

**THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER
AND
THE HON'BLE SRI JUSTICE E.V.VENUGOPAL**

CRIMINAL APPEAL Nos.599, 638, 657, 685, 694 & 735 of 2012

COMMON JUDGMENT: (Per Hon'ble Dr. Justice Shameem Akther)

Since the facts of the case and issue involved in all these appeals are identical and since all these appeals arise out of the same judgment, all these appeals are taken up together and are being disposed of by this common judgment.

2. For convenience of discussion, the parties are hereinafter referred to as arrayed before the trial Court.

3. Criminal Appeal Nos.599, 638, 657, 685 and 735 of 2012 are filed by A1, A5, A6, A2 and A3 respectively and Criminal Appeal No.694 of 2012 is filed by the complainant, challenging the judgment, dated 28.06.2012, passed in S.C.No.477 of 2010 by the learned VIII Additional Metropolitan Sessions Judge at Hyderabad. Altogether, there are seven accused in this case. The Court below, vide impugned judgment, dated 28.06.2012, while acquitting A1 to A7 of the offence under Section 120B of IPC and A1, A4 and A7 of the offence under Section 396 of IPC, convicted A2, A3, A5, A6 of the offence under Section 396 of IPC and sentenced them to undergo rigorous imprisonment for a period of ten (10) years and

to pay fine of Rs.1,000/- each, in default, to undergo simple imprisonment for three months each; and convicted A1 of the offence under Section 412 of IPC and sentenced him to undergo rigorous imprisonment for a period of five (5) years and to pay fine of Rs.1,000/-, in default, to undergo simple imprisonment for three months.

4. We have heard the submissions of Sri C.Sharan Reddy, learned counsel for the appellant/A1 in Crl.A.No.599 of 2102, Sri H.Prahalad Reddy, learned counsel, representing Mr. Mohd. Ashraf Ali, learned counsel for appellants/A5, A6 and A3 in Crl.A.Nos.638, 657 and 735 of 2012, Sri T.Pradyumna Kumar Reddy, learned senior counsel, appearing for the appellant in Crl.A.No.694 of 2012/complainant, Mr. Mohd. Muzaffer Ullah Khan, learned counsel for the appellant/A7 in Crl.A.No.694 of 2012, Sri C.Pratap Reddy, learned Public Prosecutor appearing for the respondent/State in all these appeals, and perused the record.

5. The facts of the case, in brief, are that PW.1-S.M.Hyder Ali lodged a complaint on 31.01.2007 at 05.30 AM with PW.17-K.Chakrapani, Inspector of Police, Bahadurpura Police Station, who was camping at scene of offence, that on 31.12.2007, at about 04.05 AM, his daughters Sanobar (PW.2) and Sabreen (LW.4) were sleeping with their grandfather S.M.Yousuf Ali @ Nawab Sab

(hereinafter called as “the deceased”) in his bed room on the first floor. They informed PW.1 that a five-member gang of dacoits killed the deceased and looted the cash from almirah. Immediately, PW.1 rushed to the bed room of the deceased and found his father died and his hands and legs were tied to cot. Cash of Rs.6 lakhs from almirah and a cell phone of deceased with SIM No.9848055001 were missing. His daughters told that five members were involved in the offence and out of them, one was wearing red T shirt and four others were wearing monkey caps.

6. On receipt of complaint, PW.17 forwarded the same to SHO Bahadurpura, with an endorsement for registration of crime and accordingly, PW.15-A.Sudarshan, Sub-Inspector of Police, Bahadurpura Police Station, registered a case in Crime No.302 of 2007 for the offence under Section 396 of IPC and issued Ex.P36-FIR and handed over the C.D. file to PW.17, who was camping at the scene of offence.

7. Having taken over the investigation, PW.17 conducted the scene of offence panchanama under Ex.P2, drawn rough sketches under Exs.P5 and P6 in the presence of PW.4-S.M.Yazdani Ali Mistry and LW.14-Mohd. Ahmed. In the presence of same panch witnesses, PW.17 also conducted Ex.P4-inquest panchanama over

the dead body of the deceased, prepared seizure report under Ex.P3 under which, M.Os.15-one brown colour muffler, MO.16-two pieces of lemon colour dupatta oral parda, MO.17-one lungi brown black and while colour with kurta, MO.18-one mehorane brown and white colour, MO.19-one cream colour track pant and MO.20-one cream colour track pant, were seized. Later, the dead body was sent for Post Mortem Examination and PW.5-Dr.Abhjit Subedar conducted Post Mortem Examination and issued Ex.P7-PME Report. Later, PW.17 issued a requisition through DCP South Zone to all cell networks to track the cell phone of the deceased with IME 352273012073125 and to furnish call details. On 25.01.2008, the case was transferred to CCS for further investigation, where, LW.36-Veerappa, Inspector of Police, issued a fresh FIR in FIR No.18 of 2008 for the offences under Section 396 of IPC and handed over the investigation to PW.18-I.T.V.S.Suryanarayana.

