

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 267 of 2011**

1. Nand Kumar Soni S/o Dhanesh Ram, aged about 25 years,
 2. Nohar Singh Markam S/o Phool Singh Markam, aged about 20 years,
- Both R/o village Mukundpur, Police Station Sihawa,
District Dhamtari, CG

---- Appellants**Versus**

1. State of Chhattisgarh through the Police Station
Magarlod, District Dhamtari, CG

---- Respondent**CRA No. 348 of 2011**

1. Harik Ram @ Hariklal Netam S/o Shri Paklu Ram Salam,
Aged about 22 years,
 2. Roop Lal Markam S/o Shri Hira Singh, aged about 20 years,
 3. Gangesh Kumar Salam S/o Shri Gada Ram, aged about 19 years,
- All R/o Village Rautmuda, Police Station Magarlod,
District Dhamtari, CG

---- Appellants**Versus**

1. State of Chhattisgarh through the Police Station
Magarlod, District Dhamtari, CG

--- Respondent**AND****CRA No. 851 of 2011**

1. Manoj Kumar Markam, age 20 years, son of Shree
Goverdhan Singh Markam, R/o Village Mukundpur, PS
Sihava, District Dhamtari, CG

Appellant**Versus**

1. State of Chhattisgarh through the Police Station
Magarlod, District Dhamtari, CG

---- Respondent

For Appellants	:	Shri R.K. Pali, Shri Prasoon Agrawal and Shri Kunal Das, Advocates
For Respondent/State	:	Shri Vivek Sharma, GA

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgment on Board by Pritinker Diwaker, J

23/01/2018

As the aforesaid three Criminal Appeals arise out of the same judgment dated 04.03.2011 passed by Additional Sessions Judge (FTC) Dhamtari in Sessions Trial No. 80/2010 convicting the accused/appellants under Section 395/34 IPC and sentencing each of them to undergo imprisonment for life and pay fine of Rs. 500/- plus default stipulations, they are disposed of by this common judgment.

2. As per the case of prosecution, on 13.08.2010 FIR (Ex.P-3) was lodged by Abdul Haseeb Khan (PW-1) to the effect that in the intervening night of 10/11.07.2010 when he along with his family members was sleeping in his house someone outside asked him to open the door and that from the peep-hole he saw 7-8 persons standing outside his house, out of whom one was carrying gun; one was in naxalite uniform and the remaining ones were wearing black dress. On that day when he did not open the door, he smashed the window glass

pans and ran away. Thereafter, in the intervening night of 15/16.07.2010 when he along with other family members was sleeping in his house, someone again asked him to open the door and when he opened the door, they took him out of the house and demanded Rs. 2,00,000/- and when he showed his inability to pay that much amount, they reduced their demand to Rs. 50,000/- and ultimately they took away Rs. 20,000/-. On this, they asked to give remaining Rs. 30,000/- later. Out of the total accused persons, PW-1 claims to identify the three and that the remaining ones are stated to have covered their face with black mask and therefore he could not see them. While leaving his house, they took away a bag also containing three scarfs. Based on this FIR, offence under Section 395 IPC was registered against Manoj Markam and 6-7 others. On 12.08.2010 itself on the memorandum of accused Harik Ram Ex. P-7, seizure of air gun, black colour mask, photocopy of ration card of Chainu Ram and cash of Rs. 500/- was made from him under Ex. P-8; on the memorandum of accused Roop Lal Ex. P-9, seizure of knife, voter ID card of Sahnu Ram and a cash of Rs. 500/- was made from him under Ex. P-10; on the memorandum of accused Gangesh Kumar Ex. P-11, seizure of knife, bag (*pitthu*), Naxalite uniform and a cash of Rs. 500/- was made from him under Ex. P-12; on the memorandum of accused Nand Kumar Ex. P-13, seizure of black mask and a cash of Rs. 500/- was made from him under Ex. P-14; on the memorandum of accused Nohar Singh Ex. P-15, seizure of gun, voter ID card of Govind Singh Thakur and cash of Rs.

1000/- was made from him under Ex. P-16. Likewise, 49 currency notes of 500 denomination totaling to Rs. 24,500/- were seized from Hemant Kumar Sahu (PW-3) under Ex. P-17. On 09.10.2010, Test Identification Parade (TIP for short) was conducted vide Ex. P-6 by Prakash Kumar Tandon (PW-11) – the Naib Tehsildar, and it is said that the complainant (PW-1) in whose house dacoity was committed identified the accused persons namely Harik Ram, Rooplal, Gangesh Kumar, Nand Kumar and Nohar Singh. After investigation, challan was filed by the police under Section 395 IPC followed by framing of charge by Court below accordingly.

3. In order to prove its case the prosecution has examined 11 witnesses including the victims, in support of its case. Statements of the accused/appellants were also recorded under Section 313 of the Code of Criminal Procedure in which they denied their guilt and pleaded innocence and false implication in the case.

