

Premakumar @ Kumar @ Vadda and Others Vs. State of Karnataka

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Court : Karnataka

Decided On : Jun-24-2014

Judge : Mohan M. Shantanagoudar & C.R. Kumaraswamy

Appeal No. : Criminal Appeal No. 846 of 2010

Appellant : Premakumar @ Kumar @ Vadda and Others

Respondent : State of Karnataka

Judgement :

(Prayer: This Criminal Appeal is filed under Section 374(2) of Cr.P.C. praying to set aside the Judgment of conviction and sentence dated 4/5.8.2010 passed by the Prl. Sessions Judge I/C. I Additional District Judge, Bangalore (R) District Bangalore in S.C.No.135/2009 convicting all the appellants/ accused for the offences punishable under section 396 and 201 of Indian Penal Code and convicting appellant No.3/Accused No.3 for the offence punishable under Section 397 of IPC also.)

1. The Judgment and Order of conviction passed by the Prl. Sessions Judge/ I/c 1st Addl. Sessions Judge, Bangalore Rural District, Bangalore in S.C. No.135/2009 is called in question in this appeal by the convicted accused.

All the five accused were tried and convicted for the offences punishable under Sections 396 and 201 of IPC.

Accused No.3 is also convicted for the offence punishable under Section 397 of IPC.

2. Case of the prosecution in brief is that the lorry bearing Regn.No.TN-23-D-8727 was driven by PW.21 - complainant on the night of 27.11.2008; The said lorry was loaded with Iron rods belonging to Sunvik Steel Factory, Tumkur, of which PW.12 was having the possessory right; The lorry in question was owned by PW.23; The deceased Ronald Khaf was the security guard and he was proceeding alongwith the lorry for providing security to the iron rods that were being transported; On the night intervening between 26.11.2008 and 27.11.2008, the driver had parked the lorry near the fly over of Dobaspet, on NH.4 leading from Poona to Bangalore within the limits of Dabaspeth Police Station; On the early morning of 27.11.2008 while deceased and PW.21 were asleep at about 3 a.m. Accused No.1 - Premakumar alongwith other accused entered into the cabin of the lorry forcibly from both doors of the cabin and immediately threw chilli powder on the face of the complainant; All the accused were covering their faces with a view to shield their identity. After throwing chilli powder, the accused assaulted on the head of the complainant with wheel spanner, consequently complainant fainted and then he was thrown out of the lorry. Thereafter the lorry was taken to certain distance and the security guard was also murdered. After murdering the security guard Ronald Khaf, the lorry with the goods were robbed by the accused.

The complainant regained consciousness on the early hours of 27.11.2008; he came to Dabospeth Hospital with the help of local people and got himself admitted to the hospital at about 7 a.m.; his statement was recorded in the Dabospeth Hospital at about 7 a.m. to 7.30 a.m. on 27.11.2008 and based on the same, the Crime No.202/2008 came to be registered for the offences under Sections 397 and 363 of IPC. The Police after investigation laid the charge sheet against all the accused for the offences under Sections 396, 397 and 201 of IPC.

3. In order to prove its case, the prosecution in all examined 26 witnesses and got marked 41 Exhibits and 27 Material Objects. On behalf of the defence, no witness is examined. The trial Court on evaluation of the material on record convicted all the accused for the offences with which they were charged and sentenced them

accordingly.

4. Sri K.M. Nataraj, learned, senior advocate appearing on behalf of the convicted accused/appellants submits that except the evidence of PW.21 - complainant and the evidence of the doctor who conducted the PM examination and the evidence of the Police Officer, the evidence of all other witnesses is of no use to the case of the prosecution inasmuch as all the witnesses have turned hostile; the identity of the accused is in serious doubt inasmuch as the complainant/injured had not seen the assailants at an earlier point of time; The accused were not known to him prior to the incident in question; The persons who entered the lorry were covering their faces in full; Immediately after entering the lorry, they threw chilli powder on the face of the complainant and assaulted him with wheel spanner, consequent upon which the complainant fainted; Thus according to him, there was no occasion for the complainant to know, identify and remember the faces of the assailants at the time of the incident. He further draws the attention of the Court to the fact that though Accused Nos.3 to 5 were arrested on 28.11.2008; Accused No.2 was arrested on 29.11.2008 and Accused No.1 was arrested on 2.12.2008, the Test Identification parade in respect of Accused Nos.2 to 5 was conducted only on 17.2.2009 i.e., after lapse of about 2 Vi months and the Test Identification parade in respect of Accused No.1 was not at all conducted; Absolutely no valid reason is forthcoming as to why the identification parade was not conducted immediately after the arrest of the accused; Since the identification of the assailants is in serious doubt, the appellants cannot be convicted merely on suspicion or on assumption.

