

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 785/2019

Nandu Ashok Shelke,
Age 23 years, Occ. Nil,
R/o. Waghadi, Yavatmal,
Tq & District Yavatmal.
(At present in Yavatmal Central Prison)

.... **APPELLANT**
(In Jail)

// VERSUS //

The State of Maharashtra,
through P. S. O. Wadgaon Road,
Police Station, District Yavatmal.

.... **RESPONDENT**

Shri R. M. Patwardhan, Advocate (appointed) for appellant.
Shri M. J. Khan, A.P.P. for respondent/State

<u>CORAM</u>	: <u>VINAY JOSHI, J.</u>
<u>CLOSED FOR JUDGMENT</u>	: <u>06.08. 2021</u>
<u>DATE OF PRONOUNCEMENT</u>	: <u>29.10.2021</u>

JUDGMENT

The appellant(accused) Nandu Shelke was charge-sheeted along with three others for offence punishable under Sections 394, 354, 354-B read with Section 34 of the Indian Penal Code, Sections 8 and 10 of the Protection of Children from Sexual Offences Act ('POCSO Act'). The Trial Court held all of them guilty for offence punishable

under Sections 394, 354, 354-B read with Section 34 of the India Penal Code, and Section 9 read with Section 10 of the POCSO Act. The Trial Court passed separate sentence under each count, however the maximum sentence was awarded for the offence punishable under Section 394 read with Section 34 of the Indian Penal Code to suffer rigorous imprisonment of 7 years. All substantive sentences were directed to run concurrently. Besides that the Trial Court has imposed total fine of Rs. 5000/- each, with default clause.

2. The prosecution case in nutshell is that, on 02.10.2017 in the evening around 07.00 p.m., informant girl aged 18 years along with her female friend and with their respective boyfriends went for strolling to the secluded place at the outskirts of Yavatmal City. Precisely, they went to Arni-Darwha bye-pass road and parked their two wheelers at rough road. Informant (victim girl No. 1) sat with her boyfriend PW-3 Shubham at one place whilst her female friend (victim girl No. 2) sat at some distance with her boyfriend PW-4 Sahil. Within short-time, 6 to 7 unknown boys arrived at the place and started to beat. They snatched mobile handsets from all of them and robbed cash amount of Rs. 350/- from victim girl No. 1. The assailants also took personal search of both victim girls by touching them inappropriately. They also snatched bentex chain from victim girl No. 2. Somehow both

victim girls and their companions rescued themselves and came running on the main road. They noticed a patrolling Police Van on which, they informed the things to the Police. In turn, the Police sent them to the Civil Hospital for medical aid. On the following day in the morning, victim girl No. 1 lodged report regarding the occurrence against unknown robbers. The Police initially registered crime vide Crime No. 1077/2017 for offence punishable under Sections 394, 354, 354-B read with Section 34 of the Indian Penal Code. After procuring date of birth certificates of victim girls, the provisions of Section 8 and 10 of POCSO Act, have been invoked.

3. On the following day, the Police apprehended four accused along with a child in conflict with law. The Police seized stolen cash amount and two mobile handsets at the instance of co-accused. During course of investigation, prior test identification parade (T. I. Parade) was conducted. After completing usual formalities of the investigation, final report was filed in the Special Court. The charges were framed vide Exh. 20 against all four accused. On denial of guilt, the prosecution has ventured into examining in all nine witnesses to bring home the guilt of accused. Besides that the prosecution also banks upon certain documents. The evidence of two girl victims, their respective boyfriends and Naib Tehsildar who conducted prior T. I.

Parade has been relied by the prosecution for establishing the guilt. Though the prosecution led evidence of Medical Officer to establish the injuries sustained by all of them, however it was not challenged by defence in appeal.

4. The learned counsel for appellant concentrated his submission on the point of identification of appellant in the prior T. I. parade as well as identification in the Court. He has not disputed the occurrence, however he would submit that the appellant was neither present on the spot nor involved in the robbery. According to him, merely on suspicion, the Police have falsely implicated him.

5. All accused were in judicial custody during trial. Though the Trial Court has convicted all four accused, however, this appeal is only of accused No. 3 Nandu Shelke. For the sake of convenience, report was called from the Registrar of this Court to verify whether rest of the convicted accused have preferred an appeal. However report dated 04.08.2021 indicates that rest of the convicts have not challenged the order of conviction by way of appeal. In turn, this appeal remains for consideration of convicted accused No. 3 Nandu Shelke only.

