

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE N. BALAYOGI

CRIMINAL APPEAL No.636 OF 2011

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

1) Accused Nos.1 to 3 in S.C.No.432 of 2010 on the file of the Judge, Family Court-cum-Additional District and Sessions Judge, Nalgonda, are the appellants herein. They were tried on two charges. The first charge was under Section 302 IPC for causing the death of one Venkataiah (hereinafter referred to as "the deceased") by beating him with an iron rod while he was sleeping in front of his house at Bolligutta Cross Road, H/o. Boddupally Village. The second charge was under Section 394 IPC, for causing hurt to Nakka Salamma and Nakka Yadamma, during the course of committing robbery of gold ornaments. By its judgment dated 03.06.2011, the Sessions Judge convicted and sentenced them to suffer "imprisonment for life" and to pay fine of Rs.5,000/- each, in default to suffer simple imprisonment for one year for the offence punishable under Section 302 IPC. They were further sentenced to suffer rigorous imprisonment for a period of seven years and to pay fine of Rs.2,000/- each, in default to suffer simple imprisonment for a period of six months for the offence punishable under Section 394 IPC. Both the sentences were directed to run concurrently.

2) The case of the prosecution as culled out from the evidence adduced by the prosecution is as under:

i) The deceased was the husband of PWs.1 and 2. PW.2 is none other than the sister of PW.1. PWs.3 to 5 are residents of Boddupalli Village, while PW.6 is the brother-in-law of the deceased. On the intervening night of 03/04.05.2010, while the deceased and others were sleeping in front of their house, three people came there in the midnight, beat them and also snatched away gold black beads chain, ear studs, gold pusthe, weighing one tula, half tula, half tula respectively from PW.1. According to her, she was beaten on her left forehead. Thereafter, they beat the deceased and PW.2 with iron rod and snatched away gold ear studs weighing half tula, gold pusthelu weighing half tula from PW.2. The evidence of PWs.1 and 2 further indicate that the accused broke the door, threw the articles here and there and also snatched away the cell phone from the house. The three persons claiming themselves to be naxalites, threatened them not to reveal anything to others. Their evidence further discloses that the culprits pushed them into the house, closed the door from outside and left the place. In the morning, PW.3 went to the house to give milk. On her visit, she did not find anybody at the house. Though she called them from outside, there was no response. She opened the doors and found PWs.1 and 2 and their husband with injuries. She informed about the same to PW.4, who inturn rushed to the scene and found PWs.1 and 2 and their husband with injuries.

Thereafter, PW.4 shifted them in the auto of PW.5 to Government Hospital, Devarakonda.

ii) On 04.05.2011 at about 8.00 a.m. PW.14-the Sub-Inspector of Police, received a report from PW.1, basing on which he registered a case in Crime No.133 of 2010 and issued the first information report, which was placed on record as Ex.P17. Further investigation in this matter was taken up by PW.17, the Inspector of Police. According to him, after receipt of the first information report, he along with PW.14 went to the Government Area Hospital, Devarakonda, examined PWs.1 and 2 and Venkataiah (deceased) and gave requisition to the Duty Medical Officer for treatment. Thereafter, he visited the scene of offence situated at Bolligutta chowrasta and prepared a panchanama of the scene in the presence of PW.7. Ex.P3 is the scene of offence panchanama. Thereafter, he drew a rough sketch of the scene and also got photographed the scene. During the said proceedings, he examined PWs.3 to 5 and recorded their statements. On 30.05.2010 at about 8.00 a.m. PW.1 came to the police station and presented a petition stating that her husband Nakka Venkataiah died while he was being shifted to Osmania Hospital. On receipt of the said petition, he altered the section of law to one under Section 302 IPC in addition to 394 IPC. Ex.P21 is the alteration memo. He, then proceeded to the scene of offence and conducted inquest over the dead body of the deceased in the presence of PW.8 and another. Ex.P4 is the inquest panchanama. Thereafter, the body was sent for postmortem examination.

