

1.
* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.A. 711/2009

LALIT KUMAR @ SONU Appellant
Through Mr. Sumer Sethi, Advocate.

STATE OF NCT OF DELHI Respondent
Through Ms. Fizani Husain, APP for the
State.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

JUDGMENT(ORAL)

1. By the impugned judgment dated 1st April, 2009, the appellant Lalit Kumar @ Sonu has been convicted under Section 376 Part I of the Indian Penal Code, 1860 (hereinafter referred to as IPC, for short). By the impugned order on sentence dated 13th April, 2009, the appellant has been sentenced to undergo rigorous imprisonment for ten years and directed to pay fine of Rs.2,000/- and in default of payment of fine to undergo simple imprisonment of six months.

2. On the question whether the prosecutrix was subjected to rape on 5th September, 2005, the testimony of the prosecutrix who had appeared as PW-6 and PW-3, Dr. Swati Kochhar clinches the issue. PW-3, Dr. Swati Kochhar has stated that she had examined the prosecutrix at about

9 a.m. when she had been brought before her with the alleged history of rape at 6 a.m. The prosecutrix had a history of bleeding and pain in the abdomen for two hours. There was history of trauma in the left eye. On local examination, PW-3, Dr. Swati Kochhar found the hymen to be absent and there was 0.5 cm vaginal abrasion, which means a tear in the vagina which is possible due to forceful sexual intercourse. There was bleeding from the vagina. In addition, PW-3 Dr. Swati Kochhar has stated that the prosecutrix was bleeding from rectum, which indicates that there was possible forceful intercourse, which had led to an internal injury causing bleeding from the rectum. PW-3, Dr. Swati Kochhar has stated that she took vaginal smears, which were sealed and handed over to Head Constable Hoshiar Singh. In the report of the Forensic Science Laboratory Exhibit PW-12/ C and D, it is stated that human semen was detected on the said vaginal swabs, which were marked 1a and 1b.

3. The statement of prosecutrix PW-6 was recorded without oath by the trial court. The prosecutrix is a rag picker and as per her statement, she was only seven years old at the time of the incident and when her statement was recorded in the court. However, as per the ossification report Exhibit PW-4/A, the age of the prosecutrix was between 10.2 to 14.5 years. Before recording her statement, learned Additional Sessions Judge had taken precaution to make the prosecutrix at ease and to satisfy himself whether she can make a statement. The prosecutrix in her statement has stated that on 5th September, 2005 at 5.30 a.m. in the morning she had gone out to pick up waste paper when she met a person, who told her that he can give her a bottle. The prosecutrix declined but the person closed her mouth and took her behind the shop of the painter. Thereafter, he took off her clothes. When the prosecutrix protested, she was repeatedly slapped and her eye turned red. He had forced sexual intercourse with her and she started bleeding. She went back to her mother and narrated the incident. Mother of the prosecutrix called the

police and she was taken to the hospital. The statement by the prosecutrix before the police is marked Exhibit PW-6/A. She has also stated that after making the statement, she took the police to the spot where she had been raped and they collected a 'durrie' as well as the underwear of the prosecutrix from the spot. The prosecutrix identified her underwear as well as the 'durrie', which were marked Exhibit PW-1/2 and Exhibit PW-1/1.

4. Learned counsel for the appellant submitted that there are contradictions in the statement of the prosecutrix as in her statement before the police under section 161 IPC, Exhibit PW-6/A the prosecutrix had stated that rape was committed inside the paint shop but in her statement in the court the prosecutrix had stated that she was taken behind the paint shop. It was argued that the colour of the underwear was not red but dark orange and the colour of the 'durrie' was cream, blue and orange colour stripes and not white as stated by the prosecutrix in the Exhibit PW-6/A. These so-called differences or discrepancies are minor and not material. The prosecutrix is a minor girl who was illiterate and merely a rag picker. She may not clearly understand the difference between the colours like deep orange or dark orange and red. Similarly, with regard to the colour of the durrie, this is merely a description given by a small minor girl. On the basis of the statement of the prosecutrix a site plan ExPW-12/B was prepared and the place/shop was identified. Keeping in view the age of the prosecutrix, her statement in the court that rape was committed, the discrepancy whether rape was committed behind the paint shop or inside the paint shop cannot be regarded as a discrepancy which affects and creates doubt regarding her testimony. Behind the paint shop could also mean the back portion of the shop. Learned counsel for the appellant submitted that the prosecutrix was not able to tell date and time in the court and she did not know how to read time. It was accordingly submitted that the prosecutrix could not have