6. It is the prosecution case that on 02.10.2017 both victim girls along with their male friends went to Arni Darwha bye-pass road around 07.30 p.m., then they proceeded to rough road and by parking their two wheelers, sat separately leaving some distance. It is a case that 6 to 7 unknown assailants arrived the place and by causing hurt to the prosecution witnesses, robbed them by snatching cash amount, mobile handsets and bentex chain. The assailants fled from the spot soon after the occurrence. The report was lodged on the following morning against unknown 6 to 7 miscreant. The Trial Court after appreciating the evidence on the point of age of victim and medical evidence, concluded that the girl victims were minor on the date of occurrence and all of them sustained injuries. The said aspect has not been challenged by the appellant, hence need not be dwelled upon. The only material aspects is about identity of assailants and particularly appellant Nandu Shelke in the incident.

7. Both side made exhaustive submissions on the point of fixing appellant in the occurrence. The prosecution is mainly relying on the evidence of identification in Court, identification in prior T. I. Parade and seizure of stolen articles at the instance of co-accused. Admittedly, as regards to the seizure of cash amount and mobile

handset are concerned, it is from co-accused, therefore, the said material is not available against the appellant Nandu Shelke. In other words, the appellant's conviction is solely based on his identification in Court and the evidence of prior T. I. parade. Undisputedly, the substantive evidence is the evidence of identification in the Court. As a general rule, the substantive evidence of witness is the statement made in the Court. The very purpose of holding prior T. I. parade is to test and strengthen the trustworthiness of said evidence. Normally, as a rule of prudence, the Court looks for corroboration to the sworn testimony of witness by way of prior T. I. parade. Undoubtedly, the rule of prudence do have exceptions when on given facts, the Court is impressed about the credibility of the evidence given by witness in the Court and find it very safe to rely without corroboration.

8. At the inception, I may clarify that since this is an appeal only of accused No. 3, I am concentrating on the point of his identification only. The prosecution led evidence of four witnesses who can be termed as victims of occurrence. All of them led evidence on the point of identification of accused in the Court. PW-1 i.e. victim girl No. 1 (informant) stated about the incident as occurred. It is her evidence that at the relevant time, 6 to 7 unknown boys came towards them. They snatched mobile handsets and forcibly taken sum of Rs.

350/- from her. Out of those assailants, one of them having curly hair touched her breast and waist. One another assailant having squint eyes, pulled her shirt and torn it. On the point of identification in Court, she stated that all accused before the Court are the same. She has identified the accused who outraged her modesty by pointing towards appellant Nandu Shelke. Likewise, she identified the accused who torn her shirt by pointing towards co-accused Shantaram Jichkar. In short, she has identified all four accused, put on trial as assailants and particularly identified appellant Nandu Shelke with his role of outraging her modesty.

9. PW-2 i.e. victim girl No. 2 deposed that initially 6 to 7 assailants arrived and started to beat them. They snatched her mobile handset, assaulted her touched her inappropriately and snatched her bentex chain. On the point of identification, she made a general statement that the accused before the Court are the same persons. Besides that, she separately identified co-accused Shantaram who allegedly touched her body and co-accused No. 2 Rahul allegedly assaulted her. So far as the appellant Nandu Shelke (accused No. 3) is concerned, her evidence is about general identification by stating that all accused before the Court are the assailants. Besides that, she has

neither stated any particular act of appellant Nandu Shelke, nor about his any special body feature.

10. PW-3 Shubham who sat with victim girl No. 1 at some distance deposed about the occurrence. His evidence on the identification is that, all the accused before the Court are the same who assaulted them. Besides that, he has identified co-accused Vikkey as a person who took his personal search. Likewise, he has identified co-accused Shantaram allegedly torn shirt of victim girl No. 1. Pertinent to note that besides general statement, he has not stated anything about appellant Nandu Shelke.

11. Then the prosecution led evidence of PW-4 Sahil who separately sat with victim girl No. 2. It is his evidence that he identified the accused in prior test identification parade and those are present before the Court. In other words, he made a general statement that he identified all the accused before the Court as assailants. Besides that, he has not stated about any particular act of either of the assailant including appellant Nandu Shelke.

12. To sum up the direct evidence on the point of the Court identification, besides the informant (victim girl No.1), none of them has identified appellant/accused No. 3 Nandu Shelke with his

particular overt-act or by bodily feature. All four witnesses have made a general statement that accused before the Court are the same. In-fact, in all four accused were put on trial before the Court. Naturally, they would be only in the dock during trial. Therefore, it is not safe to blindly rely on the general statement that the accused before the Court are the same. Though Court identification is substantive evidence, but it should satisfy the judicial mind of the Court. Notably besides PW-1 informant, none other has specifically identified him by his particular overtact or special bodily feature.

