SUPREME COURT OF INDIA

Ramesh

Vs.

State of Karnataka

Crl.A.No.629 of 2005

(S.B. Sinha and Cyriac Joseph JJ.)

27.07.2009

JUDGMENT

S.B. Sinha, J.

1. Accused No.3 before the learned Trial Court is before us aggrieved by and dissatisfied with a judgment and order dated 17.12.2003 passed by the High Court of Karnataka at Bangalore in Criminal Appeal No.1820 of 2003 modifying his sentence from death to rigorous imprisonment for life arising out of a judgment dated 11.11.2003 passed by the I Additional District and Sessions Judge, Bangalore Rural District, Bangalore in SC No.73 of 2000.

2. PW3, Manjusetty was the driver of a truck bearing Registration No.AP-09-4948. Deceased Shivashankar (Shekar) was the cleaner in the said truck. Accused No.5 Jayamma is said to be a member of a gang of dacoits comprising of accused Nos. 1 to 4 being Krishna, Manjunath, Ramesh (appellant) and Shivalinga. The truck belonged to one Natraja Transport Company having its office at Prashanth Nagar, Bangalore.

3. A First Information Report was lodged by PW2, Puttaswamy alleging that on 24.12.1998 when he had gone to Kunigal for work, he received a call in his mobile phone at about 7.45 am from his office informing him that the aforementioned truck had been stolen by some persons. He was asked to look into the matter. He with Driver Eshwara went in search of the said truck in a Maruti Van bearing Registration No.KA02 7055. Near a factory which is on the side of highway No.48 at Kunigal, he found that some people had gathered by the side of the road. Upon enquiries made by them, they came to know that a pair of chappal was lying at some distance away from the road. They proceeded further and found one `pant' and two undergarments. Proceeding further they found blood stains and a severed hand of a man on the field. It now stands established that the same was that of the driver of the lorry. They thereafter went towards Solur, Nelamangala, Shivagange and Kudur. On the way from Kudur to Shivagange, they again found that some people had gathered near Thoreramanahalli and upon enquiries made, they were informed that one dead body was lying at some distance. They found the dead body to be that of the cleaner, Shekar. They informed the owner of the

vehicle thereabout. They furthermore went in search of the truck. They came to learn that the driver of the truck, Manja had been admitted to Mallige Medical Centre at Bangalore City whereupon they visited the nursing home and found him to be in a seriously injured condition, his left hand having been severed. He was instructed by the owner of the truck to lodge a complaint with the police pursuant whereto a First Information Report was lodged. It was registered under Section 302, 392 and 307 of the Indian Penal Code.

4. The prosecution case, as disclosed by PW3 is as under: While he was driving the said truck on 22.12.1998 with some goods to Bhadravathi, he visited his sister's house at Marishetty Halli, village in Channaryapattana Taluk. He left his sister's village at 7.30 pm in the night on 23.12.1998. He came near the Johnson factory at about 10 pm. The road was under repair. He saw accused No.5 Jayamma standing by the side of the road. She came to him by making a signal with her hand whereupon he sent the cleaner Shivashankar to enquire as to what was the matter about. He returned back after speaking to her stating that she intended to go to KMDL factory. She had asked him to give her Rs.50/-. As PW3 had no money with him, he borrowed the said sum from the cleaner, got down from the truck and proceeded towards the place where she had been standing. Jayamma led him towards the field. When apparently they were having sex, accused No.1 to 4 came from behind and suddenly caught hold of him. Krishna, accused No.1 is said to have inflicted an injury on the backside of his neck with a hatchet. He tried to run away. He was chased by the other accused persons. They again tried to hit him on his neck. However, he raised his hand to protect his neck as a result whereof, the blow fell on his left hand resulting in severing of his left palm. He became unconscious. He regained his consciousness at around 3.30. He felt thirsty. When he tried to drink water from a nearby dhaba, it came down through his neck. He went by the side of the road to stop some vehicle. He also noticed that the truck was missing. He lost his consciousness again. He regained his consciousness at Mallige Nursing Home at Bangalore. He was in hospital for about 20 days.

> "He was called to the police station to identify one of the culprits and he identified the appellant. Fifteen days thereafter he was again called to the police station and found appellant Jayamma there. She was identified to be the woman who had actually made signal to stop the truck on the way. Seven days thereafter he was again called to the police station and found accused No.2 to be present there. He, however, could not identify accused Nos.1 and 4."

5. Admittedly, no identification parade was held. It was alleged that from the truck, a tape recorder, one watch, two tyres, one jack and one tarpaulin with a rope was stolen. Those articles were said to have been recovered at the instance of the accused. At the instance of the appellant, a blue coloured tarpaulin was said to have been recovered from PW4.

