

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 15th February, 2017
Decided on: 25th May, 2017

+ CRL.A. 534/2002

SACHIN

..... Appellant

Represented by: Mr. Harsh Prabhakar, Amicus
Curiae with Mr. Anirudh
Tanwar, Mr. Harjeet Singh
Sachdeva, Mr. Jai Bhardwaj,
Adv.

versus

THE STATE OF NCT OF DELHI

..... Respondent

Represented by: Ms. Meenakshi Chauhan, APP
with Insp. Rajeev Yadav, PSI
Sher Singh, PS Inder Puri.

+ CRL.A. 540/2002

AMIT YADAV

..... Appellant

Represented by: Mr. Rohit Sharma, Adv.

versus

STATE

..... Respondent

Represented by: Ms. Meenakshi Chauhan, APP
with Insp. Rajeev Yadav, PSI
Sher Singh, PS Inder Puri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Vide impugned judgment dated 2nd April, 2002, Sachin and Amit Yadav were convicted for the offences punishable under Sections 376(2)(g), 341/34 and 506-II IPC. Vide order on sentence dated 21st May, 2002 they were sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.100/- for offence punishable under Section

376(2)(g)/34 IPC, simple imprisonment for period of one month for offence punishable under Section 341/34 IPC and rigorous imprisonment for a period of one year for offence punishable under Section 506 Part II/34 IPC.

2. Learned counsel for the appellants submits that the testimony of PW-1 prosecutrix suffers from material contradictions vis-a-vis her statement recorded by the Investigating Agency. Variances in the version of the prosecutrix make it unsafe to act upon her testimony without corroboration. The testimony of PW-2, husband of the prosecutrix, also suffers from material improvements/contradictions vis-a-vis the statement recorded under Section 161 Cr.P.C. Though it is the version of the prosecutrix that she was successively subjected to sexual intercourse against her will, however, she did not suffer any external injury and her clothes were not torn. The circumstances leading to the apprehension of Sachin are shrouded in suspicion. Placing reliance on the decisions reported as (2013) 9 SCC 113 Kaini Rajan v. State of Kerala, (2003) 2 SCC 401 Lallu Manjhi v. State of Jharkhand and (2005) 9 SCC 769 State of Punjab v. Praveen Kumar, it is contended that when the oral testimony of the sole witness is found not to be wholly reliable, the Court can rely upon the same only after corroboration from an independent source.

3. Per contra learned APP for the State submits that though the prosecutrix was declared hostile, however, she stated that Amit, Sachin and 'P' had raped her and correctly identified them. The prosecutrix and her husband were consistent regarding the time and place of the incident. As per the FSL report, semen was detected on the petticoat of the prosecutrix. Relying on the decisions reported as 1991 (3) SCC 627 Khujii v. State of M.P., 1998 (8) SCC 624 Koli Lakhman Bhai Chanabhai v. State of Gujarat

and (2010) 8 SCC 536 Prithi v. State of Karnataka, it is submitted that the evidence of a hostile witness is not effaced altogether and the same can be accepted to the extent found reliable on a careful scrutiny. Referring to the decision reported as 1971 CrLJ 305 Jadunath Singh v. State of U.P. it is submitted that absence of test identification parade is not necessarily fatal and in the present case, till husband of the prosecutrix came back with police, the prosecutrix had enough time to have sufficient impression about the identity of the accused persons.

4. FIR No. 23/2001 was registered at PS Inderpuri under Sections 376/506/341/34 IPC on the statement of the prosecutrix wherein she stated that on 22nd January, 2001 around 4:00 P.M. she along with her husband had gone to the forest of village Todapur to collect firewood. While they were searching for firewood, around 5:00 P.M., 6/7 boys stopped them. Two boys pulled husband of the prosecutrix, and took him towards bushes. Five boys took the prosecutrix towards the forest. In the meantime, one of the two boys who had taken her husband came towards the prosecutrix and made her lie down on the ground and started committing sexual assault upon her. When she raised alarm, the other five boys standing there did not help her. Those five boys witnessing the occurrence remarked that Sachin (appellant herein) should hurry up otherwise somebody would come. Thereafter, Sachin gagged the mouth of the prosecutrix and threatened her not to raise alarm otherwise he would kill her. Sachin removed his pants, lifted the saree of the prosecutrix and committed rape upon her. Thereafter, rape was committed by two other boys and other three boys were waiting for their turn. In the meanwhile, husband of the prosecutrix, rescued himself and fled towards the village Todapur. Around 6:00 P.M., husband of the prosecutrix reached the

police station, met PW-10 HC Ganga Ram and narrated the incident to him. HC Ganga Ram along with Constable Sanjay Kumar and her husband rushed towards the forest where they found the prosecutrix. The police with the help of husband of the prosecutrix, apprehended five boys whose names were revealed as 'P' @ Jhumar @ Bona, who committed rape upon her and had threatened her, Praveen @ Bablu, Rajkumar, 'S' and 'M'. The appellants Amit and Sachin, who had absconded, had also committed rape upon the prosecutrix. Thereafter, the prosecutrix was taken for medical examination. PW-13 SI Puran Chand prepared the site plan. Amit was apprehended by SI Puran Chand on 29th January, 2001. Sachin was arrested on 7th February, 2001. Medical examination of all the accused persons was conducted.

