

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.521 of 2016

Arising Out of PS. Case No.-34 Year-2015 Thana- BAUSI District- Araria

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Md.Talib S/o Md. Jabir R/o village - Karankia, P.S. Baunsi, District - Araria
... .. Appellant/s

Versus

The State Of Bihar
... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Baban Roay, Amicus Curiae.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 16-08-2019

1. As the learned counsel for the appellant failed to appear on account thereof, Mr. Baban Roy, learned advocate has been requested to assist the court as an Amicus Curiae.

2. Appellant, Md. Talib has been found guilty for an offence punishable under Section 376 IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.25,000/- in default thereof, to undergo S.I. for one year additionally, under Section 4/6 of the POCSO Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.20,000/- in default thereof to undergo S.I. for one year additionally, with a further direction to run the sentences concurrently, with a further direction that the period



having undergone during course of trial be set off in accordance with Section 428 of the Cr.P.C. by the First Additional Sessions Judge-cum-Special Judge, POCSO, Araria relating to Bausi P.S. Case No.34/2015, Trial No.3/2015.

3. Veena Devi (PW.6) gave her fardbeyan on 09-04-2015 disclosing therein that yesterday i.e. on 08.04.2015 she along with her younger daughter (name withheld, PW.4) aged about six years has gone to cut grass. At about 12.30 noon she directed her daughter to take away shegoat to house. At about 1.30 PM her son Lalo came and disclosed that some body has committed wrong with the victim as a result of which, there happens to be profused bleeding from her private part. She immediately come to her house and inquired from her daughter who disclosed that while she was coming with she-goat, one boy, who happens to be of fair complexion and is engaged in brick-kiln, whom she claimed to identify but does not know his name, came having ice-cream and then, gave Rs.10/- and on the pretext of lifting a bundle of grass, took her away in a maize field where after undressing her, committed rape. She immediately accompanied her to Sadar



Hospital, Araria where, the O/c of the Bausi Police Station also came. After treatment, she came carrying the victim in dead of night. On account thereof, she was so mentally retarded that was unable to give statement. In the following morning, the O/c of the Bausi P.S. came and at that very moment, so many villagers also arrived. Then thereafter, they all came to the place of occurrence where they have seen a chit of paper. After lifting the same they have seen a mobile number bearing 95707637400 scribed over it. Villagers dial who disclosed his name as Manjur Alam of village-Bishunpur, P.S.-Raniganj. On query, whether his relative/villagers/friend is engaged at brick-kiln in the village whereupon he disclosed that his cousin son-in-law Md. Talib, son of Md. Jabir of village-Karankia is engaged there. After getting this information, the villagers have gone, apprehended Md. Talib and then, took him to the place. The victim has identified him to be her rapist. Furthermore, one Surendra Mandal a ice-cream hawker was also brought who affirmed that he has sold ice-cream to the Talib.



4. On the basis of the aforesaid information Bausi P.S. Case No.34/2015 has been registered followed with an investigation as well as submission of charge sheet facilitating the trial, subject matter of instant appeal.

5. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

6. In order to substantiate its case prosecution has examined altogether eight PWs who are PW.1-Chandan Kumar Chaubey, PW.2-Dilip Mishra, PW.3-Ran Bahadur Singh, PW.4-Victim, PW.5-Dr. Salik Azam, PW.6-Veena Devi, PW.7-Deepak Chandra Das, PW.8-Mahanand Mandal. Side-by-side prosecution has also exhibited Ext.1-Injury Report, Ext.2-Fardbeyan, Ext.2/1-Endorsement over the fardbeyan, Ext.2/2-Formal FIR, Ext.3,3/1-Seizure list, Ext.4-Confessional Statement, Ext.5-Case Diary, Ext.6-State of Surendra Mandal under Section 164., Ext.7-Arrest memo. As stated above, nothing has been adduced in defence.



7. The learned amicus curiae while assailing the judgment of conviction and sentence has submitted that from perusal of the record, it happens to be case of no evidence. In order to justify his submission, it has been submitted that from the fardbeyan itself it is evident that victim, a child, was not knowing the culprit by name. Police came and then, got presence of the accused on the basis of information having conveyed by one Manjur Alam through mobile and identification of the appellant by the victim in presence of police, is not admissible in the eye of law as neither the chit of paper has been exhibited, nor the call detail has been furnished, nay Manjur Alam has been examined and that being so, irrespective of other deficiency persisting on the record, the inherent lacuna as pointed is sufficient to undo the finding recorded by the learned lower court.

