

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRL.R.C. NO.2228 OF 2017

ORDER:

This criminal revision case is filed under Section Sections 397 and 401 of Cr.P.C. challenging the judgment dt.21.07.2017 in CrI.A.No.140 of 2016 passed by the VI Additional Sessions Judge, Medak at Siddipet confirming the conviction and sentence passed by the Principal J.F.C.M., Siddipet in C.C.No.2 of 2016 dt.04.10.2016 whereby the petitioner/accused No.1 was found guilty for the offence punishable under Section 379 IPC, convicted and sentenced to undergo rigorous imprisonment for a period of one year while giving set off.

2. The case of the prosecution in brief is that the de facto complainant by name Smt.V.Kalpalatha lodged a complaint on 25.09.2014 alleging that when she attended Bathukamma celebrations at Komaticheruvu, while returning, when she reached the place near her house, one unknown offender came on bike in opposite direction and snatched away three tolas of gold pustelathadu from her neck. On information, the de facto complainant lodged report with the police for taking necessary action against the unknown offenders.

3. The Sub-Inspector of Police took up investigation, examined witnesses, seized M.O.1 from the possession of the petitioner under cover of panchanama and after completion of investigation filed charge sheet before the Judicial Magistrate of First Class, Siddipet i.e. court below.

4. The case was taken on file by the learned magistrate for the offences punishable under Sections 356 and 379 IPC. After securing presence of the petitioner-accused, learned magistrate after following the procedure under Section 207 Cr.P.C., framed charges for the offences under Sections 356 and 379 of IPC, read over and explained to the accused, they pleaded not guilty and claimed to be tried.

5. During trial, PWs.1 to 5 were examined and marked Exs:P-1 to 6 and M.O.1. After closure of prosecution evidence, the accused were examined under Section 313 Cr.P.C. explained the incriminating circumstances that appeared against them, they denied the same and reported no defence.

6. Upon hearing argument of both the counsel and considering oral and documentary evidence on record, the trial court found the petitioner/A-1 guilty for the offence punishable under Section 379 IPC and sentenced him to undergo rigorous imprisonment stated supra.

7. Aggrieved by the conviction and sentence passed by the learned magistrate in C.C.No.2 of 2016 dt.4.10.2016, the petitioner/A-1 preferred an appeal in CrI.A.No.140 of 2016 before the VI Addl.Sessions Judge, Siddipet and learned Sessions Judge by judgment dt.21.07.2017 confirmed the conviction and sentence passed by the trial Court.

8. Thus, both the courts below recorded concurrent fact finding with regard to recovery of M.O.1 from the possession of the petitioner on the strength of Ex.P-2 confessional statement leading to recovery of M.O.1 and Ex.P-3 is the recovery panchanama under which police seized M.O.1 and Ex.P-5 is the rough sketch and Ex.P-6 is the observation report of scene of offence.

9. Therefore, the concurrent fact finding recorded by the courts below are now under challenge in this revision on the ground that no test identification parade was held as contemplated under Rule 35 of Criminal Rules of Practice and failure to hold test identification parade of M.O.1 is fatal to the case and therefore, failure to hold test identification parade of the property is serious lacuna which vitiates entire proceedings and prayed to set aside the conviction and sentence passed by the courts below.

10. During hearing, Smt.M.Sva Jyothi, learned counsel for the petitioner reiterated the contentions raised in the grounds of revision with regard to failure to hold identification parade of property which is relevant under Section 9 of the Evidence Act and it is a serious lacuna and placed reliance on the Division Bench judgment of this Court in SUBRAMANYAM @ GANGADHARAM @ GANGAPPA AND ANOTHER v. STATE OF A.P. REP. BY PUBLIC PROSECUTOR, HGIH COURT, HYDERABAD¹ and also placed two other decisions reported in JARAPALA DEEPALA @BABU RAO AND OTHERS v. STATE OF A.P.² and decision of Apex Court in SAFIYA BEE v. MOHD. VAJAHATH HUSSAIN ALIAS FASI³ to contend that when the procedure is prescribed for holding of test identification parade, such parade must be done in accordance with law. Therefore, failure to hold test identification parade is fatal to the case of prosecution and requested this court to set aside the conviction and sentence passed by the courts below.