13. It takes me to consider the another limb of the prosecution case which is about evidence on the point of prior T. I. parade. On 31.10.2017, PW-5 Rajabhau Vette Naib Tehsildar has conducted T. I. parade in Jail. He led evidence that on receiving letter from Tehsildar, he has arranged T. I. Parade on 31.10.2017 in the District Prison, Yavatmal. He has informed Jail Superintendent to arrange 24 dummies for holding T. I. Parade of four suspects. He arranged two pancha witnesses for T. I. Parade. He has introduced himself to the witnesses and directed them to identify the accused by touching their body. The witnesses were made to sit in cabin whilst the T. I. parade was carried in another room. He deposed about the manner in which he conducted T. I. Parade. Each time, he called 6 dummies and one

accused in the room for identification. He gave opportunity to all accused to stand in the row as per choice and also to change the clothes. After making six dummies and one accused to stand in row, turn by turn, all four witnesses were called and asked to identify the accused. It is evidence that barring few they identified the accused in each parade. His evidence suggests that for each accused, six separate dummies were used for the parade. After completing process of identification of one accused by four witnesses, it was followed by calling second accused with separate dummies and the same procedure was followed for all four accused.

14. As regards to the identification of appellant Nandu Shelke in prior T. I. Parade is concerned, all four witnesses have made general statement that they identified him in prior T. I. parade by touching his body. Close examination of their evidence conveys that without specifying the details, each one has merely stated that he/she identified all accused by touching their body. In other words, the witnesses have not specified as to which accused was identified in first parade, second parade and so on, nor either of witness has stated about the position of the identified accused in the row or their clothes or about any special feature for their identification.

15. Be that as it may, PW-5, Naib Tehsildar Rajabhau Vette deposed that, at the time of identification of each accused, separate memorandum pertaining to each witness was prepared. As regard to the appellant Nandu Shelke (accused No.3) is concerned, the parade memorandum about identification by informant (victim girl No. 1) is at Exh. 41. As per said identification memorandum, informant has identified appellant Nandu Shelke by touching his body who was standing at 4th position in the row. PW-2 i.e. victim girl No. 2 has not identified appellant Nandu Shelke during her identification parade. Concerned memorandum Exh. 48 specifies that she has not identified appellant Nandu Shelke in the said parade. As regard to PW-3 Shubham is concerned, the parade memorandum panchanama bears a reference that he has identified appellant Nandu Shelke. However, remark column was kept blank about the result of identification parade. On examination of all parade memorandum panchanama discloses that remark column was filled by the recorder as either identified by witness or otherwise. However parade panchahama Exh 53 pertains to PW-3 Shubham for accused Nandu Shelkr is concerned, remarks i.e. result of examination cloumn is blank. As regards to PW-4 Sahil is concerned, identification parade panchanama (Exh. 58) discloses that he has not identified appellant Nandu Shelke.

16. In substance, PW-2 victim girl No. 2 and PW-4 Sahil have not identified accused Nandu Shelke in identification parade whilst the memorandum panchanama regarding PW-3 Shubham appears to be incomplete about its result. Thus, it remains that identification of appellant Nandu Shelke is by PW-1 victim girl No. 1 only. One may note that victim girl has not stated the reason for identification of accused Nandu Shelke. The detailed test identification parade panchanama called as Part-II is silent on the point of reason for the witness to identify the appellant Nandu Shelke. Pertinent to note that during the course of evidence, victim girl No. 1 (informant) identified accused Nandu Shelke as a person who has outraged her modesty by touching her body. However, in prior T. I. Parade, she was silent to describe the act of accused Nandu Shelke as stated in the Court.

17. Learned counsel for the appellant has initially criticized the entire process of test identification by stating that prescribed procedure was not followed. According to him, the entire process was carried in mechanical manner. He would submit that the witnesses had ample opportunity during interregnum period to discuss about the description of accused to be identified. Secondly, proper precaution was not taken to see that prior to the identification, witness cannot see

accused. The Trial Court do observed in paras 62 and 63 of its judgment that proper procedure as per criminal manual was not followed. It reveals from the consolidated panchanam part II that there were total 16 rounds of test identification parade i.e. 4 rounds for each accused to be identified by four witnesses.

18. Perusal of panchanama-II containing description of 16 round indicates that in mechanical manner in same sequence and words, each round has been described by preprator. The mode and manner of conducting Panchanama itself is not free from doubt. There is no description as to whether the accused have opted to choose their position in the row after parade of one witness. Panchanam is silent whether the accused have opted to change their clothes for next round of parade and so on. Moreover, there is no evidence to state about the suitability of the selection of dummies for identification. Neither the holder of test identification parade asked the Jail Superintendent to bring dummies having similar physic, like the accused nor he made selection of dummies. It appears that whatever dummies were provided by the Jailer, were mechanically used by the holder of test identification parade without assessing their suitability. The said manner of holding parade itself frustrates the very purpose and

importance of the test identification parade and ultimately about its evidentiary value.

19. One another aspect also needs consideration that the two pancha witnesses used for test identification parade were subordinate of PW-5 Naib Tehsildar Rajabhau Vette. The said fact is evident from memorandum panchanama (Exh 64) itself since the panchas are working as Clerk in Tehsil Office. Pertinent to note that final memorandum panchanama does not bear signature of panchas at all. It obviously adds the suspicion to the great extent. Besides that in order to vouch credibility of the entire test identification parade, examination of independent pancha witness was necessary but they have not been examined. The memorandum panchama neither Part-I nor part-II discloses the time of each of the round of actual identification.

20. The process of holding T. I. Parade was such that all four witnesses were made to sit at one place. For identification of one accused, one by one witnesses were called and there was gap of 5 to 10 minutes in between the next round. Therefore, there was opportunity for witnesses to brief the next witness about the description of accused to be identified, like his clothes etc. PW-5 Naib Tehsildar admitted that all four witnesses were kept in one cabin and next witness was called

one after another. Moreover, Naib Tehsildar admits that barrack in which he conducted T. I. Parade, was open and visible. Therefore, it creates serious doubt about the chances of seeing the accused by witnesses prior to the holding of parade. In short, entire process of prior T. I. Parade is tainted and not free from suspicion.

21. The defence has also strongly criticized the delay in holding prior T. I. Parade. In order to support said contention, reliance is placed on the decision of this Court in case of **Vijay Dadasaheb Bhosle & anr. Vs. State of Maharashtra, 2006 ALL MR (Cri) 3390**. On the other hand, learned prosecutor would submit that the delay of one month in holding the parade cannot be termed as fatal to the prosecution, for which he relied on the decision of the Supreme Court in case of **Pramod Mandal Vs. State of Bihar, (2004) 13 SCC 150**. On the same point, he relied on another decision of the Supreme Court in case of **Anil Kumar Vs. State of Uttar Pradesh, 2003(3) SCC 569** and decision of this Court in case of **Vinod Baku Jadhao & anr. Vs. State of Maharashtra, 2018 ALL MR (Cri) 3484**. Suffice to say that there are no fixed rules as regard to within which time T. I. parade has to be conducted. It depends upon the facts and circumstances of each case, as well as credibility depends upon the plausible explanation offered if any, by the prosecution.

22. In this regard, one can make useful reference of the decision of the Supreme Court in case of **Lal Singh Vs. State of U. P. , (2003) SCC 554**, wherein the Supreme Court in para 28 and 43 has dealt with the value or weightage to be attached to the test identification parade and the effect of delay in holding such test identification parade which reads as below:-

“28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which

they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case.

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 parade 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 probalising 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 as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety.”

23. On the same point, I may refer to the decision of the Supreme Court in Case of **Pramod Mandal v. State of Bihar**, (2004) 13 SCC 150 which reads as under:-

“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.”

24. Likewise one may refer the recent pronouncement of the Supreme Court in case of **Raja Vs. State By the Inspector of Police with**

another connected matter, (2020) 15 SCC 562 wherein, the observation made in para 15 reads as below:-

“15. It has been accepted by this Court that what is substantive piece of evidence of identification of an accused, is the evidence given during the trial. However, by the time the witnesses normally step into the box to depose, there would be substantial time gap between the date of the incident and the actual examination of the witnesses. If the accused or the suspects were known to the witnesses from before and their identity was never in doubt, the lapse of time may not qualitatively affect the evidence about identification of such accused, but the difficulty may arise if the accused were unknown. In such cases, the question may arise about the correctness of the identification by the witnesses. The lapse of time between the stage when the witnesses had seen the accused during occurrence and the actual examination of the witnesses may be such that the identification by the witnesses for the first time in the box may be difficult for the court to place complete reliance on. In order to lend assurance that the witnesses had, in fact, identified the accused or suspects at the first available opportunity, the TIP which is part of the investigation affords a platform to lend corroboration to the ultimate statements made by the witnesses before the Court. However, what weightage must be given to such TIP is a matter to be considered in the facts and circumstances of each case.”