8. PW.18 secured the call details of the cell phone of the deceased from the Nodal Officer of Idea Cellular and found that A2 was using cell phone of the deceased with SIM 9912852184. On enquiry, it came to light that the said SIM was standing in the name of PW.9-Mohd. Moosa, who, on enquiry, informed that he sold the cell phone with IME No.89910704200000148074 with SIM to A2. On 08.02.2008, the sleuths of police personnel deputed,

went to Savera Hotel, Vattepally and apprehended A2, A3 and A6 and produced them before PW.18, who interrogated the said accused and recorded their confessions in the presence of PW.8-Ahmed Nizamuddin and LW.21-Ahmed Mohinuddin. Upon the information furnished by A6, the police apprehended A1, A3, A5 and A7 at Macca hotel, Tadban, and they were also produced before PW.18 and their confession was also recorded in the presence of PW.7-Mohd. Ali Khan and LW.21-Sri Ahmed Mohinuddin.

9. The following properties were recovered from A1 to A7, pursuant to their confession recorded under Exs.P10 to P16.

A1	Rs.1,00,000/-(two bundles of Rs.500 denomination) (M.O.1) and LG phone (M.O.25). Ex.P.13 is admissible confession
A2	i) cash of Rs.50,000/- (Rs.100) M.O.2 ii) SIM card (M.O.21)
A3	i) Rs.17,500/- (500) (M.O.3) ii) LG cell phone M.O.26 Ex.P.14 is admissible confession iii) Rs.1,00,000/-(two bundles of Rs.500 denomination) (M.O.4) from his house under iv) Gloves (MO-32) v) Monkey Caps (MO-33) under Ex.P-19 seizure report
A4	i) Rs.20,000/- (Rs.20/-) M.O.7 1,000/- Priya Scooter (M.O.22) Ex.P.11 is admissible confession Baja Scooter (MO-31) under Ex.P-18 seizure report
A5	i) Rs.50,000/- (500) (M.O.6) Reliance LG phone (M.O.27) monkey cap (M.O.28). Ex.P.15 is admissible confession
A6	i) Bajaj Pulsar two wheeler (M.O.23) Monkey cap (M.O.24) Rs.20,000/- (MO-5) Ex.P-12 is admissible portion of confession
A7	i) Rs.44,000/- (Rs.1000/-denomination) (MO-8) Nokia Cell (MO-29)

	Bajaj Pulsar (MO-30) Ex.P-16 is the admissible portion of confession.
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10. Subsequently, A2 led the police and panch witnesses to his house from where MO.12-Red colour T shirt with half sleeves was recovered under Ex.P17-seizure report. A4 led the police and panch witnesses to his house from where MO.31-Bajaj Chetak Scooter was recovered under Ex.P18-seizure report. A3 also lead the police to his house at Kalapathar and at his instanace, the police recovered MO.4-one lakh rupees of 500 denomination, MO.32-hand gloves and MO.33-Monkey Cap under Ex.P.19-seizure report. Ex.P.14 is the relevant portion marked in the confession of A3. A1 to A7 were arrested and they were remanded to judicial custody.

11. The police obtained police custody of A1 to A7 from 18.02.2008 to 24.02.2008. A2 to A4 and A6 made confessions in the presence of PW.8 and L.W.24-Syed Ismail. On the basis of confession made by A2 and A4, a Nokia cell phone with IMA No.352273101120731215 of the deceased was seized from the possession of P.W.11-Syed Asad Khan to whom A2 and A4 sold the cell phone, under seizure panchanama prepared in the presence of PW.7 and LW.24. Further, on the basis of confession made by A3, Rs.18,000/- was recovered from the possession of LW.26-Mohd.

Azam/brother of A.3, in the presence of PW.8 and LW.24. On the basis of confession made by A2, a sum of Rs.22,000/- was recovered from his father (L.W.27-Syed Moinuddin) in the presence of PW.8 and LW.24. On the basis of confession made by A6, a Nokia cell model 7610, which was purchased with ill-gotten amount, was seized in the presence of PW.8 and LW.24. The specimen signatures of A2 and A4 and thumb impression of A4, which were obtained with the permission of the Court, were sent to Forensic Science Laboratory to compare the same with the signatures and thumb impression found on Ex.P24-Purchase Register maintained by PW.11-Syed Asad Khan, the owner of cell shop.