stated that she had got up at 5.30 a.m. or 6 a.m. on 5th September, 2005 and had gone out to pick rags/paper. It is not possible to accept the said contention. It is a common knowledge that rag pickers are normally out on the streets early in the morning. She must have been woken up to go out to pick rags, which is the usual practice. The statement of the prosecutrix that she had left to pick rags at about 5.30/6 a.m. in the morning, therefore, cannot be disputed. The factum of sexual intercourse or rape is confirmed by the statement of the PW-3, Dr. Swati Kochhar, Senior Resident, AIIMS, who had examined the prosecutrix at 9 a.m. on the same day itself. In view of the statement of the prosecutrix, the medical record and the statement of the PW-3, Dr. Swati Kochhar, there is ample evidence on record to show and establish that the prosecutrix had been subjected to brutal and forced sexual intercourse or rape on the same day. The fact that the blood was not detected by the Forensic Science Laboratory on the underwear is not fatal to the prosecution case in view of the said evidence in form of statement of PW-3, Dr. Swati Kochhar, who has proved on record the MLC of the prosecutrix immediately after the incident.

5. The next question which arises for consideration is whether the appellant herein has committed the said offence. It is pointed out that the appellant was arrested on 12th September, 2005, nearly seven days after the said incident. Learned counsel for the appellant has also drawn my attention to the Forensic Science Laboratory report Exhibit PW-12/C and it is pointed out that semen could not be detected on his vest. He also submits that identification of the appellant made by the prosecutrix in the court should not be relied upon. With regard to the appellant's refusal to join Test Identification Parade (TIP, for short), learned counsel has relied upon *Tain Singh versus State (Delhi Administration)*, 1987 CrL. L.J. 53, *Parmod Kumar versus State*, 1990 CrL.L.J. 68 and *State of Himachal Pradesh versus Lekh Raj*, 2000 CrL. L.J. 44. It is submitted that as per

the prosecution case, the appellant was arrested on secret information but the secret informer was not produced in the court. Therefore, the appellant is entitled to acquittal and in this regard relies upon *Surender versus State*, Criminal Appeal No. 21/1994, decided on 3rd July, 2009. He further submits that the statement of the prosecutrix should not be relied and believed and in this connection reliance is placed on *Dinesh Jaiswal versus State of Madhya Pradesh*, (2010) 3 SCC 232 and *Pandurang Sitaram Bhagwat versus State of Maharashtra*, (2005) 9 SCC 44.

6. The appellant herein is son of a sweet maker, who had a shop in the said area. The shop has been identified and marked in the site plan Exhibit PW-12/B. The site plan also identifies the place where the prosecutrix was raped, i.e., the paint shop. PW-12 is ASI Surekha, who was the first Investigating Officer, had arrested the appellant on 12th September, 2005 after receiving secret information from Constable Ram Gopal. In her cross-examination, she has stated that the prosecutrix had given description of the accused though she has not given the tentative age or the height of the suspect. They had detained two-three persons on suspicion and interrogated them. These persons were later let off. After the accused was arrested on 12th September, 2005, an application was moved for conducting TIP on same day itself. TIP was in fact held on 17th September, 2005 in the presence of Ms. Barkha Gupta, M.M., who has appeared as PW-11. The appellant refused to join the TIP and had stated that the police had shown him to the witnesses and had also taken his photographs. He had also alleged that the police officers had not covered his face when he was being produced in the court and had shown him to the witnesses. The prosecutrix had identified the appellant in the court as the person who had committed the offence. This fact is specifically mentioned in the examination-in-chief. In the cross-examination she has denied that the accused had not committed the said

act.