6. The place of occurrence is said to be the Johnson factory which is situated at a distance of three kilometers ahead of Kunigal as one proceeds towards Bangalore. Near the said factory, there was a Dhaba on the left side. A little ahead, there was another dhaba on the right side. Behind the dhaba, on the left side there are agricultural fields. The area where the incident took place is known as Karikal Gudda cross. There were lights in the Johnson factory. PW3,

in his evidence, stated that near the place of occurrence, only he, Shivashankar (the cleaner) and accused No.1 to 5 were present. He removed his pant and chappal. Accused No.5 removed her undergarments for having illicit sex. The accused had caught hold of him from behind. He allegedly had conversation with them as to who else were in there in the lorry and as to where he had been going. The said place is said to be at a distance of about 100 ft. from the road. Ragi crops were standing in the field, when the assault, in the manner stated, took place. Accused No.1 Krishna was said to have been holding a Machu. Accused No.4 was holding a chaku. Accused No.2, however, was unarmed.

7. During the course of investigation whereas at the instance of the appellant, the tarpaulin was recovered from PW4, the jack, tape recorder and two tyres were stated to have been recovered at the instance of accused No.1 from different persons.

8. Relying on or on the basis of the statement of PW3 as also the recovery of the said articles, a judgment of conviction and sentence was recorded. Death sentence was awarded to accused No.1 to 4. Accused No.5, however, was awarded life imprisonment. All the accused were furthermore convicted under Section 307 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years.

9. On appeals having been preferred by the accused, the same were allowed in part and the death sentence awarded against respondent Nos.1 to 4 were reduced to life imprisonment.

10. This appeal has been filed by the appellant who was accused No.3 alone.

11. Ms. Deepshikha Bharati, learned amicus, appearing on behalf of the appellant, would submit that the place of occurrence being about 400 meters to 500 meters from the Johnson factory and the appellant being unknown to the said PW3, it was impossible to identify him in a dark night. The purported substantial evidence whereupon reliance has been placed by the learned Sessions Judge as also the High Court was not such which would lead to the conclusion that the prosecution case was proved beyond all reasonable doubts.

12. Mr. Mishra, learned counsel appearing on behalf of the State, however, supported the impugned judgment.

> "We have noticed heretobefore that no test identification parade was held. In the First Information Report, the appellant was not named. We, however, are conscious of the fact that PW2, Puttaswamy, when lodged the First Information Report, might not have received the details of incident from PW3 as he was undergoing treatment in the nursing home. According to PW3, however, he came to know the names of all the assailants during the incident as one would call the other by his name. In his statement before the police, however, admittedly he did not disclose the name of the appellant. Strangely enough, according to PW30, the Head Constable, PW23, and another constable produced accused No.5 before him at about 3.45 pm on 12.1.1999. She was arrested and interrogated. It was on that day itself, he called PW3 who identified her whereupon his further statement was recorded. The said prosecution witness, however

does not state that even accused No.5, on interrogation, disclosed the name of accused No.s 1 to 4. Accused No.3 was arrested on 9.2.1999. It is not in dispute that he is a taxi driver. He was kept in custody during the night. On the next day, allegedly, he was taken to the house of one Ibrahim who is said to have purchased from him the tarpaulin in question."

13. PW4, in his evidence disclosed that the tarpaulin purchased by him was blue in colour. PW2 and PW3, in their evidences, however, stated that the tarpaulin which was used in the truck was of mash green colour. Yet again when the tarpaulin was produced, its colour had faded but despite the same, it was identified as the same tarpaulin.

14. We have noticed hereinbefore that according to PW3, he was called upon to identify the accused No.3 first in the police station. He, after three weeks, was again called to the police station to identify accused No.5. PW13, however, as indicated hereinbefore, in his statement stated the date of arrest of accused No.5 as 12.1.1999. The incident having taken place on 24.12.1998 and PW3 being in hospital for at least 20 days and he having been called to police station three weeks thereafter, it is beyond comprehension as to how he could be asked to identify accused No.3 first and then accused No.5, although accused No.5 was arrested on 12.1.1999 and the appellant was arrested on 9.2.1999. PW4, Ibrahim, was the owner of hotel. He knew the appellant No.3 as he used to take his meals in his hotel. In his statement, the appellant was a regular customer as he had been transporting sand in his truck regularly. He was examined on 19.11.2002. According to him, about four years prior thereto, he had asked for some loan stating that he had no money to pay for food. When, however, he expressed his inability to pay the said sum stating that he had no money, he allegedly borrowed the said amount from another person on pledging a terpauline. After one and a half months, he came with the Kudur police and asked him to give his money back. At the instance of the police, the terpauline was produced. Measurement of the terpauline was taken. A panchnama was prepared. What was the measurement of the terpauline, however, has not been disclosed. The purported measurement of the terpauline said to have been stolen had not been verified with the recovered one. None of the prosecution witnesses denied or disputed the fact that appellant was a driver. It appears rather strange that Shanthakumar PW6 would be panch witnesses for recovery of MO.12 although he had advanced the amount of Rs.500 to PW4. If the tarpauline was pledged to him, there was no reason as to why it should be recovered from PW4. The special features of the tarpauline which could be identified by PW2 and PW3 have not been stated. Tarpaulines are common goods being available in the market. It has also been accepted by Shanthakumar, PW6.

