

AFR

Neutral Citation No. - 2025:AHC:32692-DB

Reserved On- 18.12.2024

Delivered On-06.03.2025

Case :- CRIMINAL APPEAL No. - 3376 of 2010

Appellant :- Ram Sujan

Respondent :- State of U.P.

Counsel for Appellant :- Kameshwar Singh,Raj Karan Yadav

Counsel for Respondent :- Govt. Advocate

Heard Sri Raj Karan Yadav and Sri Jitendra Singh, learned counsel for the appellant; Ms. Manju Thakur, learned AGA-I for the State and perused the material on record.

And

Case :- CRIMINAL APPEAL No. - 3122 of 2010

Appellant :- Anurag Mishra

Respondent :- State of U.P.

Counsel for Appellant :- Kameshwar Singh

Counsel for Respondent :- Govt. Advocate

Heard Mr. Dileep Kumar, learned Senior Counsel assisted by Sri Rajrshi Gupta and Rizwan Ahamad, learned counsel for the appellant; Ms. Manju Thakur, learned AGA-I for the State and perused the material placed on record.

And

Case :- CRIMINAL APPEAL No. - 3168 of 2010

Appellant :- Chhota @ Rajesh

Respondent :- State of U.P.

Counsel for Appellant :- Jitendra Singh, Kamta Prasad, Rajesh Kumar

Mishra

Counsel for Respondent :- Govt. Advocate

Heard Sri Jitendra Singh, learned counsel for the appellant; Ms. Manju Thakur, learned AGA-I for the State and perused the material placed on record.

And

Case :- CRIMINAL APPEAL No. - 3507 of 2010

Appellant :- Ram Jee @ Ram Lakhani

Respondent :- State of U.P.

Counsel for Appellant :- R.C. Yadav, Raj Karan Yadav

Counsel for Respondent :- Govt. Advocate

Heard Sri Raj Karan Yadav, learned counsel for the appellant; Ms. Manju Thakur, learned AGA-I for the State and perused the material placed on record.

Hon'ble Siddharth, J.

Hon'ble Subhash Chandra Sharma, J.

(Delivered by Hon'ble Siddharth, J.)

2. The above noted criminal appeals have been filed against the judgment and order dated 20.04.2010 passed by Special Judge, (Dacoity Affected Area)

Act, Banda in Special Sessions Trial No. 53 of 2023, State vs. Anurag Mishra and Another; Special Sessions Trial No. 74/2023, State Vs. Ramji Vs. Another and Special Sessions Trial No. 76/2003, State Vs. Chhota @ Rajesh and Another, by which appellants have been convicted and sentenced to one year's rigorous imprisonment and Rs. 500/- fine under Section 148 IPC and in default of payment of fine to undergo two months additional rigorous imprisonment. Appellants have been further convicted under Section 302 IPC read with Section 149 IPC for life imprisonment and Rs. 5,000/- fine and in default of payment of fine to undergo one year's additional rigorous imprisonment.

3. Prosecution case is that the informant, Chhedi Lal Dwivedi, lodged the F.I.R stating that on 22.01.2003 *baarat* of son of his brother-in-law (*sadhu*), Santosh @ Chota Gautam, had gone from District Banda to District Panna in Madhya Pradesh at the house of Vansh Pratap Pathak. On the next day i.e., 23.01.2023 at about 7 a.m the members of the marriage party, namely, Chhedi Lal, the informant, Madan Mohan, Niranjana Verma, Sudhir Kumar Pandey, Ram Sundar Dwivedi, Shailendra Tiwari, Neelu Dwivedi, left in one marshal car, driven by Breznev Kumar @ Guddu, for having *darshan* of Neelkanth Mahadev Temple, in Kalinjar fort. In the second marshal jeep behind the first jeep, Ashok Kumar Tiwari, his daughter, Shweta, Gandharva Singh Bundela, Puneet Tiwari, Shikhar Pandey, aged about 3 years, Kumari Rashi Pandey, aged about 5 years and Kumari Puja Bundela, aged about 11 years, were accompanying them and it was being driven by, Pintu Chaurasia. When they

were returning in two vehicles at about 09:00 a.m., they were surrounded by miscreants and both the drivers stopped the vehicles because of fear. All the persons were directed to come out of vehicles and to turn back and run. When the above noted persons turned back and started running upwards towards the hill, the miscreants abused them and fired from behind from rifles and guns. The informant in order to save himself fell on the ground and came rolling down from the height. Because of firing of the miscreants Ram Sundar Dwivedi, Shailendra @ Shalu, Ashok Kumar Tiwari, Kumari Shweta Tiwari, Gandharva @ Bundela, Sudhir Kumar Pandey, died. Puneet Tiwari, Madan Mohan and Breznev Kumar @ Guddu, suffered injuries. The injured were taken to Banda Hospital in two vehicles. Informant also suffered injuries because of falling and rolling from the height.

4. On the basis of aforesaid report made to the police, F.I.R. was lodged against 5 unknown accused. Investigating officer conducted investigation of the case and after completing the formalities, charge sheet was submitted against Anurag Mishra, Ram Sujana, Ramji @ Ram Lal, Raj Karan @ Pappu, Chota @ Rajpal and Kuber Singh. The trial court framed charges against them under Sections- 148, 307/149, 302/149, 504 IPC and 10/12 Dacoity Affected Area Act. All the accused denied charges and sought trial.

5. In order to prove the prosecution case, the prosecution produced P.W.-1, informant, Chhedi Lal; P.W.-2, Breznev @ Guddan; P.W.-3, Niranjana; P.W.-4, Raja; P.W.-5, Deendayal Sahu; P.W.-6, Constable Bare Lal; P.W.-7, Dr. B.K.

Saxena; P.W.-8, Dr. Rauf Siddhiqui; P.W.-9, Inspector Tulsi Ram Sakyavar; P.W.- 10, Sub-Inspector Mahendra Singh Yadav; P.W.-11, Sub-Inspector Ravindra Kumar Mishra; P.W.-12, Constable 236 Bare Lal; P.W.-13, Constable Shiv Bardan; P.W.-14, Sub-Inspector Chandrabhan Singh; P.W.-15, Bal Mukund Pandey; P.W.-16, Ram Narayan, Joint Secretary Development Authority; P.W.-17, S.D.M., Nandan Chakravarti; P.W.-18, Head Constable Jagdish Babu and P.W.-19, Sub-Inspector, Ram Das Chaudhary.

6. The statements of accused were recorded under Section 313 Cr.P.C., wherein they pleaded innocence and stated they have been implicated on account of enmity in this case. Defence side produced, D.W.-1, Sita Ram Patel, D.W.-2, Suraj Chaturvedi and P.W.-3, Mata Prasad Patel.

7. P.W.-1 in his examination-in-chief repeated the contents of the F.I.R. He further stated that after two vehicles were stopped by the miscreant, one of them came with the a rifle and pointed it towards the vehicles. He asked everyone to come out of the vehicles. The aforesaid miscreant was Pappu Yadav present in court. Thereafter four miscreants came armed with double barrel guns and the others were having single barrel guns. All of them directed the informant and his companions to run because they wanted to teach them lesson. All started firing together and four of them, namely, Pappu, Arun Mishra, Ram Sujan and Vijay @ Chota, are present in court. Six persons, namely, Ashok Tiwari, Gandharva Singh Bundela, Shailendra @ Shalu, Ram Sunder Diwedi and Sudhir Kumar Pandey and Kumari Shweta Tiwari, died on

the spot after suffering gun shot injuries. Madan Mohan, Puneet, Breznev @ Guddan, were injured. Thereafter, Niranjana Verma and the two drivers who were hiding in the bushes came out took the deceased and the injured to the hospital in the two vehicles. Later, injured, Madan Mohan and Puneet Tiwari also died during treatment.

