

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 2802 of 1999**

APPELLANT : Premchand alias Guddu S/o Pardesi
Ram Satnami, aged about 21 years, R/o
village-Manki, P.S. Lormi, Distt. Bilaspur

VERSUS

RESPONDENT : State of Madhya Pradesh (Now
Chhattisgarh) through P.S. Patharia,
Distt. Bilaspur

Criminal Appeal No. 2803 of 1999

APPELLANT : Atal S/o Basiya Satnami, aged about 45
years, R/o village Chandli, P.S. Patharia,
District Bilaspur

VERSUS

RESPONDENT : State of Madhya Pradesh (Now
Chhattisgarh) through P.S. Patharia,
District Bilaspur

Criminal Appeal No. 3211 of 1999

APPELLANT : Saheb Das alias Ashwani Kumar S/o
Sudarshan Satnami, aged about 42
years, R/o village Chakapenda, P.S.
Nandghat, District Durg

VERSUS

RESPONDENT : State of Madhya Pradesh (Now
Chhattisgarh) through P.S. Patharia,
District Bilaspur

For Appellants : Ms. Sharmila Singhai, Shri Parag Kotecha and
Shri Alok Tiwari, Advocates for the Appellants.

For Respondent-State: Smt. Smita Ghai, Panel Lawyer for the
State/Respondent.

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

C A V JUDGEMENT

Per P. Sam Koshy, Judge

18/02/2016

1. All the three Appeals arise out of a common judgment dated 07.08.1999 passed by the IVth Additional Sessions Judge, Bilaspur in Sessions Trial No. 466/1996 convicting the Appellants for the offence under Section 396 of IPC and sentencing them to undergo life imprisonment with fine of Rs.1,000/- with default stipulations.
2. Brief facts of the case are that FIR Exhibit P-22 was lodged by PW-13 Chatur Kumar Sahu on 30.12.1994 at 4.30 a.m. stating that at around 2 a.m. six persons armed with knife, Lathi and revolver entered into his house and after switching on the light of the room committed dacoity. In the course of dacoity, they attacked his uncle Chhedilal with Lathi and by firing with country made pistol causing grievous injury on his intestine. Meanwhile, due to the noise created the Appellants ran away and took Rs.1,000/- in cash from the pocket of a shirt. His uncle Chhedilal succumbed to the injuries while being taken to the hospital. While lodging the FIR, the complainant has stated that though he does not know the persons intruded into his house but if seen, he can easily recognize them.
3. During the course of investigation, on suspicion, Appellant Atal was taken into custody and in the course of interrogation, he is said to have confessed of having committed the offence along with other accused persons. On the basis of his memorandum statement Exhibit P-8, recovery of a country made pistol, an empty brass cartridge and one hundred rupee note were made vide Exhibit P-11. Later on, in the course of investigation, seven accused persons namely Atal, Nemsingh, Samaylal, Lalji, Patwari, Premchand and Saheb Das were also arrested. After the other accused

persons were arrested, during interrogation, each of them is said to have given memorandum statement. On the memorandum statement of accused Samaylal marked Exhibit P-9, a Gupti (knife) and one hundred rupee note were seized vide seizure memo Exhibit P-12. Likewise, on the memorandum statement of Lalji marked Exhibit P-10, a Sabal (an iron rod) and eighty rupees cash were seized vide seizure memo Exhibit P-13. Similarly, on the memorandum statement of accused Premchand Exhibit P-25 a jerkin black colour was seized vide seizure memo Exhibit P-7. He is said to have kept the knife with him which was seized in another offence. The Test Identification Parade (for short 'TIP') Exhibit P-23 was conducted wherein the complainant is said to have identified the present Appellants but could not identify the other accused persons. Finally, vide the impugned judgment the trial Court giving the benefit of doubt to the persons who could not be identified in the TIP acquitted them from the charges under Section 396 IPC, however, as the Appellants were identified by the complainant during the TIP, they were convicted leading to the filing of the present Appeals.

4. Counsel for the Appellants submitted that a perusal of the impugned judgment of conviction would reveal that the conviction is solely based upon the identification of the Appellants in the TIP Exhibit P-23 in which PW-13 Chatur Ku. Sahu, the lodger of the FIR and his wife PW-14 Sabana Bai are said to have identified the Appellants. It was submitted that the TIP was not conducted in accordance with law and the report Exhibit P-23 would not be admissible as it has not been properly proved before the Court. It was argued that the TIP was conducted at a much belated stage and as such it had lost its relevancy. Further, the TIP report has not been proved by the official witnesses before whom TIP was conducted and as such, it could not have been relied upon.

