

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

CRIMINAL APPEAL NO. 938 OF 2015

Harqbahaddur Logbahaddur Bhandari @ Raju	 Appellant
v/s.	
The State of Maharashtra	 Respondent

Mr. Nitin Sejpal a/w. Ms. Akshata Desai for the Appellant.
Mr. S.V. Gavand, APP for the State.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 06th SEPTEMBER, 2021.

JUDGMENT :-

. This is an Appeal under Section 374(2) of Cr.P.C. directed against the judgment dated 03/09/2015 passed by The Special Judge (Under MCOC Act, 1999), Gr. Bombay in MCOC Special Case No.05/2011 @ 12/2012.

2. By the impugned judgment, the learned Special Judge has held the Appellant, who was arrayed before the trial Court as accused no.1, guilty of offences under Sections 120-B, 307, 450, 506(ii) r/w. 120-B of the Indian Penal Code and Section 27(1) of the Indian Arms Act, 1959. The Appellant has been sentenced to undergo rigorous imprisonment for 10 years with fine of Rs.10,000/- in default to undergo simple

imprisonment for 03 years for offences under Sections 307, 450, 120-B of the Indian Penal Code and rigorous imprisonment for 05 years with fine of Rs.5,000/- in default to suffer simple imprisonment for 01 year in respect of offences under Sections 506(ii) r/w. 120-B of the Indian Penal Code and Section 27(1) of the Indian Arms Act, 1959. All the sentences are ordered to run concurrently.

3. The case of the prosecution in brief is that on 30/06/2010, three unknown persons entered the office of Sagar Builders, with whom the first informant (PW10 – Sumit Sonawane) was employed as Sales Executive. One of the persons kept a folder on the teapoy and suddenly removed a pistol and pointed at the first informant PW10 – Sumit Sonawane and fired at him. It is stated that the said person also pointed the pistol towards Hasan Gokulsab Chaudhari - PW11 and thereafter, ran away from the office. Sometime later, the police came to the place of the offence and took PW10 to Cooper Hospital. He was given first aid. PW10 thereafter went to the D.N. Nagar Police Station and lodged the first information report (Exhibit – 131). PW15- Maruti Awhad, Senior Police Inspector of D.N. Nagar Police Station visited the scene of the offence along with API - Desai and other police staff. API – Desai conducted the scene of offence panchanama and seized the bullet

and other incriminating material in presence of panchas. API – Desai recorded the statements of some of the witnesses under the supervision of PW15 – Maruti Awhad. PW15 took over further investigation on 01/07/2010. He requested the sketch artist PW16 to draw the sketch of the suspects as per the description given by PW11-Chaudhari.

4. The Appellant and the co-accused were arrested in C.R.No.83/2010 registered at Oshiwara Police Station. A rifle and some live cartridges were recovered from the possession of the Appellant. In the course of the investigation of the said crime, it was revealed that the Appellant and the co-accused were also involved in C.R.No.198/2010 registered at D.N. Nagar Police Station and were informed accordingly.

5. PW22 – Satish, API, Anti Extortion Cell took the Appellant in custody in the present crime on 06/01/2011. It was revealed that the Appellant and the other co-accused were the members of an organized crime syndicate headed by Ravi Pujari. Hence, the provisions of Maharashtra Control of Organized Crime (MCOC) Act, 1999 were also invoked after complying with all the procedural requirements.

6. PW4 – Suvidha Sawant, Nayab Tahasildar was requested to conduct Test Identification (TI) Parade. Accordingly, she conducted the TI parade on 05/02/2011 wherein PW10 and PW11 allegedly identified the Appellant. The incriminating material recovered from the scene of offence was sent to CFSL, Pune for examination. Upon conclusion of the investigation, charge sheet was filed against the Appellant and two others for offences under Sections 450, 452, 387, 307, 506(ii), 120-B r/w. 34 of the Indian Penal Code and Section 27 of the Indian Arms Act and Section 3(1)(ii), 3(2) and 3(4) of the MCOC Act, 1999.

7. The charge was framed against the Appellant and the other co-accused. They pleaded not guilty and claimed to be tried. The prosecution in support of its case, examined 24 witnesses. The statement of the Appellant and the other co-accused was recorded under Section 313 of the Code of Criminal Procedure. The Appellant and the other co-accused denied their involvement in the said crime. Upon considering the oral and documentary evidence on record, the learned Judge acquitted the other co-accused. The learned Judge also acquitted the Appellant of offences under Sections 452, 387 of the Indian Penal Code and Section 3(1)(ii), 3(2) and 3(4) of the MCOC

Act, 1999. The learned Judge however held the Appellant guilty of offences under Section 307, 450, 506(2) r/w. 120(B) of the Indian Penal Code and Section 27 of the Indian Arms Act and convicted and sentenced him as stated above. Being aggrieved by the conviction and sentence, the Appellant has preferred this Appeal.