8. P.W.-1, went to the police station in a jeep without having any registration number. In the way he met Raja Gautam and Prabha Shankar Tripathi, who had also come in the *Barat*. He informed them about the incident. He took paper and pen from the shop and Prabha Shankar Tripathi and wrote the application. He himself got the F.I.R. lodged on his oral statement and identified accused in District Jail, Banda. His injuries were medically examined and his statement was recorded by the investigating officer.

9. In cross-examination, P.W.-1, stated that he is the eldest among his three brothers. House of his parents-in-law is at Simariya Kushal, near Attara. Santosh Gautam is not his real brother-in-law (*sadhu*). Ashok Kumar Tiwari, is the brother-in-law (*sala*) of Santosh Gautam, uncle (*mama*) of Sudheer Kumar and brother-in-law (*sala*) of his elder brother, Sudheer Kumar Pandey and resides in Tindwari which is his *nani's* place. His mother was a teacher and resided there. Relationship of Sudheer Kumar Pandey with his parents was normal. He expressed ignorance about the father of Sudheer keeping another woman and was unwilling to give any property to Sudheer. He also expressed

ignorance about the fact that Ashok Kumar Tiwari helped Sudheer. There was minor dispute between Santosh Gautam and his brother, Ashok Gautam. Ashok Gautam, had not come in the marriage at Kalinjer. He never informed reasons of the incident to the investigating officer nor he informed the *Diwan* of the police station about the dispute between Santosh Kumar Gautam and Ashok Kumar Gautam. He only informed that some dispute is going on between Santosh Gautam and his brother, Ashok Kumar Gautam. They are not at talking terms and Ashok Kumar Gautam had not come in the marriage. After lodging of the F.I.R. a constable took him for medical examination. He remained in the police station for the whole day on 23.01.2003. His statement under section 161 Cr.P.C was recorded immediately. The programme of going to have darshan at Neelkanth Mahadev Temple was made on the earlier night in the presence of witness, Gopal, who accompanied them on a motorcycle. He had reached the temple after 15-20 minutes alongwith his younger brother, Virendra Pandey. They went inside the temple with him and also came back with him. He denied that Gopal came to the temple after P.W.-1 and his companions had taken Gopal and Virendra, both in the jeep and they were also sitting in their jeep. Gopal and Virendra, left on motorcycle before them. When the jeeps were stopped on the threat of the miscreants, Gopal was not seen anywhere nor any other person from public was there. In the report made at police station, he had not mentioned the names of Mithlesh Narayan Garg, Dinesh Tiwari and his younger brother on account of nervousness and fear. He had mentioned the name of Kr. Dimpi Tiwari and Pushkar @ Saurabh, but if it

is not mentioned in F.I.R, he could not tell the reason. He had not mentioned in the F.I.R. that Mithlesh Kumar Garg, was driver of the vehicle, but stated that Breznev Kumar was driving the same. Whether he informed the investigating officer about this fact or not, he is not clear. In examination-in-chief, P.W.-1, stated that Kamlesh Garg was driver the vehicle, but it was being driving by Mithlesh Garg. Mithlesh Garg had brought the injured from the place of incident in his vehicle accompanied by Niranjana Verma and Bindesh. From Baheri to Kalinjer, vehicle no. U.P. 90 A 7133 was brought by Breznev @ Guddan. Mithlesh Kumar Garg is not related to him and Niranjana Verma is not a driver. Mithlesh Garg was his childhood friend, who stated that he does not knows driving hence, Breznev @ Guddan, drove the vehicle. In the incident, Guddan, got injured and, thereafter, Mithlesh Garg brought the vehicle. The vehicle belongs to Lalji Kuril and it was taken on hire by Breznev @ Guddan. Permanent driver, Mithlesh Narayan Garg, also accompanied Breznev, who did not had driving license and he had suffered injury on his right hand by fire arm.

10. P.W.-1, did not informed the investigating officer about accused (Pappu) pointing gun for the first time rather he stated that one miscreant armed with rifle came out. He did not recognized, Pappu, therefore, he could not tell his name. After test identification parade, he came to know that the name of the aforesaid miscreant was Pappu. He could not tell when the identification parade took place. He could not identify Pappu in test identification parade

because patches were put on his face at number of places. He recognized him only when he saw him in court. Neelu, identified Pappu who came to the court on 19.02.2024 and he told him that this miscreant is Pappu. After test identification parade, he came to know that these are the accused involved in the accident. Pappu Yadav, is involved in the incident. During test identification parade names of the accused were informed and it was told that these persons are to be identified. He had seen names of number of accused in newspapers also. Santosh used to come his village 3-4 years prior to his marriage. He does not knows his elder brother, Ashok. Murder of father of Santosh, namely, Lala Ram Kishore, was committed by his real *Fufa*, Buddh Vilash. Buddh Vilash, was murdered by Ashok and Indraprakash got injured in the incident. He denied knowledge that Ashok was punished with the sentence of hanging till death in the abvoe murder case and was pardoned on mercy petition by the President of India. He also denied knowledge that Ashok was convicted for seven years imprisonment in a case of dacoity in Madhya Pradesh and has been released only about 2-3 years ago. He also denied the knowledge that son of the Buddh Vilash was a member of Santu Gang. His brother, Madan Mohan, died in the way. He had suffered scratches on his right knee and left leg. The test identification parade of the accused did not took place together. On 14.05.200, Anurag and Ram Sujana, were identified and on 05.07.2003 Vijay and Pappu were identified. No other accused was identified. He denied that Anurag Mishra and Ram Sujana were taken to Kalinjri and police got their photographs taken there. He also denied that police got them

identified by him. He also denied that he was in the second jeep and no incident took place with him.

12. P.W.-2, Breznev @ Guddan, stated that on 23.01.2003 at 09:00 a.m., the incident took place on the slope of Kalinjer Fort, near culvert. He had come in village, Baheri, on 22.01.2003 in a *Barat* from village, Mahotra. On 23.01.2003 at 07:00 a.m., he alongwith others went to Kalinjer in two marshal jeeps. In both the jeeps, there were 18-20 passengers. One marshal jeep was being driven by him wherein Chhedi Lal, Niranjana Verma, Sudhir Kumar Pandey, Neelu, Sheelu and Madan Mohan were sitting. His jeep was ahead. Second marshal jeep was being driven by Pintu Chaurasiya. After having darshan of Neelkhanth Mahadev Temple in Kalinjer Fort, they started driving back for Baheri at about 09:00 a.m. His jeep was ahead while the other jeep was behind. On the slope of the fort, one person armed with rifle was standing. He pointed out the same towards the jeep and asked him to stop the jeep which he stopped because of fear. Thereafter, 4-5 people further came armed with guns. They got the passengers down from the jeep and asked them to run and scale the slope. When the passengers and P.W.-1 started running fast the miscreants started firing from behind and people started falling. He suffered injuries on his right hand and jumped from the hill. On account of suffering gun shot injuries, Sudhir Kumar Pandey, Ashok Kumar Tiwari, Gandharv Singh Bundela, Ram Sundar Dwivedi, Sheelu and Kumari Sweta died. He got injured. Madan Mohan and Pintoo also got injured and were taken to Hospital.

Niranjan Verma also suffered injuries. P.W.-2 recognized, Anurag Mishra, Ram Sujan and lastly Pappu Yadav, who got the vehicles stopped.

13. In cross-examination, P.W.-2, stated that the other vehicle was 4-6 steps away. He saw one miscreant who came with the rifle and, thereafter, 4-5 other miscreants came. He saw 5-6 miscreants whose faces were open. He suffered injuries on his hand while jumping from the hill and after falling suffered injuries on his legs. After incident, his statement was recorded by the investigating officer. He denied that the police brought Ram Sujan at the police station and, thereafter, statements of the witnesses were recorded by calling them at police station. He further stated that after 2-3 days of the incident, he came to know that Pappu gang is involved in the incident. He went to jail for identification of the miscreants twice. He identified them on the first occasion and not on the second occasion. On the second occasion, he identified Pappu @ Jaikaran. He did not knew his name at that time, but heard his name in the court for the first time. He could not say when he suffered gun shot injuries, how many others too had suffered the same nor he can say which miscreants caused firing and which did not. After the miscreants escaped, he reached the place of incident where police force had arrived. P.A.C. Camp was on a main road.

