

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 63 OF 2001

The State of Maharashtra

...APPELLANT

VERSUS

- 1) Dashrath S/o Vishwanath alias
Aangrajya Pawar
Age : 28 years, Occ : Labour,
R/o Ambajogai, Dist. Beed.
- 2) Vinod S/o Vishwanath alias
Aangrajya Pawar
Age : 20 years, Occ : Labour,
R/o Ambajogai, Dist. Beed.
- 3) Uttam S/o Kalu Shinde
Age : 22 years, Occ : Labour,
R/o Ambajogai, Dist. Beed.

...RESPONDENTS

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Mr.A.R. Borulkar, A.P.P. for appellant - State.

Mr. Satej S. Jadhav, advocate for respondent nos.1 to 3.

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**CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.**

DATE OF RESERVING JUDGMENT : 30TH JUNE, 2017.

DATE OF PRONOUNCING JUDGMENT: 7TH JULY, 2017.

JUDGMENT [PER S.S. SHINDE, J.] :

This appeal is directed against the judgment and order dated 30th October, 2000, passed by the Additional Sessions Judge, Ambajogai, Dist.Beed in Sessions Case No. 24 of 1999, thereby acquitting respondent nos.1 to 3 (original accused nos. 1 to 3) from the offence punishable under Sections 394, 302, 307 read with 34 of the Indian Penal Code (for short "I.P. Code").

2. The prosecution case in nut-shell, is as under:-

A) Sudhakar Gopinath Jadhav, an informant (PW-9) is resident of Kalwati Tanda, Tq.Ambajogai. In the year 1998, he was residing along with his parents, his wife, children and his brothers. On 20th October, 1998 i.e. on the day of Diwali, the informant (PW-9) and his family members took dinner at their house. The informant's two

brothers, namely Madhukar (now deceased) and Shivraj and his mother Dhurabai slept in the house. After completing the work of cooking, the informant, his wife and his father slept in another room. At about 2.00 a.m. because of the shouts of mother of informant Dhurabai, the informant and his brother awaken from their sleep. At that time, the informant saw that, thieves were running by forcibly taking the nose-ring of his mother. Madhukar chased the thieves and he caught hold one thief. As a result of which, the said thief shouted and other two thieves returned back and beat Madhukar by means of knife. By that time, the informant reached to the said place. He and his brother tried to resist. The thieves were beating Madhukar by means of knife and sickle. Because of the said beating, Madhukar fell down on the ground and became unconscious. The thieves also beat the informant by means of knife and sickle. The informant also sustained bleeding injuries. The informant shouted and then thieves

ran away.

B) At the time of incident, the thieves were wearing Sweater and Woolen Caps. The informant returned to the house. So many persons were gathered in front of his house. The informant was taken to Ambajogai in a truck, as he was injured. Firstly, the informant was taken to Police Station, Ambejogai. As the informant was having bleeding injuries, the police asked him to go to hospital and police proceeded to Kalwati Tanda. The informant was admitted in S.R.T.R. Government Medical College and Hospital, Ambejogai.

C) A complaint of the informant was recorded in the Government Hospital on the same day at about 9.00 to 10.00 a.m. Crime was registered as Crime No. 231/1998 under Sections 302, 307, 394 of the I.P.C. During the investigation, the statements of witnesses were recorded. Spot and inquest panchanamas' were drawn. The dead body was

sent for post-mortem. Post-mortem report was collected. Injury certificate in respect of the informant was collected. The accused persons were arrested. Two weapons were recovered at the instance of the accused. When search was taken, the nose-ring and other articles were found in the house of the accused. Blood stained clothes were also seized. Seized articles were sent to the Chemical Analyzer and the chemical analyzer's report was collected. An identification parade was conducted. After completion of an investigation, chargesheet was filed against the accused persons under Sections 394, 302, 307 read with section 34 of the I.P.C.

D) The Judicial Magistrate, First Class, Ambajogai committed the case to the Court of Sessions' as the offence is exclusively triable by the Court of Sessions.