4. After hearing the parties the Court below has convicted and sentenced the accused/appellants as mentioned above by the judgment impugned.

5. Counsel for the accused/appellants submit as under:

(i) That there is inordinately delay of 28 days in lodging the FIR.

(ii) That the alleged dacoity was committed in the house of the victims in the intervening night of 15/16.07.2010 but

surprisingly they kept quiet till 13.08.2010.

(iii) That the unexplained inordinate delay in lodging the FIR appears to be quite un-natural to be accepted because except saying that on account of fear the report could not be lodged, no plausible and convincing reason has been assigned by the complaint.

(iv) That the entire story appears to have been cooked up against the accused/appellants only after the arrest of Manoj Markam – accused in some other case relating to dacoity and that too after publication of his photograph in a newspaper.

(v) That though all the accused persons were arrested on 04.09.2010 but their TIP was conducted on 09.10.2010 by PW-11 and no explanation has been offered by the prosecution for this inordinate delay in so doing. This delay in conducting the TIP is fatal to the case of the prosecution and on this ground alone the accused/appellants are entitled for acquittal.

(vi) That as per the FIR and the statements of the victims, some of the accused persons had covered their faces with the piece of cloth and therefore the question of their identification becomes doubtful particularly when there is no evidence to show that they were kept *Baparda* before conducting TIP.

(vii) That it is literally imposible for the prosecution to keep all the accused *Baparda* for more than two months.

(viii) That as many as 09 TIPs were conducted by the prosecution on 09.10.2010 itself in number of cases without mixing the persons properly and therefore also the TIP is

doubtful.

(ix) That there is no evidence to show that the seized articles were the same which are said to have been taken away by the accused/appellants because no identification in respect of those things has been conducted.

(x) That the accused/appellants are in jail for about seven and a half years, that they are rustic villagers and have been implicated in a false case, they may be set free forthwith.

6. On the other hand counsel for the respondent/State supports the judgment impugned and submits that the findings recorded by the Court below convicting the accused/appellants under Section 395/34 IPC are strictly in accordance with law and there is no infirmity in the same.

7. Heard counsel for the parties and perused the evidence available on record.

8. Abdul Haseeb Khan (PW-1) has stated that in the intervening night of 15.07.2010 and 16.07.2010 when he was sleeping in his house, some persons came outside his house and asked to open the door. On hearing this, when his father opened the door, three persons entered his house and the five were standing outside. Out of the persons entering the house, two were carrying gun and the one sword and all of them were in green colour uniform. According to this witness, the accused persons demanded Rs. 2,00,000/- and when he expressed his inability to part with that much amount, they came down to Rs. 50,000/-. He however gave them Rs.

20,000/- by taking out of the almirah but the accused persons were had asked him to give Rs. 30,000/- later. He is stated to have identified three persons in the Court by touching them as he had seen their faces when they entered his house. Three days prior to incident also the accused persons - five in number, had come to his house and asked him to open the door. He is stated to have identified all the accused/appellants in the test identification parade conducted at Dhamtari jail. Junet Khan (PW-2) - the witness to memorandum and seizure has supported the case of the prosecution. Hemant Kumar Sahu (PW-3) has stated that vide Ex. P-17 the police had seized Rs. 24,500/- from him which he had borrowed from accused Harikram. According to him, subsequently he came to know that Harikram had brought that amount after committing dacoity. Shyam Lal Sahu (PW-4) - the witness to test identification parade conducted under Ex. P-6 has supported the case of the prosecution. Rajesh Kumar Sahu (PW-7) is the investigating officer who has duly supported the case of the prosecution. Lalji Dhruv (PW-8) is the Patwari who prepared spot map Ex. P-5. Prakash Kumar Tandon (PW-11) is the Nayab Tehsildar who conducted test identification parade.

9. True it is that two accused persons have been identified in the test identification parade conducted by PW-11 on 9.10.2010 whereas in the Court only three persons namely Nand Kumar, Nohar Singh and Manoj have been identified. However, there is no evidence on record to show that from 04.09.2010 when the accused persons were arrested, to

09.10.2010 when the TIP was conducted they were kept *Baparda*. On the contrary, the evidence on record reflects that after arrest of the accused persons on 12.08.2010 their memornadums were recorded at village Mukundpur itself and being so the possibility of accused persons being seen by the witnesses before the TIP was conducted cannot be ruled out. Furthermore, two months' delay in conducting the TIP has also not been properly explained by the prosecution. Record shows that from the date of arrest till the date when the TIP was conducted, the accused persons were taken on remand on many occasions and therefore, in the absence of any positive evidence that all the time they were kept *Baparda*, TIP falls within the shadow of doubt. Needless to say, to keep one *Baparda* for such a long period is not practically possible.