5. Charge sheet for offences punishable under Sections 376(2)(g), 341/34, 506-II and 120B IPC was filed against 'P' @ Jhumar @ Bona, Sachin, Amit Yadav, Praveen @ Bablu and Raj Kumar. Report qua 'S' and 'M' was filed before Juvenile Justice Board as they were minor. Since during the course of trial, the prosecutrix did not assign any role to Raj Kumar and Praveen @ Bablu, they were acquitted by the impugned judgment whereas 'P', Amit Yadav and Sachin were convicted. On an application filed by 'P' claiming the benefit of being juvenile, learned Trial Court held him to be a juvenile at the time of the offence and sent the matter to the Juvenile Justice Board. Hence the two appeals before this Court by Sachin and Amit Yadav.

6. The prosecutrix deposed in Court in conformity with the statement made before the police on the basis of which FIR was recorded. She stated that one of the boys raped her twice and remaining boys raped her once. One of the boys had caught hold of her hands and one boy had gagged her mouth.

She pointed out towards Sachin and stated that he had gagged her mouth and committed rape upon her and he was one of the boys who had taken her husband towards the bushes. Thereafter, she pointed out towards 'P' and stated that he committed rape upon her twice. While pointing out towards Amit, she stated that he also committed rape upon her and he was the other boy who had taken her husband towards the bushes. Since the prosecutrix did not support the case qua Raj Kumar and Praveen, she was declared hostile. During cross examination, she stated that the police had only apprehended 'P' in her presence. She denied the suggestion that Amit and Sachin were apprehended in her presence. She further stated that at the time of incident she had sustained injuries on her elbow, feet and head.

7. Husband of the prosecutrix, corroborated the version of the prosecutrix. He further stated that before going to the Police Station he went to his jhuggi and narrated the facts to the jhuggiwalas. During cross-examination he stated that he did not state to the police that Praveen and Rajkumar were arrested in his presence.

8. PW-4 Dr. Shivani Aggarwal, Safdurjang Hospital, deposed that she had examined the prosecutrix who had come with the alleged history of gang rape by three persons namely Jhuman, 'S' and Sachin. During her medical examination, there was no evidence of bite marks or nail marks or external injuries specially on breasts and external genitals. Hymen was not intact. She exhibited the MLC as Ex. PW-4/1.

9. As per the FSL report exhibited as Ex. PW-13/9, human semen was detected on Exhibit '1' (petticoat having whitish stains), Exhibit '2a' (a piece of cotton wool swab described as 'vaginal swab') and Exhibit '2b' (a piece of cotton wool swab described as 'cervical swab').

10. Assailing the conviction, learned counsels for the appellants contend that even as per the prosecution case, the appellants were not arrested at the spot. The prosecutrix in his examination in chief even on suggestion of learned APP denied that appellants were apprehended on her pointing out thus not conducting of the test identification parade is fatal to the prosecution case and the appellants are entitled to be acquitted on this count.

11. No doubt the case of the prosecution as deposed by the investigating officer was that Sachin and Amit Yadav were apprehended at the instance of the prosecutrix, who denied the same when she was examined in the witness box however it is well settled that test identification parade is an aid in investigation and if the witness has sufficient time to see the accused then even identification for the first time in the Court can also be accepted. The offence took place on 22nd January, 2001 and the prosecutrix was examined before the Court on 3rd August, 2001 and she had sufficient time to see the accused persons who raped her. As regards Sachin, his name cropped up even in the FIR because the other co-accused took his name and asked him to hurry up.

12. Supreme Court in the decision reported as AIR 2008 SC 1813 MD. Kalam @ Abdul Kalam Vs. State of Rajasthan culling out the law on test identification parade held-

“7. As was observed by this Court in Matru v. State of U.P.(1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain (1973(2) SCC 406). The necessity for holding an

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

8. 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 Indian Evidence Act, 1872 (in short the 'Evidence Act') the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence,

however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Administration* (AIR 1958 SC 350), *Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh* (AIR 1960 SC 1340), *Budhsen and Anr. v. State of U.P.* (AIR 1970 SC 1321) and *Rameshwar Singh v. State of Jammu and Kashmir* (AIR 1972 SC 102).