iii) PW.12-the Deputy Civil Surgeon, Area Hospital, Devarakonda, conducted autopsy over the dead body of the deceased and issued Ex.P5-the postmortem certificate. According to him, the cause of death was “due to head injury”. The record also discloses that PW9-the Civil Assistant Surgeon, Community Health Centre, Devarakonda, examined PWs.1 and 2 on 04.05.2010 and issued the wound certificates which were placed on record as Exs.P5 and P6, respectively.

iv) On 15.06.2010, PW17 received a message from PW15-the Inspector of Police, Maktal, about the arrest of accused on 13.06.2010 in Crime No.72 of 2010 under Section 394 IPC. During interrogation, the accused confessed about the commission of offence in this case also. He collected the confessional statement of the accused from PW.15. Thereafter PW.17 filed an application for issuance of personal transit warrant (P.T.Warrant). Pursuant thereto, the accused was produced before the Magistrate on 18.06.2010. PW.17 filed a requisition before the Court seeking police custody of accused. He took the accused into custody from Sub-Jail, Devarakonda, from 23.06.2010 to 25.06.2010. During interrogation, the accused confessed about the commission of offence. PW.17 recorded the confessional statements of the accused in the presence of PW.10 and another. Pursuant to the confession of accused No.1, PW.17 along with his staff and accused went to Kalvakurthy and recovered the stolen property from the house of mother of accused No.1 and seized the same under a cover of panchanama. On a requisition given by PW.17, a test

identification parade of the accused was conducted by PW16-the Prl. Judicial Magistrate of First Class, Miryalaguda, at Sub-Jail, Deverakonda. Ex.P19 is the requisition and Ex.P20 is the test identification parade proceedings. Apart from that, the record also discloses that on 29.06.2010, PW.13-the Revenue Inspector, pursuant to a requisition received from the Inspector of Police, through Tahsildar, conducted test identification parade of MOs.2 to 4, wherein PW.1 is said to have identified MOs.2 to 4. Ex.P16 is the identification proceedings of the property. After collecting all the material, PW.17 filed the charge sheet before the Court of the Judicial First Class Magistrate, Deverakonda, who inturn committed the case to the Sessions Division under Section 209 of Cr.P.C. On committal, the same came to be numbered as S.C.No.432 of 2010.

3) On appearance, charges under Sections 302 and 394 IPC came to be framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

4) To substantiate their case, the prosecution examined PWs.1 to 17 and got marked Exs.P1 to P22 and MOs.1 to 4. 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 behalf of the accused.

5) After considering the oral and documentary evidence on record, the learned Sessions Judge convicted the accused for

the offences under Sections 302 and 394 IPC in the manner referred to above. Challenging the same, the present appeals came to be filed.

6) The main ground urged by the learned counsel for the appellants is that when the first information report given by PW.1 is silent as to the descriptive particulars of the accused, the test identification parade conducted on 03.07.2010 ie., nearly two months after the incident and more than one month after the arrest is illegal, improper and incorrect. Apart from that she also submits that identification of the properties conducted by the Revenue Inspector is contrary to Rule 35 of the Criminal Rules of Practice. In view of the above, she would submit that the judgment of the trial Court is per se illegal and improper.

7) On the other hand, learned Public Prosecutor would submit that even if it is to be held that the test identification of the property is in violation of the Criminal Rules of Practice, but there is nothing to suggest as to why the test identification of the persons should be believed. According to him, there is no delay in holding the test identification parade as such the order under challenge warrants no interference.

8) Coming to the first aspect of the matter namely holding of test identification of the property by the Revenue Inspector, it would be useful to refer to Rule 35 of the Criminal Rules of Practice, which reads as under:

“35. Identification of property: (1) Identification parades of properties shall be held in the Court of the Magistrate where the properties are lodged.

(2) Each item of property shall be put up separately for the parade. It shall be mixed up with four or five similar objects.

(3) Before calling upon the witnesses to identify the property, he shall be asked to state the identification marks of his property. Witnesses shall be called in one after the other and on leaving shall not be allowed to communicate with the witness not yet called in.”

