured eye-witnesses and credibility of injured eye-witnesses held that, if evidence of injured eyewitnesses is trustworthy and believed by Court, question of motive to implicate becomes totally irrelevant and merely because witnesses were close relatives to deceased, that could not be ground to discard their evidence and testimony of injured eye witnesses is worthy of credence.

27. If the principle laid down in the above judgment is applied to the present facts of the case, the testimony of PWs.1 and 2, who are injured and eye witnesses, can be accepted unless it is established that they possess enmity or foisting a false case previously for different reason and in fact no such suggestion was put to them in the cross examination of PWs. 1 and 2, except suggesting that at the instance of police a false case is foisted, they got denial and it is not sufficient to found the accused not guilty.

28. The other strong circumstances relied on by the prosecution is T.I. Parade of accused i.e, A.1, A.3, 4 and 5 conducted by PWs.9 and 10 under Exs.P.5 to P.7, the property was also identified of both in the Court during trial. The evidence of PWs.9 and 10 is specific about

⁵ (2011) 6 SCC 288

compliance of necessary procedural requirements under Rule 33 and identification of accused Nos. 1, 3, 4, 5 and 6 in the presence of PWs.9 and 10 during T.I. Parade. The correctness of the procedure followed by PWs.9 and 10 in Exs.P.5 to P.7 was not challenged by the accused during cross-examination and, therefore, in the absence of any material elicited in the cross-examination of PWs.9 and 10 so also PWs.1 to 6, it is difficult to disbelieve the identity of the accused during T.I. Parade by the witnesses. Therefore, identification of accused in the T.I. Parade and so also during the course of trial is another strong circumstance to believe that these petitioners are the persons who committed theft by causing injury in pursuance of preplan they gained entry into the house of PWs.1 and 4 and robbed both gold, silver items, cell phones, motor cycle, etc., from their houses.

29. The main contention of the counsel for the petitioners is that based on T.I. Parade, the Court cannot convict the accused. No doubt, there is some force in the contention raised by the counsel for the petitioners for identification of accused during T.I. Parade alone would not form basis to record conviction of the accused, since, it is not a substantive piece of evidence and it is only a corroborative piece of evidence. The evidence of PWs.1 to 6 is consistent with regard to the commission of offence by accused Nos.1 to 6 and this fact is supported by T.I. Parade proceedings including the wound certificates issued by P.W.11, which are marked as Exs.P.8 and P.9. T.I. Parade

is a part of investigation and failure to hold T.I. Parade is not a ground to disbelieve the case of prosecution, if the courts find substantive evidence on record. The whole idea of a T.I. 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 T.I.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 T.I. Parade. Failure to hold the T.I.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 absolute rule. The purpose of the T.I. 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 subject to exceptions vide **R.P. Kapur v. State of Punjab**⁶

30. Similarly, in another judgment reported in **Sheo Shankar Singh v. State of Jharkhand and another**⁷, the Apex Court held that failure to hold Test Identification Parade does not have the 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 an explanation for not holding Test Identification parade for other witness will not *ipse jure* prove fatal to the case of prosecution.

31. On the other hand, the consistent law laid down by the Apex Court is that even if T.I.P. is not held and the witnesses identify the accused for the first time in Court, the evidence regarding identification in the Court does not become inadmissible and cannot be rejected on the ground that it was not being preceded by T.I. parade when the Court finds the evidence in the Court regarding identification to be trustworthy. But the identification in the Court should not normally be relied upon if the name of the accused is neither mentioned in F.I.R. or before the police (vide **Dana Yadav v.**

⁶ AIR 1960 SC 866

⁷ AIR 2011 SC 1403

State of Bihar⁸). Thus, identification of the accused in T.I. Parade or Court is not a *sine qua non* in every case, if, from the circumstances the guilt of the accused was otherwise established (vide **Visveswaran v. State**⁹).

32. In view of the law declared by the Apex Court as stated above, identification of the accused for the first time in the Court which is not preceded by T.I. Parade is relevant under Section 9 of the Evidence Act, alone is not a ground to conclude that the guilt of the accused for the offence punishable under Section 395 IPC or any other witnesses.

33. Theft is defined under Section 378 IPC. Section 391 IPC defines 'dacoity', when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more ever person so committing, attempting or aiding, is said to commit 'dacoity'. Therefore, to constitute the offence punishable under Section 395 IPC, there must be five or more persons in committing or in attempting to commit robbery. Section 390 defines robbery, which reads, in robbery there is either theft or extortion and when theft is robbery, theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person

⁸ (2002) 7 SCC 295

⁹ AIR 2003 SC 2471

death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. On cogent reading of Section 390 and 391 IPC, they must cause hurt or threatening to cause hurt or death in attempting to commit a theft or robbery by more five persons.

34. In the present case, when accused No.6 knocked the door in the pretence of accused No.6-her husband beating, all the accused gained entry and causing injuries on the body of PWs.1 and 2, which is supported by medical evidence of PW.11 and wound certificates of PWs.1 and 2, which are marked as Exs.P.8 and P.9 respectively. Therefore, more than five persons ie., accused Nos.1 to 6 caused injuries on the body of PWs.1 and 2 and committed theft of various items marked as M.Os.1 to 11. Thus, the prosecution established that more than five persons by causing hurt on the body of PWs.1 and 2, stolen various items of property marked as M.Os.1 to 11, which are recovered from the possession of accused persons including the petitioners under the cover of panchanama.

35. When the petitioners are found in possession of stolen property, soon after commission of dacoity, the Court can draw a presumption that they are in possession of stolen property with the aid of Section 114 of Evidence Act. When the stolen articles have been recovered from the accused following date of dacoity and the said articles were duly identified, the accused can be convicted on the basis of presumption under Section 114(a) of the Evidence Act that the

accused were dacoits committing the dacoit and looting the seized property.

36. But, here, in this case the petitioners failed to account their possession of M.Os.1 to 11 soon after commission of dacoity. Therefore, with the help of un-rebutted presumption under Section 114(a) of the Evidence Act coupled with the testimony of injured and eye witnesses PW.1 and 2 and eye witnesses PWs.3 to 6 established that the petitioners have committed dacoity and stolen items M.Os.1 to 11 causing injuries on body of PWs.1 and 2 with a dangerous weapon like stick.

37. Though the trial Court appreciated the evidence, but the appellate Court in most casual manner decided the appeal without appreciating the evidence in proper perspective, but on the ground that the appellate Court failed to appreciate the evidence, this Court cannot reverse the findings recorded by the appellate Court. Even after re-appreciation of entire evidence on record, I find no ground to disbelieve the case of the prosecution and to interfere with the concurrent fact findings recorded by both the trial Court and appellate Court while exercising the power under Sections 397 and 401 Cr.P.C. Hence, I find that these two criminal revision cases are deserves to be dismissed.

38. In the result, both the criminal revision cases are dismissed.

Miscellaneous Petitions pending in both the revision cases, if any, shall stand closed.

M. SATYANARAYANA MURTHY, J

15th November, 2017.

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