E) Thereafter, the charge under sections

394, 307 read with section 34 of I.P.C was framed against the accused. The same was read over to the accused and the accused persons pleaded not guilty and claimed to be tried.

3. After recording the evidence and conducting full fledged trial, the trial Court acquitted all the accused for the offence punishable under Sections 394, 302, 307 read with 34 of the I.P. Code. Hence this Appeal by the State.

4. The learned A.P.P. appearing for the State submits that, the evidence of the prosecution witnesses has not been properly appreciated by the trial Court. He submits that, Sudhakar Gopinath Jadhav (PW-9) is an injured witness and he has identified the accused. He submits that, even Gopinath Parasram Jadhav (PW-7) is also an eye witness. Their evidence has not been properly considered and appreciated by the

trial Court. He further submits that, there is recovery of nose-ring. Therefore, he submits that, the appeal deserves to be allowed.

5. On the other hand, the learned counsel appearing for respondents invites our attention to the findings recorded by the trial Court and submits that, those are in consonance with the evidence brought on record and the view taken by the trial Court is possible, therefore, this Court may not interfere in the impugned judgment and order. He submits that, there was no light and the accused were wearing Sweater and Woolen Caps at the time of an alleged incident. He further submits that, the identification parade was conducted belatedly and hence, the said cannot be relied upon. In support of the said contention, he pressed into service the exposition of law by the Supreme Court in the case of **Lal Singh and others V/s State of U.P.**¹. It is submitted that, the

1 AIR 2004 SC 299

victim Dhurabai, whose nose-ring was forcibly pulled, has not been examined by the prosecution. Therefore, the learned counsel appearing for the respondents submits that, the appeal filed by the State deserves to be dismissed.

6. We have given careful consideration to the rival submissions advanced by the learned A.P.P. appearing for the State and the learned counsel appearing for the respondents (original accused nos.1 to 3). With their able assistance, we have carefully perused and scrutinized the entire notes of evidence brought on record by the prosecution.

7. The prosecution examined Dr. Satyanarayan Khastayya Goli (PW-8), who conducted the post-mortem on the body of deceased Madhukar and he stated the cause of death of deceased as Haemorrhagic shock due to stab injuries to spleen, left lung, heart and head. The prosecution has

also examined Dr. Arun Bapurao Bansode, the Medical Officer (PW-10) who stated that, Sudhakar sustained various injuries. But the real question is who are the real assailants. The prosecution has examined Sudhakar Gopinath Jadhav (PW-9), and in his evidence he stated that, he saw three thieves were running with a bag. He himself and his brother Madhukar chased the thieves. Thieves threw the bag and ran away. They chased the thieves upto the field of Ram Rathod, which is adjacent to road. Thieves jumped in the said field from the road. His brother Madhukar also jumped in the field and caught hold one thief. The said thief shouted, and therefore, the other two thieves returned and started beating his brother Madhukar. They beat his brother by means of sickle and knife. A blow of sickle was given on the head of Madhukar, as a result of which Madhukar fell on the ground. He stated that, again they assaulted Madhukar on stomach by means of knife, and the blow of sickle was also given on the head of PW-9.

A blow of knife was also given on the face of PW-9, which he tried to avoid, but he sustained the injury on his nose. He was assaulted by means of knife on his chest. Knife blow was also given on his back. Madhukar fell on the ground. He shouted due to beating and the thieves ran away. Number of persons were gathered near the house of PW-9. He sustained bleeding injuries. He was carried to the hospital. He stated that, the nose-ring worth Rs.2200/- of mother of informant Dhurabai was stolen by the thieves. After 3-4 days, he was discharged from the hospital. Then he stated the manner in which the identification parade was carried out. He identified the nose-ring of his mother.

