

(34)

HIGH COURT OF CHHATTISGARH, BILASPUR
Hon'ble Shri Justice Rajendra Chandra Singh Samant

Cr.A. No. 88 of 2000

Nadir Shah alias Patel

Versus

State of Madhya Pradesh

Cr.A. No. 261 of 2000

Lamboos alias Mahboob alias Mahangu and another

Versus

State of Madhya Pradesh

And

Cr.A. No. 288 of 2000

Tabarak @ Nagaraj

Versus

The State of Madhya Pradesh (Now C.G.)

CAV JUDGMENT

Post for 15 /11/2016

Sd//
R.C.S. SAMANT
Judge

11 /11/2016



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 88 of 2000

Judgment Reserved on 18.10.2016

Judgment Delivered on 15.11.2016

Nadir Shah alias Patel son of Gulamali, aged 19 years, r/o village Kairdhani, P.S. Manendragarh, District Korla, MP.

---- Appellant (in jail)

Versus

State of Madhya Pradesh (Now Chhattisgarh)

--- Respondent

For the Appellant

For the Respondent/ State

: Shri K.K. Singh, Advocate.

: Shri Neeraj Sharma, Deputy
Government Advocate.

Criminal Appeal No. 261 of 2000

1. Lamboo alias Mahboob alias Mahangu aged about 26 years, son of Mohd. Haneef resident of Karam Hussain Kazipur, P.S. Kunda, district Pratapgarh, U.P.
2. Rajesh alias Lalloo son of Shri Biharilal, aged about 25 years, resident of Ahmeadganj, district Pratapgarh, U.P.

---- Appellants (in jail)

Versus

State of Madhya Pradesh through Chirmiri district Korla, Madhya Pradesh (now Chhattisgarh)

--- Respondent

For the Appellants

For the Respondent/ State

: Ms. Pritha Goshal, Advocate on
behalf of Shri Awadh Tripathi,
Advocate.

: Shri Neeraj Sharma, Deputy
Government Advocate.

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Criminal Appeal No. 288 of 2000

Tabarak @ Nagaraj, aged about 27 years, son of Shri Mubarak Hussain, resident of Bihar (Uttar Pradesh)

---- Appellant (in jail)

Versus

State of Madhya Pradesh (Now Chhattisgarh)

--- Respondent

For the Appellant
For the Respondent/ State

Shri Arun Kochar, Advocate.
Shri Neeraj Sharma, Deputy
Government Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Judgment

1. Criminal Appeals No. 88 of 2000, 261 of 2000 and 288 of 2000 are directed against a common judgment of conviction and order of sentence dated 24.12.1999 passed by the Additional Sessions Judge, Manendragarh, District Korea, Chhattisgarh in Sessions Trial No. 11 of 1997, whereby and whereunder the learned Additional Sessions Judge convicted appellant – Nadir Shah @ Patel (Criminal Appeal No. 88 of 2000), appellants – Lamboo @ Mahboob @ Mahangu and Rajesh alias Laloo (Criminal Appeal No. 261 of 2000) and appellant – Tabarak @ Nagaraj (Criminal Appeal No. 288 of 2000) under Sections 395 read with Section 397 of the Indian Penal Code (for short 'the IPC') and sentenced them to undergo rigorous imprisonment for a period of seven years and to pay fine of Rs.1,000/- each and in default of payment of fine, to further undergo additional imprisonment for six months.

2. The case of the prosecution, in brief, is that on 16.9.1996 at about 09:05 pm in Kurasiya Colliery, Chirmiri, District Sarguja, neighbours of complainant - Smt. Chitra Ganguli (PW-1), namely Suryakant Sinha (PW-8)

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and Sanjeev Bhaumik (PW-7), were on visit to her house. All of a sudden 10 to 12 persons with their faces covered with clothes, carrying Katta (country-made pistol), gupti (knife) and bomb entered the house of the complainant. One person aged about 30-32 years with medium height, carrying Katta and wearing a black-spotted shirt told the complainant "Chanda do" (to give donation), threatened her and entered into the room. Second person, who was tall and aged about 26 years, wearing a pathani suit of light green colour also entered the room of the complainant asking for donation. Third person with medium height, wearing orange colour full shirt and blue pant carrying a bomb and another one of short height, wearing white full shirt and black pant aged about 20-22 years carrying a gupti also entered the room of the complainant. The man wearing pathani suit caught hold the complainant's hair, slapped her and asked for keys. Thereafter, he himself opened the Almirah. The man carrying Katta pointed it on the head of the complainant and said not to raise alarm. Husband of the complainant was assaulted with Gupti on his abdomen while closing the door. All of them ransacked the house and took away the jewelery, clothes and cash worth of Rs.83,150/- from the house of the complainant.

