

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL REVISION CASE No.672 OF 2005

JUDGMENT:

The present Criminal Revision Case is filed by the appellant - accused No.5 viz., Vankudoth Kalu, challenging his conviction under Section 235(2) of the Code of Criminal Procedure, 1973 (for short 'Code'), for the charge under Section 395 of the Indian Penal Code, 1860 (for short 'IPC'), and sentenced him to undergo rigorous imprisonment for a period of three (3) years with a fine of Rs.200/- and in default to undergo simple imprisonment for a period of three (3) months, by the judgment dated 22.01.1998 in S.C. No.18 of 1993 passed by the learned Assistant Sessions Judge, Mahabubabad.

2. In fact, the learned Assistant Sessions Judge, Mahabubabad, convicted accused Nos.3 to 5 in a split up case, but only accused Nos.4 and 5 challenged the conviction and sentence of imprisonment before the lower appellate court i.e., the learned III Additional Sessions Judge at Warangal in Criminal Appeal No.15 of 1998 and 20 of 1998 and when the learned III appellate Court confirmed the conviction and sentence of imprisonment and fine, accused No.5 alone preferred the present criminal revision case.

3. Heard Sri D. Purna Chandra Reddy, learned counsel for the revision petitioner, and the learned Additional Public Prosecutor for the State of Telangana, and perused the material on record.

4. The case of the prosecution has been that on the intervening night of 30.4.1990 / 01.05.1990, accused Nos.1 to 7 armed with knives went to the house of the *de facto* complainant - PW.1, knocked at the door and when the door was opened, they introduced themselves as extremists and demanded money towards their party fund, they then ransacked the house, looted gold and silver ornaments worth Rs.7,500/-. While leaving, they hurled the crackers in front of the house and from there, they went to the house of LW.7 of the same village, there also ransacked and snatched away wrist watch of his son. When PWs.5, 7 and 10 chased them, they fled away with the booty. They all belong to different villages of Warangal and Khammam Districts. It appears, some of them surrendered before the police. On completion of investigation, charge sheet was laid for the offence punishable under Section 395 of IPC read with Sections 3 and 5 of The Explosive Substances Act, 1908.

5. So far as the present petitioner is concerned, he was arrested on 22.07.1990, along with accused No.6, and his confessional statement was recorded in the presence of mediators and recovered gold ornaments and other properties at their instance in consequence of the confession made in the presence of the mediators.

6. During pendency of the case, accused Nos.1 and 2 died. When Sessions Case No.18 of 1993 was assigned, it was made over to the Assistant Sessions Judge at Mahabubabad, who, having framed

the charge under Section 395 of IPC, examined PWs.1 to 19 and marked Exs.P-1 to P-20 and Material Objects - 1 to 48, and, for defence, Ex.D-1, contradiction in the statement of PW.4 recorded under Section 161 of the Code, was marked.

7. The learned Assistant Sessions Judge, on perusal of the evidence, having found that the revision petitioner was identified in the Court Hall by PWs.2 and 3 and also keeping, in view the recoveries effected, believed recovery of the material objects in the present case and opining that the prosecution could prove the charge under Section 395 of IPC beyond all reasonable doubt, recorded conviction under Section 235(2) of the Code and having questioned the accused, recorded conviction and inflicted sentence of imprisonment and fine.

8. On appeal, the learned Sessions Judge independently dealt with the evidence let in by the prosecution and on appreciation, found that testimony of prosecution witnesses is trustworthy and, therefore, there is no infirmity in recording the conviction by the learned trial Court warranting interference and thereby confirmed the conviction, sentence of imprisonment inflicted and the fine imposed on the revision petitioner.

9. The learned counsel for the revision petitioner mainly attacks, on the failure to identify the revision petitioner - accused No.5

in the test identification parade by any of the witnesses and referred to the evidence of PW.18, the learned Magistrate, who held test identification parade, and, therefore, it is his submission that even the very same witnesses identifying the revision petitioner - accused in the Court Hall, no value can be attached to it, and, therefore, according to him, the judgments rendered by both the Courts below are tainted with illegality and therefore, requests to set aside the conviction and sentence of imprisonment inflicted and the fine imposed.