14. P.W.-3, Niranjan Verma, stated that about 20-22 persons had gone to Kalinjer Fort for darshan. One vehicle was being driven by Breznev @ Guddan and Neelu, Sheelu, Cheddi Lal, Mithlesh and Madan Mohan were also there in

their jeep. His jeep was ahead when the incident as alleged in the F.I.R. took place. After firing by miscreants, he fell down and came rolling down from the hill from 20-25 feet and hide himself in bushes. After the miscreants went away, he came out and took the injured to the hospital. Madan Mohan and Puneet Tiwari died on the way to hospital. All the miscreants were aged about 25, 30 and 35 years. In test identification parade, he identified, Pappu, Vijay, Anurag and Ram Sujan. Pappu was clearly identified by P.W.-3 and he also identified, Ram Lakhan and Ram Sujan.

15. In cross-examination, P.W.-3, stated that the marshal jeep was taken by Breznev on hire and it was being driven by Mithlesh. When they came to Nareni Hospital, jeep was driven by Pintu Chaurasiya. He stated that one miscreant first came and, thereafter, 4-5 others came. He could not count how many miscreants were there. They had not covered their faces. Eleven persons were sitting his jeep, who were fired upon from behind. First of all, Ram Sujan, fired from his double barrel gun, thereafter, Pappu, exhorted that kill all of them fast. Thereafter, all of them fired. He denied that he was not present on the spot and because of being friend of Breznev @ Guddan, he is giving false statement before this Court. He stated that he had informed the investigating officer that first miscreant, who pointed out rifle, was Pappu and if it was not mentioned by the investigating officer in his statement, he cannot tell the reason. After the incident people of Kalinjer Fort informed him that person who first pointed out rifle was Pappu. He could not identify Pappu in jail

because Chippi was pasted on all the persons who were produced in identification parade. Since he is now in court he has identified him. He had informed investigating officer that first firing was made by Ram Sujana by his double barrel gun, but if it is not mentioned in the statement, he cannot tell the reason.

16. P.W.-4, Raja, stated in his examination-in-chief, that on 23.10.2003 at about 09:00 a.m., he had gone to Kalinjer Fort to meet his brother, Fulla, who is employed there in the Archaeological Department. When he was coming back after meeting his brother, Fulla, he saw two marshal jeeps going down from the fort. When the vehicles reached the culvert above Patalganga he heard the sound of firing. 7-8 persons were firing. He recognized, Pappu, who is present in court. He could not recognize others because their backs were in front of him. P.W.-4, was declared hostile. In cross-examination he stated that he saw all the miscreants from distance. Pappu was having rifle and he had not informed the name of anyone except Pappu to the investigating officer. He further stated that in his cross-examination that he recognized, Pappu, Chhota and Anurag, but he did not see them earlier. They belong to his village. They were not involved in the incident. He never gave any statement to the investigating officer in this regard.

17. P.W.-5, Deen Dayal Shahu, stated that he had gone to take bath in the Kalinjer Fort and when he was returning he met Raja and Fulla, near the 7th Gate of the Fort. He saw two jeeps coming and as soon as jeeps reached near

the culvert in the way, Pappu, came out from the bushes armed with rifle. He got the passengers down from the jeep. Pappu was accompanied by Chhota, Anurag, Dhyyan, Vijay and others whom he did not recognized. Pappu directed all the persons in the jeep to come out and run above the hill and when they started running Pappu and his companions started firing on them from behind. Five persons had died on the spot, including a girl, and two got injured. Thereafter, he stated that the girl was the sixth person who died apart from the five persons. In cross-examination he stated that accused, Dhayyan, son of Babloo Yadav, is not present in court. Brother-in-law (*Sadhu*) of his elder brother, Neelkaant, was murdered and F.I.R. was lodged against unknown accused. At the time of incident, he got frightened and hide himself in the bushes. Total miscreants were 8-10 and they included the persons named by him. He cannot say how in his statement, the names of other accused have been mentioned by the investigating officer when he never informed him in this regard. One jeep was having number plate while other was without number plate. After the incident he went to Satna and came back after 20-22 days. During this period, he did not informed anyone about the incident. The investigating officer had come to his house and he informed him about the incident. Pappu was not involved in the murder of his brother, Neelkant. Dhyyan is cousin of Pappu. He denied that he is police informer and has cooked up story of his bathing at Kalinjer Fort. He stated that the accused made about 10-11 fires. Faces of some miscreants were hidden while the faces of the others were open. He was hiding with Raja Mali and Fullu for one hour.

He denied that because of enmity with Pappu, he is giving statement against him.

19. P.W.-6, Constable, Bare Lal, proved the application given by the informant at the police station.

20. P.W.-7, Dr. V.K. Saxena, proved the post mortem report of deceased, Madan Mohan; Punit son of Ashok Kumar; Kumari Shweta Tiwari, daughter of Ashok Kumar Diwedi; Sahilendra @ Sheelu Diwedi son of Madan Mohan and Gandharv Singh Bundela.

21. P.W.-8, Dr. Rauf Siddique, proved that he conducted the post mortem of the body of the deceased, Sudhir Kumar Pandey and Ram Sundar Diwedi.

22. P.W.-9, Tulsiram, proved that he was posted as S.H.O. at Police Station-Kalinjer Fort, at the time of alleged offence and he conducted the investigation of this case. He stated in his examination-in-chief that on 23.01.2003, he was posted as S.H.O., Police Station- Kalinger, when the case in dispute was registered at the police station. He himself started investigation after getting the copy of the F.I.R. He examined the place of incident and made search of the accused. Got the inquest proceedings of the dead bodies conducted and got the inquest reports prepared. He proved the documents in this regard before the trial court and got them exhibited. He further proved the preparation of site plan; collection of bloodstained and plain earth from the place of incident; recovery of empty cartridges; preparation of necessary memos; recovery of the

belongings of the deceased and preparation of their memorandums of recoveries. On 24.01.2003, he came to know from the informer that the incident in dispute was caused by Pappu Yadav Gang; on 25.01.2003, he recorded the statements of witnesses, Saurabh Gautam; driver, Pintu Chaurasiya; Gudiya; Budela, etc., who testified seeing the incident. Two vehicles involved were given in the possession of respective owners. He prepared the necessary *parchas*. On 04.02.2003, he recorded the statements of the witnesses, Fullu Mali and Raja, who gave eye witness account of the incident involving Pappu @ Kamal Yadav, Chhota, Vijay Yadav, Jaikaran @ Pappu, Santa Yadav, Ram Sujan Yadav, Kuber Singh Thakur, Chimpa and two others. He further stated that earlier the witnesses of public had named the aforesaid persons. He recorded the statement of Deen Dayal Sahu, who stated that they have seen the members of the Pappu Gang committing the offence. They also named, Anurag Mishra and Ram Ji @ Ram Lakhan, thereafter, he was transferred. In his cross-examination, P.W.-9, stated that the statement of the informant was recorded on the same day at about 04:00 p.m. He was asked three questions in reply to which he stated that he had come in the *Barat* of son of his brother-in-law (Sadhu); there is enmity going on between his brother-in-law and elder brother of his brother-in-law, Ashok. There was small family dispute between them and Ashok had not come in the *Barat*. He did not said anything about the incident and stated that on 24th of January, 2003 he came to know that Pappu Yadav is involved in the incident from the informer. There was no evidence against the accused at that time. He knew Pappu Yadav by his