5. According to the counsel for the Appellants, another flaw on the part of the investigation is that while recording the FIR, the complainant had stated of recognizing the accused persons as the accused had switched on the light of the room with which he could easily recognize them yet he has not identified them in the dock. It was submitted that the Postmortem report of the deceased also reveals that there was no gun shot injury upon the body of the deceased and all the injuries found on the body were caused with knife but the complainant in the FIR had stated that the gun shot struck his uncle's stomach. Therefore, the prosecution has not been able to prove the contention of PW-13 that one of the Appellants had fired at the deceased from his country made revolver. It was also argued that the complainant in the statement has submitted that the Appellants were flashing torch light in his eyes after they had entered the room, it is an indication that they had not put on the light in the room therefore the identification becomes doubtful. It was argued that since the identification of the Appellants itself gets doubtful in the light of the aforementioned flaw and lacuna on the part of the prosecution, the entire case of the prosecution gets shattered and therefore, prayed for quashing of the impugned judgment and for acquitting the Appellants from the charge levelled against them.

6. Counsel for the Appellants relied upon the following judgments so far as the Test Identification Parade is concerned:

- i) AIR 2008 SC 2343 (Mahabir v. State of Delhi)
- ii) (2007) 12 SCC 2343 (Maya Kaur Baldevsingh Sardar and another Vs. State of Maharashtra)
- iii) AIR 1981 SC 1392 (Wakil Singh and others v. State of Bihar)
- iv) (2007) 3 SCC 755 (State of Goa v. Sanjay Thakran and another)
- v) 2014 AIR SCW 2354 (Prakash v. State of Karnataka)

7. Per contra, State counsel opposing the Appeals submitted that apart from the TIP conducted, the statement of PW-13 itself sufficiently proves the

case of the prosecution. According to the State counsel, PW-13 has very categorically submitted in his statement that after entering into the room the Appellants had switched on the light with which he could recognize them. PW-3 had further recognized the Appellants during the course of TIP and as such it cannot be said that the identification of the Appellants is doubtful. Further, the memorandum statements of the accused persons and the subsequent recovery of weapons used in the commission of the crime i.e. knife and country made pistol at the instance of the Appellants also sufficiently proves the case of the prosecution. It was submitted that the eye witnesses had sufficient time and light to see and recognize the Appellants. It was further submitted that the FSL report of the country made gun is also positive to the extent of it being recently used and there is categorical statement of PW-13 of one of the Appellants firing with the country made pistol towards the deceased. Lastly it was submitted that with the aforesaid evidence and statement of the witnesses, the prosecution has proved its case beyond all reasonable doubt and there is no scope of interference in the impugned judgment and prayed for rejection of the Appeals.

8. Having considered the rival contentions put forth on either side and on perusal of the record what is culled out from the prosecution witnesses is that from the seizure made at the instance of the Appellants nothing substantial could be proved to substantiate the case of the prosecution in as much as in the FSL report of the knife seized from Appellant Samaylal Exhibit P-41 no blood was found. Likewise, except for the fact that there was a report of the gun having been recently used, there was no gun fire injury found on the body of the deceased in the postmortem report Exhibit P-42 given by Dr. V. K. Soni (PW-23). Rather it appears that the armourer PW-8 during the course of inspection of the country made gun it got fired which must have been the reason for the forensic people to give the report

of the gun having being recently fired with. PW-14 in her deposition submits that though she had gone to the jail for identification of the accused persons but she could not identify any accused as reveals para-4 of her evidence. Thus, the identification by this witness becomes doubtful. Likewise, PW-13, the younger brother of the deceased and lodger of the FIR has said that he had gone to the jail in the Test Identification Parade of the accused persons but at the same breath he submits that the accused persons had shown the torch light directly into his eyes on account of which he could not visualize anything for a pretty long time though later on, he submits that as the Appellants had put the light of the room on, he could recognize them. Further the fact that the accused persons were flashing a torch light on the eye of PW-13 is sufficient indication of the attack being made in the dark.

