

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 99 of 2015

Parmeshwar Dagdu Hanvate, ... **Appellant**
Age 23 years, Occu: Auto Driver,
R/o Jevli, Tq, & Dist. Latur

VERSUS

The State of Maharashtra ... **Respondent**
Athrough Police Station, Shivaji Nagar,
Latur, District Latur

Mr. Govind A. Kulkarni h/for Mr. Devang. R. Deshmukh, Advocate
for the appellant

Mr. S. D. Ghayal, APP for the Respondent-State.

**CORAM : C. V. BHADANG AND
BHARAT P. DESHPANDE, JJ.**

DATE : 8 JUNE 2022

JUDGMENT (PER C. V. BHADANG, J.)

By this appeal, the appellant/accused is challenging the judgment and order dated 3rd and 5th January 2015 passed by the learned Sessions Court at Latur in Sessions Case No. 105 of 2013. By the impugned judgment, the appellant has been convicted for the offence punishable under section 302 and 394 read with section 34 of the Indian Penal Code (for short, the IPC). The appellant has been sentenced to suffer imprisonment for life with fine under

section 302 of the IPC and under section 394 of the IPC, he has been sentenced to suffer rigorous imprisonment for five years with fine. The appellant, however, has been acquitted of the offence under section 392 read with 397, 201 and 120-B of the IPC. The substantive sentences have been directed to run concurrently.

2. The prosecution case may be briefly stated thus:

i. Deceased Baswaraj These was working as a manager with Swastik Petrol Pump. The first informant Vaijnath Kode (PW-2) was working as a sweeper at the said petrol pump. On 1 May 2013, at about 8.00 p.m., the deceased Baswaraj These and Vaijnath Kode (PW-2) were proceeding towards Swastik Gas Agency for depositing daily cash collection at the petrol pump. It is said that when they had reached at the sub way under the flyover at Shivaji Chowk, Latur, the appellant along-with co-accused Vilas Suryawanshi, since absconding and a Juvenile in Conflict with Law (JCL) intercepted them and committed robbery of cash of Rs.7,26,891/-. In the incident, Baswaraj These along-with Vaijnath Kode (PW-2) were assaulted by means of knife resulting into death of Baswaraj These.

ii. On the basis of the complaint lodged by Vaijnath Kode (PW-2), an offence at Crime No.84 of 2013 came to be registered with Police Station Shivaji Nagar, Latur under the relevant sections. During the course of investigation, statements of the witnesses were recorded. The appellant came to be arrested on 18 May 2013 and he was sent for test identification parade (TI

Parade) which was conducted by Naib Tahsildar Dilip Mulaje (PW-9) in the presence of panchas.

iii. Dead body of Baswaraj These was sent for postmortem examination and it was revealed that Baswaraj These has died due to head injury along-with injury to the chest. The statements of the witnesses came to be recorded and certain recoveries were effected including cash from the appellant. On conclusion of the investigation, a charge sheet came to be filed which was committed to the Court of Sessions and was registered as Sessions Case No. 105 of 2013.

iv. The learned Sessions Judge framed charge for the aforesaid offences to which the appellant pleaded not guilty and claimed to be tried. The defence of the appellant is of total denial and false implication.

v. At the trial, the prosecution examined in all 15 witnesses and produced the record of investigation.

vi. The appellant did not lead any evidence in defence.

vii. The learned Sessions Judge has found that the deceased has suffered homicidal death and also accepted the prosecution case as against the appellant and proceeded to convict and sentence him as aforesaid.

viii. Feeling aggrieved, the appellant is before this Court.

3. We have heard learned counsel for the appellant and learned APP. With the assistance of the learned counsel for the parties, we have gone through the record.

4. It is submitted by the learned counsel for the appellant that there is no acceptable evidence to show that the appellant was involved in the incident of robbery and the consequent death of Baswaraj Thesse. It is submitted that the evidence of the TI parade is not acceptable, in as much as, the relevant witnesses who claimed to be eye witnesses were not included as identifying witnesses in the identification parade. It is submitted that identification parade was not carried out as per the procedure set out in Criminal Manual. The learned counsel has also pointed out the manner in which the evidence of PW-9 Dilip Mulaje is recorded. It is submitted that the learned Sessions Judge has merely marked the memo of the identification parade as exhibits without PW-9 giving any particulars of the manner in which the identification parade was conducted. It is submitted that it is the substantive evidence of the Executive Magistrate conducting parade before the Court which can be considered and not the record of the memorandum of the identification parade which can, in a given case, only be read by way of corroboration. It is submitted that the evidence of the identification parade was crucial and would go to the root of the matter and in the absence of the evidence as to the identity of the appellant being established, the appellant could not have been found guilty.