name and prior to the incident he had *challaned* him and tried to him in connection with another incident. He also knew the Ram Sujan against whom case is pending at police station. P.A.C. camp was situated at distance of 1.5 kilometre from the place of incident. The enmity between Santosh Gautam and Ashok Gautam came to his knowledge in the statement of the informant and the First Information Report, but he did not considered it as the motive of crime since other information had come to his knowledge. At the time of incident he did not had the list of members of Pappu Gang, but it was present in the police station. Prior to the incident, it is not in his knowledge that Pappu committed any other offence. He recorded the statement of Deen Dayal Sahu on 14.02.2003. Prior to recording of his statement and the incident taking place, he never met Deen Dayal. Deen Dayal Sahu stated that all the accused came out armed with guns. Witness, Fullu, named Deen Dayal as the person who saw the incident. He also stated that Raja Mali too saw the incident. The names of the accused came to light from the statements of Fullu Mali, Raja Mali and Deen Dayal. He denied that Raja Mali and Deen Dayal are witnesses set up by him. P.W.-9, denied that he is not aware whether Raja Mali and Deen Dayal had any enmity with Pappu Yadav prior to the incident or not. Fullu informed the names of Pappu @ Kamal, Chottta, Vijay Yadav, Jaikaran, Ram Sujan, Kuber, Ram Narayan and Raja Mali had informed the name of Pappu Yadav, Chhota, Vijay Yadav, Jaikaran, Ram Sujan and Kuber. Both the witnesses did not named Ram Lakhan @ Ram Ji. P.W.-9 denied that he has falsely arrested and implicated Ram Lakhan @ Ram Ji in this case. Ram

Lakhan had no criminal history recorded in his police station at that time. Prior to the incident in dispute, Pappu Yadav Gang had not committed any heinous offence. Prior to the incident, mother and sister of the Pappu Yadav were challaned in a criminal case. Nirranjan did not gave statement that the first miscreant who got the vehicle stopped by pointing rifle was Pappu. Witness, Cheddi Lal, did not informed him that Mithlesh Garg was driving one of the vehicle rather he informed that at that time Guddan son of Madan Mohan was driving the same. P.W.-9, further sated in his cross-examination that he was not shown the place of coming out of the witnesses, Deen Dayal Sahu, Fullu and Raja out from the Kalinjer Fort and they are hiding because the information came later. He did not prepared any site plan later. He further stated that on 03.07.2003 at about 09:00 a.m. he had gone to the house of the accused, Ram Sujan and broken his house and arrested his brother Ram Jiyawan and kept him in a lockup till 02.08.2003. He also denied that he threatened these person of false implication. He denied that on 03.08.2003, Ram Jiyawan gave affidavit before the C.M.O., Banda, regarding medical examination of injuries caused to him by P.W.-9. He also denied that father of Ram Jiyawan gave application to higher authorities and Human Right Commission with regard to the incident. He denied that he falsely implicated Ram Jiyawan and Ram Sujan.

23. P.W.-10, Investigating Officer, Mahendra Singh, proved the part of the investigation conducted by him. P.W.-10, stated that he took over the

investigation of this case on 05.04.2003. He got the information of arrest of accused, Chhota, at Tikamgarh and recorded his statement. He admitted his involvement in this case in his statement. He further stated that on 10.05.2003, he came to know that recovery of arms of Pappu @ Kamal Yadav has been made from Barkola on 09.05.2003. Thereafter, he went to Ajaygarh and recovered one rifle factory made, one DBBL gun factory made, another DBBL gun factory made 12 bore, SBBL gun 12 bore, one country made rifle and number of live cartridges belonging to Kamal Yadav Gang. Case crime no. 88/2003, under section 25/27 Arms Act and case crime no. 90/2003, under sections- 212/216 IPC were registered. Statements of accused, Nandu @ Rajauli and the Dadua @ Daddu, were also recorded wherein they admitted the recovery of aforesaid arms as of Pappu Yadav @ Kamal Yadav. On 14.05.2003 proceedings of test identification parade of Anurag Mishra and Ram Sujan was conducted and its details were mentioned in the case diary. Finding sufficient evidence against them charge-sheet were submitted by him before the trial court. Statement of accused, Jaikaran @ Pappu was recorded in district jail on 24.05.2003 and on 31.05.2003 application for taking him in police remand was made when his statement was recorded. On 05.06.2003 accused, Chimpa @ Rajnarayan, was reportedly killed and entry to this effect was made in the case diary. On 10.06.2003 test identification parade of accused, Jaikaran, was done and he was identified by witnesses. On 11.06.2003, statements of accused, Pappu, Vijay and Ram Lakhan @ Ram Ji were recorded in Central Jail, Satna. They admitted to their involvement in alleged offence. The clothes of the

deceased were sent to F.S.L. Agra. Charge-sheet was filed against Jaikaran @ Pappu, in court. An application was given for transfer of accused, Kamal, Vijay and Ram Lakhan @ Ram Ji, from Satna Jail to Banda. An application was also given for conducting their test identification parade. Test identification parade was conducted and its details were mentioned in the case diary. On 15.07.2003 statements of informant, Cheddi Lal, Neelu, Brejnev, Niranjana Verma, Brijendra Kumar and Pushkar Saurabh were recorded. On 18.07.2003 charge-sheet was filed against accused, Anurag Mishra, Kamal, Vijay, Ram Ji @ Ram Lakhan. On 30.07.2003 after accused, Chhota @ Rajesh, came to Banda, he gave application for his test identification parade. Its details were mentioned in the case diary. In his cross-examination, P.W.-10, stated that the statements of the witnesses were recorded by the earlier investigating officer. None of the witnesses stated that they knew the accused prior to the incident. He recorded their statements for the second time only to ascertain the motive of the crime. He did not record the statements of Raja Mali, Fullu Mali and Deen Dayal Sahu because their statements were recorded earlier by the investigating officer. When he overtook the investigation of this case, the names of the accused had come to light and, therefore, he did not conduct investigation in any other direction. He did not find any motive of the elder brother of informant, Ashok, in commission of the alleged offence. There was no such evidence which may connect Ashok to this crime. He denied that the photograph of Pappu @ Kamal, shoot by Station House Incharge, Dharmapur, Ashok Chaurasiya on 31.05.2003 was given to him. He further denied that he

got test identification parade of Pappu @ Kamal done after showing this photograph to the witnesses. Pappu @ Kamal, Vijay and Ram Lakhan were in Banda court on 03.07.2003. He does not remembers whether they were *baparda* or not. He denied that he had got the accused identified by the witnesses on 03.07.2003 itself. Nanhu and Daddu are not accused in this case nor they were arrested in police encounter. They were normally arrested. On 10.06.2003 witnesses, Guddan @ Brejnev, Neelu and Pushkar participated in the test identification parade, thereafter, their statements were recorded. After identification they were informed about the names of the accused. After test identification, he asked witnesses, how they know the names of the accused then they informed that they came to know of their names during test identification proceedings. He got the accused, Anurag Mishra, also identified in test identification parade and recorded the statements of the witnesses. Witnesses had informed the names of the accused. He denied that the witnesses were informed about the names of the accused prior to the test identification parade.