8. In cross examination Sudhakar (PW-9) stated that, when he came out of room his father and two brothers also came out of their room. His mother went out of room, prior to him. When he went out of room, Prakash and others were not

present. Madhukar first chased the thieves. PW-9 also followed Madhukar and he was about 8 to 10 feet in front of him. While chasing the thieves, he also shouted. There is no house adjacent to road after the house of PW-9 towards southern side. He chased the thieves for about 400 feet. When Madhukar caught hold one thief, he was at a distance of 5 feet from him. Other two thieves were at a distance of 20 to 25 feet. When the thieves were beating to his brother, at the same time, they were also beating him. It appears that, though he stated that, he was at a distance of 5 feet from Madhukar, in second breath he stated that, at the same time, thieves were also assaulting him at the same spot. In his cross-examination he stated that, the portion marked 'A' and 'B' from his complaint read over to him not stated by him while lodging the complaint. In his cross-examination, he stated that, while lodging the complaint, he has stated that, he awoken and saw three thieves running and also that, thieves

threw the bag, which they were carrying, however, he cannot assign any reason why this is not mentioned in the complaint. It is admitted by PW-9 in his deposition that, the thieves were wearing Sweater and woolen caps at night.

9. The prosecution also examined Gopinath Parasram Jadhav (PW-7), the father of the deceased. The prosecution has not firmly established that, he saw thieves and he identified them during identification parade. PW-7 admitted in his evidence that, 4-5 days of arrest of accused, he was called to the police station. Therefore, possibility that, already he knew the accused cannot be ruled out.

10. Upon considering the evidence of all the prosecution witnesses in its entirety, the trial Court found that, the same suffers from inherent omissions, contradictions and improvements. The night of the incident was the night of Amavasya and

it was dark night. There is no evidence on record to show that, there was any source of light in that area.

11. The accused were immediately arrested within couple of days of the alleged incident i.e. on 28th October, 1998, however, the Tahsildar Bharat Nandu Kadam (PW-13) conducted identification parade after two months of the alleged incident i.e. on 03.01.1999. There is more than two months delay in conducting the identification parade. The Supreme Court in the case of **Musheer Khan @ Badshah Khan and anr V/s State of M.P.**², wherein in the facts of that case, identification parade was carried out after three months from the date of incident, held thus:-

"32. In so far as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24.01.2001 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 24.01.2001, 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 High Court on such delayed T.I. parade for which there is no explanation by the prosecution." (Underlines added)

In the said judgment it is further observed by the Supreme Court that, the test identification parade was conducted after a gap of over a month from date of arrest and after about 3 months from date of incident and no explanation is offered by prosecution for delay. No reliance can be placed on such delayed identification parade, particularly, when witness had only fleeting chance of seeing accused. The Supreme Court also observed in the said judgment that, the identification test is not a substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that

their progress with the investigation into the offence is proceeding on right lines. It further appears that, the Tahsildar while conducting the identification parade has not properly followed the guidelines/procedure prescribed for conducting identification parade. At this juncture, it would be apt to reproduce hereinbelow the guidelines laid down i.e. Para 16(2)(a) to (p) from Chapter I of Criminal Manual issued by the High Court of Judicature at Bombay, for the Guidance of the Criminal Courts and Officers Subordinate to it in respect of conduct of test identification parade, which read thus :-

"16(2)(a)The object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested.

(b) It should be fair and seem to be fair and every precaution must be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses'

attention being directed specifically to the suspected persons instead of equally to all the persons to be paraded.

(c) The Officer concerned with the case against the suspect, if present, must not take part in conducting the parade.

(d) The parade should be arranged by an officer who is not a police officer.

(e) After the commencement of the identification parade, every thing in respect of it should take place in the presence and hearing of the suspect, including any instruction to the witnesses attending it as to the procedure that is to be adopted.

(f) All unauthorised persons should be strictly excluded from the place of identification parade.

(g) The witnesses should be prevented from seeing the suspect before he is paraded with other persons, and witnesses who have previously seen a photograph or description of the suspect should not be led in

identifying the suspect by reason of their recollection of the photograph or description, as for instance by being shown the photograph or description, before the parade.

(h) The suspect should be placed among persons (if practicable eight or more) who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life. Two suspects of roughly of similar appearance should be paraded with at least twelve other persons. Where, however, the two suspects are not similar in appearance or where there are more than two suspects, separate parades should be held using different person on each parade.

