

IN THE HIGH COURT OF ORISSA AT CUTTACK**CRLA Nos. 184, 183 & 697 of 2012 and CRLA No. 619 of 2011*****Amit @ Gullu @ Amitav Kumar
(In CRLA No.184 of 2012)******Chandan Sharma @
Chandan Kumar Sharma
(In CRLA No.183 of 2012)***

....

Appellants***Lambu @ Chandra Mohan Jha
(In CRLA No.697 of 2012)******Chhunu @ Chunni @
Mohan Chowdhury
(In CRLA No.619 of 2011)******-versus-******State of Odisha***

....

Respondent**Advocates appeared in this case:*****For the Appellants***

:

**Mr. Salman Khurshid,
Senior Advocate assisted by
Mr. Avijit Pal, Ms. Lubna Naaz
and Mr. Sommya Chaturvedi,
Advocates
(In CRLA 184 of 2012)****None****(In CRLA Nos.183 & 697 of 2012
and CRLA No. 619 of 2011)*****For the Respondent***

:

**Mr. Janmejaya Katikia,
Additional Government Advocate****CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIAK**

JUDGMENT

23.08.2022

1. These four appeals are directed against the judgment dated 20th September, 2011 passed by the Additional Sessions Judge (Fast Track Court-II), Bhadrak in Sessions Trial No.91/66 of 2007-09 convicting the Appellants for the offences punishable under Sections 395, 396 & 397 IPC and Sections 25 & 27 of the Arms Act and sentencing them as under:

I. to undergo imprisonment for life each and a fine of Rs.1000/- and in default to undergo further six months rigorous imprisonment (RI) each for the offence under Section 396 IPC;

II. to undergo RI for ten years each and fine of Rs.1000/- and in default to undergo further RI for six months each for the offence under Section 395 IPC;

III. to undergo RI for seven years each for the offence under Section 397 IPC;

IV. to undergo RI for three years each and fine of Rs.500/- and in default to undergo RI for three months each for the offence under Section 25 of the Arms Act;

V. to undergo RI for three years each and fine of Rs.500/- and in default to undergo RI for three months each for the offence under Section 27 of the Arms Act;

all the sentences were directed to run concurrently.

2. At the outset, it must be mentioned that seventeen persons were sent up for trial, of which four of them i.e. Lambu @ Chandra Mohan Jha- Accused No.1 [A1] (Appellant in CRLA No.697 of 2012); Amit @ Gullu @ Amitav Kumar [A6] (Appellant in CRLA No.184 of 2012);

Chhunu @ Chunni @ Mohan Chowdhury [A7] (Appellant in CRLA No.619 of 2011) and Chandan Sharma @ Chandan Kumar Sharma [A8] (Appellant in CRLA No.183 of 2012) were found guilty of the aforementioned offences and the remaining thirteen were acquitted of all the offences.

Case of the Prosecution

3. On 23rd February 2007, Sri Maguni Charana Mahanta (PW-6), the Manager of Central Bank of India, Bhadrak Branch, Bhadrak submitted a written complaint to the Officer-In-Charge (OIC), Police Station (PS), Bhadrak stating that at about 1.25 pm on that date the cashier of the Bank, Rabindra Nath Mandal (PW-13), the Arm Guard, Dibakar Sahu (deceased), and the sub-staff-Lal Mohan Singh (deceased) collected cash from the Life Insurance Company of India (LIC) Bhadrak Branch and while coming out of the LIC building towards the gate where the hired vehicle was parked, "4 or 5 persons fired at the above employees, and snatched the gun and cash box from them." The complainant stated that there was cash to the tune of Rs.24,09,274.90, which included the cash received from both the LIC as well as the Railway counter. Immediately, the LIC staff informed the nearby outpost over phone and the injured staff were shifted to the Bhadrak Medical by PW-13.

4. In the FIR that was lodged at 3.30 pm on 23rd February 2007, in the column titled 'Accused', it was written 'unknown'. The original written report referred to above was treated as the FIR.

5. The case of the prosecution as spoken by its star witness, PW-13 i.e. the cashier of the Bank, was that he along with the two deceased went

to collect cash from the Railway and the LIC in Bhadrak by hiring a private vehicle. The cash collected from both places was kept in a tin box. While emerging from the LIC office carrying the tin box towards the car, PW-13 heard a sound of firing and saw one bullet hit on the finger of Sanat Kumar Majumdar (PW-10), the driver of the car and the bullet injuries on the two deceased. He saw that six persons were fleeing away on three motorcycles by carrying a tin box. He immediately gave information to PW-6 over telephone about the occurrence.

6. The two deceased i.e. Dibakar Sahu, the Arm Guard and Lal Mohan Singh, the sub-staff were shifted to the Bhadrak Hospital and from there to the SCB Medical College and Hospital, Cuttack (SCB). While Lal Mohan Singh died on the way, Dibakar Sahu died in the hospital.

7. On 23rd February 2007, Dr. Amarendra Nayak (PW-14) of the SCB conducted the post-mortem (PM) on the dead body of Lal Mohan Singh. On dissection, he found a foreign body looking like a fired bullet. He found there tear and blood stains on the shirt of the deceased and blast-like effect and powder deposits thereon. PW-14 found the bullet's entry and exit wound and opined that the death was homicidal.

8. On the same day, PW-14 conducted the PM of the deceased Dibakar Sahu and found four punctured lacerated wounds and multiple contusions. He recovered the deformed bullet like postulate from the dead body. There was both gunshot entry and exit wounds. Here again, he opined that the death was homicidal.

9. Dr. Dipti Murty Panda (PW-16) at Bhadrak DHH, who examined Dibakar Sahu at around 2 pm, found two gunshot injuries and one entry wound with profuse bleeding. He also examined Lal Mohan Singh and found two gunshot penetrating injuries and one exit wound on his body.

10. According to the prosecution, there were three injured bystanders—Kiran Kumar Khuntia (PW-9), Arpita Mohanty (PW-11) and Bijay Barik (PW-12). Their injuries were proved by Dr. Goura Chandra Jena (PW-17), who examined PW 9 and found one entry wound on right side of umbilicus and then referred PW 9 to the SCB. He examined PW-12 and found one entry wound and one exit wound and again referred him to SCB. He examined PW-11 and opined that the injuries were caused within 6 hours of the time of examination and referred her to the SCB.

11. The case was registered at the Bhadrak Town Police Station (PS) as Case No.31 of 2007. Shri Rabindra Kumar Jena (PW-32), the Inspector of Police, on receipt of the information, proceeded to the spot where he found blood stains, empty cases of ammunitions and broken guns. He prepared a spot map and mentioned the details of the spot in the crime details form. He examined the complainant at the spot. At 5 pm, the scientific team reached at the spot and inspected it. Later on that date, he seized three pieces of broken double barrel gun, two empty cartridge cases of 9 mm pistol, a fired bullet, saline extraction of blood stain from the road of the LIC office, sample gauze cloth, etc.; seized the Maruti Esteem car, which was hired to carry the cash. PW-32 examined the driver (PW-10) at the Hospital. He also examined other witnesses on 24th February, 2007. He stated that on 26th February 2007, he received reliable information regarding three motorcycles and a car used by the

culprits. He seized one motorcycle from the Chermpha Railway Station. The identity of some of the accused was ascertained on 27th February 2007. A1 was arrested in the house of one Ratnakar Patra at Balasore and a motorcycle was also seized as was a mobile phone. He searched a rented house of A1 and seized some cash. On 27th February 2007 itself PW-32 managed to arrest apart from A1, Hrushikesh Das (A2), Laxmidhara Behera (A3), Chanda @ Sk. Haffizuddin (A4) and Lali @ Mir Alim (A5) and forwarded them to the Court of SDJM, Bhadrak. A team was sent on the next date to Patna for further investigation. On 12th March 2007, one of the suspects, Raju Kumar Ray, was brought by the team that went to Patna.

12. On 4th April 2007, at the raid conducted at hotel Sagar Inn in Bhadrak, A6, A7, A8, Tutu @ Mayanka Kumar, Masterjee @ Sunil Kumar (A9) were arrested and Rs.4 lakh of cash was seized along with weapons. Several other arrests took place of other accused on 10th April, 2007.

13. Shri Partha Sarathi Pattnaik (PW-24) working as JMFC, Bhadrak conducted Test Identification Parade (TI Parade) in the Bhadrak jail premises on 5th March, 2007. Manas Kumar Panda (PW-7), Asutosh Sahu (PW-1), Sanat Kumar Majumdar (PW-10) and Ananta Gopal Das (PW-2) were the witnesses, who identified the present four Appellants. The TI parade in respect of A6, A7 and A8 was held on 11th April, 2007.

14. It must be noticed here that A6, A7, Tutu @ Mayanka Kumar (the case against whom was split up) and Masterjee @ Sunil Kumar (A9)

were arrested in connection with Bhadrak PS Case No.90 of 2007 while they assembled at hotel Sagar Inn and were preparing to commit dacoity.

15. On completion of investigation, the police submitted a charge-sheet against A1, A2, A3, A4, A5, A6, A7, A8, A9 and Tutu @ Mayanka Kumar under Sections 396/307/120-B IPC and sections 25/27 of the Arms Act. The charge-sheet was submitted against accused Sanjay Singh @ Subodh Kumar, Raju Kumar Ray @ Paswan under Section 120-B/109 IPC and against Mintu @ Dharmendra Kumar (A10), Bibek Kumar Sharma (A11) and Rajib Kumar Sharma (A12) under Section 120-B IPC. Accused Sanjaya Kumar Sinha (A13), Sanjit Kumar (A14), Vikram Kumar Gupta (A15), Krushna Chandra Behera (A16) were charge-sheeted under Section 120-B IPC mentioning that there was not sufficient evidence against them. The police sought permission of the Court to continue the investigation under Section 173 (8) Cr PC.

16. The SDJM., Bhadrak took cognizance against A13, A14, A15 and A16 although sufficient evidence was not collected against them during investigation. The case against Raju Kumar Ray @ Paswan and Tutu @ Mayank Kumar was split up on 13th October, 2009 by the ADJ., Bhadrak. A supplementary charge-sheet was filed against J.P.@ Jai Prakash @ Bipin Sharma (A17) and the case was committed for trial in ST Case No.171 of 2007 dated 16th November, 2009. The said case was tagged with the present case and A17 faced trial along with other accused persons.

17. On behalf of the prosecution, 34 witnesses were examined. The accused took the plea of denial and false implication. A1 claimed that he had no Yamaha motorcycle and that his mobile phone had not been seized by the police. A2 stated that his Pulsar motorcycle was not seized from his house, but had been seized when his son had been to meet him at the PS. A5 claimed he was not arrested from hotel Sagar Inn, but was called from his house and arrested at the PS. A6 stated that on 3rd April 2007, one Manoj Das of Orissa Police had brought him from his house. A7 also stated that he was brought from his house and was forced to sign on some blank papers. A8 claimed that on 3rd April, 2007, the police had brought him from his house. A9 stated that on 5th April 2007, Manoj Das brought him from Bihar and obtained his signature on a plain paper.

18. The defence examined 7 witnesses. 3 witnesses were examined on behalf of A2; A9 examined himself as DW4; A7 examined himself as DW5; A4 and A5 were examined as DW6 and one Madan Mohan Parida, who was originally being arraigned as PW, was examined as DW7 on behalf of A7.

The trial Court judgment

19. The trial Court on an analysis of the evidence, returned the following findings:

(i) From the evidence of PWs 6, 7 and 13 it was proved that on 27th February 2010, PW 13 along with the deceased collected the aforementioned cash from the ECR and the LIC, Bhadrak branch;

(ii) Based on the TI Parade, the evidence of PW 24 i.e. the Judicial Magistrate who conducted the TI Parade, and the evidence of PWs 1 and 7, it was proved that between 1 and 2 pm on 23rd February, 2007 there was a dacoity committed in front of the LIC office; the security guard was assaulted by gun and six persons including the four accused i.e., A-1, A-6, A-7 and A-8 were involved in the dacoity.

(iii) The evidence of PW 7 was very clear, cogent and trustworthy. There was no reason to discard the evidence on the question of participation of the four accused. Inasmuch as the spot map (Ext-35) does not, as explained by PW 32 (IO), reveal all the shops located around the LIC Office, the failure to locate the shop of PW 7 therein did not affect his evidence that it was in fact in front of the LIC Office.

(iv) Both the deceased died by gunshot injuries. The driver viz, PW 10 of the Maruti car hired to take the cash, was injured. He corroborated the evidence of PWs 6 and 13 about the occurrence. PW 10, the injured eyewitness, had identified only A-1 and not the other accused. As regards, the minor discrepancies in the evidence of PWs 1, 2 and 7, it was observed as under by the trial Court:

“P.W. 1, P.W.2 and P.W. 7 were the persons of lower strata of the society. They were examined in the court about two and half to three and half years, after the occurrence. It is not expected from them that they would give a graphic description of the occurrence. In this case, the occurrence started from firing and thereafter culprits snatched away the tin box containing the cash and fired short towards the security guard and thereafter started indiscriminating firing and fled away. The witnesses were present at different places and they have only saw a part of the

occurrence. As because, the witnesses were not stated about the whole occurrence so, the part of the reliable evidence of the witness cannot be rejected only for that ground.”

(v) The evidence of PW 7 and PW 18 clearly revealed that six persons were present at the time of occurrence and they went away by motor cycle. That all the six persons went away by motor cycle after the occurrence showed that they had committed the offence conjointly. Admittedly, prosecution failed to establish the identity of two other persons who were present at the spot along with accused Amit @ Gullu @ Amitabh Kumar, Chandan Kumar Sharma, Lambu @ Chandramohan Jha and Mohan Chaudhury. Therefore, the prosecution was able to establish that six persons were involved in the offence. Consequently, the contentions of the defence that the prosecution had failed to establish the involvement of five or more persons in the occurrence was liable to be rejected.

(vi) Considering the date of arrest of the accused persons and the date of holding the TI Parade, there was no delay in holding it.

(vii) The apprehension of Amit @ Gullu @ Amitabh Kumar, Chunnu @ Chunni @ Mohan Choudhury, Chandan Kumar Sharma and Mir Lali @ Mir Ali from Hotel Sagar Inn was an incriminating piece of circumstance against them.

(viii) The prosecution failed to establish the alleged seizure of cash, arms and ammunition from the accused persons. The bags alleged to have been seized as per Ext 86 to 90 were not produced in this case.

(ix) In absence of any certificate by any responsible officer of the cellular Company of the call detail report (CDR), Ext. 74 to Ext. 81 could not be taken into consideration.

(x) The prosecution failed to bring home the charges against A-1, A-2, A-3, A-4, A-5, A-9 to A-17. Also, no evidence was produced by the prosecution as regards the seizure of fire arms. There was no direct or circumstantial evidence to establish the conspiracy between the accused persons for committing dacoity and murder. Therefore, it was held that the charge under Section 120B IPC had not been established.

(xi) Ultimately, the trial Court concluded as under:

“76. From the above discussion, I hold on 23.2.07 during (Noon) the occurrence took place in front of L.I.C. Office, Bhadrak at Bonth Chhak. Accused Lambhu @ Chandramohan Jha, Amit @ Gullu @ Amitabh Kumar, Chhunu @ Chunni @ Mohan Chaudhury and accused Chandan Kumar Sharma along with two others conjointly have committed dacoity of cash of Rs.24,09,274.90 of Central Bank of India, Bhadrak. During occurrence accused persons were illegally possessing firm arm like revolver, country made pistol and use the same causing death of Dibakar Sahu and Lalmohan Singh. Accused persons also caused fire arm injury to Kiran Khuntia, Sanat Majumdar, Arpita Mohanty and Bijoy Barik on the vital part of their bodies. The above named four accused persons were correctly identified by the eye witnesses during Test Identification Parade and in the Court. Accused Amit @ Gullu @ Amitabh Kumar, Chhunu @ Chunni @ Mohan Chaudhury and Chandan Kumar Sharma were apprehended by the police from hotel Sagar Inn at Charampa. Accused Chandra Sharma was staying at Mishra Guest House at Charampa prior to two days of the

occurrence in the name of Rakesh Kumar and he left the guest house, just prior to the occurrence. Police seized the weapon of offence (revolver and country made pistol) used at the time of occurrence. Prosecution failed to establish the identity of two other accused persons present during the occurrence, alongwith the above named four accused persons. Since, two of the other accused persons are still absconder, so the non-identification of two other accused persons no-way affect the prosecution case about the involvement of six persons during the occurrence. As I hold six persons were present at the time of occurrence, so all the accused persons are conjointly liable for the offence committed in this case. Therefore, I hold prosecution able to establish the offence against Lambu @ Chandramohan Jha, Amit @ Gullu @ Amitabh Kumar, Chhunu @ Chunni @ Mohan Chaudhury and Chandan Kumar Sharma u/s. 395, 396, 397 I.P.C. & u/s. 25/27 of Arms Act beyond all reasonable doubt.”

The offence punishable under Section 396 IPC

20. Mr. Salman Khurshid, learned Senior Counsel appearing for the Appellants along with Mr. Avijit Pal, learned counsel submitted that 17 persons were sent up for trial of which 13 have been acquitted and four have been convicted. Accordingly, the conviction for the offence under Sections 395 and 396 IPC cannot be sustained in law. Since there is no charge as regards the offence of murder punishable under Section 302 IPC *vis-à-vis* each of the four accused, the Appellants cannot possibly be convicted for that offence. If Section 395 IPC goes then automatically Sections 396 and 397 IPC also will have to go since they are interlinked and they cannot be understood in isolation. Without the charge under Section 395 being proved, Sections 396 and 397 cannot be contemplated. Reliance is placed on the judgment of the Supreme Court in ***Om Prakash v. State of Rajasthan AIR 1998 SC 1220.***

21. On the other hand, Mr. Katikia, learned Additional Government Advocate for the State relied on the decision in ***Ganesan v. State represented by Station House Officer 2021 SCC Online 1023*** and pointed out that as long as there is involvement of more than five persons shown in the crime, the fact that less than five may have been found involved in the offence punishable under Section 395 IPC would not result in their being acquitted of such offence as not made out only because five persons were not convicted for that offence.

22. The above submissions have been considered. It is no doubt true that Section 391 IPC envisages five or more persons conjointly committing or attempting to commit a robbery and, in such event, every person so committing or attempting would be held to be guilty of the offence of dacoity. Section 396 IPC provides for dacoity with murder and Section 397 provides for robbery or dacoity with attempt to cause death or grievous hurt. While it is no doubt true that the essential ingredients are that there shall be more than five persons involved in the robbery, in the present case, the involvement of more than five persons was shown in the first place in the FIR, as it was filed against ‘unknown persons’. In other words, even if the identity of some of the other persons is not known, the fact remained that there were more than five involved and this fact has not been able to be dislodged by the defence.

23. In ***Om Prakash v. State of Rajasthan*** (*supra*) neither the charge nor the finding recorded by the trial Court was that the three convicted persons “and two other unknown persons had committed dacoity.” Only five named accused were alleged to have committed the offence. It was in

those circumstances that it was held that with two of them having been acquitted, it was as if the remaining three alone had committed the offence and, therefore, it was not proper to convict the remaining under Section 395 IPC.

24. However, the facts in the present case are closer to the facts in ***Ganesan v. State represented by Station House Officer (supra)*** where it was observed as under:

“53. ... Even there are concurrent findings recorded by all the courts below that five persons were involved in committing the offence of robbery. Merely because some of the accused absconded and less than five persons came to be tried in the trial, it cannot be said that the offence under Section 391 IPC punishable under Section 395 IPC is not made out. What is required to be considered is the involvement and commission of the offence of robbery of five persons or more and not whether five or more persons were tried. Once it is found on evidence that five or more persons conjointly committed the offence of robbery or attempted to commit the robbery a case would fall under Section 391 IPC and would fall within the definition of dacoity.”

25. In the present case, the involvement of more than 17 persons who were sent up for trial is evident. In fact, the witnesses talked about six persons coming on three motor bikes at the scene of crime and then fleeing away. The other two were not known. Therefore, the involvement of six persons in the actual crime is more than adequately brought out in the case of the prosecution. Consequently, it cannot be said that the present four Appellants cannot be convicted for the offence under Section 395 read with Section 397 of IPC.

Section 105 Evidence Act

26. It was then contended that for the purpose of Section 105 of the Evidence Act, the evidence brought on record created doubt regarding the involvement of the present Appellants in the crime and therefore, they must be given the benefit of doubt. Reliance in this regard is placed by Mr. Khurshid on the judgment in *Vijayee Singh v. State of U.P. AIR 1990 SC 1459*.

27. In reply, it was submitted by Mr. Katikia, learned AGA that the evidence of PWs 1, 2, 7 and 10 about the involvement of six persons in the crime was clear. Of those six persons the evidence proved beyond doubt the participation of the present four Appellants, who were identified in the TI Parade by the aforementioned PWs 1, 2, 7 and 10. There was no occasion therefore, for giving the accused the benefit of doubt under Section 105 of the Indian Evidence Act.

28. The Court has carefully examined the testimonies of PWs 1, 2, 7 and 10 as well as that of PW 24, the JMFC who conducted the TI Parade. Neither the procedure for holding TI Parade has been able to be shown to be not in consonance with the legal requirement nor the actual identification of the Appellants by the aforementioned witnesses in the TI Parade been shown to be doubtful. In other words, the identity and the involvement of each of the present Appellants is more than adequately proved through the TI Parade.

TI Parade

29. It is then contended that two of the victims of the crime i.e. PWs 13 and 10 had not participated in the TI Parade to identify the Appellants and

therefore, there was a reasonable doubt created over their involvement. Reliance is placed on the decision in ***Rahimal v. State of UP (1992) CriLJ 3819***. It was further submitted that the TI Parade by itself cannot be substantive evidence under Section 9 of the Evidence Act. Reliance is placed on the decisions in ***Budhsen v. State of U.P. AIR 1970 SC 1321***; ***Sheikh Hasib @ Tabarak v. State of Bihar AIR 1972 SC 283*** and ***Sampat Tatyada Shinde v. State of Maharashtra AIR 1974 SC 791***.

30. In response, it is submitted by Mr. Katikia that in the present case the T.I. Parade is one of the elements in the pieces of evidence which corroborated the eyewitness testimony. It was not projected by the prosecution as a substantive piece of evidence.

31. Having carefully perused the trial Court judgment as well as the entire evidence on record, the Court accepts the plea of the prosecution that in the present case the TI Parade evidence has not been relied upon by the prosecution as a substantive piece of evidence but only as corroborating the main evidence. In ***Raja v. State by the Inspector of Police (2020) 15 SCC 562***, the Supreme Court explained the legal position as under:

“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 Criminal Appeal No. 740 of 2018 etc. Raja etc. vs. State by the Inspector of Police 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.

16. Again, there is no hard and fast rule about the period within which the TIP must be held from the arrest of the accused. In certain cases, this Court considered delay of 10 days to be fatal while in other cases even delay of 40 days or more was not considered to be fatal at all. For instance, in *Pramod Mandal v. State of Bihar* the accused was arrested on 17.01.1989 and was put up for Test Identification on 18.02.1989, that is to say there was a delay of a month for holding the TIP. Additionally, there was only one identifying witness against the said accused. After dealing with the decisions of this Court in *Wakil Singh v. State of Bihar*, *Subhash v. State of Uttar Pradesh* and *Soni v. State of Uttar Pradesh* in which benefit was conferred upon the accused because of delay in holding the TIP, this Court considered the line of cases taking a contrary view as under:

“18. The learned counsel for the State submitted that in the instant case there was no inordinate delay in holding the test identification parade so as to create a doubt on the genuineness of the test identification parade. In any event he submitted that even if it is assumed that there was some delay in holding the test identification parade, it was the duty of the accused to

question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the test identification parade. Reliance was placed on the judgment of this Court in *Bharat Singh v. State of U.P.* In the aforesaid judgment this Court observed thus: (SCC p. 898, para 6)

“6. In *Sk. Hasib v. State of Bihar* it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time. Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the police officer who conducted the investigation should have been cross-examined in that behalf.”

XX

XX

XX

18. ... The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra v. Suresh* as under: (SCC p. 478, para 22)

22. ...We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by

them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.”

19. It is, thus, clear that if the material on record sufficiently indicates that reasons for “gaining an enduring impression of the identity on the mind and memory of the witnesses” are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution.”

32. The TI Parade in the present case has been held in accordance with the procedure established by law and has created no doubt in the mind of the Court over the identity and therefore, the involvement of the four accused persons. Merely because PWs 10 and 13 may not have participated in the actual TIP would not in any manner dilute the value of the said evidence.