3. First Information Report (Ex.P/1) was lodged in police station Chirmiri on the same day i.e. 16.09.1996 at about 9:30 pm on which offence under Sections 395 and 397 of the IPC was registered. Investigation was conducted and in test identification parade (Ex. P/2), complainant – Chitra Ganguli (PW-1) identified appellant – Nadir Shah @ Patel (Criminal Appeal No. 88 of 2000), appellants – Lamboo @ Mahboob @ Mahangu and Rajesh alias Lalloo (Criminal Appeal No.261 of 2000) and appellant – Tabarak @ Nagraj (Criminal Appeal No. 288 of 2000). On further investigation, recovery



and seizures were made from all the appellants on the basis of their memorandum statements. After completion of the investigation, the appellants alongwith six others were charge-sheeted. The trial Court charged appellant – Nadir Shah @ Patel (Criminal Appeal No. 88 of 2000) and appellants – Lamboo @ Mahboob @ Mahangu and Rajesh alias Lalloo (Criminal Appeal No.261 of 2000) under Sections 395 and 397 of the IPC and appellant – Tabarak @ Nagraj (Criminal Appeal No. 288 of 2000) under Sections 395 and 397 of the IPC and Sections 25 and 27 of the Arms Act. The appellants and other accused persons denied the charges framed against them, after which the trial was conducted and by the impugned judgment, the appellants in all the three appeals have been convicted and sentenced as mentioned above.

4. The grounds of appeal in all the three cases are similar. The grounds taken are that the judgment of conviction and order of sentence passed against the appellants is bad, improper, incorrect and illegal. The case of the prosecution is based on test identification parade. From the evidence, it is clear that the witnesses had an opportunity to see the appellants before holding the test identification parade. The evidence of the prosecution witnesses is full of contradictions, omissions and improvements. The evidence of the prosecution was doubtful with regard to recovery from the appellants as well. For these reasons, it is prayed that by allowing the appeals the appellants in all the three appeals may be acquitted and in alternative it is prayed that the sentences imposed upon the appellants is harsh, which may be rectified and reduced.



5. It is submitted on behalf of the appellants that in the FIR lodged by the complainant, it is mentioned that all the persons who committed dacoity had covered their faces with clothes. Chitra Ganguli (PW-1) has admitted in her cross-examination that all the persons had their faces covered with clothes below their eyes. In her statement, it is also mentioned that cloth on the face of 4 to 5 persons slipped off at the time of incident due to which she recognized the accused persons. This statement was not recorded by her in FIR (Ex.P/1) and neither it is recorded in her police statement (Ex.D/2). For this reason, this witness is not reliable and the evidence of remaining witnesses is full of contradictions, omissions and improvements. Hence, for the aforesaid reasons, the appellants may be acquitted.

6. On behalf of the State, it has been argued that the prosecution has proved the case against the appellants beyond reasonable doubt and there is no infirmity in the impugned judgment. Minor contradictions, omissions and improvements are of no consequence and insignificant to shake the trustworthiness of the prosecution witnesses. For this reason, it is prayed that all the appeals may be dismissed.

7. Learned counsel for the Appellants and the Respondent were heard at length and the questions for determination in this appeal are as under:

1. Whether the Test Identification Parade (for short 'the TIP') relied upon in the impugned judgment has passed the test of proof beyond reasonable doubt?
2. Whether the evidence of prosecution is reliable despite contradictions, omissions and improvements?

In these appeals, the occurrence of dacoity in the house of the complainant is not under challenge. The only challenge is to the identification of the

appellants, hence consideration in these appeals shall be confined to the proof regarding the TIP as per the questions framed in this respect.

8. Chitra Ganguli (PW-1) is the key witness who has identified the present accused persons, namely, Aneesh Ahmed, Rajesh @ Lalloo, Lamboo @ Mahboob @ Mahangu, Nadir Shah @ Patel and Kallu @ Israr in the Court. After narrating about the incident and recording of FIR (Ex. P/1), she stated that the TIP was conducted on 3.12.1996 in Baikunthpur Jail. Executive Magistrate conducted this procedure in which she identified accused persons, namely, Sadavriksh, Kallu @ Ishrar, Nadir Shah @ Patel (appellant in Cr.A. No. 88 of 2000), Lamboo @ Mahboob @ Mahangu (appellant in Cr.A. No. 261 of 2000) and Aneesh Ahmed and affixed her signature on the memorandum of identification parade (Ex. P/2). Later on, on 15.6.1997 when she was called to jail at Baikunthpur she identified a person who carried a Katta at the time of incident. This TIP was recorded vide Ex. P/3 by the Executive Magistrate.