Sri Vivek Reddy, learned advocate also argued in support of the defence.

Per contra, learned Government Advocate argued in support of the Judgment of the Court below by contending that the evidence of PW.1 coupled with the Test Identification parade result is sufficient to convict the accused, particularly when the recovery of iron rods through the voluntary statement of the accused is proved.

5. PWs.1 and 2 are the witnesses for the scene of offence panchanama; Both of them have turned hostile. PWs.3,4 and 5 are the witnesses for the inquest panchanama Ex.P4 and they have also turned hostile. PW.6 is the Head

Constable working in the Fire Station; He searched for the dead body of the deceased at the request of the Investigating Officer and ultimately the dead body was found at Kalyani in DobsPET Police Station limits; His evidence would be helpful only to show that the dead body was found at the particular place. PW.7 is the witness for the inquest mahazar Ex.P4; He has turned hostile. PWs.8 and 9 are the panchas for recovery panchanama Ex.P6 under which lorry was recovered in between 4 p.m. and 5 p.m. on 28.11.2008; Both the witnesses have turned hostile. PW.10 is the witness for recovery panchanama Ex.P7 under which Mo.2 - knife was recovered based on the voluntary statement of Accused No.1 from his house; The recovery was on 2.12.2008; PW.10 has also turned

hostile. PW.11 who was supposed to identify the dead body of the deceased and who acted as witness for inquest mahazar - Ex.P4 has turned hostile. PW.12 is the officer of Sunvick Steel Factory and he identified the dead body. PW.13, who was supposed to depose about the recovery panchanama - Ex.P7 relating to MO.2 - knife, has turned hostile; His evidence is on par with the evidence of PW.10. PWs.14 and 15 are the witnesses for recovery panchanama - Ex.P8 under which 'iron rods were recovered at the instance of Accused Nos.3 to 5 near Thyamagondalu on footpath; The total weight of iron rods is 15 tons and they worth about Rs.4,00,000/-; under the very mahazar, wheel spanner was also recovered; Both PWs.14 and 15 have turned hostile. PW.16 is the Public Relations Officer of Steel factory and he filed the application for interim custody of the iron rods and he got it. PW.17 is the eye-witness; He has turned hostile; His statement before the Police is marked at Ex.P14. PW.18 is the doctor who conducted the postmortem examination on the dead body of the deceased and the PM report is at Ex.P15. PWs,19 and 20 are the witnesses for the recovery panchanamas Ex.P9 to Ex P13; they have turned hostile. PW.21 is the injured complainant; The complaint is at Ex.P18; He has supported the case of the prosecution. PW.22 is the witness for Ex.P19 under which the blood stained clothes of the complainant were seized. PW.23 is the owner of the lorry involved in the accident. PW.24 is the doctor who examined the complainant on 27.11.2008 at 6.30 a.m.; the wound certificate is at Ex.P20 and as per the wound certificate, the complainant has sustained five injuries. PW.25 is the Taluka Executive Magistrate who conducted the Test Identification parade in respect of Accused Nos.2 to 5. PW.26 is the

Investigating Officer who completed the investigation and laid the charge sheet.

6. From the aforementioned facts, it is clear that PWs.1,2,3,4,5,7,8,9,10,11,13,14,15,17,19 and 20 have turned hostile. The witnesses for recovery panchanama as well as scene of offence panchanama have also turned hostile. They have not supported the case of the prosecution in regard to recovery of lorry, iron rod and wheel spanner.

7. The evidence of the doctor PW.18 coupled with the postmortem report Ex.P15 clarifies that the death of Mr. Ronald Knaf is homicidal in nature. Even otherwise, there is no serious dispute with regard to that aspect of the matter. The only question to be decided in this appeal is as to whether the appellants herein were involved in the crime or not. For the said purpose, the evidence of PW.21 and the evidence of the Taluka Executive Magistrate who conducted the Test Identification parade viz., PW.25 coupled with the evidence of the Investigating Officer is necessary to be considered.