9. However, if it was the case of the prosecution, at the first instance itself, the complainant PW-13 and his wife PW-14 could have identified the accused persons as they had seen them with their naked eyes and there was sufficient light in the room yet the trial Court believed the statement of the prosecution witnesses in its entirety so far as the identification part is concerned. The undisputed fact in the instant case is that the witnesses to the Test Identification Parade i.e. the Executive Magistrate as well as the Assistant Jailer before whom the identification parade was conducted have not been examined. In the absence of any direct evidence in proving the document, the same could not be relied upon to the extent of it being the sole factor for convicting the accused persons.

10. So far as the TIP is concerned, the main purpose for a parade is to provide a fair strong evidence of identity to the prosecution. The advantage of identification parade from the point of view of the trial is that by giving the witness a number of persons from among whom he has to choose the

accused person which also enables the prosecution to fortify the investigation as to whether the accused person in the dock is in fact the same person seen at the time of offence and referred to by the witnesses. The main purpose of identification evidence is to assure the investigating agency that the investigation is going on in the right direction. However, to corroborate the said evidence, witnesses have to be examined to prove the identification parade. But in the instant case no witness to the TIP has been examined except for the statement of PW-13 of making a statement firstly identifying the accused persons as they had switched on the light of the room and secondly recognizing them among a group of persons produced in the TIP. Once the prosecuting agency has got a TIP conducted, it is the duty of the investigating agency and the prosecution to examine the witness to the said TIP. In the instant case, the two direct witnesses to the TIP i.e. the Executive Magistrate before whom the TIP was conducted and the Assistant Jailer namely Shri R. R. Rai in whose jail the TIP was conducted have not been examined. In the absence of which there are serious doubts in the case of the prosecution so far as the procedure in which the identification was conducted and the weak piece of evidence led by the prosecution to prove the TIP. Another aspect which is to be seen is that PW-13 in his deposition do not at any point of time say that the accused persons who were identified in the TIP are the same persons present in the Court. Admittedly, the TIP has not been proved by any official witness thereby reducing its credibility. PW-14 who is an eye witness to the incident has been able to recognize only one person from among 7 persons who had entered into the house in spite of the fact that there was sufficient light for recognizing them. If we read the testimony of PW-14 it would reveal that she did not in fact had sufficient time to recognize the accused persons as she just had a fleeting glimpse of the persons identified and who had no particular reason to remember the accused persons when the identification

was being made for the first time in the Court. In her Court statement PW-14 denies identifying any of the accused which gives rise to a great element of doubt in the TIP.

11. The Supreme Court in the case of Mahabir v. State of Delhi reported in AIR 2008 SC 2343 dealing with the issue of Test Identification Parade has held as under:

“11. ...The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation.

12. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings.”

This has been the consistent view of the Supreme Court as is evident from the decisions rendered by the Apex Court in AIR 1981 SC 1392 (Wakil Singh and others v. State of Bihar), (2007) 3 SCC 755 (State of Goa v. Sanjay Thakran and another), (2007) 12 SCC 2343 (Maya Kaur

Baldevsingh Sardar and another Vs. State of Maharashtra) and as recent as in 2014 AIR SCW 2354 (Prakash v. State of Karnataka).

12. Admittedly, the evidence on record does not inspire confidence so far as the identity of the accused is concerned particularly when the Executive Magistrate or the Assistant Jailor before whom the identification parade was conducted not being examined. No other official witness was examined to prove the TIP. Though, PW-13 is said to be an eye witness to the incident but there are many conflicting and contradictory evidence which he has adduced before the Court giving rise to doubt so far as his having recognized the accused persons. Even otherwise the entire conviction cannot be solely based upon the testimony of PW-13 an identification particularly when it has not been corroborated by any other independent witness. Once when the prime factor on which the conviction was based i.e. identification itself gets shattered, the entire case of the prosecution gets weakened giving rise to great element of doubt on the prosecution story. The benefit of the said doubt so created by the Appellants would always go in their favour and as such the order of conviction passed by the trial Court solely relying upon the identification of the accused persons in the Test Identification Parade is not sustainable.

13. Accordingly, the impugned judgment dated 07.08.1999 passed by the IVth Additional Sessions Judge, Bilaspur in Sessions Trial No. 466/96 is set aside. The Appellants are acquitted of the charge under Section 396 of IPC. They are set at liberty subject to the conditions of Section 437A Cr.P.C.

14. The Appeal is allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE