

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

SR. No.311

CRA-S-64-SB-2002 (O&M)
Reserved on:30.11.2022
Pronounced on:08.02.2023

Mukhwinder Singh @ Mukha and another

...Appellants

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE N.S. SHEKHAWAT

Present: Mr. K.P.S.Virk, Advocate as Amicus Curiae and
Mr. Ashish Gupta, Advocate and
Mr. Gaurav Tangri, Advocate,
for the appellants.

Mr. M.S. Bajwa, DAG, Punjab.

N.S. SHEKHAWAT, J.

The appellants have preferred the present appeal before this Court against the judgment of conviction and order of sentence dated 04.12.2001 passed by the learned Additional Sessions Judge, Kapurthala, whereby they were convicted for the offence punishable under Section 397 IPC and sentenced to undergo rigorous imprisonment for a period of 07 years and to pay a fine of Rs.1,000/- each with default stipulation.

The present case was registered on the basis of the statement made by the complainant Sudesh Sharma. As per her, at about 4.00 P.M. on 23.04.1996, she was going to her house at Mehli Galt, Phagwara and when she reached near her house, three persons came on a scooter. One of them was aged about 23/24 years, height 5'-9", heavy structure and of wheatish complexion and looked like a wrestler and the second person was aged

about 18/19 years, height 5'-5" and of black complexion. The third person was a Sikh young man, height 5'-6", wheatish colour and aged about 35/36 years. The Sikh young man had shown her a pistol and asked her to hand over him the gold chain and the person, who looked like a wrestler, had taken gold chain from her and then they threatened her not to raise the noise and ran away. She further stated in the FIR Ex. PA that out of fear, she did not register any complaint then and on 18.05.1996, she came to know that the city police had apprehended a gang of thieves and had recovered gold ornaments from them. So, she along with Vijay Kumar s/o Faqir Chand came to the police station and asked MHC Mandeep Singh about it. On this, MHC had shown her many ornaments and she identified her gold chain, on which 'SK' was inscribed in English.

In the meantime, on 10.05.1996, accused/appellant No.1 Mukhwinder Singh was arrested by the police in some other case. On 12.05.1996, while he was in police custody in another case, he made a disclosure statement before ASI Karamjit Singh that he alongwith Jaswinder Singh @ Billa and Kulwinder Singh had committed the robbery of a gold chain at pistol point and he had kept the same buried in the southern portion of his house and could get the same recovered. The memo in this regard was attested by HC Swarna Ram & PHG Pritam Dass. Accused Mukhwinder Singh led the police party to the disclosed place and got recovered the gold chain, on which word 'SK' was inscribed. It was taken into possession by the police vide memo, which was attested by HC Swarna Ram and PHG Pritam Dass. It was alleged that the said chain was identified by the complainant and accordingly, the FIR in the instant case was got registered by her.

Initially accused Jaswinder Singh @ Billa was arrested in the present case and he had faced the prosecution, whereas Kulwinder Singh was declared a proclaimed offender. Since the case was triable by the learned Court of Sessions, it was committed to the learned Sessions Court and vide order dated 09.07.1997, the learned trial Court charge sheeted the appellants under Section 397 IPC. Both the accused/appellants pleaded not guilty and claimed trial.

To bring home the guilt of the accused/appellants, the prosecution examined five witnesses. The prosecution examined ASI Karamjit Singh as PW-1; HC Swarna Ram as PW-2; Sudesh Sharma as PW-3; Sanjiv Kumar as PW-4 and Inspector Baldev Singh as PW-5. The prosecution exhibited certain documentary evidence to prove the guilt of the accused-appellants during the course of trial.

After closure of the prosecution evidence, the statements under Section 313 Cr.P.C. of the accused were recorded in which they submitted that they had been falsely involved in the present case. Accused-appellant No.1-Mukhwinder Singh @ Mukha denied that he had made a disclosure statement and got the ornaments recovered. As per the accused, the police had taken them from their houses and later on, a false case was planted on them.

Learned counsel for the appellants vehemently argued that in the present case, the occurrence had taken place at about 4:00 PM on 23.04.1996 in a busy market towards Mehli Gate, Phagwara. At the relevant time, the complainant had already reached near her house and was walking in a busy market. Even several persons were attracted at the spot and the

complainant, who was working as a Lecturer, surprisingly did not register the FIR in the instant case and ultimately the FIR was got registered by her on 18.05.1996 i.e. after a delay of about 25 days of the occurrence. In fact accused-appellant No.1-Mukhwinder Singh @ Mukha was arrested on 10.05.1996 in a different case and after 08 days of his arrest, the present false case was planted on him and Jaswinder Singh @ Billa. The above-said submissions made by learned counsel for the appellants have been opposed by learned State counsel. He contended that out of fear, the complainant did not report the matter to the police. However, when the complainant came to know that a gang of thieves had been arrested and certain jewellery had been recovered from them, she mustered the courage and lodged the FIR on 18.05.1996. Thus the delay in registration of the FIR stood sufficiently explained in the present case.

After hearing learned counsel for the parties and going through the record of the case carefully, I find sufficient force in the submissions made by learned counsel for the appellants. The prosecution examined the complainant Sudesh Sharma as PW-3. Apparently, she was working as a Lecturer in a Govt. School, Banga Road, Phagwara and was an educated person. Even the place of occurrence was on a busy road in a thickly populated area. Even her house was situated near the place of occurrence and she was passing through the market at the relevant time. Even the shops were open. She even raised the noise, when the accused had sped away on their scooter and number of persons had gathered at the spot. PW-3 Sudesh Sharma, complainant, also admitted in her cross-examination that she went to the police station after the occurrence with some of the persons, who had

gathered at the spot and had informed the police. The police recorded her statement and obtained her signatures. But surprisingly, the police failed to exhibit any such complaint, which was lodged by the complainant on the date of alleged occurrence under her signatures. Apart from that, in her cross-examination, she admitted that she had gone to the police station on 10.05.1996, when the accused were in custody. However, the FIR in the instant case was registered on 18.05.1996. Thus, the prosecution miserably failed to offer any explanation with regard to the delay in registration of the FIR and the prosecution story is liable to be disbelieved on this ground alone.

Hon'ble the Supreme Court in **Thulia Kali Vs. The State of T.N., 1972 (3) SCC 393** has observed as under:-

“ It is in the evidence of Valanjiaraju that the house of Muthuswami is at a distance of three furlongs from the village of Valanjiaraju. Police station Valavanthi is also at a distance of three furlongs from the house of Muthuswami. Assuming that Muthuswami PW was not found at his house till 10.30 p.m. on March 12, 1970 by Valanjiaraju, it is not clear as to why no report was lodged by Valanjiaraju at the police station. It is in our opinion, most difficult to believe that even though the accused had been seen at 2 p. m. committing the murder of Madhandi deceased and a large number of villagers had been told about it soon thereafter, no report about the occurrence could be lodged till the following day. The police station was less than two miles from the village of Valanjiaraju and Kopia and their failure to make a report to the police till the following day would tend to show that none of them had witnessed the occurrence. It seems likely, as has been stated on behalf of the accused, that the villagers came to know of the death of Madhandi deceased on the evening of March 12,

1970. They did not then know about the actual assailant of the deceased, and on the following day, their suspicion fell on the accused and accordingly they involved him in this case. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay the report not only gets bereft of the advantage of spontaneity danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case Kopia daughter-in-law of Madhandi deceased according to the prosecution case, was present when the accused made murderous assault on the deceased. Valanjiaraju, step-son of the deceased, is also alleged to have arrived near the scene of occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjiaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance in our opinion would raise considerably doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it.”

The learned counsel for the appellants vehemently argued that in the instant case, the complainant had given a vivid account of the entire occurrence and had mentioned the detailed physical features of all the accused. Not only that, she even mentioned the approximate age and complexion of the skin as well. Thus, the police was under a legal obligation to hold the test identification parade. He further contended that the findings recorded by learned trial Court are apparently unsustainable in this regard. The learned trial Court wrongly held that it was for the accused-appellants to claim the identification parade and if they refused to participate in the test identification parade, the only inference was that they knew that they would be identified by the PWs. The said submissions made by learned counsel for the appellants have been vehemently opposed by the learned State Counsel by submitting that PW-3 Sudesh Sharma had duly identified all the accused before the learned trial Court and her deposition on oath is liable to be believed in this regard. The accused-appellants themselves refused to appear for the test identification parade and an adverse inference was correctly drawn against them by the learned trial Court.

I find sufficient force in the arguments raised by the learned counsel for the appellants. In her cross-examination, the complainant-Sudesh Sharma (PW-3) clearly stated that she went to the police station on 10.05.1996 and the accused were in custody on the said day. The FIR in the instant case was registered on 18.05.1996. When the said witness i.e. PW-3 Sudesh Sharma had already seen the accused on 10.05.1996 itself, the accused correctly refused to get themselves identified in a test identification

parade, which was to be held subsequent to the registration of FIR on 18.05.1996. Apart from that, even the evidence led by the prosecution clearly shows that the accused/appellants were not produced before the court in muffled faces. When the accused-appellants were not known to the witnesses, it was the duty of the prosecution to hold the test identification parade and to ensure that the accused were produced before the court in muffled faces. Even PW-5 Inspector Baldev Singh, SHO, admitted in his cross-examination that he could not say if the accused were produced before the Judicial Magistrate in muffled faces. Thus, the prosecution was obliged to test identification parade of the accused at the first available opportunity during the course of investigation, which could have lent support to the identification of the accused by the prosecution witnesses in the Court.