8. Heard Mr. Nitin Sejpal, learned counsel for the Appellant and Mr. S.V. Gavand, learned APP for the State. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

9. The evidence on record indicates that PW10 – Sumit Sonawane was working as a Sales Executive whereas PW11- Hasan Gokulsab Chaudhari was working as Site Supervisor for Codcon Builders having office at A Wing, Indian Ocean Building, 1st floor, Andheri (W), Mumbai. PW10 and PW11 have deposed that on 30/06/2010, at about 01:30 p.m., while they were in the office, two unknown persons entered the office. One of the persons was carrying a folder. He kept the said folder on the teapoy. Immediately thereafter, the said person removed a firearm and fired at PW10 – Sumit Sonawane and then pointed the firearm at PW11. PW10 and PW11 shouted for help but

the said unknown persons ran away from the spot.

10. The evidence of PW10 and PW11 indicates that the assailant and the other person who had accompanied him, were not known to them. PW10 had given description of the assailant as a person with long hair, medium built and having shallow complexion. The other person was stated to be thin built with height of 5'5". PW11 also claims that the police had called a sketch artist (PW16) and that he had drawn a sketch of the suspects as per the description given by him.

11. The evidence on record reveals that the Appellant was arrested on 05/09/2010 in C.R.No.83/2010 registered at Oshiwara Police Station. PW22 – Satish, API, Anti Extortion Cell took him into custody in the present crime on 06/01/2011. On 28/01/2011, PW22 requested PW4 – Suvidha Satish Sawant, Nayab Tahasildar to conduct the Test Identification Parade. She conducted the TI parade on 05/02/2011. The evidence of PW4 and the memorandum of TI parade at Exhibit – 67 collectively indicates that PW10 and PW11 had allegedly identified the Appellant in the TI parade.

12. Mr. Nitin Sejpai, learned counsel for the Appellant submits that there is an inordinate delay in conducting the TI parade. Per contra, Mr.

S.V. Gavand, learned APP states that the Appellant was taken into custody in the present crime only on 06/01/2011. He, therefore, submits that there is no inordinate delay in conducting the TI parade.

13. It may be mentioned that in the case of ***Pramod Mandal v/s. State of Bihar (2204) 13 SCC 150***, the Apex Court has held that “*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. ”

14. These principles have been reiterated by the Apex Court in the case of ***Raja v/s. State by the Inspector of Police with Govindaraj and Ors. v/s. State by the Inspector of Police, AIR 2020 SC 254***. The Apex court has held that there is no hard and fast rule about the period within which the Test Identification Parade must be held from the date of arrest of the accused. In the instant case, though there is delay of about one month in conducting the Test Identification Parade, the records reveal that the Investigating Officer (PW22) was not at all cross examined on this aspect and no motive was imputed to the prosecution for the delay in holding the TI parade. Hence, the delay in holding the TI parade is not per se fatal to the case of the prosecution.

15. Mr. Nitin Sejpal, learned counsel for the Appellant further contends that the TI parade was conducted in total breach of the

guidelines laid down in the Criminal Manual of this Court. He therefore contends that the learned Judge has grossly erred in relying upon the evidence in respect of identification of the Appellant by PW10 and PW11 by the TI parade conducted by PW4.

16. It is well settled that the evidence of Test Identification Parade is not substantive evidence. The object of conducting Test Identification Parade is to enable the witness to identify the suspect who was previously not known to him. The Criminal Manual of this High Court lays down the guidelines and prescribes the procedure in holding the Identification Parade. These guidelines include : (i) identification parade should be held and every precaution must be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses ; (ii) the witnesses should be prevented from seeing the suspect before he is paraded with the other persons, and witnesses who have previously seen a photograph or description of the suspect should not be led in identifying the suspect ; (iii) the suspect should be placed among the persons who are as far as possible of the same age, height, general appearance and position in life.

17. The procedure for holding Identification Parade provides, inter

alia, that : (i) the Executive Magistrate should first acquaint himself very briefly, with the facts of the case and find out who is to be put in parade for identification and who are the witnesses to be called for identification, (ii) the Executive Magistrate should satisfy himself that the two independent respectable persons arranged for by the police are infact independent and fairly intelligent persons and should acquaint them briefly with the facts of the case, (iii) the memorandum should include (a) the names, ages, occupations and the full addresses of the two respectable persons, (b) the names and the approximate ages of the persons standing in the parade, mentioning clearly, one below the other, in numerical order, their positions in the parade, (iv) the fact that no person, other than those in the parade and the two respectable persons were allowed to remain in the room and that all police officers and constables were asked to withdraw, (v) After the memorandum is completed, the Executive Magistrate should make an endorsement at the end certifying that identification was conducted by him personally with the help of the two respectable witnesses whose names should be specified in the endorsement and further certify that their signatures have been obtained in what transpired in their presence ; (vi) the memorandum should also have an endorsement of the two respectable persons certifying that they have read the memorandum or that it was

explained to them or that it depicts the correct state of affair as stated in the memorandum and the Executive Magistrate is required to obtain signatures of the two respectable persons with whose help he held the Identification Parade.

18. It may be mentioned here that the Division Bench of this Court in *Mohammed Harshad Shaukat Ali v/s. State of Maharashtra 1998 Bom CR (Cri) 352*, has referred to the previous decisions in *Sanjay Dagdu Jadhav v/s. The State of Maharashtra 1997 All M.R.(CrM) 197*, *Vilas Vasantrao Patil v/s. The State of Maharashtra, 1996 Cri.L.J. 1854* and *Ganesh Bhagwati Pandian v/s. State of Maharashtra 1985 (1) Cri.L.J. 191*, has reiterated that instructions contained in the Criminal Manual issued by the High Court for conducting Identification parade are not statutory but have been consistently followed to ensure a fair and unassailable identification parade. While rejecting the contention of the prosecution that breach of guidelines of the High Court Manual is merely an irregularity, the Division Bench reiterated that unless guidelines issued by the Manual are scrupulously followed, there is likelihood of committing serious errors i.e., risk of implicating innocent person.

19. In the instant case, the evidence of PW4 reveals that the police had called the two independent respectable persons. The evidence of PW4 does not indicate that she had briefed them about the facts of the case. There is also nothing on record to indicate that she had ascertain that the two persons brought by the police were in fact independent persons. As stated earlier, the Test Identification Parade was conducted about a month after the arrest of the Appellant in this crime. PW10 has deposed that Investigating Officer had called them to the Police Station to identify the suspects arrested in this crime. It was therefore incumbent upon PW10 to rule out the possibility of the identifying witnesses having an opportunity to see the Appellant prior to the Test Identification Parade. PW4 has admitted in her cross examination that she had not asked the witnesses whether the police had shown them the photographs of the accused. She claims that she had asked the said question when the witnesses were instructed to sit in the closed room. This is implausible in view of the admission of PW4 that prior to commencement of the parade, she had not gone to the room where the witnesses were made to sit. It is thus evident that PW4 had not taken necessary precautions to ensure that the identifying witnesses had no opportunity to see the Appellant or his photograph before conducting the TI parade.

20. The evidence of PW4 also does not indicate that the dummies were of similar age with similar physical appearance, as the person to be identified. The memorandum also does not disclose the names and other details of the persons who were placed in the parade along with the Appellant. PW4 and the two respectable persons have also not made endorsements at the foot of the memorandum of the Test Identification Parade. It is thus evident that the Test Identification Parade is in breach of the guidelines and procedure prescribed in the Criminal Manual. Hence, the identification of this Appellant in the Test Identification Parade has no evidentiary value.

21. It is also the case of the prosecution that PW10 and PW11 had given the description of the assailant and that PW16 had prepared a sketch of the assailant based on the description given by them. No such sketch has been placed on record and there is no evidence to indicate that the description as given in the first information report tallies with the description given by PW10 and PW11. It is also pertinent to note that the evidence of PW4 & memorandum of TI parade does not indicate that the identifying witnesses had specified whether the Appellant was the person who had come with the firearm and shot at PW10 or whether he was the person who had accompanied

the main assailant. Such statement was made for the first time while identifying the Appellant in Court. It is to be noted that the alleged incident had occurred in the year 2010. The evidence of PW10 and PW11 was recorded in the month of May, 2015. The Appellant was not previously known to the witnesses and they have identified him in the Court almost 05 years after the incident. The evidence of PW10 and PW11 indicates that the entire incident had lasted for about a minute and the witnesses only had a fleeting glance of the assailant. The evidence of PW10 also indicates that after he was shot, he went completely blank and sat on the chair. Under such circumstances, it is difficult to believe that these witnesses who were shocked and traumatized by the incident, would notice the features or facial expression of the assailant within such a short span of time. Hence, it would be extremely risky to place implicit reliance on such identification after a long lapse of time.

22. It is the case of the prosecution that on the date of the arrest in C.R. No.83/2010 registered at Oshiwara Police Station, the Appellant was found in possession of a rifle and some live cartridges and that the same were seized under panchanama. There is no evidence to prove that the bullet which was allegedly recovered from the scene of the

offence was fired from the said revolver. Thus, there is no evidence to prove that the said rifle was used by the Appellant as a weapon of offence.

23. Having considered the entire evidence on record, in my considered view, the prosecution has failed to establish the guilt of the Appellant beyond reasonable doubt. Hence, the conviction and sentence cannot be sustained. Resultantly, the impugned judgment dated 03/09/2015 passed by The Special Judge (under MCOC Act, 1999), Gr. Bombay in MCOC Special Case No.05/2011 @ 12/2012 is set-aside. The conviction and sentence of the Appellant for offences under Sections 120-B, 307, 450, 506(ii) r/w. 120-B of the Indian Penal Code and Section 27(1) of the Indian Arms Act, 1959 is hereby set-aside. The Appellant is acquitted in respect of the said offences. Bail bonds stand discharged. Fine amount, if paid, be refunded to the Appellant.

PREETI
H JAYANI

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(SMT. ANUJA PRABHUDESSAI, J.)