25. In the light of above position, undeniably it is a factual aspect to be decided by the Court whether the delay caused in holding T. I. Parade vitiates the process. Admittedly, the incident occurred on 02.10.2017 whilst on the following day i.e. on 03.10.2017 itself, all four accused were arrested. However, after 28 days, i.e. on 31.10.2017 test identification parade was conducted. Absolutely, no explanation has been offered by the prosecution for holding belated test identification parade. The record indicates that on 10.10.2017 itself, Investigating Officer vide letter Exh. 106 informed the Executive Magistrate to hold T. I. Parade on or before 13.10.2017. However, despite said caution, the test identification parade was delayed. There is purpose for which Court expects the quick holding of test identification parade as the witnesses may not forget the features of the accused which they have seen at the time of occurrence. Thus, unexplained delay in holding T. I. Parade is a matter which adds suspicion.

26. Reverting to the facts, as per prosecution evidence on the day of incident around 07.00 p.m. all four witnesses i.e. two boys and two girls, initially met at Shivaji Garden, Yavatmal. All of them went by riding two wheelers to Arni-

Dharwha bye-pass which was 7 to 8 k.m. away from the city and reached around 07.30 p.m. It is the evidence that after 20 to 25 minutes, the assailants arrived on the spot meaning thereby, the incident occurred in between 07.45 p.m. to 08.00 p.m. Admittedly, it was a winter season being a month of October and therefore, judicial note can be taken that days would be shorter than night. The learned defence counsel has submitted that almanac shows that on that day, sunrise was at 06.30 a.m. whilst sunset was at 06.27 p.m. Reasonably, it can be inferred that it was a dark when the incident occurred at isolated bye-pass road. Notably the witnesses were not at Arni-Darwha bye-pass road but again they went to inside rough road at some distance from the bye-passe road. There is no evidence that there was street light nor it can be presumed in absence of any material. PW-2 victim girl No. 2 though denied that there was no visibility, however she admits that there was no clear visibility. Therefore, it is evident that incident took place in dark.

27. The witnesses have admitted that they got frightened due to sudden occurrence. It is a matter of appreciation that the incident took place on isolated place

during night hours. Both couples sat separately near bushes. The incident happened as of sudden which no one expected. All four witnesses were in their tins therefore, naturally they got frightened and scared about their safety. In the situation, their priority would be to escape from the clutches of goons and nothing else. It is not a case of single assailant so as to concentrate on his activities. However, as per evidence, 6 to 7 unknown assailants came in dark and started to beat the witnesses and looted them. It is not the case that there was conversation in between them so that the witnesses could get time to observe the assailants. The occurrence would have hardly taken time of few minutes. It is difficult for the frightened teenagers to see, observe and to memories images of miscreants. On such background, notably the test identification parade was conducted after one month and the victim's evidence was recorded after one year from the occurrence therefore, the so-called identification conducted in the Court is not free from doubt.

28. In the above scenario, it is not safe to place implicit faith on the evidence of identification in Court. Particularly, it was not supported by the credible evidence of prior test

identification parade. Moreover, besides victim girl No. 1, other witnesses have not identified appellant even in the Court. Therefore, it is too risky to rely on such shaky evidence to base conviction. I may reiterate that though there was recovery of cash amount, mobile handsets, however it was from non-appelling co-accused, therefore, the said material cannot be used against the appellant Nandu Shelke.

29. To summarize, the Trial Court has based its conviction solely on the evidence of identification of appellant in Court as well as in prior T. I. Parade. For the reasons stated in forgoing discussion, the prosecution evidence is not reliable to establish the identity of the appellant in the occurrence. Neither the evidence about Court identification nor about prior T. I. Parade inspires confidence. The Trial Court erred in appreciating the evidence of identification in proper perspective. In the result, judgment and order of conviction would not sustain in law, hence appeal calls interference.

30. While parting with the judgment, one may take note of legal position that in certain cases, the benefit of decision can be extended to the non-appealing co-accused who are similarly situated. However, in case at hand, the evidence against non-appealing co-

accused is distinct on the point of identification as well as seizure of articles. Therefore, the benefit of this decision cannot be extended to non-appealing co-accused as it requires independent assessment.

31. In view of above, the appeal succeeds. The impugned judgment and order passed by the Additional Sessions Judge-2, Yavatmal in Spl. (POCSO) Case No.76/2017 dated 12.07.2019 is hereby set aside. The appellant/ accused namely Nandu Ashok Shelke is acquitted of the charged offences and he be released forthwith, if not required in any other offence. Fine amount, if any, deposited be refunded. Muddemal property be dealt with in accordance with law.

32. Fees for the appointed counsel to be paid as per Rules.

JUDGE

Gohane.