11. The main endeavour of the learned counsel for the petitioner is that the petitioner did commit no offence much less an offence punishable under Section 379 IPC and the property allegedly seized from the constructive possession of the accused under cover of Ex.P-3 panchanama in pursuance of confession leading to discovery which is relevant under Section 27 of the Evidence Act, but no test identification parade of property as per the procedure prescribed under Rule 35 of Criminal Rules of Practice was not held, thereby in the absence of identification of property in holding test identification parade, identification of M.O.1 for the first time in the court held is not sufficient and it vitiates the entire proceedings.

12. No doubt, in the present case the offence committed by the petitioner is snatching of gold chain from the neck of de facto complainant who is wife of PW-1 and even according to the

¹ 2016(3) ALT (CrL.) 489 (DB) (A.P.)

² 2006(1) ALT (CrL.) 54 (A.P.)

³ AIR 2011 SC 421

complaint, some unknown persons snatched away gold chain from neck while she was returning to her house after attending Bathukamma festival. It is an undisputed fact that the petitioner was not identified initially by PW-1 or his wife. But, the basis for recording conviction of the accused is recovery of M.O.1 from the possession of the accused in pursuance of confession leading to discovery under Section 27 of Evidence Act and recovery panchanama under Ex.P-3 from PW-3, but no crime was registered against PW-3-G.Santhosh Kumar who was found in possession of stolen article M.O.1. But, according to the evidence of PW-3, the accused pledged M.O.1 with him and he received the same without knowledge that it was stolen property. Therefore, pledging of M.O.1 with PW-3 is sufficient to believe that he is the person either received the stolen property or a thief in view of presumption under Section 114(a) of Indian Evidence Act. But, when no property was received from the possession of the petitioner, question of drawing such presumption would not arise. Moreover, the evidence of PW-3-G.Santhosh Kumar with whom M.O.1 was pledged is crucial in this matter and his consistent evidence is that the petitioner pledged M.O.1 for Rs.14,000/-. In the entire cross-examination of PW-3, nothing was elicited to disprove pledge of M.O.1 with PW-3. PW-5 is another important witness. According to PW-5 on 17.11.2015 on the confession of one M.Sikanth, he apprehended petitioner and A-2 and on their interrogation in the presence of PW-2, the petitioner confessed that he took the bike from A-2 and committed theft of M.O.1, pledged the same with PW-3 and the same is reduced into writing and based on his confessional statement leading to discovery made by petitioner which was marked as Ex.P-2, proceeded to the house of PW-3 and seized M.O.1 under cover of Ex.P-3. The seizure panchanama Ex.P-3 is not disputed by PW-3. Therefore, the undisputed fact is that the seizure of M.O.1 is from the possession of PW-3 under cover of Ex.P-3 panchanama. But, the only question is whether A-1 and A-2 pledged M.O.1 with PW-3. The evidence of PW-3 is free from any legal infirmities and he is wholly credible witness and therefore, based on the evidence of PW-3, the

magistrate concluded that the petitioner herein pledged M.O.1 for Rs.14,000/- and the same was confirmed by the appellate court in the appeal, thereby convicted the petitioner for the offence punishable under Section 379 IPC.

13. When there is satisfactory evidence on record, this court while exercising power under Sections 397 and 401 Cr.P.C. cannot re-appreciate the evidence since the jurisdiction of this court is mostly confined to legal questions, but this court may interfere while exercising power under Sections 397 and 401 Cr.P.C. only when the court finds that there is manifest perversity or apparent error in the concurrent fact finding recorded by both the courts below.

14. In the present case, there is nothing to suggest that the concurrent fact finding recorded by both the courts below is manifestly perverse or utterly erroneous. Therefore, I am not inclined to interfere with the concurrent fact finding recorded by both the courts below.

15. The only contention raised before this court is failure to hold test identification parade of property adhering to Rule 35 of Criminal Rules of Practice is fatal and it vitiates the entire proceedings.