12. The final result of the investigation disclosed that A1 is the grandson of deceased, who was living with the deceased. He was addicted to luxury life by hiring the cars and roaming with girls. A1 and A7 are friends and studied in the same school at Lakidikapool. A5 is the common friend of A1 and A7. A3 is the friend of A5. A2, A4 and A6 are friends and A6 is a lorry driver working under A5. In the first week of December, 2007, A5, at request of A1 and A7, introduced A3 to commit theft of amount from the almirah of the deceased. A1, A3, A5 and A7, having conspired together, made a reccy at the house of deceased in order to gain access to the room

of deceased to steal the amount from the bed room of the deceased. A5 and A3 again made second reccy to plan the commission of offence by climbing on to the balcony over the compound wall from the back side of the house. Nevertheless, A5 and A3 expressed their unwillingness to burgle the house of the deceased, instead they wanted to engage regular thieves to execute plan. To that end, they met A6, who, in turn, introduced A2 and A4, who were regular property offenders.

13. Five days prior to the incident, A2, A4 and A6 went to Bahadurpura and met A1, A3, A5 and A7 and went to the house of the deceased to conduct final reccy to execute the offence. At this reccy, PW.3-Nadira Ameena Kauser Sultana/sister of PW.1 had seen all the accused. On 30.12.2007, except A1, all other accused gathered at Guntala Baba Dargha in furtherance of their conspiracy with A1 and planned the offence. With such plan, they went to the house of the deceased and met A1, who, as planned, unbolted sliding aluminium door of balcony and kitchen window, to facilitate the accused to gain access. Then, A1 and A7 waited outside, i.e., backside of the house and the other accused climbed in to the house. Thereafter, they gained entrance into the bed room of the deceased. Before that, some of the accused have bolted the other rooms from outside and then, after entering into

the bed room of the deceased, A2 to A6 looted amount of Rs.6,00,000/- from the almirah of the deceased. When PW.2 and other minor woke up, they were threatened by the accused and as such, they (PW.2 and other minor) were secretly watching with the little opened eyes. When the deceased tried to wake up, A2 went to him and applied liquid whitener eraser and made the deceased to become unconscious. The deceased died due to smothering done with muffler to neck. Thereafter, the accused removed their caps and fled away.

14. On 29.03.2008, Test Identification Parade was conducted by a learned Magistrate, wherein, PW.2 identified A2, A3, A5 and A6 (did not identify A4) and PW.3 identified A2, A3 and A7 (did not identify A4, A5 and A6). After examination of the relevant witnesses by collecting various documents and expert opinions, charge sheet was laid before the learned XII Additional Chief Metropolitan Magistrate, Hyderabad. The Magistrate has taken cognizance of the case in P.R.C.No.4 of 2008 and committed the case to the Metropolitan Sessions Judge, Hyderabad, under Section 209 Cr.P.C., since the case is exclusively triable by the Court of Session. On committal, the Metropolitan Sessions Judge, Hyderabad, registered the case as S.C.No.477 of 2010 and made over to the Court below for disposal, in accordance with law. On

appearance of A1 to A7, the Court below framed charges against them for the offences punishable under Sections 396 & 120B of IPC, read over the same to them, for which, they pleaded not guilty and claimed to be tried.

15. To prove the guilt of A1 to A7, the prosecution has examined PWs.1 to 18 and got marked Exs.P1 to P41 and MOs.1 to 34. On behalf of the accused, no oral evidence has been adduced and Exs.D1 to D3 were marked. When A1 to A7 were confronted with the incriminating material appearing against them and were examined under Section 313 Cr.P.C, they denied the same.

16. The trial Court, having considered the submissions made and the evidence available on record, *vide* impugned judgment, dated 28.12.2012, passed in S.C.No.477 of 2010, while acquitting A1 to A7 of the offence under Section 120B of IPC and A1, A4 and A7 of the offence under Section 396 of IPC, convicted A2, A3, A5, A6 of the offence under Section 396 of IPC and convicted A1 of the offence under Section 412 of IPC and sentenced them as stated *supra*. Aggrieved by the same, A1, A2, A3, A5 and A6 filed Crl.A.Nos.599, 685, 735, 638 and 657 of 2012 respectively challenging the conviction and sentence recorded against them; and the complainant filed Crl.A.No.694 of 2012 challenging the acquittal recorded in favour of A4 and A7.

