

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.290 OF 1997

1. Rajendrasing @ Raju Babasingh Soori,
Occ.Fitter/Turner, R/o.Andheri Char Bungalow,
Kamgar Nagar, Room No.93, Andheri (West),
Mumbai.

2. Mohabat Hussain Abdul Hassan,
Age 30 years, Occ.Driver, R/o.Marina Market,
Khairani Road, Saki Naka, Mumbai-400 072.

Appellants

versus

The State of Maharashtra

Respondent

**WITH
CRIMINAL APPEAL NO.302 OF 1997**

Salim Mehaboob Khan, at present confined
in Thane Central Prison, Thane

Appellant

versus

The State of Maharashtra

Respondent

Mr.Bhavesh Thakur i/by S.R.Pasbola and Nitin H. Sejpal for
appellants.

Mr.S.R.Agarkar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

Date of reserving the judgment : 3rd February 2018

Date of pronouncing the judgment : 17th February 2018

JUDGMENT :

1. The appellants are convicted for offences punishable under Sections 392 read with Section 34 of Indian Penal Code ('IPC'). They are sentenced to suffer rigorous imprisonment for a period of eight years and to pay a fine of Rs.1,000/- each. The appellants are also convicted for the offences punishable under Section 397 read with Section 34 of IPC. They are sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.1,000/- each. The appellant no.2 in Criminal Appeal No.290 of 1997 was acquitted of the offence punishable under Section 3 read with Section 25 of Arms Act.

2. Criminal Appeal No.290 of 1997 is filed by accused nos.2 and 3, whereas Criminal Appeal No.302 of 1997 is filed by accused no.1. Since both appeals arise out of one prosecution, the same are heard and decided by common judgment.

3. The case of the prosecution is as follows.

The accused were prosecuted for the offences punishable under Sections 392, 395, 397, 379 read with Section 34 of IPC. Accused no.3 was also prosecuted for contravention of the provisions of Arms Act. Three cases were consolidated together. The first case relates to CR No.126 of 1984. The date of incident is 6th April 1984. The said incident had occurred in shop premises of PW-1 Kirti Thakkar at Mulund (West). The second incident had occurred within the limits of Chembur Police Station and offence was registered vide CR No.224 of 1984. The incident is of dated 6th April 1984. The place of incident is Jagdish Stores situated at Chembur. The third incident took place on 20th April 1984 at Malad (West) and the

offence was registered vide CR No.291 of 1984 with Malad Police Station. The place of incident is shop premises viz Manmandir Cut Piece Centre situated at Malad (West), Mumbai. Accused no.1 was arrested on 13th May 1984. Accused no.2 was arrested on 10th July 1984 and accused no.1 was arrested on 21st September 1984.

4. The prosecution case is that the accused were involved in committing the offence of dacoity and robbery at three places and the mode of commission of crime is similar. The accused entered into commercial premises and they were armed with weapons. The accused threatened the witnesses while committing robbery.

5. The prosecution examined seven witnesses in support of its case. PW-1 Kirti Thakkar was examined in relation to the incident which had occurred at Mulund, Mumbai on 6th April 1984. He has lodged the FIR with Mulund Police Station vide CR No.126 of 1984. He has deposed that the accused had entered into the said premises armed with weapon. PW-1 was present with his brother Shirish, Kirtikumar and Sakharam. The accused snatched away a bag containing Rs.30,000/- and also a golden chain belonging to PW-1. All the four accused ran away from the scene of offence. He further deposed that on 15th June 1984 he was called by police for identification of the suspects at the police station along with his brother, Kirtikumar and Sakharam. He identified the accused. In the Court, he identified the accused no.1. He was attributed the role of pointing of knife and snatching the bag containing cash of Rs.30,000/- and gold chain. He also identified the golden chain in the Court. He further deposed that he was again called to identification parade on 17th July 1994 and he identified the suspect.