24. P.W.-11, proved that after the transfer of P.W.-10 he conducted the remaining investigation of this case. P.W.-11, stated that on 16.02.2003, he was posted as S.H.O. at Police Station- Kalinjer. Prior to that the investigation of this case was being done by P.W.-9, Tulsi Ram. After his transfer, he overtook the investigation. He went through the *parchas* made earlier in the case diary. He recorded the statement of accused, Anurag Mishra in jail wherein he

admitted the commission of alleged crime. He recorded his statement for affecting recovery of the weapons of the gang. Thereafter, the properties of accused, Pappu, were attached. He was taken on remand. Accused, Pappu, was taken in handcuffs *baparda* to his house where he got a 12 bore single barrel gun recovered from a box kept in his house alongwith two live cartridges. He admitted that he committed the alleged crime alongwith his accomplices, Pappu and others, with the help of this gun. After seeing the accused, Pappu, *baparda*, the people of the locality closed the doors and windows of their houses and went inside. Anil, Shyam Sundar and Kharika, who met in the way refused to give their statements because fear had engulfed *Kasba* of Anurag Mishra. He could not show the license of the gun recovered. The gun and cartridges recovered from the spot were sealed and sample was made. He proved the arms recovered by him from the accused before the Court. He proved the signatures of the Sub-inspector, R.N. Lal, on the inquest reports of the deceased besides other documents. He further stated that he submitted charge-sheet against Ram Sujan, Anurag Mishra, Pappu and others and, thereafter, he was transferred from the police station, Kalinjer. Earlier investigation was carried out by P.W.-10, Mahendra Singh Yadav. During cross-examination, P.W.-11, stated that he was not aware whether Sub-inspector, R.N. Lal, has retired or not. Accused, Anurag Mishra, is lodged in Chitrakoot Jail where he admitted that he committed the alleged offence. He did not had any other evidence against Anurag Mishra. He stated that when he took accused, Anurag Mishra, in custody on 28.02.2003, he got the recovery of

arms made on his pointing out. He denied that he had shown fake recovery of arms. He stated that in *Kasba*, Kalinjer and the area around, there is great terror of accused, Anurag Mishra, and, therefore, no one agreed to give statement against him at the time of recovery of arms on his pointing out. He further stated that he does not remembers whether accused, Anurag Mishra, was implicated in any other case prior to this case or not.

25. P.W.-12, Bare Lal, proved that he was posted as constable clerk at Police Station- Kalinjer Fort, and prepared the memo of recovery of the SBBL gun on the pointing out of the accused, Anurag Mishra.

26. P.W.-13, Shiv Bardani, proved that he got the SBBL gun recovered from the accused, Anurag Mishra, alongwith cartridges. Anurag Mishra was taken from the Banda Jail for the above purpose.

27. P.W.-14, S.I. Chandrabhan Singh, stated that he registered the Case Crime No. 18/2003, under section- 25 of the Arms Act and conducted the investigation regarding the SBBL gun recovered on the pointing out of the accused, Anurag Mishra.

28. P.W.-15, Mukund Pandey, proved that the report regarding the case under section 25 of the Arms Act was registered by him on oral dictation by C.P. Singh.

29. P.W.-16, Ram Narayan, proved that he got test identification parade conducted on 10.06.2003, while working as City Magistrate ,of accused, Jaikaran @ Pappu. He was identified by witnesses, Brijendra Kumar and Neelu. He proved the identification memo prepared by him. P.W.-16, stated that on 10.06.2003, he was posted as City Magistrate in District- Banda. When he got the test identification parade of accused, Jaikaran @ Pappu, conducted in his presence. Ten jail inmates of similar physcial features were made to stand together with accused, Jaikaran @ Pappu and he was identified by Brijendra Kumar and Neelu. Identification memo were prepared which bears his handwriting and signature. However, he stated that there is nothing mentioned in the identification memo at what places on the face of accused, Pappu @ Jaikaran, *chippi* was put. On the first occasion Guddan @ Brejneev, did not recognized Jaikaran. Pushkar @ Saurabh, also did not identified him. He denied that the test identification parade was done illegally under the direction of the police.

30. P.W.-17, Nandan Chakravarti, stated that he was posted as Pargana Magistrate on 14.05.2003 in District- Banda, and got the test identification parade of accused, Anurag Mishra and Ram Sujan conducted. They were identified by the witnesses and got the identification memo prepared and signed by him. The identification of accused, Chhota @ Rajesh, was done on 06.08.2003 and he prepared the identification memo. Anurag Mishra was identified by the witnesses. He admitted that in his cross-examination that he

got the identification of accused, Vijay Yadav, Ram Lakhan by Chheddi Lal, Niranjana Verma and Brijendra Kumar done on 05.07.2003. P.W.-17 stated that on 05.07.2003 he got the test identification parade of accused, Pappu @ Kamal, Vijay yadav, Ram Lakhan @ Ram Ji, who were identified by Chheddi Lal, Niranjana Verma, Brijendra Kumar and Neelu correctly. In cross-examination, he stated that he does not know whether summons were sent for conducting test identification parade or not. It is not mentioned in the memo that persons having similarities with accused, Ram Lakhan, were made to stand with Ram Lakhan and test identification parade.

31. P.W.-18, Constable, Jagdish Babu, proved the test identification register maintained in the police station. He stated in his statement that on 14.05.2003 that he was posed as Pargana Magistrate in Banda when test identification parade of accused, Anurag Mishra and Ram Sujan was conducted. Nine persons of similar height and weight were put for test identification with them. After test identification he made his signature on the memo. On 06.08.2003 identification of accused, Chhota @ Rajesh, was done in District Jail, Banda, in the presence of D.K. Mishra, A.P.O. Witnesses, Chheddi Lal, Pushkar @ Saurabh, identified accused, Chhota @ Rajesh. He proved his signature and handwriting on the memo. In cross-examination, he stated that accused, Anurag Mishra, was taken to jail on 29.01.2003 and his test identification parade was conducted on 14.05.2003. Anurag Mishra was clearly identified by all the witnesses. He admitted that there is no mention in the identification

memo about the number of jail inmates put for test identification alongwith Anurag Mishra. He stated that the procedure of identification adopted in the case of Anurag Mishra was also adopted in the test identification of accused, Chhota @ Rajesh.

32. P.W.-19, Ram Das Chaudhary, proved that he got the inquest report of deceased, Punit @ Lal, prepared and sent his dead body for post mortem.

33. The statement of the witnesses were recorded under section 313 Cr.P.C. wherein they stated that they were arrested and brought to the police station in a false case of police encounter and were got identified by the witnesses at police station. Accused, Chhota, said that he was brought on warrant "B" from Satna Jail to Banda and identified by the witnesses during transit. Similar statement was given by the accused, Ramji @ Ram Lakhan. Accused, Anurag Mishra, stated that because of enmity with his enemies, planted recovery was shown against him and he was falsely implicated. Accused, Pappu, also stated that he was taken in police custody and, thereafter, shown to the witnesses. He is innocent and has been falsely implicated in this case.

34. D.W.-1, Sitaram, stated that he was present in his agricultural field on the date of incident and no such incident took place on the date of incident.

35. D.W.-2, proved that he remained in his agricultural field from about 09:00 a.m to 10:00 a.m on 23.01.2003. The younger brother of Ram Sujjan was arrested by the police and beaten. Ram Sujjan gave application to higher

authorities in this regard and hence the police was annoyed with him. He saw Ram Sujan from 08:00 a.m on 30.01.2003 in the village when he was watering his crops.

35. D.W.-3, Mamta Patel, also testified the fact that Ram Sujan was irrigating his field on 23.01.2003 from 07:00 a.m. to 10:00 a.m.

36. The trial court after considering the evidence on record convicted and sentenced the appellants by the judgment and order of conviction dated 20.04.2010 and hence the above noted appeals have been preferred by the appellants.

37. Learned counsel for the appellants submits that first information report was lodged against five unknown persons on 23.1.2003 at 09.30 a.m. regarding the alleged incident dated 23.01.2003 which took place at about 09:00 a.m., at a place which is situated at a distance of 4 kilometres from the police station.

38. P.W.-1, Chhedilal, the complainant, was examined before the trial court and according to him in the first information report five unknown miscreants are mentioned while during course of investigation the investigating officer has made 9 persons as accused which shows possibility of false implication of several innocent persons in the present case.

39. In statement-in-chief of the P.W.1, Chhedilal, stated that 5 persons were involved in the incident but in his statement before the court he named five

accused persons for the first time when he did not mentioned the names of accused persons in the first information report as well as in his statement under section 161 Cr.P.C.recorded by the Investigating officer.