8. The first information - Ex.P18 is lodged by PW.21 who is the injured eye witness. The plain reading of the first information discloses that at about 10.30 p.m., when the lorry came near Dabospet, the right wheel of the lorry was punctured. Therefore the lorry was parked by the side of National I Highway No.4 near the flyover. Since the deceased security person - watchman had not taken his dinner, he went and had dinner in the nearby hotel. Thereafter the deceased as well as the complainant decided to sleep in the lorry itself at about 12 midnight intervening between 26.11.2008 and 27.11.2008 and accordingly they slept. At about 3 to 4 a.m. on 27.11.2008, 4 to 5 persons entered the cabin of the lorry from both the doors; such persons had covered their faces; immediately after entering the lorry, before the complainant could talk anything, such assailants who entered the lorry threw chilli powder on the complainant; the mouth of the complainant was gagged by inserting a cloth in his mouth. The lorry was taken on the cross road by the offenders wherein the complainant was assaulted with a knife. The complainant did not know as to what happened to the security person (i.e., deceased). When the complainant tried to lift his head, he was assaulted on his head with wheel spanner and pushed him out of the lorry and took away the lorry

with the deceased. It is specifically stated that the offenders were about 20 to 22 years old and all of them had covered their faces. It is also mentioned in the first information that he can identify the offenders if shown.

Thus it is clear from the first information that all the culprits had covered their faces and immediately after entering the lorry, they threw chilli powder on the complainant and consequently they could not have seen the faces of any of the culprits. The incident on the spot had happened at the spur of the moment without giving any room to the complainant to see the faces of the culprits. Since the faces of the culprits were fully covered with clothes, the complainant could not have seen the faces of the persons involved in the incident.

Contrary to the version as found in Ex.P18, the complainant has deposed before the Court that he knows the accused and that the accused before the Court are the persons who entered the lorry and assaulted him with wheel spanner after stabbing him with knife and consequent! he fainted; Thereafter he was thrown out of the lorry by the offenders and the lorry was taken by them along with the watchman. He did not know as to what had happened to watchman at that point of time. Since all the faces of the offenders were fully covered and as the chilli powder was thrown on the complainant by the offenders immediately after entering the lorry and as the incident had occurred somewhere between 3 a.m. and 4 p.m. on 27.11.2008, that too when the complainant and watchman were sleeping, it would not have been possible for the complainant to see the faces of any of the offenders. Therefore the version of PW.21 before the Court that he identified the offenders appears to be an exaggerated version.

10. The Investigating Officer has proceeded to get the Test Identification parade done with regard to Accused Nos.2 to 4 on 17.2.2009, PW.25 is the Taluka Executive Magistrate to whom the requisition was sent by the Investigating Officer for conducting the Test Identification parade and accordingly, PW.25 came to the prison wherein Accused Nos.3 to 5 were detained and conducted the Test Identification parade. As aforementioned, Accused Nos.3 to 5 were arrested on 28.11.2008 and Accused No.2 was arrested on 29.11.2008. The Test Identification parade was held on 17.2.2009 i.e., after the lapse of about 2 V2 months through

the eye-witness (PW.21). The Investigating Officer has not assigned any reasons muchless acceptable reasons for such a long delay in conducting the Test Identification parade. It is by now well settled that the Test Identification parade in order to become acceptable needs to be conducted as early, as possible after the arrest of the offenders or culprits. Even otherwise, the acceptable reasons should be assigned by the Investigating Officer as to why Test Identification parade could not be conducted at an early point of time. It is not for the defence to prove that the parade held was suffering from the legal infirmities because, admittedly, the onus of proof in criminal case never shifts as the accused is presumed to be innocent till proved otherwise beyond all reasonable doubts. The test identification is considered as a safe rule of prudence for corroboration. Though the holding of the identification parades may not be substantive evidence, yet such parades are used for corroboration purposes in order to believe or not the involvement of the persons brought before the Court for the commission of the crime. The holding of identification parade being a rule of prudence is required to be followed strictly in accordance with the settled position of law and expeditiously. The delay, if any has to be explained satisfactorily by the prosecution

11. In this regard, we may usefully refer to certain of the decisions on the point.

In the case of STATE OF ANDHRA PRADESH .vs. DR. M.V. RAMANA REDDY (AIR 1991 SC 1938) there was delay of 10 days in conducting the Test Identification parade. In that context, the Apex Court has held that where there is unexplained delay in holding the Test Identification parade, the evidence of the prosecution regarding identity of an accused cannot be held absolutely reliable and in such a case the accused is entitled to the benefit of doubt. The explanation for delay in holding the identification parade offered by the prosecution shall be trustworthy.