7. Be that as it may, no suggestion was given to the prosecutrix that she was shown photographs of the appellant or was shown the appellant at the time of the arrest. Even in his statement, under Section 313, the appellant did not state that he was shown to the prosecutrix at the time of arrest or thereafter. In these circumstances, I think the recognition of the appellant by the prosecutrix in the court when her statement was recorded on oath should be accepted under Section 9 of the Evidence Act, 1872 (Evidence Act, for short). Identity of the accused is a relevant fact as per the said Section and the testimony of the witnesses before a court is substantive evidence. TIP belongs to investigation stage and is relied for the purpose of corroboration. The purpose of TIP is to test and strengthen the trustworthiness of the substantive evidence in the court. TIP is held under the supervision of a Magistrate to eliminate any suspicion or unfairness and to reduce chances of testimonial error. The importance of identification of the accused in the court, the TIP proceedings, and the refusal of the accused to join the TIP proceedings and in which cases and when adverse inference can be drawn, has been subject matter of several decisions. The Supreme Court has held in the case of *Munshi Singh Gautam versus State of MP*, (2005) 9 SCC 631 that substantive evidence is the evidence of identification in the court. TIP is conducted during investigation stage to eliminate the possibility of the accused being shown to the witness prior to his evidence being recorded in the court. The purpose of prior identification is to test and strengthen the trustworthiness of the evidence recorded in court. It is a safe rule of prudence to generally look for corroboration of the sworn testimony of witness in court. But in an appropriate case dock identification can be relied upon without corroboration.

8. In *Sidhartha Vashisht @ Manu Sharma versus State (NCT of*

Delhi), (2010) 6 SCC 1, the Supreme Court noticed the importance of TIP and logic behind it. It is the practice not borne out of procedure but out of prudence. In this case the Supreme Court has exhaustively examined the entire case law on the subject. It was observed:-

“254. Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by Section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of Section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in court. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation.”

9. Supreme Court has further referred to its earlier decisions which state:-

“256. The law as it stands today is set out in the following decisions of this Court which are reproduced as hereinunder:

*Munshi Singh Gautam v. State of M.P.*¹; (SCC pp.642-45, paras 16-17 & 19)

“16. As was observed by this Court in *Matru v. State of U.P.*² identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See *Santokh Singh v. Izhar Hussain*³.) The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main

object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

17. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. 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 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. 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. (See *Kanta Prashad v. Delhi Admn.*⁴, *Vaikuntam Chandrappa v. State of A.P.*⁵, *Budhsen v. State of U.P.*⁶ and *Rameshwar Singh v. State of J&K*⁷.)

* * *

19. In *Harbajan Singh v. State of J&K*⁸, though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in court

corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16-12-1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held: (SCC p. 481, para 4)

‘4. In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the investigating officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in *Jadunath Singh v. State of U.P.*⁵⁹ absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant.’ ”

10. Earlier the Supreme Court in *Munna versus State (NCT of Delhi)*, (2003) 10 SCC 599 had examined the question of refusal of an accused to participate in the TIP and effect thereof in case the said accused is identified by a witness in the court. It was observed where an accused declines to participate in the TIP, the prosecution has no option but to proceed with dock identification. In the said case, the Supreme Court relied upon the statement of the prosecutrix in the witness box in which she had identified the accused. The accused had refused to join TIP and had also given some explanation in the statement under Section 313 but the Supreme Court was not inclined to accept the said explanation and held:-

“8. It is true that the normal rule is that testimony of a witness, who does not know an accused from before

and identifies him for the first time in the court as a person who had participated in the commission of the crime, without holding a previous identification parade does not carry much weight. The substantive evidence of a witness is the statement in court but as a rule of prudence, earlier identification proceedings are held in order to corroborate the testimony of a witness given in court as regards the identity of the accused who is not known to him from before. However, this normal rule can have no application in the present case on account of own conduct of the appellant. The investigating officer produced appellant Munna “*baparda*” (with his face muffled) in the Court of Metropolitan Magistrate on 15-2-1992 and an application was given praying that necessary orders be passed for holding his test identification parade. It was mentioned in the application that after his arrest Munna had been kept “*baparda*” and is being produced in court in that condition. However, the appellant categorically refused to participate in a test identification parade. Thereafter, the learned Metropolitan Magistrate passed the following order:

“Accused Munna in muffled face in police custody is produced and identified before me by SI Satya Pal, PS Roop Nagar. The accused was questioned whether he wanted to join test identification parade. He refused to join. He is warned that his refusal to join TIP may be interpreted in evidence against him. Still he does not want to participate in TIP. Let his statement be recorded.”