40. During cross examination, P.W-1, stated that there was marriage of Sandeep son of Santosh Gautam and there is dispute between Santosh Gautam and his real brother, Ashok Gautam and they are not on talking terms, therefore, Ashok Gautam had not participated in the marriage of his son.

41. P.W.2, Breznev alias Guddu, was examined before the trial court and he stated that about 5 to 6 accused persons had participated in the aforesaid crime.

42. P.W.3, Niranjan Verma, was examined before the trial court and he stated firstly that there were 4-5 accused persons, but thereafter he stated that there were 7 accused persons who participated in the aforesaid crime.

43. P.W.-4, Raja, was examined before the trial court but he did not supported the prosecution story therefore he was declared hostile.

44. P.W.5, Din Dayal Sahu, was examined before the trial court who stated 8-10 accused participated in the aforesaid crime.

45. The P.W.5, Din Dayal Sahu, has named, Anurag Mishra, and Pappu Yadav and Chhota, due to his previous enmity with them.

46. P.W.9, Tulsi Ram Sakyawal, was examined before the trial court and he stated that on 4.2.2002 statement of Phullu Mali and Raja Mali was recorded by him under section 161 Cr.P.C., in which they have named the accused, Pappu alias Komal, Chhota, Vijay Yadav, Jai Karan, Santa, Ram Sujan, Kuber Singh, Chimpa and 2 unknown persons but they did not named, Anurag Mishra. There was no explanation why these two witnesses Phullu Mali and Raja Mali , kept mum for 14 days and they did not informed anyone about the aforesaid occurrence.

47. The statement of P.W.5, Din Dayel Sahu, was recorded under section 161 Cr.P.C.on 14.3.2003 after about 22 days of incident and there is no explanation of the delay in recording of his statement.

50. On 4.02.2002 statements of Phullu Mali and Raja Mali were recorded under section 161 Cr.P.C. in which for the first time Chhota alias Rajesh and Ram Sujan were named as accused. In the statement of Din Dayal, P.W.-5, recorded under section 161 Cr.P.C., name of Anurag Mishra came to light for the first time and the prosecution did not produced the alleged eye witness, Fullu Mali, before the trial court and Raja Mali P.W.4 has not supported the prosecution story therefore story of the prosecution to this extent is not credible.

51. Test identification parade was conducted on 14.5.03 at District Jail, Banda and there was suggestion that photograph of appellant, Ram Sujan, was taken at Police station and it was got recognised by witness.

52. The implication of the appellants has been made on the basis of test identification parade conducted after more than a month. The Apex Court in the case of **Rajesh Govind Jagesha Vs. State of Maharashtra AIR 2000 SC 160** has held that where identification parade was conducted after inordinate delay of five weeks from arrest of the accused and there was no trustworthy explanation of delay, implication of the accused on the basis of such test identification was not justified and the accused was entitled to benefit of doubt. For a ready reference paragraph no. 4 of the aforesaid judgment is quoted hereinbelow:-

“This Court in State of Andhra Pradesh v. Dr. M. V. Ramana Reddy & Ors., AIR (1991) SC 1938, held that where there is unexplained delay in holding the 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 in the instant case is not trustworthy. The non-availability of a Magistrate in a city like Bombay for over a period of five weeks from the date of the arrest of Accused Nos. 1 and 2 and three weeks from the arrest of accused Nos. 3 and 4 cannot be accepted. It is not denied that scores of Magistrates are available in the city of Bombay

*and that the investigating agency was not obliged to get the parade conducted from a specified Magistrate. The High Court was not justified in holding that the parade could not be held early on account of alleged difficulties of the Special Executive Magistrate. It was 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, by the prosecution. In cases where a person is alleged to have committed the offence and is not previously known to the witnesses, it is obligatory on the part of the investigating agency to hold identification parade for the purposes of enabling the witnesses to identify the person alleged to have committed the offence. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Such a parade may not be necessary in a case where the accused person is arrested on the spot immediately after the occurrence, The evidence of identifying the accused person at the trial, for the first time, is from its very nature, inherently of a weak character. This Court in *Budhen & Anr. v. State of U.P.*, [1970] 2 SCC 128, held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witnesses came to pick out the accused person and the details of the part which such persons played in the crime in question with reasonable particularity. 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. 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 exeditiously. The delay, if any, has to be explained satisfactorily by the prosecution. ”

53. Learned AGA-Ist appearing for prosecution has vehemently opposed the submissions made by learned counsel for the appellants. She has submitted that it is case of gruesome murder of eight of innocent persons. Merely on the ground of delay in conducting test identification parade accused cannot be absolved of all charges. She has also relied upon the case of **Rajesh Govind Jagesha (Supra)** and has submitted that the the case rests on its own facts, and mere delay in holding the test Identification parade cannot be the sole reason for rejecting the identification.

54. After hearing the rival contentions, we find in the present case that there is no motive of crime assigned, alleged or proved by the prosecution. From the prosecution case, it is clear that after causing the murder of six persons, the miscreants did not looted anything, if they are considered to be dacoits. Therefore, the prosecution got the test identification parade of the accused conducted.

55. Before proceeding to consider this case, a look at the relevant provisions regarding conducting of test identification parade is required.

56. In paragraph 116 of the **U.P. Police Regulations**, the procedure for conducting test identification parade of suspects is provided which is quoted hereinbelow:-

“Identification parade of suspects.- In all cases in which there is any likelihood that suspects will at any stage have to be paraded for identification by witness, the investigating officer must take steps from the very beginning of his investigation to ensure that witnesses are given no opportunity of seeing the suspects before identification proceedings are held. Such proceedings should whenever possible, be postponed until they can be held in the jail under the provisions of the Manual of Government Orders and Paragraph 31 of these regulations, for the due observance of which, as far as the police are concerned, the Public Prosecutor will then be responsible. When identification proceedings cannot be held in the jails, owing to there being no sufficient evidence on which the suspects can be arrested for any other reason, the instructions referred to above must be followed by the investigating officer as far as they can be made applicable. In such cases the proceedings should take place before a Magistrate, as they would if they were held in the jails or if no magistrate is available before two respectable and impartial persons who should be asked to satisfy themselves that the proceedings are fair both to witnesses and to accused. In any case of importance, when no Magistrate is

available to conduct identification proceedings not held in the jails, a gazetted police officer should arrange to attend.”

57. Paragraph No. 416 of **Jail Manual** further provides for the procedure for conducting test identification parade which is quoted hereinbelow:-

“ 443. Procedure in the case of undertrial prisoners who have to be subsequently identified. (a) When an undertrial prisoner who may have to be subsequently put up for identification by witnesses is admitted to jail, the Superintendent of police or some police officer not below the rank of an inspector shall inform the jail in writing at the time of admission or as soon thereafter as possible, that the prisoner will be put up for identification: Provided that prisoners who are to be identified be not selected for being mixed up at the identification parades.

(b) When such intimation has been received the Superintendent of jail shall issue instructions with a view to preventing the prisoner from disguising himself or changing his appearance in such way as to make recognition difficult. Such prisoners shall be required to keep their hair in the same condition until convicted or discharged, e.g., if the prisoner is clean shaven he must not be allowed to grow a beard and vice versa. At the time of the identification parade the prisoner shall wear the same clothing as he was wearing at the time of admission. If he cannot wear his own clothes he shall wear clothes of a similar kind, eg., if he is a field labourer he should not be

dressed in the white clothes of a city man or vice versa. In all cases of doubt the orders of the Magistrate conducting the identification should be taken. Before the proceedings begin, the prosecuting inspector and counsel for the defence, who shall be permitted to be present, may satisfy themselves that all the rules in this paragraph have been fully observed. The proceedings shall also be attended by a jail officer who shall carry out any orders given to him by the Magistrate conducting the identification.