(i) All members of a group of suspects more than two should not be paraded together. There should be more parades than one, each including not more than two. Two suspects of obviously dissimilar appearance should not be included in the same parade. Identification numbers should be concealed.

(j) The suspect should be allowed to select his own position in the line and should be expressly asked if he has any objection to the persons present with him or the arrangements made. He should be informed that if he so desires, he should have his Advocate (or a friend) present at the identification parade.

(k) The witnesses should be introduced one by one and, on leaving, should not be allowed to communicate with witnesses waiting to see the persons paraded; and the suspect should be informed that he is free to change his position after each witness has left.

(l) The witness should be asked whether the person he has come to identify is on the parade. He should be told that if he cannot make a positive identification, it is open for him to say so.

(m) Generally, a witness should be asked to touch any person whom he purports to identify, but if the witness is nervous at the prospect of having to do that (in case where the witness is a woman or a child who

has been victim of a sexual or violent assault or other frightening experience) and if prefers not to touch the person, identification by pointing out should be permitted.

(n) If a witness indicates someone, but is unable to identify him positively, this fact should be carefully noted by the officer conducting the parade and every other circumstances, (such as whether the suspect or any other person is identified or not), connected with it should be noted.

(o) If any request is made by a witness, for example to see the suspect with his hat on or his hat off or to see he person walk or to hear the person speak and there being no objection to the person paraded as asked for, the incident should be recorded.

(p) Where a parade has to be held in prison, a prison officer should be present throughout in-charge of the discipline of the prisoners who would take part. Otherwise, the police officer unconnected with the case, ought to be responsible for the parade. It must be

ensured that the parade is conducted in the same way as a parade outside prison."

There is procedure prescribed in para 16 of abovementioned Manual for conducting the identification parades. Clause (iv) and (v) of the said procedure read thus :-

"(iv) The parade should then be arranged in a room or a place which is such that the identifying witnesses, as well as the persons connected with the Police, should not be able to look into it.

(v) If there is only one accused person to be identified, there should be atleast half a dozen persons placed in the parade. If two accused persons are to be identified, then there should be about 10 or 12 persons in the parade. Not more than two accused should be placed in any single identification parade. Normally, the Police themselves will have called up the persons to be put in the parade; but the Executive Magistrate/Honorary Magistrate should see that they are persons of more or less the same physical appearance , and approximately of the same age, as the person to be identified. It is

desirable that innocent persons to be mixed should be different for each such parade."

12. It is not known that, whether the Tahsildar was aware about the aforementioned guidelines issued for holding the identification parades. Upon perusal of the clause (iv), while conducting the parade, the parade should be arranged in a room or a place which is such that the identifying witnesses, as well as the persons connected with the Police, should not be able to look into it. In clause (v), it is stated that, if there is only one accused person to be identified, there should be atleast half a dozen dummy persons should be placed in the parade. If two accused persons are to be identified, then there should be about 10 or 12 persons in the parade. Not more than two accused should be placed in any single identification parade. Normally, the police themselves will have called up the persons to be put in the parade; but the Executive

Magistrate/Honourary Magistrate should see that they are persons of more or less same physical appearance, and approximately of the same age, as the person to be identified. It is desirable that dummy persons to be mixed should be different for such parade.

13. So far as an alleged recovery/discovery is concerned, Dhurabai, whose nose-ring was forcibly pulled by the thieves, was not examined by the prosecution. She did not sustain any injuries, and therefore, the allegation that the nose-ring was forcibly pulled cannot sustain. The Supreme Court in the case of **Lal Singh (supra)** held that, the evidence of an identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earlier possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probabalizing

the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence. Moreover, the cases where the conviction is based not solely on the basis of identification in Court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the Court has to consider the evidence in its entirety.

