

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

CRIMINAL APPEAL NO. 430 OF 2004

1. Natha S/o. Dhanna Sathe,
Aged 51 years, R/o. Surendra
Nagar.
2. Lakhan S/o. Bhusa Sathe,
Aged 61 years,
3. Heera S/o. Shana Awathade,
Aged 61 years,
4. Vithal S/o. Hamir Awathade,
Aged 61 years,
5. Narayan S/o. Samant Gawali,
Aged 66 years,
6. Raktu S/o. Hamir Awathade,
Aged 46 years,
7. Jetha S/o. Mittha Jognar,
Aged 71 years,
8. Kana S/o. Ghusa Chaple,
Aged 21 years,
9. Kala S/o. Dewa Awathade,
Aged 51 years,

Accused Nos. 1 to 9 are
R/o. Surendra Nagar, P.S.Chotala,
Dist. Surendra Nagar (Gujrat)

10. Jagga S/o. Bhura Sathe,
Aged 24 years,

11. Kalu S/o. Varja Sathe,
Aged 46 years,

Accused No.10 & 11 are R/o.Lomdi,
P.S. Lomdi, Distt. Surendra Nagar
(Gujrat)

.... APPELLANTS.

// VERSUS //

State of Maharashtra,
through Police Station Officer,
Police Station, Veltur,
District : Nagpur.

.... RESPONDENT.

Shri Atharva Sunil Manohar, Amicus Curiae
Shri Amit R. Chutke, A.P.P. for Respondent/State.

CORAM : ANIL S. KILOR, J.
DATED : SEPTEMBER 08, 2022.

ORAL JUDGMENT :

1. Heard Shri Atharva Manohar, Amicus Curiae and Shri
Chutke, learned A.P.P. for the Respondent/State.

2. This appeal takes exception to the judgment and order dated 03/07/2004 passed by First Ad-hoc Additional Sessions Judge, Nagpur, in Sessions Trial No.496 of 2001, convicting the Appellants/Accused for the offence punishable under Section 143 of the Indian Penal Code and sentenced to pay fine of Rupees Five Hundred each, in default to undergo rigorous imprisonment for fifteen days, further sentenced to pay fine of Rupees One Thousand each, in default to suffer rigorous imprisonment for thirty days for the offence punishable under Sections 147 & 148 of the Indian Penal Code, to suffer rigorous imprisonment for four years and fine of Rupees One Thousand each, in default to suffer rigorous imprisonment for thirty days for the offences punishable under Sections 326 & 395 of the Indian Penal Code, to pay fine of Five Hundred each, in default to suffer rigorous imprisonment for fifteen days for the offences punishable under Sections 342 & 427 of the Indian Penal Code and to pay fine of Rupees One Hundred each, in default to suffer rigorous imprisonment for five days for the offence punishable under Section 90(A) of the Bombay Police Act.

3. The brief facts of the prosecution case are as under:

Waman Deshmukh is a cultivator of village Kharada, Tahsil : Kuhi, Police Station : Veltur, District : Nagpur. On 12/04/2001 at about 10:00 to 11:00 a.m. he was in his field. The chilly crop was sown by him and it was standing in the field. At about 10:00 a.m., the Kathewadi cowherds came to his field along with their cows. Waman Deshmukh attempted to drive them out of the field and crop. The accused persons obstructed him from restraining them and their cows, to enter in his field and allowed their cows to enter in the field and crop. Some of the accused persons caught-hold Waman and tied him by a rope to the electric pole. The accused persons grazed their cows in chilly crop. Some of the accused had plucked chilies from the crop. The villagers came to know about this incident and, therefore, some villagers rushed to the spot. The accused persons assaulted them and beat them by sticks and by pelting stones with the help of sling. Anandrao Deshmukh received injury by means of stick. Vishwanath Deshmukh also received injury to his head by pelted stone and injury on his leg by stick. Dayaram Dongre received an injury to his right shoulder of pelted stone by sling. Prabhakar Deshmukh also received injuries. Hiranman Deshmukh was also injured. Duryodhan Kullurkar received injury of pelted stone by sling. Mahagu Khobrabade received injury of pelted

stone, on his fore-head. Prabhakar Shendre received injury of pelted stone by sling on his left hand. Prakash Shendre was also present there. He received injury to his forehead. The villagers had taken injured persons to the police station Veltur and all of them were referred to the hospital for their treatment and medical examination. The report was lodged by Prakash Shendre in Police Station. The injured persons were referred to the Medical College Hospital, Nagpur, for their further treatment.

4. Thereupon the offence was registered and the investigation was carried out. On completion of the investigation charge-sheet was filed. Thereafter charges were framed at Exh.10 and it was read over and explained to the accused persons. The accused pleaded not guilty and claimed to be tried for the charges. The pleas of the accused were recorded separately.

5. After conclusion of the trial, on marshalling the oral as well as documentary evidence, the trial Court convicted the appellants for the offences punishable under Sections 143, 147, 148, 326, 342, 427 and 395 of the Indian Penal Code and Section 90-A of the Bombay Police

Act and further acquitted the accused persons for the offence punishable under Section 135 of the Bombay Police Act vide impugned judgment and order dated 03/07/2004.

6. Shri Manohar, learned Amicus Curiae submits that there are discrepancies about the time of the incidence, number of persons assaulted and about the number of cows, who have damaged the crops.

7. He further submits that none of the eyewitnesses were acquainted with the accused or the assailants and they were not knowing the names of any of the assailants and in the said backdrop identification parade ought to have been conducted by the Investigating Officer, but the prosecution failed to do so.

8. It is pointed out that the witnesses have, for the first time, identified the appellants/ accused in the Court. He, therefore, submits that such evidence of identification is valueless and not safe to be relied upon for the purposes of conviction. To fortify his argument he has placed reliance upon the judgments of the Hon'ble Supreme Court of India in the cases of *Rameshwar Singh ..vs.. State of J. and K.*, reported in

(1971) 2 SCC 715, *Dana Yadav ..vs.. State of Bihar*, reported in (2002) 7 SCC 295 and *Mulla ..vs. State of U.P.*, reported in (2010) 3 SCC 508.

9. Shri Manohar, learned Amicus argues that the spot of occurrence was the agricultural field of P.W. 1 Waman, whereas the spot panchnama was drawn at some other place. He further points out that both the panchas i.e. P.W. 11 and P.W. 12 were declared hostile. He, therefore, submits that the prosecution has failed to establish the guilt against the appellants beyond doubt by bringing sufficient and cogent evidence on record. He, accordingly, submits that the impugned judgment and order suffers from perversity and therefore, the accused need to be acquitted by quashing and setting aside the impugned judgment and order.

10. On the other hand, Shri Chutke, learned A.P.P. supports the impugned judgment and order and submits that as the learned trial Court, after scrutinizing the oral as well as documentary evidence and after recording the reasons, has held the appellants guilty. There is no legal infirmity or illegality committed by the learned trial Court. Accordingly, he prays for dismissal of the present appeal.

11. In the backdrop of the submissions made, I have perused the record and the impugned judgment and order with the able assistance of both the learned counsel.

12. From the F.I.R. and the statements of eyewitnesses, it is evident that none of the witnesses has disclosed the name of the accused persons when the statements were recorded. Furthermore, none of the witnesses has stated the names of the assailants. It has come on record that the assailants were 30 to 40 persons, whereas the 11 accused persons have been charge-sheeted. It has also come in the evidence that the witnesses were not acquainted with the assailants.

13. It is pertinent to note, at this juncture, that no identification parade was conducted by the Investigating Officer in this case and the accused were identified first time in the Court. Therefore, it is significant to note that the time gap between the date of occurrence of the alleged incidence and the date of identification of the accused by the witnesses in the Court, is three years. This is further significant in the light of the oral evidence of P.W. 13-complainant, who in his cross-examination has categorically stated that most of the Kathewadi people look alike and therefore he could not identify them properly. He further states that if

100 Kathewadi people were present then he could not identify the persons who were present in the field.

14. Thus, in the above referred backdrop, it is necessary to consider the law on the point of identification and its importance. In the case of *Rameshwar Singh* (supra) the Hon'ble Supreme Court of India, has held thus :

6. Before dealing with the evidence relating to identification of the appellant it may be remembered that the substantive evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards are effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is thus and thus alone that justice and fairplay can be assured both to the accused and to the prosecution. The

identification during police investigation, it may be recalled, is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in Court. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in court of the identifying witness.

15. It is profitable to refer to the judgment in the case of *Dana*

Yadav (supra), the Hon'ble Supreme Court of India, has held thus :

“38. In view of the law analysed above, we conclude thus:

(a) to (d)

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) ...

(g) Ordinarily, if an accused is not named in the first Information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.”

16. Similarly, useful reference can also be made to the view taken in the case of *Mulla ..vs. State of U.P.* (supra) by the Hon'ble Supreme Court of India, wherein it is held thus :

“41. Now, let us consider the arguments of the learned amicus curiae on the delay in conducting the test identification parade. The evidence of test identification is admissible under Section 9 of the Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court.

42. Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction.

43.

44. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of

holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.”

17. From the above referred observations of the Hon'ble Supreme Court of India it is evident that the evidence of Test Identification is admissible under Section 9 of the Evidence Act, 1872. The identification parade belongs to the stage of investigation by the police. It further makes clear that the necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a Test Identification Parade is that the witnesses who claim to have seen the culprits at the time of occurrence are to identify them in the midst of the other persons without any aid or any other source. The test is done to check upon their veracity. Thus, the main object of holding an identification parade during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime.

18. It is further clear that, it is a matter of great importance both for the Investigating Agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards are effectively taken so that the investigation proceeds on correct lines for punishing the real culprits. It would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in Court of the identifying witness.

19. In the teeth of the above referred well settled law, I revert back to the evidence led by the prosecution.

20. It is an admitted position that none of the witnesses has stated the names of the assailants. It is further clear from the evidence that the witnesses were not acquainted with the assailants and in the said backdrop, it was imperative for the prosecution to conduct the identification parade without avoidable and unreasonable delay.

21. In this case, the oral testimonies of the eyewitnesses were recorded after three years of the incidence, during which they identified the accused, first time in the Court. Therefore, the possibility and chances of fading of their memory after a gap of three years, cannot be ruled out. Particularly, complainant in his oral testimony has stated that Kathewadi people look alike and therefore, he could not identify them properly.

22. In the circumstances, I have no hesitation to hold that the prosecution has failed to bring on record sufficient and cogent evidence as regards identity of the accused persons by not conducting identification parade during the stage of investigation. In the circumstances, identification of the accused by the witnesses in the Court is valueless and not safe for conviction.

23. In addition to this, there are many discrepancies and contradictions in the evidence of the eyewitnesses.

24. As per P.W. No.1 time of incidence is 10:00 a.m. and according to him, 100 to 200 cows entered into his field and as per him there were 30 assailants.

25. As per P.W. 2 the time of incidence was 10:00 a.m., number of assailants were 25-30, whereas, cows were about 1500.

26. According to P.W. 3 the time of incidence was 10:00 to 10:30 a.m., cows were about 1000 and assailants were 40.

27. As per the oral testimony of P.W. 4 time was 08:00 to 08:30 a.m. cows were 1000-2000 and the assailants were 30-40.

28. As per P.W.7, time was 09:00 am and the assailants were 35.

29. As per P.W. 9 the time was 09:00 to 10:00 and assailants were 35 to 40 and as per P.W. 13 time was 10:00 a.m. and cows were 500 to 600 and assailants were 15.

30. The above contradictions, according to me, are fatal. Similarly, P.W. 1 states that the accused tied him to the electric pole by a rope, whereas, P.W. 2 states that P.W. 1 was tied to Neem tree and P.W. 13 says Guava tree.

31. P.W. 5, who is seizure panch and P.W. 11 and 12 who are panchas to spot panchnama, also do not support the case of the prosecution.

32. As far as omissions are concerned, the evidence of Investigating Officer is relevant, who has categorically stated that the omissions pointed out were not stated to him by the witnesses. Thus, considering the overall evidence brought on record by the prosecution, it can be said that the prosecution has failed to bring the guilt home against the accused. In these circumstances, I pass the following order.

33. Before parting with the judgment, I record appreciation for the able assistance provided by the learned Advocate Shri Atharva Manohar as Amicus Curiae.

- i) The appeal is allowed.
- ii) The impugned judgment and order dated 03/07/2004 passed by the First Ad-hoc Additional Sessions Judge, Nagpur in Sessions Trial No.496 of 2001 is hereby quashed and set aside.
- iii) The appellants are acquitted of the offences punishable under Sections 143, 147, 148, 326, 342, 427 and 395 of the Indian Penal Code and Section 90-A of the Bombay Police Act.
- iv) His Bail Bonds shall stand cancelled.
- vi) The Muddemal Property be dealt with as per order of the learned Special Judge.

The criminal appeal stands **disposed of** accordingly. The pending applications, if any, shall stand disposed of accordingly.

JUDGE

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