Shops of bystander witnesses

33. It is then contended that the spot map (Ext. 35) did not show the shops of PWs 1 and 7 who were projected as eyewitnesses. Relying on the decision in *Tori Singh v. State of U.P. AIR 1962 SC 399*, it is submitted that this is a material omission and amounts to also a material contradiction.

34. This Court would tend to agree with the trial Court that this omission to show the shops of PWs 1 and 7 in the spot map cannot be viewed as a material omission. As explained by the IO (PW 32), not all the shops in the area were indicated in the spot map. These are indeed small shops which are not permanent structures and were able to be easily dismantled

and taken away at short notice. Their omission from the spot map therefore, does not create a serious doubt over the presence of PWs 1 and 7 on the scene of crime.

Issue of Estoppel

35. It is then contended that the arms, ammunitions and cash seized in connection with Bhadrak Rural P.S. Case No. 90 of 2007 was bought in the case by the order of the learned S.D.J.M., Bhadrak. PW 32 received the seized articles in connection with the present case. The present Appellant along with A-2 Hrusikesh Das and A-9 Masterji were acquitted in the said case. The S.I. of that case J.N. Jena was not examined in that case and there the trial Court drew an adverse inference. In other words, the prosecution was held to have failed to establish the seizure of cash, arms and ammunitions in that case. Relying on the decision in ***Manipur Administration v. Thokchom Bira AIR 1965 SC 87***, it is submitted that the benefit of that acquittal must enure to the present Appellants and they would be entitled to acquittal here as well.

36. This Court is unable to agree with the above submission. Irrespective of whether the Appellants along with certain other accused were acquitted in the other case, the fact of their involvement in the present case has been more than adequately established by the prosecution. PW 7, who was able to identify all the four Appellants, very clearly stated that he saw one person assaulting another by means of a gun and after the assault, the gun was thrown below the bridge in front of the LIC Office; the person who was assaulting took the tin box containing the cash and fled away by a Pulsar Motorcycle, which was in a starting condition by another person. He further clearly stated that “the person was carrying a tin box and was

sitting on the Pulsar Motorcycle started firing in all directions and four persons and two in the motorcycle followed them”. He could see together all six persons come in three motorcycles towards Bonth Chhak.

37. PW 10 who was the injured driver also spoke of one person moving his head as a result of which the bullet hit on the palm of his right hand. He too correctly identified A-1 Chandra Mohan Jha. PW-1 who was having a tea shop at the spot correctly identified A-6 (Amit) as the person who fired one shot skywards and another shot towards a different direction. In the TI Parade he correctly identified A-1 and A-2. Therefore, the involvement of all these persons with their fire arms has been more than adequately proved. This is apart from the fact that bullets were recovered from the injured persons PWs 9 and 11 and the weapons of offence were also seized from the accused persons. The report under Ext.98 of the ballistic expert proved that the Ext. K bullet recovered from the body of PW 9 and Ext-L bullet recovered from PW 11 were fired from Ext-M the automatic pistol seized by the Police from the possession of the accused.

38. In that view of the matter, it is not possible for the present Appellants be given the benefit of doubt since they were acquitted in the other criminal case.

Alternate submission

39. It was contended by an alternative submission by Mr. Khurshid, learned Senior counsel for the Appellants that at the highest this could be an offence under Section 302 IPC and not Section 395 read with Section 397 IPC. Since this Court has already rejected the above submission

regarding Section 395 read with Section 397 IPC, there is no occasion of this Court to consider whether the accused can in the alternative be convicted under Section 302 IPC. With two persons having been killed and by being fired at with deadly weapons in their vital parts, the question of applying Section 304 Part I IPC as pleaded by Mr. Khurshid also does not arise.

Conclusion

40. For all of the aforesaid reasons, the Court finds no reason to interfere with the impugned judgment and order of sentence of the trial Court. The appeals are accordingly dismissed. No order as to costs.

41. Wherever bail has been granted to any of the Appellants, the bail bonds shall stand cancelled and those Appellants who are on bail shall forthwith surrender in any event not later than 1st September, 2022 failing which the IIC of the concerned police station will take immediate steps to have them arrested and brought back to custody to serve out the remainder of their sentence.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

M. Panda/ PA
SK Jena/ Secy.