15. In view of the fact that other accused are not before us, we are of the opinion that it is difficult to uphold the judgment of conviction and sentence against the appellant herein. The place where the assault took place was said to be at a distance of 400 to 500 meters from the factory. Not only the place of occurrence was agricultural fields as stated by PW3 but the crop had also been standing thereon.

16. If accused No.5 was arrested first and accused No.3 one month thereafter, it does not stand to any reason as to why PW3 would be called to identify accused No.3 first which

according to him took place 20 days after his discharge from the hospital and 15 days thereafter he was again summoned to identify accused No.5.

17. We have noticed hereinbefore the respective dates of arrest of accused No.5 and accused No.3 respectively. It is difficult to conceive that accused No.5 would still be available so that the Investigating Officer could ask the witnesses to come to the police station. There is nothing to show that she was in custody of the police for more than 30 days. A presumption must be drawn that by that time, she was in judicial custody. It is also wholly unlikely that names of all the accused person would be disclosed during commission of the offence by one another. It furthermore appears to be somewhat unusual that although PW3 and accused No.5 were caught while they were indulging in illicit sex and all of them came from behind and the first attack was on the back of his neck, still conversations would not only took place by and between PW3 and the accused persons; the former even in that condition would be able to follow the same.

18. Mr. Chaudhary would submit that in all cases, it is not necessary to hold test identification parade. That may be so. In a case of this nature, the test identification parade would have been meaningless as appellant were shown to PW3 in the police station. Appellant was shown to PW3 at the police station. He was identified in court also. Reliance has been placed by Mr. Chaudhary on *Malkhansingh Ors. Vs. State of M.P.*[1] wherein this Court opined:

> "The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, 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 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, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. It was furthermore held:
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> It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court."

19. Judged by the aforementioned legal principles laid down therein, in our opinion, the identification of appellant PW3 in court cannot be held to be trustworthy.

> "Reliance has also been placed by Mr. Chaudhary on a judgment of this Court in *Asharfi Ors. V. The State*[2] wherein it was held that identification by only one person may not be relied upon stating:
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> Hence, only one identification cannot eliminate the possibility of the pointing out being purely through chance and for this reason is insufficient to establish the charge.
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> In *Heera Anr. V. State of Rajasthan*[3] a test identification had been held in presence of a Civil Judge and a Judicial Magistrate. The said decision, therefore, is not applicable. In *Ravindra Laxman Mahadik v. State of Maharashtra*[4] in a case involving Section 395 of the Code of Criminal Procedure, it was opined:
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> I find merit in Mr. Mooman's submission that it would not be safe to accept the identification evidence of Manda Sahani. Manda Sahani in her examination-in-chief stated that on the place of the incident, there was no light. In her cross-examination (para 6) she stated that it was dark at the place of the incident but, slight light was emanating from the building situate on the shore. The distance between the building and the place where Manda Sahani and her husband were looted has not been unfolded in the evidence. The learned trial Judge has observed that the evidence of Vinod Sahani is that the incident took place at a distance of about 100 ft. from the Gandhi statute, where the meeting was held. What he wanted to convey was that hence there must have been light at the place of incident in my view, on the face of the definite statement of Manda that it was dark as there was only slight light, and bearing in mind that the incident took place at 9.30 p.m. in the month of February, 1992, it would not be safe to conclude that there was sufficient light on the place of the incident enabling Manda Sahani to identify the appellant.The decision of the Allahabad High Court in Asharfi lal (supra) was followed therein.
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> In *Kanan Ors. V. State of Kerala*[5] this Court held :
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> It is well settled that where a witness Identifies an accused who is not known to him in the Court for the first time, his evidence Is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The Idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.

20. As identification of PW3 is highly doubtful, in our opinion, having regard to the nature of other evidences brought on record by the State, i.e., purported recovery of a tarpauline by

itself cannot be said to be sufficient to convict the appellant for a charge of such grave offence.

21. The appeal is allowed. The appellant should be set at liberty forthwith unless wanted in connection with any other case.

[1]*(2003) 5 SCC 746*
[2]*AIR 1961 All. 153*
[3]*(2007) 10 SCC 175*
[4]*(1997 Criminal Law Journal 3833)*
[5]*AIR 1979 SC 1127*