8. The learned APP while controverting the submission has submitted that from the judgment impugned it is apparent that the lower court has meticulously carefully examined the material, whereupon did not attract interference.



9. From the record it transpires that three kinds of incriminating materials have been brought up against the appellant. The first one is, an inculpatory extra judicial confessional statement made by the appellant in presence of public including the police, (b) identification of appellant at the spot by the victim, (c) the presumption in accordance with Section 29 of the POCSO Act inconsonance with the steps taken by the appellant in rebuttal thereof.

10. So far admissibility of inculpatory extra judicial confessional statement of appellant is concerned, though it has been before the public but, after having presence of the police who indulged in recording of the statement (Ext.4). It is needless to say that whenever inculpatory extra judicial confessional statement is made by an accused having presence of the police, the same happens to be inadmissible in the eye of law in accordance with Section 25 of the Evidence Act. Furthermore, it is evident that no effort had been taken at the end of I.O. to get the statement of the appellant recorded under Section 164 Cr.P.C. Consequent thereupon, the



propriety of inculpatory extra judicial confessional statement along with Ext.4 goes out of consideration.

11. Now coming to remaining two. For that, the prosecution has advanced a story that after having mobile number discovered at the place of occurrence having script over a paper, the people having assembled there, dialed and, on the other side one Manjur Alam had responded who on query disclosed identity of appellant Md. Talib to be his cousin son-in-law who was engaged at a brick-kiln and, whereupon the villagers gone, caught hold appellant Md. Talib, brought him at the place of occurrence where, the victim had identified him to be her rapist. During course of evidence while conducting trial, it is evident that all have identified the accused in dock. It is needless to say that the identification in court happens to be substantive evidence. After going through the evidence, it is further evident that the victim PW.4 has not been cross-examined on that very score.

12. In **Sheo Shankar Singh vs. State of Jharkhand** reported in **(2011) 3 SCC 654**, it has been held:

“46. It is fairly well settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such



identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation.

47. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration.

48. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in *Malkhansingh v. State of M.P.*(2003) 5 SCC 746: (SCC pp. 751-52, para 7)

“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. (See *Kanta Prashad v. Delhi Admn.* AIR 1958 SC 350, *Vaikuntam Chandrappa v. State of A.P.* AIR 1960 SC 1340, *Budhsen v. State of U.P.* (1970) 2 SCC 128 and *Rameshwar Singh v. State of J&K* (1971) 2 SCC 715)”

49. We may also refer to the decision of this Court in *Pramod Mandal v. State of Bihar* (2004) 13 SCC 150 where this Court observed: (SCC p. 158, para 20)

“20. 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 each case. If a rule is laid down prescribing a period within which the 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 offender 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 there 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.”

50. The decision of this Court in Malkhansingh case 2003 SCC (Cri) 1247 and Aqeel Ahmad v. State of U.P. (2008) 16 SCC 372 adopt a similar line of reasoning.”

13. In State of Rajasthan vs. Daud Khan

reported in **(2016) 2 SCC 607**, it has been held:

“42. It was contended by Daud Khan that the three chance witnesses, PW 7 Mahabir Singh, PW 23 Narender Singh and PW 24 Rishi Raj Shekhawat were all from out of town. As such, they could not have identified Daud Khan or Javed. It was further contended that no test identification parade (for short “TIP”) was conducted and reliance could not have been placed only on their dock identification.

43. No such argument was raised by Daud Khan either in the trial court or in the High Court and we see no reason to permit such an argument being raised at this stage.

44. That apart, it was recently held in *Ashok Debbarma v. State of Tripura (2014) 4 SCC 747* that while the evidence of identification of an accused at a trial is admissible as a substantive piece of evidence, it would depend on the facts of a given case whether or not such



a piece of evidence could be relied upon as the sole basis for conviction of an accused. It was held that if the witnesses are trustworthy and reliable, the mere fact that no TIP was conducted would not, by itself, be a reason for discarding the evidence of those witnesses. In arriving at this conclusion, this Court relied upon a series of decisions. AIR 1958 SC 350 Earlier, a similar view was expressed in *Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1.

45. In any event, there were two other witnesses to the shooting, namely, PW 11 Narendra Kumawat and PW 19 Suraj Mal who were local residents and knew Nand Singh and Daud Khan and could easily identify them.”

14. In Mukesh and another vs. State (NCT of Delhi) and Ors. reported in (2017) 6 SCC 1:

“143. In *Santokh Singh v. Izhar Hussain* (1973) 2 SCC 406, it has been observed that the identification can only be used as corroborative of the statement in court.

144. In *Malkhansingh v. State of M.P.* (2003) 5 SCC 746, it has been held thus: (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. ...”

And again: (SCC p. 755, para 16)

“16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. ...”



145. In this context, reference to a passage from *Visveswaran v. State* (2003) 6 SCC 73 would be apt. It is as follows: (SCC p. 78, para 11)

“11. ... The identification of the accused either in 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. ...”

146. In *Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1, the Court, after referring to *Munshi Singh Gautam v. State of M.P.* (2005) 9 SCC 631, *Harbajan Singh v. State of J&K* (1975) 4 SCC 480 and *Malkhansingh* (2003) 5 SCC 746, came to hold that the proposition of law is quite clear that even if there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive.

147. In the case at hand, the informant, apart from identifying the accused who had made themselves available in the TIP, has also identified all of them in court. On a careful scrutiny of the evidence on record, we are of the convinced opinion that it deserves acceptance. Therefore, we hold that TIP is not dented.”

15. In **Prakash vs. State of Karnataka** reported in **(2014) 12 SCC 133**, it has been held:

“**15.** An identification parade is not mandatory (2012) 9 SCC 284 nor can it be claimed by the suspect as a matter of right. (2013) 14 SCC 266. 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 later in court at the trial. (1971) 2 SCC 715 If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable (2010) 2 SCC (Cri) 1150 unless the suspect has been seen by the witness or victim for some length of time. 1979 SCC (Cri) 115 In *Malkhansingh v. State of M.P.* (2003) 5 SCC 746 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 (1970) 3 SCC 518 or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media (2013) 14 SCC 266 no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In *Visveswaran v. State* (2003) 6 SCC 73 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.”

16. In the aforesaid background, the evidence of the victim has got priority. She has been examined as PW.4 and during course thereof, she has deposed that Talib took her to maize field. Untied her pant and then, gagged her mouth. Thereafter, he committed raped identified him in dock and has said that he is the person who had committed rape on her. During cross-examination she has stated that he had taken her



near bamboo cluster having in the maize field itself. That filed lies at a short distance from her house. She was kept there, raped and then, left. At para-3 she stated that she was raped by Talib as a result of which, blood came out from her genital. At para-4 she has stated that just after the occurrence, she had disclosed the same to her parents.

17. PW.5 is the doctor who has deposed that a medical board was constituted consisting of doctor Mandasa and he himself for examination of the victim. After examining the victim on 08.04.2015 they have found no fresh injury over her person including over private part of the victim. However, they have seen wound over left side of hymen having bleeding and hymen was ruptured. Vaginal swab was taken and sent for pathological examination. No spermatozoa either dead or alive was found. X-ray was taken of knee, wrist with regard to ascertainment of her age which was ascertained as six years. They have also opined the victim to be sexually assaulted. (Exhibited). During cross-examination, it is evident that nothing has been confronted over the factum of rape.



18. PW.7 is the I.O. who has deposed to the effect that after registration of the case, (exhibited all the concerned documents) investigation was entrusted to him. Accordingly, he along with other police officials who were present since before, proceeded with the investigation. Inspected the place of occurrence which happens to be the maize field of Gauri Tiwari. In midst thereof is a mango tree and beneath aforesaid mango tree, the P.O. happens to be. During course of inspection they have found one chit of paper having mobile number 9507637400. On the other side it was scribed in English Maharaja and for that, seizure list was prepared. At a distance of two hands therefrom ice-cream duly wrapped in a cloth was found and for that, another seizure list was prepared. Accused has confessed his guilt which was scribed by him. Recorded further statement of the informant, statement of the witnesses, statement of the victim. Surendra Mandal ice-cream hawker has been examined under Section 164 Cr.P.C. Accused has been arrested, remanded to custody and then, submitted charge sheet. Identified the accused in dock. During cross-examination at para-11 he has stated that



he had not mentioned the exact time regarding examination of the witnesses. In para-12 he has stated that P.O. was inspected as pointed out by the informant but, he is unable to say who other than informant had accompanied them. In para-13, 14 there happens to be cross-examination regarding the place of occurrence. Further there was no maize crop standing beneath the mango tree. In para-16 he has stated that call details was procured and the same is incorporated in the case diary. In para-20 he has stated that victim was examined by the doctor. He had not disclosed to the doctor with regard to any kind of injury if any, having over person of the victim. In para-21 he has stated that informant along with others took him to the place of occurrence and during course of inspection of the P.O. they have found the a chit of paper having mobile number. In para-25 he has stated that whether there was hurt over private part of the victim, he was not knowing as, he had not seen to same. Then he has denied the suggestion that the occurrence has been committed by son of Lukman and only to save skin of son of Lukman, appellant has been implicated at the instance of Lukman. He has further stated that he had



procured call detail of the mobile number. Manjur Alam was the holder of the mobile was duly verified. Then denied the suggestion that no such kind of occurrence had ever been placed nor, during course of conduction of investigation partiality has been shown.

19. The other kind of evidence happens to be by way of corroboration by examining PW.1, PW.2, PW.3, PW.8 who have deposed that after coming to know about the commission of the occurrence, they have assembled and during course thereof, they have found blood coming out from the private part of the victim. Talib was apprehended on the basis of the information so collected who was identified by the victim and then he was arrested.

20. During cross-examination PW.1 at para-5 has stated that on the following day of the occurrence, police brought the accused in his custody at the house of the Veena Devi. Veena Devi had disclosed. PW.2 at para-2 of his cross-examination has stated that he had not seen the occurrence. Occurrence was disclosed by the victim. At para-4 he has stated that accused was brought to brick-kiln where he was



arrested, again corrected he was arrested at his house so many persons including Mukhiya and Ex-mukhiya and others were present.

21. PW.8 had at para-2 disclosed that accused is resident of village-Kanikiya while informant is of Dhobaliya having distance in between about 1 $\frac{1}{2}$ K.M.. At para-8 he has stated that the P.O. lies within 200 feet from the brick-kiln.

22. PW.6 is the informant/mother of the victim. She has disclosed that on the alleged date and time of occurrence, she had gone to scrap grass along with victim. At that very time, victim had disclosed that she is feeling thrusty whereupon, she directed her to go to house and during course thereof, Md. Talib had committed rape in the maize field of Gauri Tiwary. She had seen blood coming out from her private part. On query, her daughter had disclosed. Accused was brought apprehended by police whereupon, victim had identified to be her rapist. She had given fardbeyan before the police. Victim was medically examined. Identified the accused. During course of cross-examination at para-6 she has stated that victim had disclosed regarding commission of the rape at



her house when she came. At that very time, it was 12 noon. Rapist was apprehended by the police but she is unable to say the exact time. In para-9 she has stated that police had taken away the accused to the police station. She has further stated that she is unable to say how much time police kept the accused in his custody. In para-11 she has stated that when her daughter disclosed regarding the occurrence, she took her to place of occurrence. She had seen some plants of maize completely damaged. In para-12 she has stated that at the northern side of the field rape was committed. Bamboo cluster is near about the occurrence. In para-14 she has stated that rapist had purchased the ice-cream from one Surendra Mandal as was disclosed by her daughter.

23. From the evidence of the victim it is apparent that she has identified the appellant to be her rapist and during cross-examination, it is apparent that victim PW.4 has not been cross-examined (a) over the manner of identification (b) over the occurrence. Therefore, her evidence remained intact including over commission of rape is found duly corroborated by the doctor PW.5. so far status of remaining witnesses are



concerned, it is the case of the prosecution and further, it is also apparent from their evidences that they all have come to know about the occurrence on a disclosure made by the victim herself and again, as is evident on that very score, they have not been cross-examined though, on an ancillary event they have been duly tested.

24. Apart from the evidence of the victim substantiating the factum of rape, there happens to be presumption that means to say legal fiction in accordance with Section 29 of the POCSO Act which, the accused is under compulsion to rebut. From the evidence as discussed herein-above, it is evident that nothing has been adduced in defence. It is also evident that victim has not been cross-examined on the factum of rape, (on the cost of repeatation) over the place of occurrence, over the mode of identification on account thereof, the accused failed to rebut the presumption. From the record, it is evident that neither during examination-in-chief I.O. PW.7 has disclosed regarding compliance of Section 53A of Cr.P.C. nor during cross-examination, same has been raised, so could not be seen adverse to prosecution more



particularly when there happens to be utter failure at the end of appellant to rebut the presumption. Consequent thereupon, the finding so recorded by the learned lower court needs no interference. That being so, this appeal is found devoid of merit and is accordingly dismissed. Appellant is under custody which he will remain till saturation of the period of the sentence.

25. First and last page of judgment be handed over to the learned Amicus Curiae for the needful

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	21.08.2019
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