10. The learned Additional Public Prosecutor would contend that the factum of witnesses identifying the accused in the Court Hall while he was in the witness box since constitutes substantive evidence, their evidence cannot be scored out, more particularly, the evidence of PWs.2 and 3 and besides the same, even recovery of material objects at the instance of the revision petitioner and other accused since unshaken, there is nothing wrong in appreciation of evidence and recording findings by both the Courts below and, thus, supports the conviction and even sentence of imprisonment and fine.

11. The learned Assistant Sessions Judge, while referring to the evidence of PW.18, the learned Magistrate, who conducted test identification parade of accused Nos.1 and 4 to 6 at the Central Prison, Warangal, found that PW.1 identified accused No.2, PW.2 identified accused Nos.2 and 7, PW.3 identified accused Nos.2 and 7 and even

in his evidence PW.18, asserted the same. Thus, it is true, the present revision petitioner was not identified by PWs.1 to 3 in the test identification parade. It is no doubt true, PWs.2 and 3 again identified him in Court and, thus, it may give some sort of suspicion as to identification of the revision petitioner, but, all the more, it cannot be said that by that itself, the prosecution failed to prove the charge beyond all reasonable doubt. On occasions, when the witnesses are required to identify the suspect mixed with others at the ratio of 1 : 5 or 1 : 9, who would relatively resemble, it would be difficult for them to identify the suspect. In the present case, as many as four suspects, who are accused Nos.1 and 4 to 6, were kept in the test identification parade and if, 1 : 5 ratio was preferred by the learned Magistrate, at least, twenty (20) members would be standing in the row and if the ratio was at 1 : 9, then, at least thirty six (36) members would be standing in the row and the witnesses would certainly, develop some sort of fear and will be phobic and they get often confused and that could be the reason they may not be able to identify. These are all the factors, which are to be kept in mind while appreciating the evidence of the witnesses when they identify the accused while in the witness box. It is needless to observe that identification of the accused in Court would constitute substantive evidence and identification in test identification parade, but not identifying them in the Court by the very same witness makes the evidence of the witnesses so far as identification of particular accused is concerned as inconsequential.

Therefore, it cannot be said that the testimony of that particular witness, who identifies the accused in the Court Hall having failed to identify in the test identification parade, has to be out-rightly rejected.

12. This apart, as already adverted to in the above, recovery constitutes vital factor in a case of dacoity. When the material objects have been recovered at the instance of the accused persons in consequence of their confession, the said recovery cannot be thrown out unless the mediators' evidence is not creditworthy, more so, when the victim fails to identify the property as belonging to him or her. Such is not the situation occurring in the present case. Hence, it cannot be said that the findings recorded by the Courts below, except to the extent where some sort of discrepancy occurs, which can only be considered as minor infirmity, the findings recorded by both the Courts below do not suffer from any patent illegality warranting interference. Hence, the conviction recorded under Section 235(2) of the code for the charge under Section 395 of IPC against the revision petitioner and the sentence of three years rigorous imprisonment inflicted and the fine of Rs.200/- imposed are to be upheld. Thus, there is no merit in the present revision.

13. Therefore, the Criminal Revision Case is dismissed confirming the orders under challenge passed by the Courts below.

14. As a sequel thereto, Miscellaneous Petitions, if any, pending in the present revision stand dismissed.

15. This Court by the order dated 20.04.2005 in Criminal M.P. No.864 of 2005, suspended substantive sentence of imprisonment imposed by the trial Court as confirmed by the lower appellate Court. Therefore, the revision petitioner is directed to surrender himself before the learned Assistant Sessions Judge by 22.12.2017, and, in case, he fails to surrender by that date, the learned Assistant Sessions Judge, Mahabubabad, is directed to secure presence of the revision petitioner before him in person to serve out the sentence of rigorous imprisonment imposed by the Courts below.

November 29, 2017.
PV

A. SHANKAR NARAYANA, J