9. In *Jadunath Singh and Anr. v. The State of Uttar Pradesh* (1977) 3 SCC 518, the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive considerations of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in *Parkash Chand Sogani v. The State of Rajasthan Criminal Appeal No. 92 of 1956* decided on January 15, 1957, wherein it was observed:

It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to

him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person who is well-known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances.

10. The Court concluded:

“It seems to us that it has been clearly laid down by this Court, in *Parkash Chand Sogani v. The State of Rajasthan* (supra) (AIR, Cri LJ), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case.”

11. In *Harbhajan Singh v. State of Jammu and Kashmir* (1975) 4 SCC 480 though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in Court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16th December, 1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held:

*“In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in *Jadunath Singh v. State of U.P.* (AIR 1971 SC 363) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant.”*

12. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.

*13. In *Ram Nath Mahto v. State of Bihar* (1996) 8 SCC 630) this Court upheld the conviction of the appellant even when the witness while deposing in Court did not identify the accused out of fear, though he had identified him in the test identification parade. This Court noticed the observations of the trial Judge who had recorded his remarks about the demeanor that the witness perhaps was afraid of the accused as he was trembling at the stare of Ram Nath -accused. This Court also relied upon the evidence of the Magistrate, PW-7 who had conducted the test identification parade in which the witness had identified the appellant. This Court found, that in the circumstances if the Courts below had convicted the appellant, there was no reason to*

interfere.

14. In Suresh Chandra Bahri v. State of Bihar (1995 Supp (1) SCC 80), this Court held that it is well settled that substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. From this point of view it is a matter of great importance, both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. Thereafter this Court observed:

“But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TI parade.

15. In State of Uttar Pradesh v. Boota Singh and Ors. (1979)1 SCC 31), this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

16. In Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat (2000 (1) SCC 358) after considering the earlier decisions this Court observed:

“It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and

circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of State (Delhi Admn.) v. V.C. Shukla MANU/SC/0545/1980 : 1980CriLJ965 wherein also Fazal Ali, J. speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye-witnesses. It, therefore, cannot be held, as tried to be submitted by learned Counsel for the appellants, that in the absence of a test identification parade, the evidence of an eye-witness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned Counsel for the appellants that the later decisions of this Court in the case of Rajesh Govind Jagesha v. State of Maharashtra MANU/SC/0703/1999 : 2000CriLJ380 and State of H.P. v. Lekh Raj MANU/SC/0714/1999 : 2000CriLJ44 , had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned Counsel for the appellants that the evidence of, these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eye-witnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance

and identity would well within imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them.”

17. These aspects were also highlighted in Malkhansingh and Ors. v. State of M.P. (2003 (5) SCC 746) and Munshi Singh Gautam (dead) and Ors. v. State of M.P. (2005) (9) SCC 631).

18. In view of the evidence which the trial Court and the High Court have analysed and the identification by PW-3 in the TI Parade, there is no infirmity in the conclusions of guilt of the accused. The appellant's conviction is accordingly maintained. The sentence also does not warrant interference.”

13. Further contention of learned counsel for the appellant is that though the prosecutrix deposed that she suffered injuries on her elbow, feet and head however the MLC does not reveal any external injuries. Though no external injury had been received by the prosecutrix however since after the incident within three hours the FIR was registered and she was medically examined, semen stains of AB Group were found on her petticoat, vaginal swab and cervical swab. Testimony of the husband of the prosecutrix who immediately ran to call for the help got two police officers who apprehended five accused at the spot and the FSL report are sufficient to corroborate the version of the prosecutrix which can be relied upon even in the absence of corroboration as noted above.

14. Learned counsels for the appellants have laid emphasis on the fact that the prosecutrix was declared hostile for the reason she failed to attribute any role to Praveen @ Bablu and Raj Kumar due to which they were acquitted. It is well settled that testimony of a hostile witness does not get effaced

totally and conviction can be based on the part testimony which is corroborated in material particular. (See Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh (1991) 3 SCC 627). Though Praveen @ Bablu and Raj Kumar were apprehended at the spot however they were the ones who stood on one side and did not commit rape on the prosecutrix. In such a situation, the possibility of prosecutrix not having seen them properly cannot be ruled out. Further merely because she did not identify Praveen @ Bablu and Raj Kumar as the two boys along with the appellants, who stood on one side, her testimony qua the appellants herein cannot be ignored.

15. In view of the aforesaid discussion, the impugned order of conviction and order on sentence are upheld. Bail bonds and surety bonds of appellants are cancelled. They will surrender to custody to undergo the remaining sentence.

16. Appeals are dismissed.

17. TCR be returned.

18. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

(MUKTA GUPTA)
JUDGE

MAY 25, 2017
‘v mittal’