He identified the accused no.2 in the Court as person holding knife. He was called for parade on 24th September 1984 where he identified the suspect. He identified the accused no.3 as person holding revolver. In the cross examination, however, he deposed that all the identifying witnesses were sitting in a room before the parade, but he cannot say whether it was inspector's room. After identifying the accused he again went to the same room where other identifying witnesses were sitting. He also deposed that his further statement was not recorded after the parade was conducted.

6. PW-2 Shirish Thakkar is the brother of PW-1. He reiterated the version of PW-1. He attended the parade on 15th June 1984, 17th July 1984 and 24th September 1984. He identified the suspects in parade. He identified accused nos.1, 2 and 3 in Court. PW-3 Kirtikumar Somaiyya is the third witness in relation to the incident which had occurred at Mulund and also deposed similar version as deposed by PW-1 and PW-2. He attended the parade on 15th June 1984 and 17th July 1984. He identified the suspects. He identified accused nos.1 and 2 in Court. He is silent about identification of accused no.3.

7. PW-4 Hasmukh Sanigara was examined in relation to the incident occurred at Malad (West), Mumbai. He lodged the FIR at Malad Police Station vide CR No.291 of 1984. He deposed that the incident had occurred on 20th April 1984. One accused entered into the shop and left the premises after making some inquiries. After some time, the said person again came to the shop and about five to six persons entered into the shop. They were armed with weapons. They took out cash from the counter and one of them snatched the

golden chain from his person. He attended first parade but did not recollect the date. He identified three suspects. He identified accused no.1 in Court. He attended second parade in August-1984. He identified three suspects. He stated that the suspects are not present in Court. He again attended the parade after one month. He did not identify any suspect in that parade. He was also cross examined by the defence. PW-5 Bhavarlal Parmar also deposed about the incident of Malad (West) and reiterated the version of PW-4. According to him, he was called for parade in July-1984 by DCB, CID office. He had identified two suspects. He could not identify the said suspects amongst the accused present in Court. He could not identify the chain snatched from his person. PW-6 Hanmant Jadhav is the Head Constable attached to Malad Police Station, who referred to the prohibitory order issued by Commissioner of Police.

8. PW-7 Narendra Vasvani referred to the incident of Chembur. The incident occurred on 16th August 1984. He lodged the FIR with Chembur police station vide CR No.224 of 1984. He deposed that three unidentified persons came to his shop. They pushed him and snatched the bag from his hand and ran away from the place of incident. He also stated that he was called by police for identification parade on 6th August 1984. He identified three suspects. He identified accused no.2 in the Court as the person who snatched the bag. PW-8 is Police Inspector attached to GBCB, CID, who referred to the investigation conducted by him and the statement made by accused no.1 leading to discovery of property. He admitted that the articles were not packed/sealed and labelled. PW-9 Mahesh Muley is the Special Executive Magistrate who conducted the identification parade. He stated that he had conducted the

identification parade wherein the suspects were identified. According to him, he had taken all the precautions while conducting the parade. The three accused were identified by the witnesses. He stated that all the identifying witnesses have identified the accused. In the cross examination he deposed that he is not aware of the rules and guidelines prescribed in the criminal manual. He stated that two persons were selected as panch and other were discharged before holding the parade which fact is not mentioned in the memorandum. He also deposed that he had mentioned that the witnesses were kept in a separate room and the parade was held in another room and that after the parade, the identifying witnesses were sent to third room. He did not ask the identifying witnesses if they had an opportunity of seeing the suspected accused persons after the incident and till holding the parade he was not aware that three suspected persons should not be put together for holding identification parade. Although it is not mentioned in the memorandum that police and the persons connected with the police had no opportunity of seeing the parade room, it is mentioned in the memorandum that before holding the parade, he saw to it that all the doors and windows are closed. He also deposed that it is not mentioned on page no.2 of Exhibit-30 that while bringing the witnesses to the parade room whether he had taken care to see that when the accused are being brought from the lock-up, the identifying witnesses did not have any opportunity to see them. He admitted that this fact is not mentioned in Exhibits-29 to 33. He also admitted that there is over writing in the memorandum, which is not initialed by him. He admitted that he did not follow the criminal manual and instructions issued by High Court for holding the parade and that he is not aware of it.