14. The Supreme Court in the reported judgment in the case of **Prakash V/s State of Karnataka**³ in paras 15 and 16 held thus:-

"15. An identification parade is not mandatory nor can it be claimed by the suspect as a matter of right. The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim

3 (2014) 12 SCC 133

later in court at the trial. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable unless the suspect has been seen by the witness or victim for some length of time. In *Malkhansingh v. State of M.P.* it was held : (SCC pp. 751-52, para 7)

"7... The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."

16. However, if the suspect is known to the witness or victim or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always factual to the case of the prosecution. In *Visveswaran*

v. State, it was held : (SCC p. 78, para 11)

"11.....The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."

15. Upon an independent scrutiny and re-appreciation of entire evidence brought on record by the prosecution, it clearly emerges that, there are serious omissions, contradictions and improvements in the evidence of prosecution witnesses which goes to the root of the prosecution case and makes said evidence unworthy and unreliable. We are therefore of the view that, the findings recorded by the trial Court are in consonance with the evidence brought on record by the prosecution. There is no perversity as such. The view taken by the trial Court is plausible view. The Supreme Court in the case of **Muralidhar**

alias Gidda and another Vs. State of Karnataka⁴ in para 12 held thus:-

12. The approach of the appellate Court in the appeal against acquittal has been dealt with by this Court in *Tulsiram Kanu Vs.State*, AIR 1954 SC 1, *Madan Mohan Singh Vs. State of U.P.*, AIR 1954 SC 637, *Atley Vs. State of U.P.*, AIR 1955 SC 807, *Aher Raja Khima Vs. State of Saurashtra*, AIR 1956 SC 217, *Balbir Singh Vs. State of Punjab*, AIR 1957 SC 216, *M.G.Agarwal Vs. State of Maharashtra*, AIR 1963 SC 200, *Noor Khan Vs. State of Rajasthan*, AIR 1964 SC 286, *Khedu Mohton Vs. State of Bihar*, [1970] 2 SCC 450, *Shivaji Sahabrao Bobade Vs. State of Maharashtra*, [1973] 2 SCC 793, *Lekha Yadav Vs. State of Bihar*, [1973] 2 SCC 424, *Khem Karan Vs. State of U.P.*, [1974] 4 SCC 603, *Bishan Singh Vs. State of Punjab*, [1974] 3 SCC 288, *Umedbhai Jadavbhai Vs. Sate of Gujarat*, [1978] 1 SCC 228, *K.Gopal Reddy Vs. State of A.P.*,

4. 2014 [4] Mh.L.J.[Cri.] 353

[1979] 1 SCC 355, Tota Singh Vs. State of Punjab, [1987] 2 SCC 529, Ram Kumar Vs. State of Haryana, 1995 Supp [1] SCC 248, Madan Lal Vs. State of J & K, [1997] 7 SCC 677, Sambasivan Vs. State of Kerala, [1998] 5 SCC 412, Bhagwan Singh Vs. State of M.P. [2002] 4 SCC 85, Harijana Thirupala Vs. Public Prosecutor, High Court of A.P., [2002] 6 SCC 470, C. Antony Vs. K.G.Raghavan Nair, [2003] 1 SCC 1, State of Karnataka Vs. K.Gopalakrishna, [2005] 9 SCC 291, State of Goa Vs. Sanjay Thakran, [2007] 3 SCC 755 and Chandrappa Vs. State of Karnataka, [2007] 4 SCC 415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate Court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of

acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the powers of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial Court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate Court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate Court in interfering

with such conclusions is fully
justified; and (iv) Merely because
the appellate Court on re-
appreciation and re-evaluation of the
evidence is inclined to take a
different view, interference with the
judgment of acquittal is not
justified if the view taken by the
trial Court is a possible view. The
evenly balanced views of the evidence
must not result in the interference
by the appellate Court in the
judgment of the trial Court.

[Underlines supplied]

16. Therefore, in the light of discussion hereinabove, the Appeal filed by the State shall fail and accordingly, the same stands dismissed. The bail bonds of the respondents/accused, if any, same shall stand cancelled.

[S.M. GAVHANE, J.]

[S.S. SHINDE, J.]

SGA