

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY
CRIMINAL APPEAL No.1192 OF 2007

JUDGMENT:

This appeal is filed under Section 378(3) & (1) of Cr.P.C. by the State assailing the judgment dated 07.01.2005 in S.C.No.434 of 2004 on the file of the Court of the Assistant Sessions Judge-cum-Senior Civil Judge, Karimnagar, wherein and whereby respondents 1 to 4-accused Nos.1 to 4 were found not guilty for the offence punishable under Section 395 of Indian Penal Code and consequently, acquitted them of the said offence.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the present appeal are briefly as follows: On 25.07.2003 **Gopadi Venkateshwar Rao**-PW.1 submitted Ex.P.1 complaint to the Sub-Inspector of Police, Karimnagar Rural Police Station. Basing on the complaint of PW.1, the Sub-Inspector of Police-PW.13 registered a case in Crime No.254 of 2003 against accused Nos.1 to 4 for the offence punishable under Section 395 I.P.C. During the course of investigation, it is revealed that on 24/25.07.2003 intervening night the accused entered into the house of PW.1 and forcibly taken away the gold ornaments. In that transaction, the accused beat PWs.1, 2 and 5. On 07.10.2003 accused Nos.1 to 4 were arrested. The Circle Inspector of Police-PW.18 recovered Mos.1 to 5 gold ornaments from the possession of accused in the presence of PWs.7, 9 and 12. PW.8 recorded the confessional statement of accused in the presence of PWs.14 and 15. PW.10 examined

PWs.1, 2 and 5 and issued wound certificates Exs.P.6 to P.8. The Judicial Magistrate of First Class-PW.8 conducted test identification parade. Ex.P.13 is the proceedings. Ex.P.14 is the requisition. Ex.P.5 is the report. After completion of the investigation, PW.18 laid charge sheet before the Judicial Magistrate of First Class, Karimnagar. The learned Magistrate has taken the case on file against accused Nos.1 to 4 for the offence punishable under Section 395 I.P.C. and numbered the charge sheet as P.R.C.No.58 of 2004. The learned Magistrate had supplied the copies of all documents to the accused as contemplated under Section 207 Cr.P.C. and committed the case to the District and Sessions Division, Karimnagar under Section 209 Cr.P.C. as the offence under Section 395 I.P.C. is exclusively triable by a Court of Sessions. The learned Principal District and Sessions Judge, has taken the case on file against accused Nos.1 to 4 for the offence under Section 395 I.P.C. and numbered it as S.C.No.434 of 2004 and made over the same to the Assistant Sessions Judge, Karimnagar for disposal in accordance with law.

4. On appearance of the accused, the learned Assistant Sessions Judge heard the prosecution and defence version, framed the charge under Section 395 I.P.C. against the accused, read over and explained to them in Telugu, which they denied and claimed to be tried.

5. During the course of trial, on behalf of the prosecution, PWs.1 to 18 were examined and Exs.P.1 to P.21 and MOs.1 to 5 were marked. After completion of the prosecution side evidence, the accused was examined under Section 313 Cr.P.C. with regard

to the incriminating material available against them by the prosecution witnesses, which they denied.

6. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the prosecution failed to prove the guilt of the accused for the offence punishable under Section 395 I.P.C. and consequently acquitted them for the said charge. Hence, the present appeal by the State.

7. The learned Public Prosecutor submitted that the trial Court failed to appreciate that PWs.1 to 5 have identified the accused in the test identification parade proceedings. He further submitted that the prosecution proved the recovery of MOs.1 to 5 in the presence of PWs.7, 9 and 12 and the same was not considered by the trial Court in right perspective. He also submitted that the trial Court acquitted the accused on assumptions and presumptions and the findings recorded by the trial Court are not based on evidence much less legally admissible evidence; therefore, it is a fit case to allow the appeal.

8. Now the points that arise for consideration in this appeal are:

1. Whether the prosecution has proved the guilt of the accused for the offence punishable under Section 395 I.P.C. beyond all reasonable doubt? and
2. Whether the judgment of the trial Court is sustainable?

9. Point Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

10. Before adverting to the findings of the trial Court, it is not out of place to refer the following decisions.

(i) **State of Rajasthan vs. Mohan Lal¹**, wherein the Hon'ble Apex Court held at Para No.34 as follows:

34. From the above decisions, in Chandrappa and Ors. v. State of Karnataka, (2007) 4 SCC 415, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal were culled out:

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

(ii) **State of Maharashtra v Dnyaneshwar Laxman Rao Wankhede²**, wherein the Hon'ble apex Court held at Para Nos.15, 21 and 22 as follows:

15. Before embarking on the rival contentions raised before us, it is our duty to remind ourselves that we are dealing with a judgment of acquittal and, thus, it is absolutely essential to keep in mind the well-settled principles of law that in the event two views are possible to be taken, this Court shall not interfere with a judgment of acquittal. There cannot be any doubt that in the event, having regard to the materials brought on record, the Court comes to the conclusion on the basis thereof that only one

¹ AIR 2009 SC 1872

² (2009) 15 SCC 200

view is possible, a judgment of acquittal may be interfered with. (See *Shivappa v. State of Karnataka*, (2008) 11 SCC 337, *State of Maharashtra v. Rashid B. Mulani*, (2006) 1 SCC 407 and *State v. K. Narasimhachary*, (2005) 8 SCC 364.)

21. Even in a case where the burden is on the accused, it is well known, the prosecution must prove the foundational facts. (See *Noor Aga v. State of Punjabi*, (2008) 16 SCC 417 and *Jayendra Vishnu Thakur v. State of Maharashtra*, (2009) 7 SCC 104.)

