

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 30-11-2018****Pronounced on 4-12-2018****CRIMINAL APPEAL No. 1060/2002**

(Arising out of judgment of conviction and order of sentence dated 25-9-2002 passed by Third Additional Sessions Judge, Raipur (CG) in ST No. 186/2001)

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Anand Soni, S/o. Salikram Soni, aged about 30 years, occupation Icecream Parlour, R/o. Samta Colony, PS Saraswati Nagar, Tahsil and District Raipur (CG)

---Appellant**-VERSUS-**

State of Chhattisgarh through P.S. Tikerapara, Raipur, District Raipur (CG)

---Respondent

For appellant : Shri Adil Minhaj, Adv.

For State : Shri R.K. Pandey, P.L.

Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT

1. In this criminal appeal the challenge is levied to the judgment of conviction and order of sentence dated 25-9-2002 passed by Third Additional Sessions Judge, Raipur (CG) in ST No. 186/2001 whereby and whereunder he convicted the appellant for offence punishable under Section 324 of the Indian Penal Code (in brevity 'IPC') and sentenced him to undergo RI for 2 years and to pay a fine of Rs. 500/-, in default of payment of fine, to further undergo additional RI for one month.

2. In brief the prosecution story is that on 25-1-2001 at about 10 PM complainant Satish Kumar was returning back to his house crossing the pond. At Virbhadra Nagar one unknown person having fair complex caused injury on his right side of chest and right side of abdomen by knife. The other persons who were present there were shouting that Anand Soni had caused the injuries. Complainant reached in his house, narrated the incident to his mother. She admitted him in the hospital. The complainant said that he will identify the miscreant on seeing. ASI S.P. Singh reached in MECAHARA Hospital on the information given by the employees of MECAHARA Hospital and lodged Dehati Nalishi on 25-1-2001. Thereafter he lodged FIR in police station Tikrapara, Raipur on 26-1-2001. After the investigation, a charge sheet was filed against him. The trial Court framed the charge against him under Section 307 of the IPC. After completion of trial, trial Court convicted and sentenced him as aforesaid.

3. Shri Adil Minhaj, counsel for the appellant argued that trial Court has not appreciated the evidence in proper perspective. There is no test identification parade conducted by the investigating officer. Mere on the basis of Dock identification which is not corroborated by any other evidence, he cannot be convicted. Thus, the conviction and sentence of him are bad in eyes of law. Hence, he may be acquitted of the aforesaid charge.

4. Counsel for the State argued that the conviction and sentence of the appellant are based on clinching evidence. The conviction and sentence of the appellant do not call for any interference by this Court.

5. P.W. 5 Satish Kumar says in para 1 of his statement given on oath that appellant had caused injury on his right side of abdomen. He

says in para 4 during cross-examination that appellant was shouting that he is Anand Soni. He says in para 8 that the person who caused injury to him was fair in complexion.

6. P.W. 3 Kamlabai who is mother of the complainant says in para 2 of her statement given on oath that his son had told that assailant was shouting that he is Anand Soni.

7. Counsel for the appellant placed reliance on the decision of Hon'ble Supreme Court in the matter of Dara Singh -v- **Rabindra Kumar Pal alias Dara Singh -v- Republic of India** [(2011) 2 SCC 490], para 42 and 43 of which are relevant and quoted below :-

“**42.** In the same manner, showing photographs of the miscreants and identification for the first time in the trial court without being corroborated by TIP held before a Magistrate or without any other material may not be helpful to the prosecution case. To put it clearly, the evidence of witness given in the court as to the identification may be accepted only if he identified the same persons in a previously held TIP in the jail.

43. It is true that absence of TIP may not be fatal to the prosecution. In the case on hand, A-1 and A-3 were identified and also corroborated by the evidence of slogans given in his name and each one of the witnesses asserted the said aspect insofar as they are concerned. We have also adverted to the fact that none of these witnesses named the offenders in their statements except few recorded by IOs in the course of investigation. Though an explanation was offered that out of fear they did not name the offenders, the fact remains, on the next day of the incident, the Executive Magistrate and top-level police officers were camping in the village for quite some time. Inasmuch as evidence of the identification of the accused during trial for the first time is inherently weak in character, as a safe rule of prudence, generally it is desirable to 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 TIP. Though some of them were identified by the photographs except A-1 and A-3, no other corroborative material was shown by the prosecution.”

8. Hon'ble Supreme Court in the matter of **Manu Sharma -v- State (NCT of Delhi)** [(2010) 6 SCC 1], in para 254 held that :-

“254. Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by Section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of Section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in court. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation.”

It was further held in para 256 :-

“256. ... ‘7. 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 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 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. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.'

It was further held in para 259 :-

"259. ... The photo identification and TIP are only aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath."

9. Hon'ble Supreme Court in the matter of **Umar Abdul Sakoor Sorathia -v- Narcotic Control Bureau** [(2000) 1 SCC 138], held in para 12 that :-

"12. In the present case prosecution does not say that they would rest with the identification made by Mr Mkhathswa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the court. Then alone it would become substantive evidence. But that does not mean that at this stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time."

10. The Hon'ble Supreme Court in the matter of **Dana Yadav -v - State of Bihar** [(2002) 7 SCC 295], concluded in para 38, relevant portion of the same is quoted below :-

“(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.”

11. In the case in hand no test identification parade was conducted by the investigating officer.

12. Prosecution failed to examine any person who was present at the spot who may say that at the time of incident he had shouted that Anand Soni had caused injury, and for saying so, such was the reason.

13. There is omission in Ex. P-4 Dehati Nalishi that assailant had told that he is Anand Soni. This omission is material and important. Thus, this Court disbelieves aforesaid statements of para 4 of P.W. 5 Satish Kumar, para 2 of P.W. 3 Kamlabai in the reference that assailant was shouting that he is Anand Soni.

14. P.W. 5 Satish Kumar says in para 8 that appellant was dark in complexion.

15. As per the prosecution story complainant had traced the house of appellant and identified him. But P.W. 5 Satish Kumar does not say that he had traced the house of the appellant and identified him and

informed police about these facts. Instead of it, he says in para 9 that when the police had told him that they had arrested the assailant then he went to the police station and identified appellant.

16. As per the aforesaid judicial precedents of Hon'ble Supreme Court in **Rabindra Kumar Pal alias Dara Singh** (supra), **Manu Sharma** (supra), **Umar Abdul Sakoor Sorathiya** (supra) and **Dana Yadav** (supra), this Court finds that the identification in the Court is a substantive piece of evidence. Mere identification of the accused at the trial for first time is inherently of a weak type of evidence. The purpose of test identification parade is to test and strengthen the trustworthiness of dock identification. TIP is not a substantive piece of evidence. As per the safe rule of prudence, dock identification parade requires corroboration in the form of either TIP or by other evidence. Its exception is that if the court is impressed by a particular witness whose testimony can safely be relied without such corroboration and court act upon it. In the case in hand aforesaid statement of para 2 of P.W. 5 Satish Kumar so far as it relates to the identification of appellant in dock is not corroborated with TIP or any other evidence. It is not an exceptional case where dock identification of appellant by the complainant may be relied without any corroboration. In these circumstances, and looking to the above mentioned circumstances, this Court finds that the aforesaid statement of para 2 of P.W. 5 Satish Kumar so far as it relates to dock identification of the appellant is not believable, thus this Court disbelieves it and it cannot be used to convict the appellant.

17. After the appreciation of the evidence discussed herebefore, this Court finds that prosecution failed to prove beyond reasonable doubt

the charge punishable under Section 324 of the IPC against the appellant. Thus, this Court sets aside the aforesaid judgment of conviction and order of sentence. The appellant is acquitted of the charge punishable under Section 324 of the IPC.

18. The fine amount if deposited by the appellant be returned to him after expiration of the prescribed period for legal action available to the parties.

19. The appellant is reported to be on bail. His bail and bond are cancelled subject to provision of Section 437-A of the Cr.P.C.

20. Appeal allowed.

Sd/-
(Sharad Kumar Gupta)
Judge