9. In cross-examination, Chitra Ganguli (PW-1) admitted in paragraph 12 that at the time of incident all the culprits had their faces covered with clothes below their eyes and also stated that during the incident of robbery clothes from the faces of 4 to 5 persons slipped off due to which she recognized them. She stated that she gave this statement while recording the FIR (Ex. P/1) and in her police statement (Ex. D/1). Further, in cross-examination, again she stated that she saw the accused persons whom she identified in lockup of the police station Chirmiri when she went there. This statement has not been further clarified whether she saw the identified accused persons before the TIP was conducted or after it. From this

suggestion on the part of defence, it cannot be assumed that she had an opportunity to see the apprehended accused persons in lockup of the police station Chirmiri before the TIP was conducted. Her admission in cross-examination that while recording the memorandum of TIP, the SHO of police station - Chirmiri was sitting by side of the Executive Magistrate does not itself mean that the TIP was conducted in presence of a Police Officer. In TIP the persons to be identified and the persons who are made to stand with them are physically present at the spot, where the person who has to identify in physical presence and after making observation of all the persons the identification is made. Recording of this procedure as usual is made after the identification is done physically. Hence, the presence of SHO by the side of the Executive Magistrate at the time of preparing the test identification memorandum is not suggestive of this fact that this procedure was conducted in presence of a police officer.

10. In cross-examination, Chitra Ganguli (PW-1) stated that the clothes from the faces of 4 to 5 accused persons slipped off at the time of incident may be considered as an improvement because this fact is not recorded in FIR (Ex. P/1) lodged by her and in her police statement (Ex. D/1). Although, it was her statement to the police that she could identify the persons on seeing them. On behalf of the appellants, reliance has been placed on the judgment of M.P. High Court in **Abdul Haque v. State of Madhya Pradesh** reported in **1982 J.L.J 744** in which the facts of the case were, that the miscreants had covered their faces at the time of incident. The complainant identified the accused on the basis of their voice. Apart from this, the parties were on inimical terms. These were the reasons in totality on the basis of which the evidence of the prosecution on the point of TIP was disbelieved in

that case. The Apex Court held in the case of **Shyamal Ghosh vs. State of West Bengal** reported in **AIR 2012 SC 3539** as under:

56. 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 eye-witnesses of the crime.

57. It is equally correct that the CrPC does not oblige the investigating agency to necessarily hold the **Test identification Parade**. Failure to hold the **Test identification Parade** while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the **Test Identification Parade** 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 the 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 is, however subjected to exceptions. Reference can be made to *Munshi Singh Gautam v. State of M.P.* [(2005) 9 SCC 631: (AIR 2005 SC 402 : 2004 AIR SCW 6537)], *Sheo Shanker Singh v State of Jharkhand and Anr.* [(2011) 3 SCC 654 : (AIR 2011 SC 1403 : 2011 AIR SCW 1845)].

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58. Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case.'

This view has been upheld by the Apex court that the TIP is only the corroborative piece of evidence which supports the identification of an accused in the court by the witness concerned. In the present case, Chitra Ganguli (PW-1) identified Nadir Shah @ Patel (Criminal Appeal No. 88 of 2000) and Lamboo @ Mahboob @ Mahangu and Rajesh @ Lalloo (Criminal Appeal No. 261 of 2000) identification made by this witness in court and her statement regarding TIP makes her statement reliable. Chitra Ganguli (PW-1), later on in jail at Baikunthpur when another TIP was conducted, identified appellant - Tabarak @ Nagraj vide Ex. P/31 on which she has put her signature. This statement remained unrebutted in cross-examination.

11. All the miscreants had their faces covered with clothes, is not sufficient to discredit identification by her because recognition of a person is done on the basis of his general form, face, voice or any other characteristics which has impressed on the mind of the witness at the time, when he or she had seen the person before the TIP is conducted. In FIR (Ex. P/1), she gave the



detailed description of the persons who committed dacoity in her house regarding which no question has been put in her cross-examination. The prosecution has sufficiently brought this evidence that she identified appellant/ accused persons in the TIP vide Ex. P/2 and P/31. The defence had an opportunity to rebut on relevant grounds by putting questions to her, that the features on the basis of which she identified the appellant/ accused persons in the TIP, but no such question has been put to this witness with regard to the identification of appellant – Tabarak Hussain.