10. It is a settled position of law that the test identification parade should be conducted as soon as possible after the arrest of the accused and this becomes necessary to eliminate the possibility of accused being shown to witnesses prior to parade. It is also a settled position of law that delay in conducting test identification parade is not always fatal especially when sufficient cause has been assigned by the prosecution to substantiate such delay. In the case of **Lal Singh and others v. State of UP** reported in **(2003) 12 SCC 554** while discussing the cases germane to the question of identification parades and the effect of delay in conducting them it has been held by the Apex Court as under:

“43. It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification at the earliest-possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probabalising the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in Court, but on the basis of other corroborative evidence, such recovery of looted articles, stand on a different footing and the Court has to consider the evidence in its entirety.”

11. In the case of **Anil Kumar v. State of UP (2003) 3**

SCC 569 it has been held by the Apex Court as under:

“It is to be seen that apart from stating that delay throws a doubt on the genuiness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal... A mere lapse of some days is not enough to erase the facial expressions of assailants from the memory of father and mother who have seen them killing their son....”

12. In another case of **Pramod Mandal v. State of Bihar**

(2004) 13 SCC 150 placing reliance on the case of *Anil*

Kumar (supra) the Apex Court observed as under:

“It is neither possible nor prudent to lay down any invariable rule as to the period within which a Test Identification Parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the Courts of fact to decide in the facts and circumstances of this case. If a rule is laid down prescribing a period within which a Test Identification Parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their

very nature may be witnessed by a single witness, such as rape. The offence may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of their being only one identifying witness. Prudence therefore, demands that these matters must be left to the wisdom of the Courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

13. In the matter of **Mullah v. State of UP (2010) 3 SCC**

508 it has been held by the Apex Court as under:

"Therefore, the following principles regarding identification parade emerge: first an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of the witnesses; this condition can be revoked if proper explanation justifying the delay is provided; and (3) the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses."

14. Yet another important aspect of the case which creates doubt in the prosecution story is that dacoity has been committed in the house of as many as six persons in this case and in four other cases where also the accused persons have been convicted but yet these victims kept quiet for about 30 days in lodging the FIR. In the case in hand the incident took place in the intervening night of 10/11.7.2010 whereas for the first time the matter was reported to the police by one of the victims namely Abdul Haseeb Khan (PW-1) on 13.08.2010. This un-explained inordinate delay in lodging the FIR also creates doubt in the prosecution story. Dealing with the question of delay in lodging FIR in the matter of **Dilwar Singh**

v. State of Delhi reported in **(2007) 12 SCC 641** it has been held by the Apex Court as under:

“9. In criminal trial one of the cardinal principles for the court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the court always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case.

10. In *Thulia Kali v. State of TN* (1972) 3 SCC 393 it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

11. In *RamJag v. State of UP* (1974) 4 SCC 201 the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution.

12. The complainant has attempted to explain the delay by stating that the matter was reported to the police but the police did not take any action. Such statement can hardly be taken to have explained the delay. It is the wimplest of things to contend that the police, though report had been lodged with it, had not taken any steps. But it has to be established by calling for the necessary records from the police to substantiate that in fact a report with the police had been lodged and that the police failed to take up the case.”

15. Further in the matter of **Muttaicose alias Subramani v. State of Tamilnadu represented by Inspector of Police** reported in **(2017) 8 SCC 598** it has been held by the Apex Court as under:

“9. In *Ashok Kumar Chaudhary v. State of Bihar* (2008) 12 SCC 173 this Court has observed as under:

16. It is trite that mere delay in lodging the first information report is not by itself fatal to the case of the prosecution. Nevertheless, it is a relevant factor of which the court is obliged to take notice and examine whether any explanation for the delay has been offered and if offered, whether it is satisfactory or not. If no satisfactory explanation is forthcoming, an adverse inference may be drawn against the prosecution. However, in the event, the delay is properly and satisfactorily explained; the prosecution case cannot be thrown out merely on the ground of delay in lodging the FIR. Obviously, the explanation has to be considered in the light of the totality of the facts and circumstances of the case.

10. In *Ravinder Kumar v. State of Punjab* (2001) 7 SCC 690 this Court observed as under:

14. When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquility of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is, the persons who are supposed to give such information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident.”

16. Another important aspect of the case is that the articles seized on the basis of memorandums of the accused persons have not been put to identification proceedings. As regards seizure of the currency notes, they being commonly available in the market for circulation, cannot be connected with the crime in question being the same currency notes which were taken away by the accused persons from various victims. This fact has even been admitted by the investigating officer.

17. Thus viewing the aforementioned lacuna in the prosecution case in the light of the legal position adumberted above, this Court is of the considered opinion that the prosecution has not been able to prove its case to prove its case beyond all reasonable doubt and for that the accused/appellants are entitled to have the benefit of doubt. Accordingly, the appeals are allowed, the judgment impugned is set aside and the accused/appellants are acquitted of the charge levelled against them. They being in jail are directed to be released forthwith if not required in any other case.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(Sanjay Agrawal)

Judge