In the case of RAJESH GOVIND JAGESHA .vs. STATE OF MAHARASHTRA (AIR 2000 SC 160) there was 23 days delay in conducting the Test Identification parade. In that context, the Apex Court has held that it is not for the defence to prove chat the parade held was suffering from the legal infirmities because, admittedly, the onus of proof in criminal case never shifts as the accused is

presumed to be innocent till proved otherwise beyond all reasonable doubts.

In the case of BUDHSEN .vs. STATE OF U.P (AIR 1970 SC 1321) the Apex Court has held that the Test Identification is considered as a safe rule of prudence for corroboration. Though the holding of the identification proceedings may not be substantive evidence, yet such proceedings are used for corroboration purposes in order to believe or not the involvement of the person brought before the Court for the commission of the crime. It is further held therein that the holding of identification parade being a rule of prudence is required to be followed strictly in accordance with the settled position of law and expeditiously. The delay, if any has to be explained satisfactorily by the prosecution.

In the case of HARINATH .vs. STATE OF U.P. (AIR 1988 SC 345) there was unexplained delay of four months in conducting the Test Identification parade. The Apex Court in the said matter has observed that the conduct of an identification parade belongs to the realm and is part of the investigation. The evidence of test identification is admissible under Section 9 of the Evidence Act. But the value of the test identification, apart altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test. Where the Test Identification parade is conducted after unexplained delay, the benefits of this regrettable and the unexplained delay in holding the test identification enure to the accused.

In the case of SONI .vs. STATE OF UTTAR PRADESH {(1982)3 SCC 368(1)} there was delay of 42 days in conducting the Test Identification parade from the date of arrest of the accused. In that context, the Apex Court held that such delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a long time the witnesses would be remembering the facial expressions of the accused.

In the case of SIDDANKIRAM REDDY .vs. STATE OF A.P. {(2010)7 SCC 697} there was delay of about one month 13 days in conducting the Test Identification parade. The Apex Court while acquitting the accused by disbelieving the Test

Identification proceedings has observed that delay in holding the Test Identification parade is fatal to the case of the prosecution. In the very judgment, relying upon another judgment of the Apex Court in the case of LAL SINGH .vs. STATE OF U.P. {(2003)12 SCC 554} has observed that the eye witnesses had little time to see the accused; where the witness had only a fleeting glimpse of the accused at the time of the occurrence, the delay in holding a test identification parade has to be viewed seriously.

From the aforesaid judgments, it is clear that the identification parade needs to be held at an early date after the arrest of accused, in order to ward off any suspicion in the mind of the Court.

12. In the case of hand, there was no prior acquaintance between the complainant and the accused. The incident in question had occurred In the darkness of a night. The offenders had covered their faces in full at the time of the incident. Immediately after entering the lorry, before the complainant (eye-witness) could talk anything or before the eye witness could have even the fleeting glimpse of the offenders, the offenders threw chilli powder on the face of the eye-witness. After throwing the chilli powder, the offenders had assaulted on the head of the eye-witness and he was thrown out of the lorry. The eye-witness (PW.21) could come out of the shock only after about 1 or 2 hours of the incident. Therefore the evidence relating to Test Identification parade calls for careful scrutiny. Since the complainant/eye witness did not know the offenders before the occurrence of crime, the identification of the accused persons for the first time before the Court after the long lapse of time is improper. In the matter on hand, the

Test Identification parade itself was held after two months of the incident. The identification before the Court by PW.21 was on 4.11.2009 i.e., during his deposition before the court below. As aforementioned, the incident had occurred on 27.11.2008 i.e., about one year prior to his deposition.