17. Learned counsel for the appellant in Crl.A.No.599 of 2012/A1 would contend that the conviction and sentence recorded against A1 is contrary to law, weight of evidence and probabilities of the case. A1 was convicted and sentenced for the offence under Section 412 of IPC, without there being any substantial evidence on record. The Court below ought not have convicted A1 of the offence under Section 412 of IPC without there being any cogent and convincing evidence on record. PW.7 and PW.18 are highly interested witnesses and it is not safe to act upon their testimony. In fact, no currency notes were seized from the possession of A1. The recovery of cash of Rs.1 lakh pursuant to the alleged confession of A1 as mentioned in Ex.P13 is planted for the purpose of this case. Even there is no identification of the property, which is allegedly robbed. Furthermore, there is no evidence to show that the deceased or PW.1 had withdrawn any amount from Standard Chartered Bank and kept the same in the almirah in the room where the deceased slept. A1 is the grandson of the deceased. He has immense love and affection towards the deceased. He has no role whatsoever in the commission of dacoity coupled with murder and ultimately prayed to set aside the conviction and sentence recorded against A1 for the offence under Section 412 of IPC.

18. Learned counsel for the appellant in Crl.A.Nos.685 of 2012/A2 would contend that the Court below ought not have placed reliance over the testimony of PWs.2 and 3, who are highly interested witnesses and it is not safe to act upon their testimony. PW.3 was suffering from poor eyesight. Hence she identifying A2 is doubtful. Further, PW.2 is a child witness who was aged 7 years as on the date of the alleged offence and it is not safe to rely upon her testimony in convicting the A2 and the other accused. Further, as per FIR, the offenders were wearing monkey caps. There is no mention anywhere in the FIR that their faces were visible. Moreover, there is no evidence of presence of light in the house at the scene of offence, i.e., the room where the alleged dacoity coupled with murder was committed. Further, LW.4-Nadira Saba Noor Sultana, another sister of PW.1, who was allegedly sleeping in the room, where the deceased was sleeping, was not examined for the best reasons known to the prosecution. Further, there is no evidence to show that five persons have indulged in commission of the alleged offence. The essential ingredients of offence under Section 396 of IPC have not been proved against the appellant/A2. Few other contentions which were raised on behalf of A1 were also raised by the learned counsel for the appellant/A2 with regard to withdrawal of money from the bank and keeping in

the almirah etc. No credibility can be attached to the identification of the accused by PWs.2 and 3. Further, recovery of Rs.50,000/- (MO.3) and the SIM Card (MO.26) at the instance of the appellant/A2 is planted for the purpose of investigation of the case. There is no cogent and convincing evidence on record which establish that the appellant/A2 is guilty of the offence under Section 396 of IPC and ultimately prayed to set aside the conviction and sentence recorded against the appellant/A2 of the offence under Section 396 of IPC.

19. Learned counsel for the appellants in Crl.A.Nos.735, 638 and 657 of 2012/A3, A5 and A6 respectively, have also raised similar contentions which were raised by the learned counsel for A2. It was also vehemently contended that PW.2 and LW.4 were not sleeping in the room where the deceased was sleeping inasmuch as there is no mention of presence of any bed or bed sheets to demonstrate that PW.2 and LW.4 were sleeping in the room where the deceased was sleeping. There is also no mention of presence of light in the room at the time of commission of offence. In support of his contentions, appellants in Crl.A.Nos.735, 638 and 657 of 2012/A3, A5 and A6 respectively had relied on the following decisions.

1. State of Uttar Pradesh Vs. Wasif Haider and others¹
2. State of M.P. Vs. Ghudan²
3. Bala Pandurang Vs. State of Maharashtra³
4. State of Maharashtra Vs. Syed Umar Sayed Abbas⁴
5. Bashamoni Saidulu Vs. State of A.P.⁵
6. Siddanki Ram Reddy Vs. State of Andhra Pradesh⁶
7. Vadivelu Thevar Vs. State of Madras⁷
8. Arbind Singh Vs. State of Bihar⁸
9. State of Rajasthan Vs. Talevar and another⁹

20. Learned senior counsel appearing on behalf of the appellant in Crl.A.No.694 of 2012/complainant would contend that the Court below committed grave error in recording acquittal in favour of A4 and A7 in this case. There is clear evidence of PW.7 to show that an amount of Rs.44,000/- was recovered at the instance of A7. Further, A4 was identified by PW.2 in the Court. The Court below erred in holding that except recovery of amount, there is no incriminating evidence against A4 which connects him with the subject death. Further, pursuant to the confession made by A4 and A7, MO.11-cell phone of the deceased was recovered. Further, as per Section 396 of IPC, if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, each one of those persons shall be punished. The circumstances of the case amply prove the participation of A4 and A7 in the subject offence and hence, the