9. PW-10 Abdul Kadar Khan was attached to DCB, CID, Unit-VII as Police Inspector. He conducted the investigation. He also arrested the accused. In the cross examination he deposed that he had not drawn the arrest panchanama when accused nos.2 and 3 were arrested. The premises of the accused nos.2 and 3 were searched but the search panchanama was not drawn. The property was seized vide Exhibit-27A which was not packed, sealed and labelled. When the property was seized, except statement of Ganesh Sanghavi, no statement of any other person was recorded. The signature of Ganesh Sanghavi was not obtained on the panchanama Exhibit-27A. Certain omissions in the depositions of the witnesses were also proved through the said witness.

10. Learned advocate for the appellants Mr.Thakur submitted that the accused were falsely implicated in the crime. There is no proper identification of the accused. The procedure for conducting the identification parade was not followed thereby the parade was defective. The parade was conducted at the police station. The special executive magistrate who conducted the parade, did not follow the procedural safeguards embodied under the High Court Criminal Manual with regards holding the test identification parade. PW-3 did not identify the accused no.3 in Court. The prosecution case relates to involvement of four persons, however, the investigating authority had arrested five persons, who were identified by the witnesses. The special executive magistrate has categorically deposed that he is not aware about the guidelines under the High Court Criminal Manual. The special executive magistrate had no occasion to see the suspects. He did not ask the

witnesses whether they had an opportunity to see the suspects. The three suspects were put up in one identification parade. After the identification, the witnesses had joined the same room where the other witnesses were waiting for identification parade. The statements of the witnesses were not recorded after identification parade. The description of the accused was not given in the evidence. The recovery was not proved. One of the suspect was a Sardar and no precautions were taken to keep dummies of similar description during the parade. The submissions are also applicable in respect to the appellant-accused no.1, who had filed Criminal Appeal No.302 of 1997. Learned counsel for the appellants relied upon the decisions of this Court in the case of **Ramcharan Bhudiram Gupta and other Vs. The State of Maharashtra**¹, and **The State of Maharashtra Vs. Rajesh Alias Kaka Madanlal Soni and others**².

11. Learned APP submitted that there is consistent evidence of the witnesses involving the accused. There is recovery at the instance of accused. The infirmities in the identification parade were minor which would not vitiate the identification. The witnesses had identified the suspects in the parade and also in the Court. The accused were involved in serious crime which is established by eye witnesses. There is cogent evidence of the witnesses to all the incidents which has not been discarded by the defence. The witnesses have attributed specific overt acts to the accused. The judgment of the Trial Court convicting the appellants-accused is required to be confirmed by dismissing the appeals.

1 1995(1)-ALL MR-122

2 1998-ALL MR (Cri.)-471

12. I have gone through the evidence of the witnesses and also perused the documents exhibited in evidence. The evidence of the witnesses is analyzed in the paragraphs hereinabove. The defence is primarily challenging the prosecution on the ground of defective parade and infirmities in evidence by way of contradictions and omissions. It is canvassed by the appellants that the accused were unknown to the witnesses and, therefore, identification of the accused is a crucial aspect which has to be proved beyond doubt. If the identification itself is defective through the identification parade, the identification in the Court shall also be not considered for convicting the accused. The accused were identified in Court after about thirteen years from the date of alleged incidents. The appellants have thereby endeavoured to point out the serious infirmities in the test identification parade conducted by special executive magistrate PW-9. The defence has succeeded in bringing on record the defects in the parade through the cross examination of PW-9.

13. PW-1, PW-2 and PW-3 have deposed that they were taken to the parade room by police. PW-3 who is the eye witness did not identify appellant no.2 (accused no.3) in the Court. The witnesses in their statements before police, had given the description of four culprits as Sikh persons. The accused nos.1 and 3 are not Sikh nor fit into the description of Sikh. The accused no.2 was a Sikh. The respondents have not stated that all the four culprits were Sardarjis. It was the case of PW-1, PW-2 and PW-3 that there were only four miscreants who had come to the shop on the day of incident. The police arrested five persons and all of them were identified. PW-1, PW-2 and PW-3 had identified Surendrasingh Randhava (the

absconding accused) as the person who was holding the pistol at the time of alleged incident. It was the case of prosecution that only one person was carrying fire arm. The witness identified two persons as holding the fire arms. The identification of the accused has not been established beyond doubt. PW-2 in the cross examination has stated that he did not see accused no.3 at the police station or in the DCB, CID office or anywhere. The identification in the Court was not corroborated by the test identification parade. In view of serious infirmities in the identification parade, no value can be attached to the identification in the Court. The identification parade conducted by the investigating machinery is not in conformity with the provisions of criminal manual of the High Court. PW-9 did not comply the provisions under the said manual. The memorandum does not disclose that the special executive magistrate took any precaution to cover the faces of accused/suspects while they were brought to the parade room from the locker room. The possibility of the witnesses who are already present having been shown the suspects while proceeding to the parade room cannot be ruled out. PW-9 did not make any effort to see that the first identifying witness does not contact the remaining witnesses. PW-9 ought to have sent a panch along with identifying witnesses after he had left the parade room so as to see that he does not contact the other witnesses. PW-9 has admitted that he was unaware of the provisions of High Court criminal manual and, therefore, he did not comply the same. PW-9 failed to ascertain from the identifying witnesses whether they had any opportunity of seeing the suspects before parade. He also did not ascertain from the suspects whether they were shown to the witnesses prior to the parade. Thus, the identity of the suspects/accused/appellants was under the shadow of doubt.

14. PW-1 has stated in examination-in-chief that on 15th June 1984 he was at the DCB CID office for identification of the suspects. He identified three suspects amongst fifteen to sixteen persons. He deposed that ten to twelve persons were standing in a queue in that room. The evidence of the said witnesses disclose that the parade was not conducted in accordance with rules. PW-9 has stated that he has conducted about 150 to 175 identification parades out of which about 75% parades were conducted for DCB, CID. He admitted that the parade was held on 15th June 1984. In the parade there were three accused. He admitted that panch Noor Mohammed is the the common panch in Exhibits-31 and 33. He admitted that he was not aware that three suspects were not similar to each other should not be put in one identification parade. The identification parade memorandum Exhibits-29 and 33 do not disclose that PW-9 took any precaution to cover the faces of suspects while they were being brought from the lock-up to the parade room. These aspects were not appreciated by the Trial Court in proper perspectives. There were contradictions and omissions in the evidence of witnesses. The articles recovered by police were not in sealed condition. Taking into consideration the over all circumstances it cannot be said that the prosecution has proved its case beyond all reasonable doubts. There is omission on the part of PW-3 on account of weapons. He had stated before the police while giving his statement that three miscreants out of five were holding knives at the time of incident, however, he did not assign any reason as to how police did not written the same in his statement. The alleged articles viz gold chains were not recovered at the instance of accused no.1. PW-10 has stated that on 8th June 1994 the accused made voluntary

statement in the presence of two panchas. He agreed to lead the police and panchas to the person to whom he had sole the gold chains. The panchas for seizure of gold chain were not examined. The property was neither packed, sealed nor labelled. This fact is admitted by PW-10 in his evidence. The properties viz gold chains were shown to witnesses on 19th June 1984. The evidence shows that PW-1 has stated that four days after the identification parade, the witnesses were called in DCB, CID office to identify the article numbers 1 and 2 i.e. gold chains. PW-2 admitted that the articles 1 and 2 are freely available in the market. There is no specific identification mark on the articles. PW-1 has stated in cross examination that he do not remember whether the police officer showed him two gold chains and other articles. There was darkness at the time of incident. The incident lasted for about three to five minutes. It is difficult for the witnesses to remember the faces of the suspects and identify them in the Court after thirteen years.

15. PW-4 is the complainant in CR No.291 of 1984 registered with Malad Police Station. According to him, he identified three suspects in first parade, three suspects in second parade and did not identify any accused in third parade. In the Court, he only identified accused no.1. PW-5 is also examined in relation to incident reported at Malad Police Station. He stated that he identified two suspects in parade held in July-1984. He did not identify any accused nor identified gold chain in Court. He deposed that the incident had occurred within a minute. PW-7 refers to incident of Chembur. He deposed that he identified three suspects in parade of 6th August 1984. However, he identified accused no.2 in Court as person who snatched the bag.

16. This Court in the case of Ramcharan Bhudiram Gupta (supra) has observed that the evidence of identification can only be relied upon only if all the chances of suspects being shown to the witnesses are wholly eliminated. It is also observed that the prosecution has to adduce the link evidence to the effect that right from the time of arrest till being lodged in jail, the faces of suspects were kept veiled and no one had the opportunity to see them. The identification parade should not be held in police station but should be held in jail. Not more than two suspects at a time should be put to identification parade at one time. It is also observed that the provisions in the High Court criminal manual should be strictly adhered to. The special executive magistrate who conducted the parade in the case which is subject matter of this decision, had stated that he is not aware about the High Court criminal manual about holding the method of parade. The Court had observed that this is a shocking state of affairs. In the present case also PW-9 has categorically stated that he is not aware about the guidelines enumerated in High Court criminal manual about identification parade.

17. In another decision of this Court in the case of Rajesh @ Kaka Madanlal Soni and others (supra), this Court reiterated the principles laid down in the earlier decision referred to hereinabove. It was observed that the test identification parade should be fair and reproach. It must be ensured that the suspect is not shown to identifying witnesses. The Magistrate has to ask the witnesses in this regard which is mandatory. The Magistrate should also ensure that the dummies are similar to the suspects.

18. The condition precedent for accepting evidence of identification is that it should be conducted by taking all the precautions and it must be seen that there was no opportunity to the witnesses to see the suspects. In the present case it is seen that the witnesses have deposed that after identifying the suspects, the identifying witnesses have joined the other witnesses. The special executive magistrate who conducted the parade, did not take precautionary measures to see that the parade was conducted in fair manner. The evidence of PW-9 has been analyzed hereinabove, which clearly establishes that the identification parade was a farce and no reliance can be placed on such identification parade. In the evidence, the special executive magistrate has admitted that the fact that two persons were selected as panch and the other were discharged before holding parades, is not mentioned in the memorandum. Panch Noor Mohammed is common for Exhibits-31 and 33. The witness was shown paragraph-V of Rule 16 pertaining to identification parade. He had disagreed earlier that there should be at least six persons placed in parade, if there is only one suspect to be identified. While identification of accused no.2, he had not mentioned that he had pagadi and he was bearded man. He did not mention special features of dummies in memorandum. He did not ask the identifying witnesses if they had opportunity of seeing the suspected persons after the incident till parade. In Exhibit-30 i.e. memorandum of parade, it is not mentioned that while bringing the accused to parade room, he had taken care to see that when accused are being brought from lock-up, the identifying witnesses do not have opportunity to see them. In the light of the guidelines embodied in the High Court criminal manual and in the light of the observations made in the above decisions viz-a-vis evidence on

record, the benefit of doubt ought to be given to the appellants-accused and thereby conviction is liable to be set aside.

19. Hence, I pass following order :

ORDER

(i) Both the appeals viz Criminal Appeal No.290 of 1997 and Criminal Appeal No.302 of 1997 are allowed;

(ii) The judgment and order dated 10th April 1997 passed by the Additional Sessions Judge for Greater Bombay in Sessions Case No.169-A/1995 convicting the appellants for offences under Section 392 read with Section 34 of IPC and under Section 397 read with Section 34 of Indian Penal Code, is quashed and set aside and the appellants are acquitted.

(PRAKASH D. NAIK, J.)

MST