5. It is next submitted that mere recovery of certain amount of cash, even if accepted, cannot be said to be an incriminating evidence. It is submitted that according to the prosecution, the appellant was the third person who was waiting at a distance on a motorcycle on which the absconding accused and the JCL managed to flee after committing robbery. It is thus submitted that the first informant (PW-2) and (PW-11) Parshuram Kale who claim to be an eye witnesses had no occasion to see the appellant in order to facilitate identification.

6. Learned APP has supported the impugned judgment. It is submitted that there is an injured eye witness namely PW-2 Vajinath Kode and his evidence would carry greater probative value. It is submitted that PW-9, who is Nayab Tahsildar and Executive Magistrate conducting identification parade, is an independent witness and had prepared memorandum of identification parade which is produced on record at Exhibits 61 and 62. It is submitted that as per section 291-A of the Code of Criminal Procedure, memorandum of identification parade is admissible in evidence. The learned APP pointed out that evidence of PW-9 has not been displaced in the cross examination. It is submitted that in addition there to, there is evidence of recovery of cash, which lend sufficient corroboration to the prosecution evidence. It is, therefore, submitted that the appeal be dismissed.

7. We have carefully considered the rival circumstances and the submissions made.

8. There is no dispute in this case that Baswaraj These met with an homicidal death. The question is, whether the appellant was involved in the incident of robbery and consequent assault on Baswaraj These, leading to his death. It is clear that none of the assailants were known to the deceased or PW-2 Vaijnath Kode and PW-11 Parshuram Kale who are examined as eye witnesses by the prosecution. Thus, the issue of identification assumes significance. A perusal of the evidence of the investigating officer shows that according to the prosecution, the actual incident of assault on PW-2 and the deceased and snatching away of the bag containing cash is attributed to the accused who is absconding and the JCL. Insofar as the present appellant is concerned, the prosecution claims that he was the one, who was waiting on a Pulsar Motorcycle near Saudagar Wine Shop at Mitranagar and on whose motorcycle they fled from the spot.

9. PW-2 Vaijnath Kode, who is an injured eye witness, has admitted that he has not given description of the physical features of the persons involved in the incident. It can thus be seen that PW-2 has not even given the description of the persons involved in the actual incident of assault who, according to the prosecution, are the accused Vilas Suryawanshi who is absconding and the JCL. It can thus clearly seen that PW-2 has also not given description of the third person who was waiting on the Pulsar Motorcycle who, according to the prosecution, is the appellant. In fact, PW-2 even does not claim to have ever seen the said person who was waiting on the Pulsar motorcycle.

10. Coming to the evidence of PW-11 Purshuram Kale, his evidence is criticized on behalf of the appellant on the ground that he is a chance witness. PW-11 claims that after dropping his colleague at his house at Gayatri Nagar, Khani, he was returning to Gandhi Chowk via Shivaji Chowk. When he reached near the underground road, he heard shouts and saw a mob gathered there. He therefore parked his motorcycle and went to see as to what was happening. He states that one Hero Honda Motorcycle was lying on the ground near the divider and one person was standing there holding a white bag. Two other persons were trying to assault him with the help of knife. He has given description of these persons as one of them was tall with fair complexion and that other was short and of black complexion. He states that the person holding the bag tried to run away from the spot when other two persons chased him and one of the persons assaulted him on the hand while other gave a blow of knife on his back. Thereafter, the bag was snatched away and both of them ran towards Saudagar Wine Shop, where one person was waiting near the wine shop on a pulsar motorcycle, who, according to the prosecution, is none other than the appellant. It can thus be seen that the witness has not given description of the person who was allegedly waiting near the Saudagar Wine Shop. Thus, in our considered view, neither PW-2 nor PW-11 have given any description of the person who was waiting on the motorcycle near Saudagar Wine Shop and thus, the alleged identification of the appellant in the test identification parade conducted on 21 June 2013 by PW-9 is rendered suspect.

11. We also find that there is material discrepancy in the evidence of PW-2 and PW-11 on the point of incident of actual assault. PW-2 attributes the assault to only one person.

12. We now come to the evidence of PW-9 and we find that his evidence is not at all satisfactory. There is one more aspect which assumes significance and that is the manner in which the evidence of PW-9 has been recorded by the learned Sessions Judge. We may reproduce the examination-in-chief of PW-9 recorded by the learned Sessions Judge as under:

“In view of the provisions of section 291-A of the Criminal Procedure Code, the report of identification parade and memorandum are admissible in evidence. Hence, they are exhibited at Exh.61 and 62 and the Naib Tahsildar who is present in the Court and conducted the parade can be put under cross - examination by the defence.”

It can thus be seen that PW-9 has not stated in his substantive evidence as to the manner in which the identification parade was conducted. The learned Sessions Judge has simply marked his memorandum of identification parade as Exhibit 61 and 62 placing reliance on section 291-A of the Code of Criminal Procedure.

13. Section 291-A of the Code of Criminal Procedure reads as under:

“291-A. Identification report of Magistrate.- (1) Any document purporting to be a report of identification under

the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:

Provided that where such report contains a statement of any suspect or witness to which the provisions of section 21, section 32, section 33, section 155 or section 157, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), apply, such statement shall not be used under this Sub-Section except in accordance with the provisions of those sections.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report.”

Thus, section 291-A of the Code of Criminal Procedure can be seen as an enabling provision as, in an appropriate case, any document purporting to be the report of identification under the hand of an Executive Magistrate, in respect of a person or property may be used as evidence in any inquiry, trial or other proceedings under this Code, although such Magistrate is not called as a witness. Sub section 2 of section 291-A would make it clear that on an application by the prosecution or the accused, the Court is obliged to summon and examine such Magistrate as to the subject matter of the said report.

14. In the present case, the Magistrate was indeed called for examination and should have stated about the manner in which the identification parade was conducted. It is necessary to note that the

criminal manual makes elaborate provisions for conduction of the identification parade which are aimed at ensuring that the same is conducted in a free and fair manner so as to give credence to the identification of the accused made before the Court. It is necessary to note that identification before the Court which is the substantive evidence, may find corroboration in the event the test identification parade is conducted in a proper manner and is shown to be acceptable. Even going by the memorandum at Exh.61 and 62, we do not find that same are satisfactory. There are blanks left in the memorandum at Exh.61 including name of the identifying witness who had purportedly identified the appellant.

15. PW-9 has admitted that Exhibit 62 was prepared subsequently. Incidentally, Exhibit 62 mentions the names of Vaijnath Kode (PW-2) and Parshuram Kale (PW-11) and one other witness (who is not examined by the prosecution) as identifying witnesses. It is also not clear whether these witnesses were jointly asked to identify the suspect or whether the identification parade was conducted separately for each identifying witness, after giving opportunity to the appellant, as suspect, to change his position amongst the dummies etc.

16. Looked from any angle, we find that the evidence of the identification parade is not at all satisfactory. Even the identification in the Court would be suspect and not acceptable as neither PW-2 nor PW-11 claimed to have clearly seen the person waiting on the motorcycle near Saudagar Wine Shop or gave the description of the

said person. It is necessary to note that PW-2 has not even given the description of the other two accused who are attributed with the actual assault on the deceased. PW-11 has also not given the description of the third person.

17. The evidence of recovery is essentially in the nature of corroboration. The substantive evidence of the identification having been found to be not acceptable, we find that the appellant is entitled to acquittal. Hence the following order:

ORDER

- (i) The appeal is allowed.
- (ii) The conviction of the appellant-accused for the offences punishable under Section 302 r.w. 34 of IPC and under Section 394 r.w. 34 of IPC is set aside. The appellant is acquitted of the said offences as charged.
- (iii) The appellant be set at liberty forthwith if not required in connection with any other offence.
- (iv) The order relating to disposal of the property is hereby maintained.

BHARAT P. DESHPANDE, J.

C. V. BHADANG, J.

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