¹ (2019) 1 SCC 701

² (2003) 12 SCC 485

³ 2000 Cr.L.J. 693

⁴ (2016) 4 SCC 735

⁵ 2018 (1) ALT (CRL) 234 (DB)

⁶ (2010) 7 SCC 697

⁷ 1957 Cr.L.J. 1000

⁸ 1994 Cr.L.J. 1227

⁹ (2011) 11 SCC 666

Court below is not justified in recording acquittal in favour of A4 and A7. A4 and A7 are also liable for punishment for the offence under Section 396 of IPC and ultimately prayed to set aside the acquittal recorded in favour of A4 and A7 and convict and sentence them for the offence under Section 396 of IPC. In support of his contentions, learned senior counsel had placed reliance on the decision of the Hon'ble Apex Court in **Parvinder Kansal Vs. State of NCT of Delhi and another**¹⁰.

21. Here, it is apt to state that the State had not preferred any appeal challenging the acquittal recorded in favour of A4 and A7 by the Court below.

22. Learned Public Prosecutor appearing for the respondent/State in all these appeals would contend that the findings recorded by the Court below are based on evidence and sound reasoning. PW.2 was sleeping in the room where the deceased was sleeping at the time of commission of alleged dacoity coupled with murder. The sketch map clearly demonstrates the same. PW.2 is a direct witness to the alleged incident. She clearly deposed in her evidence that she saw the whole incident with half-opened eyes in view of the threat given to her by one of the culprits. PW.2 clearly deposed in her evidence

¹⁰ 2020 SCC Online SC 685

that out of five persons, four persons were wearing monkey caps and the other fat man was wearing red T shirt and was pressing the mouth and nose of the deceased. The evidence of PW.2 is sustainable in the eye of law, since she has given descriptive particulars of the persons who committed the subject offence and also identified four culprits. Further, no suggestion was put to PW.2 by the defence counsel with regard to the presence of light in the room where the subject offence was committed. There are no laches on the part of the investigating officer in conducting investigation in this case. The confession made by the accused leading to recovery of money robbed by them and other material objects clearly establish the commission of the subject offence by accused and ultimately prayed to confirm the impugned judgment, dated 28.06.2012, passed by the trial Court. In support of his contentions, learned Public Prosecutor had placed reliance on the following decisions.

1. **Mishrilal and others Vs. State of M.P.**¹¹
2. **P.Ramesh Vs. State rep. by Inspector of Police**¹²
3. **Raja Vs. State by Inspector of Police**¹³
4. **Alavala Nagi Reddy Vs. State of A.P.**¹⁴

23. In view of the above submissions of the learned counsel, the points that arise for determination in these appeals are as follows:

¹¹ 2005 AIR SCW 2770

¹² (2019) 20 SCC 593

¹³ AIR 2020 SC 254

¹⁴ MANU/HY/0147/2018

- 1. Whether there is substantial unimpeachable evidence on record to convict A1 of the offence under Section 412 of IPC?**
- 2. Whether there is substantial unimpeachable evidence on record to convict A2, A3, A5 and A6 of the offence under Section 396 of IPC?**
- 3. Whether the conviction and sentence recorded against A2, A3, A5 and A6 by the Court below of the offence under Section 396 of IPC liable to be set aside?**
- 4. Whether the Court below is justified in recording acquittal in favour of A4 and A7?**
- 5. To what result?**

POINTS:-

24. The Court below placed reliance heavily on the testimony of PW.7 which reveals that pursuant to the confession of A1, the police recovered MO.1-Rs.1 lakh (in two bundles of Rs.500/- denomination each) and MO.25-cell phone. However, PW.18-investigating officer conceded that immediately on search, nothing was recovered. Firstly, there is no identification of currency notes alleged to have been recovered pursuant to the confession made by A1. The Court below, having dealt with the offence of conspiracy under Section 120B of IPC, was pleased to acquit all the accused of the said offence. The Court below did not place reliance over the evidence of PW.3 on the ground that she was having poor eyesight. Furthermore, the evidence of PW.3 is not cogent and convincing to demonstrate that she saw all the accused five days prior to the subject death of the deceased. She could not

identify all the accused at the time of conduct of Test Identification Parade by the Magistrate, so also in her evidence before the Court. Furthermore, when she was called upon to identify certain accused in the Court, she admitted that she was having eye sight defect. The Court below, assigning reasons, did not place reliance on the testimony of PW.3. Here, it is appropriate to refer to the decision of the Hon'ble Bombay High Court in **Bala Pandurang Kesarkar and another Vs. State of Maharashtra**¹⁵, wherein, in paragraph No.12 of the said judgment, it was held as follows:

"It is true that in cases where the recovery has been immediately effected, this Court can draw an inference under Section 114(a) of the Indian Evidence Act and convict the accused for the substantive offence of theft or robbery or dacoity or dacoity with murder etc., as the case may be. But in the instant case, the recovery is not immediate. It was effected on 04.10.1991, i.e., six days after the incident. In view of this belated recovery, the offence of robbery would not be established against this appellant and only one under Section 411 of IPC would be made out against him.

25. In the instant case, there is no cogent and convincing evidence to connect A1 with the alleged offence. Furthermore, it cannot be said that the amount said to have been recovered pursuant to the confession made A1 is the part of the amount derived by way of committing dacoity coupled with murder. There is a long gap in between the commission of the alleged dacoity and recovery of amount pursuant to the alleged confession made by A1. Further, the amount recovered pursuant to the alleged

¹⁵ 2000 Cri.L.J. 693

confession made by A1 is only Rs.1 lakh, which is a small amount. The circumstances projected by the prosecution against A1, at the most, leads to a suspicion with regard to the involvement of A1 in the subject offence. It is settled law that suspicion, however strong it may be, cannot take place of legal proof. In the absence of cogent, convincing and unimpeachable evidence to demonstrate that A1 had participated in the commission of subject offence, it is not safe to convict him even for the offence under Section 412 of IPC. The prosecution failed to prove the guilt of A1 of the offence under Section 412 of IPC and the Court below is not justified in convicting him of the said offence. In our considered opinion, A1 is entitled for acquittal for the offence under Section 412 of IPC.

26. The Court below, while placing reliance over the oral testimony of PW.2 and her identification of accused in the course of trial of the case and also placing reliance over the Test Identification Parade conducted by the Judicial Magistrate of First Class and confessions leading to recovery of amounts and other incriminating material recovered in the presence of PWs.7 and 8, was pleased to convict A2, A3, A5 and A6 of the offence under Section 396 of IPC. For the applicability of Section 396 of IPC, the prosecution should prove that five or more persons, who are conjointly committing dacoity, commits murder in so committing

dacoity. This Court was pleased to record acquittal in favour of A1 for the offence under Section 412 of IPC. The Court below, holding that PW.3 had sight defect and as such, she identifying the accused in the house along with A.1, doubted the same, completely discarded the evidence of PW.3. So, the evidence of PW.3 is not at all helpful to the prosecution and the complainant to establish the commission of the subject offence. There remains the evidence of PW.2, who is said to be an eye witnesses to the subject incident. There is one more sister (LW.4) who is said to be sleeping in the room at the time of commission of alleged offence. She was not examined by the prosecution for the reasons best known to them. Ex.P2 is the scene of offence panchanama. It is nowhere mentioned in Ex.P2 that there was a burning lamp at the scene of offence at the time of commission of the subject offence. In Ex.P1-complaint also, there is no mention of burning lamp or availability of light with which PW.2 and her sister (LW.4) witnessed the commission of dacoity coupled with murder. Further, in Ex.P1-complaint, there is specific mention that five persons indulged in commission of dacoity coupled with murder and one of them was fat and wearing red T shirt and other four persons are having monkey caps. There is no specific mention

therein that the faces of the assailants were visible and identifiable by PW.2 and her sister (LW.4).

27. Further, PW.2 is a child witness who was aged 7 years as on the date of the alleged offence. Law is well settled that the evidence of child witness must be evaluated carefully, as a child can be swayed away by what others tell him/her and as he/she is an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied upon. True it is, there is no law that the evidence of a child witness cannot be acted, but however, greater circumspection is required for evaluating the evidence of a child witness, because a child is susceptible of being tutored. However, the law that the evidence of a child witness requires adequate corroboration before it can be acted upon is more a matter of practical wisdom than of law. In the instant case, PW.2, who was a child witness aged about 7 years as on the date of commission of the subject offence, identified A2, A3, A5 and A6 in the identification parade as culprits who participated in the offence but could not identify A4 and A7, whereas, in the Court, she identified A2 to A6. Even in the evidence of PW.2, she did not mention the presence of light in the room and witnessing the assailants with the help of any burning lamp. As per Ex.P1-complaint, the subject dacoity coupled with

murder was committed at 04:05 AM on 31.12.2007. At that time, there is no possibility of switching on the lights. Further, in Ex.P1-complaint, there is no mention that the assailants removed monkey caps and left the scene of offence. It has come up for the first time in the evidence of PW.2 in the Court. Though PW.2 had stated in her evidence that out of the five persons, four were wearing monkey caps and their faces were visible whereas the fifth man was fat and wearing red T Shirt, however, in her cross-examination, she stated that all the culprits, at the time of incident, were wearing similar monkey caps. PW.2, in her cross-examination, stated as follows:

"It is true that after the date of incident and the arrest of the culprits, the culprits and other events showed the Electronic Media and published in the print media. It is incorrect to say that prior to the identification parade, I was taken to CCS, Hyderabad, and where the police showed me the culprits and also informed me about their physical features and also the police furnished me the photographs of culprits. PW.3 also came to the Central Prison, Chanchalguda, Hyderabad, on the day I visited the prison."

PW.17-Investigating Officer, in his cross-examination, stated as follows:

"It is true that P.W.1 specifically did not state before me that his daughter P.W.2 told him that among the five persons one person with the help of muffler pressing on the face of the deceased, two persons tied the hands and the legs of deceased and other two persons opened all the Almirahs. P.W.2 did not state before me that she can identify M.O.12 to M.O.14. P.W.2 did not state before me that one among the five wearing T-shirt threatened her and her sister. P.W.2

did not state before me that one among the five persons was pressing the Nose and Mouth of the deceased with hands. P.W.2 did not state before me that the carry bag was in the block colour and same was available in the Almirah. P.W.2 did nto state before me that she and another noticed the bed room of closed by bolting outside and the same was opened by them. P.W.2 did nto state before me that the deceased was sleeping on the cot. P.W.2 did not state before me that she and another woke up on hearing the sound of Almirah."

The evidence of PW.2 reveals that there are lot of improvements. So much of improved version has come up in her examination before the Court.

28. In view of these circumstances, the presence of burning lamp in the room where the subject offence was committed and the assailants removing the monkey caps and leaving the scene of offence, is doubtful. Further, PWs.1 and 3 have admitted in their evidence about publication of the arrest of the accused and their photographs in print and electronic media. Such publication was much before conducting identification parade. Therefore, there was ample opportunity to the identifying witness to note down the physical features of suspects on account of publication of their arrest and the photographs in print and electronic media. Further, since there was inordinate time gap between the commission of the offence and the recovery of allegedly stolen amount from the accused, it is difficult to sustain that the recovered currency notes

are part of currency notes that were kept in the almirah in the room of the deceased. Furthermore, the police recovered cash of Rs.22,000/- from the father of A2 (L.W.27) in the presence of P.W.8 and L.W.24, on 19.02.2008. The subject incident occurred on 31.12.2007. Thus, there is a long time gap between the commission of offence and the alleged recovery, which makes the participation of A2 in the subject offence doubtful. In view of the improvements made by PW.2 and as there was possibility of her seeing the photographs of the accused in print and electronic media and there is possibility of she being tutored in view of her tender age and also incapable of understanding the consequences of her deposition before the Court as she is susceptible of being tutored, it is unsafe to place reliance over her testimony.

29. While committing dacoity, one of the accused, i.e., A2 said to have taken away the cell phone belonging to the deceased. Cell phone was not recovered from A2. There is no record to show that the cell phone in question belongs to the deceased. There is lot of time gap in between the confession made by A2 and recovery of cell phone belonging to the deceased. Therefore, recovery of cell phone cannot be tagged to A2. The evidence placed on record, at the most, leads to suspicion against A2, A3, A5 and A6 that they, while conjointly committing dacoity, committed murder of the

deceased in so committing dacoity. It is settled law that suspicion, however strong it may be, cannot take place of legal proof. In the absence of any substantial evidence against A2, A3, A5 and A6, the Court below committed error in convicting and sentencing them of the offence under Section 396 of IPC. In view of the evidence placed on record, we are of the considered opinion that it is a fit case to acquit A2, A3, A5 and A6 of the offence under Section 396 of IPC by extending benefit of doubt.