Apart from the fact that the Test Identification parade was conducted after long lapse of 2 months, that too without any reason, muchless valid reason, the Test Identification parade conducted by PW.25 appears to be highly mechanical. The manner in which the Test Identification parade is to be held is narrated in Chapter-

33 of the Karnataka Police Manual. We are conscious of the fact that the Police Manual is nothing but a compendium of Departmental orders issued by the Inspector-General of Police for the administrative guidance of Police Officers. However, they are issued under the Karnataka Police Act.

In the absence of any statutory provision relating to the procedure to be adopted to conduct Test Identification parade, the well accepted guidelines framed by the Police Department may be followed (as far as possible) as a safe method.

As per Chapter:-33 of the Karnataka Police Manual, the following are the salient points to be borne in mind by Police Officers arranging identification parades:

- i) Warn the accused person that he will be put up for a parade and he could keep himself veiled;
- ii) Secure the services of a Magistrate for holding an identification parade;
- iii) If this is not possible, secure two or more respectable and independent persons of the locality to hold the parade;
- iv) Do not select persons already known to the identifying witnesses to stand along with the suspects in the parade;
- v) Arrange for the identification parade immediately after an accused is arrested. There should be no delay.
- vi) When one accused is arrested in a case in which more than one accused is required to be identified, do not postpone the parade of the arrested accused, till the others are secured. As each accused is arrested, go on arranging for the parade.
- vii) Other persons participating in the parade should be of the same build, age, dress and appearance as the suspects;
- viii) Maintain a minimum proportion of 1:5 and a maximum proportion of 1:10;

ix) Distribute the accused among others. They should not be made to stand together;

x) Keep the accused out of the view of the witnesses and take precautions to prevent their being seen by others from the time of their arrest, if they are to be put up for identification parade subsequently;

xi) Shuffle the persons in the parade after identification by each witness and make a record of having done so in the proceedings;

xii) In respect of each accused, a separate identification parade should be held;

xiii) When several accused persons are required to be identified, the innocent persons, mixed up with one accused at one parade, should not be mixed up with another accused at a second parade. They should be changed, with every change of an accused person.

13. From the evidence of PW.25 coupled with the Test Identification reports Ex.P21, 22, 23 and 24, it is clear that the Taluka Executive Magistrate has not proceeded as per the guidelines found in the Police Manual. There is nothing on record to show that the persons who were standing along with the accused during Test Identification parade had got almost the same salient features such as height, weight, breadth, colour, complexion etc., So also the material is not clear as to whether the accused were shuffled or not. The evidence of PW.25 does not inspire the mind of the Court. PW.25, except deposing that he has conducted the Test Identification parade and that he has given his reports as per Ex.P21 to 25, he has not narrated as to what procedure he has adopted for conducting Test Identification parade. Even assuming that the guidelines as prescribed in the Karnataka Police Manual cannot take the place of the statute, the rules of prudence require that the Test Identification parade shall be conducted as per the well established norms in order to ward off any suspicion in the mind of the Court relating to the procedure adopted while conducting the Test Identification parade.

14. In view of the above, we are of the opinion that the trial Court is not justified in relying upon the Test Identification reports and the evidence of PW.25 for the

purposes of holding that the accused before the court have taken part in the offence in question. It is relevant to note here itself that no Test Identification parade was conducted in respect of Accused No.1 at all.

As aforementioned, the witnesses who were supposed to depose about the incident, scene of offence mahazar, seizure mahazar, recovery mahazar based on the voluntary statement of the accused, have turned hostile. In the light of such material, it would be difficult for the Court to convict the accused. Since the identification of the accused itself is in serious doubt, the Court cannot come to a definite conclusion that the accused before the Court were the assailants and that they have committed the crime. Since the material with regard to identity of the accused is in serious doubt and shaky, the benefit of doubt should go in favour of the accused. The accused cannot be convicted merely on suspicion. Hence the Judgment and Order of conviction is liable to be set aside.

Accordingly, we pass the following order:

1. The Judgment and Order of conviction and sentence passed by the trial Court in S.C. No. 135/2009 dated 4/5.8.2010 stands set aside;
2. The accused/appellants are acquitted of all the charges levelled against them. They shall be released forthwith, in case if they are not required in any other case.
3. The bail bonds of Accused No.5, who is on bail, shall stand cancelled.

The appeal is allowed accordingly.

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