(c) The prisoner to be identified shall be placed among a number of prisoners as similar to him as possible in dress, stature and appearance and shall not be allowed to conceal his face or stature so as to impede recognition: Provided that prisoners who are to be identified be not selected for being mixed up at the identification parades.

(d) When a prisoner who is wearing fetters is to be identified the prisoners paraded with him should be selected from among those who are wearing fetters. Conversely, if the prisoner to be identified is not wearing fetters none of those paraded with him should be wearing fetters. Where this is impracticable the method of covering up all prisoners in the parade, whether wearing fetters or not, up to the waist with blankets may be adopted.

Note. Further provisions regarding the conduct of identification proceedings by Magistrates will be found in paragraph 842 of the Manual of

Government Orders and Chapter VIII. Rule 9 of the General Rules (Criminal), High Court, and Chapter VIII, Rule 11 of the Oudh Criminal Rules.”

58. There is also a memorandum of identification proceedings of suspects provided in **General Rules (Criminal) 1976** which is as follows:-

“Memorandum of identification proceedings of the following accused conducted on.....at.....

<i>Name, parentage and residence of the accused, statement if any made by him and his signature or thumb impression</i>	<i>Offence</i>	<i>Any distinctive marks likely to affect</i>	<i>Step (if any) taken by the Magistrate conducting the proceedings regarding</i> <i>Column 3</i>	<i>Date of admission into the jail (or on bail)</i>	<i>Name, parentage and residence of the witness</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>

The person/persons to be identified was/were mixed up with other under-trial prisoners/ persons. All were made to stand in a circle. They were made to wear

the clothes in which they were originally admitted to the jail (with the exception of the changes mentioned in Column 4). No fetters were on. The accused were given the option to change places at will but were not allowed either to conceal their faces or stature so as to impede recognition and to exchange their clothings. The witness were called in one by one and asked to single out the person or persons they had come to identify and to mention the action for which they identified him or them. Every precaution was taken to ensure that no succeeding witness communicated in any manner with the preceding one. The result of the proceedings was as follow:

<i>Name or description of the person whom the witness came to identify with details of the part which that person played in the crime as seen by witness (in his own words)</i>	<i>Name of the accused correctly identified</i>	<i>Wrong person pointed out (if any)</i>	<i>Any other statement made by the witness</i>	<i>Magistrate remarks about demeanour of witness</i>	<i>Signature or thumb impression of the witness</i>
<i>7</i>	<i>8</i>	<i>9</i>	<i>10</i>	<i>11</i>	<i>12</i>

Remarks of the Magistrate who conducted the proceedings on the following points : (1) Was the Superintendent of Jail informed at the time of the admission of the accused to the jail lock-up that his identification would be conducted later on? (2) Steps taken by the jail authorities to ensure the proper conduct of the proceedings. (3) How the application(s), if any, moved on behalf of the accused was/were dealt with? (4) Name of counsel, if any, appearing for the accused, and whether his/their signatures have been taken on the memo. (5) Did the counsel for accused, if present, point out any other mark not noted by you? (6) Any other point. Dated.....20 .Magistrate

N. B. - It is very useful to note whether the witness knew the name of the person he had come to identify or he only described him in some such way as the man who was standing at the door at the time of the dacoity. The witness is not to be asked in a general way.

"Identify whomsoever you know" "

59. Division Bench of this Court in the case of **Asharfi and another Vs. State (Allahabad) of U.P. 1961 AIR (Allahabad) 153** has very elaborately considered the conditions necessary for acceptable identification evidence in paragraph 33 onwards which are quoted hereinbelow:-

"33. CONDITIONS NECESSARY FOR ACCEPTABLE IDENTIFICATION EVIDENCE: *The Court is bound to follow the rule that evidence as to the identification of an accused person must be such as to exclude with reasonable certainty the possibility of an innocent person being identified.*

In the very recent case of State of Madhya Pradesh v. Manka, 1980 MFC 216, a Division Bench of the Madhya Pradesh High Court, after examining some Indian English and American rulings, held:

"The evidence of identity must be thoroughly scrutinised, giving benefit of all doubt to the accused; but if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not to fight shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification."

With great respect we agree with their Lordships.

The following twelve questions are apt to arise and must be answered by the Court to its satisfaction before it can accept the evidence:--

- (1) Did the identifier know the accused from before?*
- (2) Did he see him between the crime and the test identification?*
- (3) Was there unnecessary delay in the holding of the test?*
- (4) Did the Magistrate take sufficient precautions to ensure that the test was a fair one?*
- (5) What was the state of the prevailing light?*
- (6) What was the condition of the eye-sight of the identifier?*

(7) What was the state of his mind?

(8) What opportunity did he have of seeing; the offenders?

(9) What were the errors committed by him?

(10) Was there anything outstanding in the, features or conduct of the accused which impressed him?

(11) How did the identifier fare at other test identifications held in respect of the same offence?

(12) Was the quantum of identification evidence sufficient?

60. Facts which establish the identity of an accused person are relevant under [S. 9](#) of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a 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 evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be 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 proceeding. There may, however, be exceptions to this general rule, 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 investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by [s. 162](#), Cr. P.C. It is for this reason that the identification parades in this case seem to have been held under the supervision of a Magistrate. Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must, therefore, take intelligent interest in the proceedings, bearing in mind two considerations : (i) that the life and liberty of an accused may depend on their vigilance and caution and (ii) that justice should be done in the identification. Those proceedings should not make it impossible for the identifiers who, after all, have, as a rule, only fleeting

glimpses of the person they are supposed to identify. Generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify, it may be kept in view, varies according to the power of observation and memory of the person identifying and each case depends on its own facts, but there are two factors which seems to be of basic importance in the evaluation of identification. The persons required to identify an accused should have had no opportunity of seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny by the Court.

61. The Apex Court in the case of **Rajesh Govind Jagesha vs State Of Maharashtra, AIR 2000 SUPREME COURT 160** has held that the physical appearance of the suspect produced for identification parade should not be changed. Where the suspect was having beard and long hairs at the time of lodging of F.I.R. and no person with beard and long hairs was included in the parade, but the witness identified the suspect even after his changed appearance, the possibility of the witness having seen the said accused

between the date of arrest and test identification parade cannot be ruled out. The Apex Court also held in this case that delay in holding of such parade is fatal for the prosecution where there is no justifiable reason shown before the court justifying the delay. Apex Court has also held that where the ocular testimony of the witnesses is clear, cogent and reliable, the questions of motive is of no importance.

62. The undisputed facts of the case are that six persons died on the spot, namely, Ram Sundar Dwivedi, Shailendra @ Sheelu, Ashok Kumar Tiwari, Kumari Shweta, Gandharv Singh Bundela and Sudhir Kumar Pandey and two persons namely, Puneet Tiwari and Madan Mohan, died on the way to the hospital. The only injured witness in this case is Breznev @ Guddan, who was produced as P.W.-2 before the trial court. No one was named as accused in the First Information Report lodged against five miscreants. Total eight accused were charge-sheeted and two of them namely, Kamal @ Pappu and Vijay, died during trial. Only four appellants namely, Ram Sujan, Anurag Mishra, Choota @ Rajesh and Ram Ji @ Ramlakhan, have been tried and convicted. Appellant, Anurag Mishra, was acquitted by the trial court of all charges under sections 504, 307/149 IPC; section 10/12 of Dacoity Affected Area Act and Section 25 of Arms Act and the remaining three appellants have been acquitted of charges under sections 504, 307, 149 and section 10/12 of Dacoity Affected Area Act. Two accused, namely, Jaikaran @ Pappu and Kuber Singh, were acquitted of all charges. The eye witness, P.W.-1 and the injured witness, P.W.-2, have not been assigned any specific role of firing on any of the accused-appellant nor

any incriminating recovery of the weapons was made from their possession or their pointing out. P.W.-4 was declared hostile. There was no motive of the crime committed. The dispute of Santosh Gautam, whose son was getting married, with his brother, Ashok Kumar Gautam, could have been cause of incident, but no evidence in this regard was led before the trial court.