12. Another witness of TIP is Balai Chandra Ganguli (PW-2), who identified accused Kallu @ Ishrar, appellant Lamboo @ Mahboob, Rajesh @ Lalloo and Nadir Shah @ Patel and further stated that appellant - Rajesh @ Lalloo stabbed him on his abdomen with a gupti. He is also a witness to the identification proceedings (Exhibit P/2). However, he has stated that appellant - Tabarak @ Nagaraj was the first person who entered the house on the date of incident carrying a desi katta. He identified appellant Tabarak in TIP vide Ex. P/32 as well. In cross-examination, he admitted that after the date of incident, i.e. on 16.9.1996, he saw appellant Tabarak @ Nagaraj for the first time in the Court, does not negatives his statement regarding TIP vide Ex. P/32. Sanjeev Bhaumik (PW-7) is another witness of identification. In TIP recorded vide Ex. P/2, he identified the only appellant - Lamboo @ Mahboob. This statement remained intact in his cross-examination. Suryakant Sinha (PW-8) was also present at the time of incident and he is a witness of TIP recorded vide Ex. P/2, who identified appellant - Lamboo @ Mahboob in the Court as well as in TIP and his statement remained unshaken.

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13. Executive Magistrate, S.S. Kushroo (PW-6) stated that he conducted the TIP in sub-jail Baikunthpur on 3.12.1996. All the accused persons excluding Tabarak @ Nagraj were present and 24 other persons were standing with the accused persons. The witnesses were called for identification in this parade. Balai Chandra Ganguli (PW-2) identified appellant Rajesh @ Laloo, Sanjeev Bhumik (PW-7) identified appellant Lamboo @ Mahboob and Chitra Ganguli (PW-1) identified appellants Nadir Shah @ Patel, Lamboo and Rajesh. TIP was recorded in Ex. P/2. He also conducted TIP of seized articles vide Ex. P/3, which remained a consistent statement.

14. The other ground in this appeal is that the seizure made at the instance of the appellants in their presence was not established beyond reasonable doubt. In the impugned judgment, the evidence recorded is that the seizure was made from the appellants Nadir Shah (Criminal Appeal No. 88 of 2000) and Lamboo (Criminal Appeal No.261 of 2000). No emphasis has been supplied during the argument advanced on behalf of the appellants concerned. Hence, there is no need to examine the evidence regarding the seizure at the instance of the appellants/accused persons. S.S. Kushroo (PW-3) in the capacity of Executive Magistrate conducted the TIP of the recovered articles. Chitra Ganguli (PW-1) was the only witness who identified the articles of theft and robbery and her statement has remained un rebutted in cross-examination. No evidence has been led by the defence which shows that the articles seized from the appellants concerned did not belong to complainant Chitra Ganguli (PW-1) this lends further support to prosecution case. Hence, in this matter, the appellants/ accused persons have failed to prove their case in defence. The evidence of the prosecution

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in this respect had been sufficient and proof beyond reasonable doubt, to establish that the articles seized from the appellants/ accused persons were the articles of theft which were robbed and looted from the house of Chitra Ganguli (PW-1) on the date of incident which raises a very strong presumption under Section 114 of the Evidence Act against the appellants/ accused persons.

15. The evidence of the prosecution witnesses has some contradictions, omissions and some improvements but these are of no material consequence, because of lapse of time the recollection of facts at the time of incident may vary at the time of narration before the Court in evidence, which is a natural phenomena and happens in normal course. Hence, only on this count that some contradictions, omissions and improvements in the statements pointed out by the defence cannot be considered as material to discredit the evidence of the prosecution witnesses.

16. Prashanto Sarkar (PW-3) is the witness of investigative procedure and memorandum (Ex. P/4) given by Rajesh @ Lamboo followed by seizures Ex. P/4 and P/5. He is also the witness of memorandum given by Mahboob @ Lamboo vide Ex. P/7 followed by seizure Ex. P/8 and memorandum statement of Nadir Shah @ Patel vide Ex. P/9 followed by seizure of articles vide Ex. P/10, 11 and 12. The remaining accused person have been acquitted by the trial Court. Tamal Dutta (PW-4) is also witness of above-mentioned memorandum statements and seizures. Suryakant Sinha (PW-8) has witnessed the incident. Ram Swaroop Gupta (PW-11), Patwari, has elaborated the spot map Ex. P/28. Rishi Kumar (PW-12) is the witness to memorandum Ex. P/33 given by appellant – Tabarak @ Nagraj and seizure

memorandum Ex. P/34. H. Peters (PW-13), Sub-Inspector has proved the investigation. Maheshwar Das (PW-14) is a hostile witness. C.R. Tandya (PW-15), Inspector has proved the investigation. H. Peters (PW-2) is Sub-Inspector who has stated in proof of memorandum and seizures made during investigation.

17. Having heard learned counsel for the parties and on perusing and considering the evidence of the prosecution in its entirety, it is found that the conclusions drawn and the findings given by the trial Court in the impugned judgment do not suffer from any infirmity. Accordingly, the appeals are dismissed. Appellant in each case are on bail, their bail bonds are cancelled, they shall be taken in custody and sent for undergoing the remaining part of their respective sentences.

Sd/-
(Rajendra Chandra Singh Samant)
Judge