9. Thereafter, the statement of appellant Munna was recorded where he stated that he did not want to participate in the test identification parade because the witnesses had already seen him in the police station.

10. In a case where an accused himself refuses to participate in a test identification parade, it is not open to him to contend that the statement of the eyewitnesses made for the first time in court, wherein they specifically point towards him as a person who had taken part in the commission of the crime, should not be relied upon. This plea is available provided the prosecution is itself responsible for not holding a test identification parade. However, in a case where the accused himself declines to participate in a test identification parade, the prosecution has no option but to proceed in a normal manner like all other cases and rely upon the testimony of the witnesses, which is recorded in court during the course of the trial of the case.

11. The effect of not holding a prior test identification parade has been recently examined in considerable detail by a three-Judge Bench in *Malkhansingh v. State of M.P.*¹ and after review of

practically all the earlier decisions, it has been held as under:

“7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. 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. ... 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.”

“10. 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.”

“[T]he substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine.”

11. Recently, Supreme Court in *Mulla and Another versus State of Uttar Pradesh*, (2010) 3 SCC 508 examined the question of TIP and

observed that the same are for the purpose of helping the investigating agencies to ensure that the suspect is the same person who the witness had seen in connection with the said occurrence/incident. Failure to hold TIP does not make the evidence of identification in the court inadmissible, rather the same is very much admissible in law but can affect its credibility. It was also observed that it is a common plea of the accused that they have been shown to the witnesses. Prosecution, therefore, should be conscious to ensure that TIP is conducted expeditiously. After examining the case law on the subject, it was observed as under:

“55. The identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Therefore, the following principles regarding identification parade emerge:

- (1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses;
- (2) this condition can be revoked if proper explanation justifying the delay is provided; and
- (3) the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses.”

12. In *Tain Singh and Parmod Kumar (supra)* it has been observed that the accused had relied upon cogent circumstances to establish the reasons why he declined to participate in the TIP and, therefore, no adverse inference was drawn on account of their refusal. This is not the situation in the present case. In *Lekh Raj (supra)* it has been observed that evidence of identifying the accused person at trial for the first time is, by its very nature is, inherently of a weak character especially when an accused was not known and familiar to the witness. However, in the present case the appellant refused to take part in the TIP. Therefore, the prosecution had no option but to ask the prosecutrix to identify the

appellant in the court. She correctly identified the appellant in the court. There is no reason for the court to disbelieve and not accept her statement, which is categorical, clear, trustworthy and reliable.

13. The decision in the case of *Dinesh Jaiswal* (supra) states that statement of the prosecutrix can be relied upon and believed, except if there improbabilities in her story. The court has to examine whether the statement of the prosecutrix inspires confidence. The said judgment instead of supporting the appellant supports the prosecution case. The contention that the investigation was sloppy and, therefore, the appellant in the present case is entitled to acquittal cannot be accepted in view of the evidence of PW-6, the prosecutrix as well as evidence of PW-3, Dr. Swati Kochhar, the Senior Resident. The arrest of the appellant is also supported by the evidence of PW-5, Contable Ram Gopal and PW-12, ASI Surekha. The secret report or information on the basis of which the appellant was arrested is not placed on record but this by itself is not fatal to the prosecution case in view of the other evidence and material on record. In the case of *Surender* (supra), the accused was acquitted because of a number of reasons, including the reason that the secret information on the basis of which the scooter belonging to the deceased was recovered from the possession of the appellant was not tendered. The prosecution had relied upon presumption under Section 114 of the Evidence Act as it was alleged that the appellant was found to be in possession of a stolen property. It was observed that the stolen property was recovered after a time gap and, therefore, benefit of presumption under Section 114 of the Evidence Act was not applicable as it uses the expression “soon after”. It was observed that as the secret informer was not produced in the court, secret information was not admissible. No secret report/information has been produced and admitted in evidence in the present case.

14. On the question of sentence, looking at the nature and conduct of

the appellant, the helplessness of the prosecutrix, her age as well as the MLC report and the statement PW3 Dr. Swati Kochhar, I do not see any reason to interfere with the quantum of sentence.

15. In view of the above, I do not find any merit in the present appeal and the same is dismissed.

SANJIV KHANNA, J.

SEPTEMBER 20, 2010
VKR