63. We further find that in the F.I.R. five persons were made accused while during course of investigation nine persons were implicated in this case as accused but chargesheet was submitted only against eight of them. P.W.-1 did not name any of the accused in the F.I.R. or in his statement recorded under section 161 Cr.P.C. P.W.-1 stated before the investigating officer that his real brother, Ashok Kumar Gautam, is not on talking terms with him and, therefore, he did not participate in the marriage of his son. The accused are said to have threatened that all the passengers in two vehicles are required to be taught a lesson. The investigating officer has not investigated the possibility of involvement of Ashok Kumar Gautam in this case at all. There is inconsistency in the number of accused involved in the incident apparent from the statements of the witnesses. While P.W.-1 implicated 5 persons in the F.I.R. and also before the court, P.W.-2 implicated 4-5 persons who came on the scene of incident armed with guns and stopped the vehicles. P.W.-3 stated that one miscreant came first of all and, thereafter, 4-5 others came. P.W.-4, stated that 7-8 persons were making firing while P.W.-5 stated that total miscreants were 8-10 in numbers. Therefore, it is clear that besides names of the accused

involved in this case, there is also discrepancy in the number of accused involved.

64. Clearly, the incident took place on 23.01.2003 and test identification parade of the accused, Kamal, Vijay and Ram Ji @ Ramlakhan, was conducted on 15.07.2003. Test identification parade of accused, Chhota @ Rajesh, was conducted on 06.08.2003. Test identification parade of accused, Anurag Mishra and Ram Sujan was conducted on 14.05.2003. Test identification parade of accused, Jaikaran @ Pappu, was conducted on 10.06.2003.

65. P.W.-16, the City Magistrate, who got the test identification parade conducted in his presence admitted before the court that he can not tell at what place on the face of accused, Pappu @ Jaikaran, *chippi* was put. He only stated that ten jail inmates of similar physical features were made to stand together for identification, but did not stated whether they were asked to stand in a circle as per General Rule (Criminal), 1976. It is provided under the Jail Manual and General Rule (Criminal) that Superintendent of Jail shall ensure that the accused who are to be put for identification should not change their appearances in such a way as to make their recognition difficult. The hairs and beard should be kept in the same position at the time of test identification parade and the accused should wear the same clothing as he was wearing at the time of commission of alleged offence. All the accused mixed with other under trial prisoners/persons are required to stand in a circle and not permitted to change their places. There is no evidence of compliance of these mandatory

conditions in the statements of P.W.-10 and P.W.-11, the investigating officers, who put the deceased for test identification parade or P.W.-16 and P.W.-17, the Magistrates, involved in conducting of the test identification parade of the accused persons. In this case there is no explanation on behalf of prosecution regarding the delay of 4 to 7 months in conducting the test identification parade of the accused persons. There is also no evidence led by the prosecution to prove that during the period prior to test identification parades, the accused were not exposed to public view and were always kept away from being seen by anyone. Accused, Chhota, was brought on Warrant-B from Satna Jail to Banda and there is no evidence that he was kept *baparda* in transit.

66. Learned counsel for appellants has relied upon paragraph nos. 15 to 18 of the judgment of Apex Court in the case of **Md. Sajjad @ Raju @ Salim Vs. State of West Bengal (Criminal Appeal No. 1953 of 2010)** and has submitted that none of the witnesses deposed about the physical features, height, weight, etc., of the accused which would have been a pointer to involvement of the accused in this case. For ready reference following relevant paragraphs are reproduced hereinbelow:-

“15. In the case in hand, apart from the fact that there was delay in holding the Test Identification Parade, one striking feature is that none of the concerned prosecution witnesses had given any identification marks or disclosed special features or attributes of any of those four persons in general and the accused in particular. Further, no incident or crime had actually taken place in the presence of those prosecution witnesses nor any special circumstances had occurred which would invite their attention so as to register the

features or special attributes of the concerned accused. Their chance meeting, as alleged, was in the night and was only for some fleeting moments.

16. In [Subash Vs. State of U.P.](#)(1987 (3) SCC 331) the aspects of delay as well as absence of any special features for identification and the effect thereof were considered by this court in paragraphs 8 and 9 as under:-

“8. Apart from this infirmity we further find that Shiv Shankar was not put up for test identification parade promptly. The identification parade has been held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. There is, therefore, room for doubt as to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features.

9. Over and above all these things there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Exhibit Kha-1 nor in their statements during investigation, the eyewitnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had “sallow” complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then.

Thus in the absence of any descriptive particulars of Shiv Shankar in Ex. Kha-1 or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and

hold that he was one of the assailants of Ram Babu. As pointed out in [Muthuswami v. State of Madras \(AIR 1954 SC 4\)](#), where an identification parade was held about 2½ months after the occurrence it would not be safe to place reliance on the identification of the accused by the eyewitnesses. In another case [Mohd. Abdul Hafeez v. State of A.P. \(AIR 1983 SC 367\)](#). It was held that where the witnesses had not given any description of the accused in the first information report, their identification of the accused at the sessions trial cannot be safely accepted by the court for awarding conviction to the accused. In the present case there was a long interval of nearly 4 months before the test identification parade was held and it is difficult to accept that in spite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade.”

17. Similarly the issue of delay weighed with this court in [Musheer Khan vs. State of M.P \(2010 \(2\) SCC 748\)](#) in discarding the evidence regarding test identification as under:

“8. Insofar as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24-1-2001 and the incident is of 29-11-2000, even though A-5 was arrested on 22-12- 2000. There is no explanation why his identification parade was held on 24- 1-2001 which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance ought to have been placed by the courts below or the High Court on such delayed TI parade for which there is no explanation by the prosecution.”

18. In the instant case none of the witnesses had disclosed any features for identification which would lend some corroboration. The identification parade itself was held 25 days after the arrest. Their chance meeting was also in the night without there being any special occasion for them to notice the features of any of the accused which would then register in their minds so as to enable them to identify them on a future date. The chance meeting was also for few minutes. In the circumstances, in our considered view such identification

simplicitor cannot form the basis or be taken as the fulcrum for the entire case of prosecution. The suspicion expressed by PW 8 Saraswati Singh was also not enough to record the finding of guilt against the appellant. We therefore grant benefit of doubt to the appellant and hold that the prosecution has failed to establish its case against the appellant.”

67. In view of the above consideration, we are of the view that the prosecution has failed to prove the case against the appellants beyond reasonable doubt. Since the recording of the statements of the witnesses under section 161 Cr.P.C. to their statements recorded before court none of the witnesses pointed out to any special features of any of the accused. All the witnesses saw the miscreants for a very short while. Test identification parade of accused took after 4 to 7 months. It cannot be said with certainty that the witnesses had correctly identified the accused. In such circumstances court should not have recoded their conviction on the basis of such evidence.

68. In this case it is admitted that one of accused was transferred from one jail to the other. There is nothing in the evidence which shows that accused were kept *baparda* in the process of transit.

69. Most of the conditions enumerated by this Court necessary for acceptance of identification evidence by this Court in the case of **Asharfi and Anr.** (supra) have not be fulfilled by the prosecution.

70. All the appellants have undergone about fourteen years of incarceration in jail from the date of judgment of the trial court. They must have been in jail earlier also without there being any reliable evidence against them.

71. All the Criminal Appeals are **allowed**. The appellants shall be set at liberty forthwith, if not wanted in any other case.

72. Let this judgment be notified to the trial court and record of trial court be returned within two weeks.

Order Date :-06.3.2025

Abhishek

(Subhash Chandra Sharma,J.)

(Siddharth,J.)