16. Learned counsel for the petitioner would draw the attention of this court to the decision in SUBRAHMANYAM @ GANGADHARAM @ GANGAPPA AND ANOTHER (1st supra) wherein the Division Bench of this Court while deciding the complicity of the accused for the offence punishable under Sections 302, 382 r/w section 34 IPC concluded that as per Rule 35 of Criminal Rules of Practice, the magistrate has to conduct identification of the property in the presence of mediators and it is mandatory. But, conducting test identification parade is only relevant under Section 9 of the Evidence Act, it is not a substantive piece of evidence. The necessity of holding test identification parade would arise only when there is dispute as to identity of property said to have stolen from the possession of the complainant or from whose possession the property was stolen.

Here, for the first time the property was identified in the court and no test identification parade was held by the magistrate for identification of property under Section 9 of the Evidence Act which is relevant for the purpose of deciding the present controversy and according to Section 9 of the Evidence Act that 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 for that purpose.

17. So, identification of property or identity of person is relevant in deciding controversy is relevant under Section 9 of the Evidence Act. But, identification of property by itself is not substantive piece of evidence. It is only a corroborative piece of evidence.

18. As per Section 9 of the Evidence Act, facts which establish the identity of an accused are relevant. Identification parade belongs to investigation stage 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 a magistrate is expected to take all possible precautions.

19. A similar question came up before the Apex Court in *Ravi Kapur Vs. State of Rajasthan*⁴, and while deciding an appeal arising out of conviction for the offence punishable under Section 304-A IPC, the Apex Court highlighted the necessity to hold test identification parade as follows:

⁴ AIR 2013(1) ALD (CrI.) page 303 (SC) (MANU/SC/0659/2012)

“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.”

20. Similarly, in *Sheo Shankar Singh Vs. State of Jharkhand and another*⁵, the division Bench of Apex Court at paras 37 and 40 held as follows:

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

21. The principles laid down though pertains to identification of accused adhering to Rule 34 of Criminal Rules of Practice, the effect of failure to hold identification parade under Rule 35 of Rules is one and the same for identification of the property.

22. On the other hand, identification of driver in accident cases where the accused is an unknown person, there is some justification in holding test identification of accused. But, when a gold chain was snatched from

⁵ AIR 2011 SC page 1403

the neck of wife of PW-1 which can be identified by her if shown in usual course as she was wearing such gold chain in her neck at the same time that can be identified by her husband PW-1. Therefore, failure to hold test identification parade by itself would not vitiate the entire proceedings but when test identification parade was held without adhering to Rule 35 of Criminal Rules of Practice, then it vitiates the test identification parade, which is relevant under Section 9 of the Evidence Act, but not otherwise and when the property was identified in the court, it is not fatal to the prosecution case. In fact, it was not the case of the petitioner that M.O.1 belongs to him and no suggestion was put to any of the witnesses that he is the owner of M.O.1. Therefore, when the petitioner is not claiming that he is the owner of M.O.1 and when pledge of the same is proved with PW-3 by examining PW-3 and it is recovered under Ex.P-3 in pursuance of the confession leading to discovery marked as Ex.P-2. The failure to hold test identification parade does not vitiate the entire prosecution case. Therefore, the contention of the counsel for the petitioner that failure to hold test identification parade based on the principle laid down by the Division Bench of this court in SUBRAHMANYAM @ GANGADHARAM @ GANGAPPA AND ANOTHER (1st supra) which is contrary to the principles laid down by the Apex Court and on that ground the accused cannot be acquitted. She also relied on another decision of this court in JARAPALA DEEPALA @ BABU RAO AND OTHERS (2nd supra) to the same effect, but the two decisions are of little assistance to the petitioner.

23. In view of the law declared by the Apex Court in the judgements referred supra, failure to hold test identification parade is not a ground to acquit the petitioner for the offence punishable under Section 379 IPC in view of voluminous evidence available on record and that too when the petitioner is not claiming ownership over M.O.1, consequently, the revision fails as it lacks merits.

24. IN THE RESULT, the criminal revision is dismissed at the stage of admission.

Miscellaneous petitions, if any, pending in this criminal revision case shall stand closed.

M.SATYANARAYANA MURTHY,J

DATE:08-09-2017
ccm



THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY



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