30. Further, A4 and A7 were acquitted by the Court below for the offences charged against them and challenging the same, the complainant filed Crl.A.No.694 of 2012. As indicated above, no appeal was preferred by the State challenging the acquittal of A4 and A7. The Court below held that though PW.7 supported recovery of Rs.44,000/- from A7, he was not identified by PW.2 and that though PW.7 supported recovery of money from A4 and though he was identified by PW.2 in the Court hall, he was not identified by PW.2 in the Identification Parade and that except recovery of amount, no other incriminating evidence was found against A4 and A7 and in view of other reasons assigned by the Court below as there was no cogent and convincing evidence against A4 and A7 to prove that they have participated in the commission of offence and the money recovered is part of criminal

case property, this Court is in agreement with the findings recorded by the Court below in acquitting A4 and A7, which are based on sound reasoning. There are no circumstances to interfere with the same. Accordingly, Crl.A.No.694 of 2012 is devoid of merit and is liable to be dismissed.

31. We have gone through the decisions relied by the learned senior counsel appearing on behalf of the appellant in Crl.A.No.694 of 2012/complainant and the learned Public Prosecutor appearing for the respondent/State. In **Mishrilal's** case (11 supra) relied by the learned Public Prosecutor, it was contended that the witnesses therein could not have identified the assailants due to paucity of light. The Apex Court held that the incident had taken place in the evening and the deceased and the witnesses were grazing cattle and there would not have been much darkness. But in the instant case the incident took place in the early morning at about 04:05 AM and hence, it is natural that there would be no light. Moreover, there is no evidence on record that there was burning lamp in the room where the deceased was sleeping. Hence, the cited decision is not helpful to the prosecution. In **P.Ramesh's** case (12 supra) relied by the learned Public Prosecutor, the Hon'ble Apex Court, while discussing the law relating to child witness, held that the Judge is at liberty to test the capacity of the

child witness and no precise rule can be laid down regarding the degree and intelligence and knowledge which will render the child a competent witness. There cannot be any dispute with regard to the preposition of law laid down in the aforementioned decision. But in the instant case, even if PW.2, who is a child aged about 7 years as on the date of the commission of offence, is considered as a competent witness, it is not safe to act upon her testimony as there are several omissions and improvements in her evidence, more particularly in the absence of any other attending circumstances supporting her evidence. Hence, the said decision is not helpful to the prosecution. In **Raja's** case (13 supra) relied by the learned Public Prosecutor, the Hon'ble Apex Court held that the injured witnesses therein had adequate and proper opportunity to observe the features of each of the accused and that what is important is the identification in Court and if such identification is otherwise found by the Court to be truthful and reliable, such substantive evidence can be relied upon by the Court. We respectfully agree with the preposition of law laid down by the Hon'ble Apex Court. But in the instant case, in the Identification Parade conducted by the Magistrate, PW.2 did not identify A4 and PW.3 did not identify A4, A5 and A6. Further, it is borne by record that before identification of the accused in the Court, PW.2 and

PW.3 had the opportunity to note down their physical features, as they were shown in print and electronic media. Further, PW.3 was suffering from poor eyesight. Under these circumstances, no much credibility can be given to the identification of the accused by PWs.2 and 3 in the Court. Hence, the cited decision is not helpful to the prosecution. In **Parvinder Kansal's** case (10 supra) relied by the learned counsel for the appellant in Crl.A.No.694/2012/ complainant, the Hon'ble Apex Court held that the victim's right of appeal is restricted to three eventualities, namely, acquittal of the accused, conviction of the accused for lesser offence, or for imposing inadequate compensation and that while the victim is given opportunity to prefer appeal in the event of imposing inadequate compensation, but at the same time, there is no provision for appeal by the victim for questioning the order of sentence as inadequate, whereas Section 377 Cr.P.C. gives the power to the State Government to prefer appeal for enhancement of sentence. There cannot be any dispute with regard to the said preposition of law. However, it is settled law that each case has to be decided on its own merits.

32. In the result, Criminal Appeal No.599 of 2012 filed by A1 and Criminal Appeal Nos.638, 657, 685 and 735 of 2012 filed by A5, A6, A2 and A3 respectively, are allowed by setting aside the

impugned judgment, dated 28.06.2012, passed in S.C.No.477 of 2010 by the learned Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge at Hyderabad. Consequently, A1 is acquitted of the offence under Section 412 of IPC and A2, A3, A5 and A6 are acquitted of the offence under Section 396 of IPC. Criminal Appeal No.694 of 2012 filed by the complainant is dismissed, confirming the impugned judgment, dated 28.06.2012, insofar as A4 and A7 are concerned. Fine amount, if any, paid by A1, A2, A3, A5 and A6 shall be refunded to them and their bail bonds shall stand cancelled.

Miscellaneous petitions, if any, pending in all these appeals, shall stand closed.

Dr. SHAMEEM AKTHER, J

E.V.VENUGOPAL, J

30th December, 2022
Bvv