9) In *Jarapala Deepala @ Babu Rao and others v. State of A.P.*¹ this Court held as under:

“As seen from Rule 35 of the Criminal Rules of Practice the identification of properties shall be held in the Court of Magistrate where the properties are lodged and each item of property shall be put up separately for the parade and it shall be mixed up with four or five similar objects and before calling upon the witnesses to identify the property, he shall be asked to state the identification marks of his property and the witnesses shall be called in one after the other and on leaving shall not be allowed to communicate with the witnesses not yet called in. The said procedure of conducting identification parade in respect of the property has not been followed in this case, as admittedly the identification parade was not conducted in the Court of the Magistrate. As seen from Ex. P-7 the alleged test identification proceedings dated 16-11-1995, the test identification was conducted in Dubacherla Grampanchayat office and each item of property was not put up separately in the parade after mixing with 4 or 5 similar objects as required under Rule 35 (2) of the Criminal Rules of Practice. As per the proceedings, the police secured only

¹ (2005) 2 ALD (CrI.) 818 (A.P.)

two more similar articles and each variety of item handed over to the mediators and the mediators clubbed all of them and asked the witnesses one by one to come and identify their properties. Further, as seen from the proceedings, the witnesses were not asked to state the identification marks of their respective properties before showing the properties put up for test identification as required under Sub-rule (3) of Rule 35 of the Criminal Rules of Practice. Thus, it is clear that the test identification in respect of the properties are not conducted in accordance with the procedure prescribed in Criminal Rules of Practice. Therefore, much credence cannot be given to the alleged test identification of M. Os. 1 to 6 by the witnesses P.Ws. 1 to 4.”

10) In *Subramanyam @ Gangadharam @ Gangappa and another v. State of A.P.*, this Court held as under:

“As per this Rule, the Magistrate has to conduct identification of the property in the presence of mediators and it is mandatory. In this case, the testimony of P.W.14 reveals that he sent a requisition to P.W.1 along with M.Os.1 and 2 through a constable for conducting test identification parade of M.Os.1 and 2. On the next day, he received identification of property proceedings Ex.P2. This piece of evidence would clearly reveal that P.W.14 asked P.W.1 to conduct test identification of the property in this case. P.W.1, Panchayat Secretary, was not competent to conduct test identification of the property as per Rule 35 of the Criminal Rules of Practice. The very identification of M.Os.1 and 2 in the presence of P.W.1 by P.Ws.2 and 4 is not proved in this case. The entire version of the prosecution with regard to very identification of M.Os.1 and 2 by the family members of the deceased P.Ws.2 and 4 is not proved as per the procedure contemplated under Rule 35 of the Criminal Rules of Practice.”

11) In view of the judgments referred to above, it is clear that, it is only the Magistrate, who has to conduct the test identification of the properties in the Court. Admittedly, in the instant case, the

test identification of the properties came to be conducted by the Revenue Inspector, which in our view is in contravention of Rule 35 of the Criminal Rules of Practice. Apart from that it is to be noted that the evidence on record do not anywhere indicate that the articles which are subjected to test identification of the property were mixed with five articles of similar in nature, as required under the said Rule. Viewed from either angle, we are of the opinion that the test identification proceedings of the property are illegal and improper.

12) The next circumstance which is sought to be relied upon by the prosecution is identification of the accused by PWs.1 and 2.