22. It is also a well-settled principle of law that where it is possible to have both the views, one in favour of the prosecution and the other in favour of the accused, the latter should prevail. (See *Dilip v. State of M.P.*, (2007) 1 SCC 450 and *Gagan Kanojia v. State of Punjab*, (2006) 13 SCC 516.)

11. As per the principle enunciated in the cases cited supra, where it is possible to have two views – one in favour of the Prosecution and the other in favour of the accused – the latter view should prevail. Let me consider the facts of the case on hand in the light of the principles enunciated in the cases cited supra.

12. As seen from the testimony of PW.1, on 25.07.2003 he submitted a complaint Ex.P.1 to the Sub-Inspector of Police, Karimnagar-PW.13. The testimony of PW.13 reveals that he registered a case in Crime No.254 of 2003 under Section 395 I.P.C. against accused Nos.1 to 4. Basing on Ex.P.1 complaint, he issued F.I.R. Ex.P.10. In the cross-examination of these two witnesses, nothing is elicited to shake their testimony so far as lodging of complaint and registration of the case are concerned. The material available on record clinchingly establishes that PW.1 set the criminal law into motion.

13. As per the prosecution version, on the intervening night of 24/25.07.2003, the accused entered into the house of PW.1 and forcibly taken away the gold ornaments. The testimony of PWs.1 to 5 also reveals that the accused entered into their house and taken away gold ornaments. The testimony of PWs.1 to 5 reveals that the

accused beat PWs.1, 2 and 5. In the cross-examination of these witnesses, nothing is elicited to shake their testimony so far as committing of the dacoity in their house. As seen from the testimony of PW.10, on 25.10.2003 he examined PWs.1, 2 and 5 and issued Exs.P.6 to P.8 wound certificates. The oral testimony of PW.10 coupled with Exs.P.6 to P.8 reveals that PWs.1, 2 and 5 have sustained injuries on the intervening night of 24/25.07.2003.

14. The next question that falls for consideration is whether PWs.1 to 5 identified the accused in the test identification parade. As seen from the testimony of PW.8 on 03.01.2004 he conducted test identification parade in Central Prison, Warangal. As per the testimony of PW.8, PW.1 identified A.1 to A.5, PW.2 identified A.4, PW.3 identified A.1, A.2 and A.4, PW.4 identified A.1 and A.4, PW.5 identified A.1, A.3 and A.4 in test identification parade. The trial Court disbelieved the version put forth by the prosecution that PWs.1 to 5 identified the accused.

15. It is not in dispute that P.Ws.1 to 5 have no acquaintance with accused Nos.1 to 4 prior to 24.07.2003. The incident had happened in the intervening night of 24/25.07.2003. On seeing the accused, P.Ws.1 to 5 might became panic. As seen from the testimony of P.W.8, P.Ws.1 to 5 have not stated the physical features of accused Nos.1 to 4 prior to test identification parade. Without disclosing the physical features of the accused, how P.Ws.1 to 5 have identified the accused in the test identification parade after lapse of eight months is not properly explained by the prosecution. As per the testimony of PWs.17 and 18 the investigating officers, the accused were in police custody from 16.10.2003 to 23.10.2003. In such circumstances, the possibility

of showing the accused to P.Ws.1 to 5 cannot be ruled out completely. P.W.8 in unequivocal terms deposed that he did not record the statements of the accused after completion of test identification parade. The testimony of P.W.8 clearly reveals that he did not record the statements of P.Ws.1 to 4 prior to test identification parade. P.W.8 has not followed the procedure as contemplated under Criminal Rules of Practice. The testimony of P.Ws.1 to 5 is not corroborating with each other with regard to the identity of the accused in the test identification parade. Basing on the material available on record, the trial Court arrived at a conclusion that much reliance cannot be placed on test identification parade proceedings Ex.P5. The version put forth by the prosecution that P.Ws.1 to 5 identified the accused in the central prison is very much doubtful and improbable. I am fully endorsing with the finding recorded by the trial Court on this aspect.

16. The other circumstance on which the prosecution relied on is recovery of M.Os.1 to 5 from the possession of accused Nos.1 to 4. As per the testimony of PWs.17 and 18, they recovered M.Os.1 to 5 from the accused in the presence of P.Ws.7, 9 and 12. There is no whisper in the testimony of these witnesses that the investigating officer seized M.Os.1 to 5 from the possession of accused Nos.1 to 4 in their presence. These witnesses turned hostile. The testimony of these witnesses is no way helpful to the prosecution to establish that M.Os.1 to 5 were recovered from the possession of the accused.

17. Another circumstance on which the prosecution relied on is the testimony of PWs.14 and 15. As per the prosecution version,

the accused made confession in the presence of PWs.14 and 15. Any confession made by the accused in the presence of police is inadmissible in view of Sections 25 and 26 of Indian Evidence Act. Therefore, the testimony of PWs.14 and 15 is no way helpful to the prosecution.

18. The trial Court appreciated the oral and documentary evidence available on record in right perspective and arrived at a conclusion that the prosecution failed to prove recovery of M.Os.1 to 5 from the possession of the accused. The findings recorded by the trial Court are based on sound principles of law. The trial Court has assigned reasons much less cogent and valid reasons to its findings. I am fully endorsing with the findings recorded by the trial Court.

19. Having regard to the facts and circumstances of the case, I am of the considered view that the prosecution failed to prove the guilt of the accused for the offence punishable under Section 395 I.P.C. beyond all reasonable doubt. There are no grounds much less valid grounds to interfere with the findings of the trial Court and the appeal is liable to be dismissed.

20. In the result, the Criminal Appeal is dismissed. As a sequel, Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 15.02.2018

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