Hon'ble the Supreme Court in **Raja Vs State by the Inspector of Police, (2020) 15 SCC 562** has observed as under:-

*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, (2004) 13 SCC 150** 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, (1981) Suppl. SCC 28**, **Subhash v. State of Uttar Pradesh, (1987) 3 SCC 231** and **Soni v. State of Uttar Pradesh, (1982) 3 SCC 368** 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. 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., (1973) 3 SCC 896**. In the aforesaid judgment this Court observed thus: (SCC p. 898, para 6)*

*“6. In **Sk. Hasib v. State of Bihar, (1972) 4 SCC 773**, 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.”*

In the instant case we find that the defence has not imputed any motive to the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade. The evidence of the Magistrates conducting the test identification parade as well as the investigating officer has gone unchallenged. Learned counsel for the State is, therefore, justified in contending that in the facts and circumstances of this case the holding of the test identification parade, about one month after the occurrence, is not fatal to the case of the prosecution as

there is nothing to suggest that there was any motive for the prosecution to delay the holding of the test identification parade or that any irregularity was committed in holding the test identification parade.

*19. Learned counsel for the State has also relied upon the decision of this Court in **Anil Kumar v. State of U.P., (2003) 3 SCC 569** wherein the test identification parade was held 47 days after the arrest of the appellants. This Court after considering several decisions of this Court including the decisions in **Brij Mohan v. State of Rajasthan, (1994) 1 SCC 413**, **Daya Singh v. State of Haryana, (2001) 3 SCC 468** and **State of Maharashtra v. Suresh, (2000) 1 SCC 471** concluded that since the identifying witness was attacked by the assailants including the appellant and another, he had a clear look at the assailants. When his younger brother came to save him, he was killed by the assailants while the witness also received serious injuries. These were circumstances which would have imprinted in the memory of the witness the facial expressions of the assailants and this impression would not diminish or disappear within a period of 47 days. Similar was the case of the father and the mother of the identifying witness who had seen the assailants attacking their sons and one of their sons getting killed. In their memory also the facial expressions of the assailants will get embossed. A mere lapse of 47 days would not erase the facial expressions from their memory.*

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.

*21. Lastly in **Malkhansingh v. State of M.P., (2003) 5 SCC 746** a three-Judge Bench of this Court of which one of us (B.P. Singh, J.) was a member, after considering various decisions of this Court observed thus: (SCC pp. 751-52, para 7)*

“7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form

of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.”

(emphasis supplied)

Still further, the prosecution could not lead any evidence to show that the stolen article i.e. gold chain belonged to PW-3 Sudesh Sharma. To prove the said fact, the prosecution examined PW-4 Sanjiv Kumar, Jeweler, who stated that the gold chain Ex.P1 was prepared by him and the word ‘SK’ was inscribed on it. He issued a receipt Ex.PK to PW-3 Sudesh Sharma regarding the chain Ex.P1. However, in cross-examination, he admitted that he did not keep any account of receipt Ex.PK. He had not signed the receipt Ex.PK, but it bore the seal of his shop and was in his hand. He further admitted that he did not keep any receipt book in his shop. He could not tell the date, month and the year, when his statement was recorded by the police. His cross-examination clearly exposes the falsehood of the prosecution case and apparently PW-4 Sanjiv Kumar was a planted witness. Even the receipt Ex.PK, with the help of which the ownership of the chain was sought to be proved, appeared to be a document prepared

subsequent to the registration of the FIR and the prosecution evidence in this regard is liable to be disbelieved.

It has been shown by the prosecution that on 10.05.1996, accused-appellant No.1-Mukhwinder Singh had suffered a disclosure statement and admitted his complicity in the crime. He had also mentioned about the role of Jaswinder Singh, appellant No.2. However, the said statement was not admissible qua the role of Jaswinder, co-accused. Apart from that, it has been shown that in pursuance to the disclosure statement suffered by Mukhwinder Singh, appellant No.1, a gold chain was allegedly recovered by PW-1 ASI Karamjit Singh from the southern corner of his house. However, PW-2 HC Swarna Ram clearly admitted that no private person was called at the time of interrogation of accused/appellant Mukhwinder Singh on 12.05.1996, when the disclosure statement was allegedly suffered by Mukhwinder Singh. Even no private witness was joined at the time of interrogation or the recovery. The house of accused was situated in the *abadi* and the said house was lying open. Even no private witness was joined during the course of recovery proceedings from the house of the accused. Thus it is apparent that the recovery of the stolen article at the instance of the present appellant No.1 was doubtful. Further, the said evidence could not have been used against appellant No.2 to base the judgment of conviction.

In view of the above-said discussion, it is not possible to sustain the conviction of the accused/appellants on the evidence produced in the present case. Resultantly, the instant appeal is allowed and the judgment of conviction and order of sentence dated 04.12.2001 passed by the learned

Additional Sessions Judge, Kaurthala are set aside. The bail bonds of both

the appellants stand discharged and they may be released from custody, if not on bail and if not required in any other case.

Pending application, if any, is also disposed off, accordingly.

Case property, if any, be dealt with, and, destroyed after the expiry of period of limitation. The trial Court record be sent back.

In the end, I record my appreciation for Mr. K.P.S.Virk, learned Amicus Curiae, who had rendered his able assistance to this Court.

08.02.2023
mks

(N.S. SHEKHAWAT)
JUDGE

Whether Speaking/Reasoned: YES / NO

Whether Reportable: YES / NO