13) As seen from the record, the first information report was given by PW.1, who is an injured witness. In the first report given by PW.1, there is no reference to the identification marks of the culprits. Even during the course of investigation, none of the witnesses gave any descriptive particulars or special marks of identification of the accused. The record shows that the accused were arrested on 13.06.2010 in Crime No.72 of 2010 of Maktal Police Station. During the course of interrogation in the said crime, they claimed to have confessed about the commission of offence in this crime. Pursuant thereto, PW.17 collected the confessional statement from the investigating officer on 18.06.2010 and on P.T.Warrant produced the accused before the Judicial Magistrate of First Class, Deverakonda. PW.17 filed a requisition to the Court for police custody of the accused and took

them from Sub-Jail, Deverakonda from 23.06.2010 to 25.06.2010. During the interrogation, the accused confessed about the commission of offence. PW.17 recorded the confessional statements of the accused. Thereafter, a requisition was given to PW.16-the Principal Judicial Magistrate of First Class, Miryalaguda, for holding of test identification parade for three suspects in the present crime. Accordingly after obtaining necessary permission from the I Additional District and Sessions Judge, Nalgonda, PW.16 proceeded to Sub-Jail, Deverakonda, to conduct the test identification parade, on 03.07.2010. In the said proceedings, PW.1 is said to have identified accused Nos.1 to 3 while PW.2 identified only accused Nos.1 and 2.

14) The argument advanced by the learned counsel for the appellants is that in view of the abnormal delay in holding test identification parade from the date of arrest, which was in the month of June and in the absence of any explanation as to why he took such a time, the entire proceedings gets vitiated.

15) In *State of Andhra Pradesh v. Dr. M. V. Ramana Reddy*² the Apex Court dealt with an issue of delay in conducting test identification parade. In the said case, "the evidence of PW-1 is that when she heard the cries of her father she woke up and saw accused No. 1 and six or seven others be-labouring him. This means that she did not know and could not identify the companions of accused No. 1. However, when she tried to raise an alarm, three of the assailants approached her, pinned her down to the bed, and

² 1991 AIR 1938

one of them threatened to stab her. He did carry out his threat as is evident from the injuries sustained by her. She was able to identify two of them at the identification parade held on May 23, 1975. This was proved through the evidence of PW-14, who conducted the test identification parades."

16) In view of the delay of ten days in holding the identification parade and in view of the special features presented by the facts of the case and the invalid explanation for the delay, the Apex Court did not rely upon the test identification parade.

17) Even in the instant case, as seen from the evidence of the investigating officer, PW.15 arrested the accused 13.06.2010 and thereafter they were produced before the Judicial Magistrate of First Class, Deverakonda. Police custody was taken for a period of three days ie. from 23.06.2010 to 25.06.2010. On 03.07.2010 the test identification parade was conducted by PW.16. The test identification parade was conducted nearly two months after the incident and 21 days after the arrest of the accused. The delay in holding test identification parade without any particulars being furnished at the earliest point of time, throw some suspicion on the identification of the accused.

18) Apart from that, in the cross-examination of PW.2, it has been elicited that all the accused came to the house and it was a dark night. She further admits that she does not know that who had specifically beaten first, however she admits that she was beaten by one of the accused, and as such she fell down un-

conscious. She also admits that she does not know what happened later. To a suggestion that she was not beaten by the accused was denied by her.

19) It is also to be noted that PWs.1 and 2 have not given any descriptive particulars of the accused, which would enable them to identify the accused. Since the witnesses were not having any previous acquaintance with the accused and as they saw the accused for the first time in the night of the incident, it will not be easy for them to identify the accused without any special marks of identification. The Apex Court on more than one occasion held that the delay in conducting test identification parade would lead to any amount of suspicion with regard to identification, more so, when descriptive particulars of the accused were not given in any of the earlier statements and also before the Magistrate while holding the test identification parade.

20) For the aforesaid reasons, we feel that the prosecution failed to establish the guilt of the accused beyond reasonable doubt.

21) Accordingly, the Criminal appeal is allowed. The conviction and sentence recorded against the appellants/accused in the judgment, dated 03.06.2011 in S.C.No.432 of 2010 on the file of the Judge, Family Court-cum-Additional District and Sessions Judge, Nalgonda, for the offences punishable under Sections 302 and 394 IPC are set aside. Consequently, the accused shall be set at liberty forthwith, if they are not required in any other case or

crime. The order passed with regard to MOs.1 to 4 shall stand confirmed.

22) As a sequel to it, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

JUSTICE N. BALAYOGI

15.12.2017
gkv

