

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

SR. No.311

CRA-S-63-SB-2002 (O&M)

Reserved on:30.11.2022

Pronounced on:08.02.2023

Mukhwinder Singh @ Mukha and others

...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.

Feeling aggrieved against the judgment of conviction and order of sentence dated 04.12.2001 passed by the learned Additional Sessions Judge, Kapurthala, whereby the appellants 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 appellants have preferred the instant appeal before this Court.

Adumbrated facts of the present case are that the criminal law was set into motion on the basis of the statement made by Charanjit Singh. As per the complainant, he was working as a property dealer in Phagwara. About one year ago, when he was present in his house with his wife Raj Rani at about 12.00 noon on 03.03.1995, two persons had entered their

house, out of them, one person was clean shaven and healthy and was about 5'-9" tall and looked like a wrestler and was aged about 23/24 with wheatish complexion. The second person was also clean shaven, height 5'-5" and had wheatish complexion and was aged about 27/28 years old. The third person was standing on the main gate and was aged about 40/41 years old, 5'-9" in height and had wheatish complexion with white beard. The third accused was also wearing a turban. The person, who looked like a wrestler, threatened him and his wife by showing them a pistol and asked them to hand over, whatever they had. On the asking of the complainant, his wife handed over her gold ear-rings and a gold chain, on which 'C.S'. was inscribed. She also handed over a nose-pin (nath) to them and the total weight of the ornaments was about 20 grams (02 tolas). They left the house of the complainant while threatening them not to raise any noise and left on a scooter, which was already parked near their main gate. In fact on 10.05.1996, the police had registered a different case against the accused/appellants, in which they were arrested. A disclosure statement was suffered by accused/appellant No.1-Mukhwinder Singh @ Mukha on 12.05.1996 to the effect that about one year ago, he, Dharam Pal, Faqir Singh, Jaswinder Singh @ Billa and Kulwinder Singh snatched one gold chain, one pair of ear rings and a nose pin from a house situated in village Jasso Mazra from a woman in the presence of her husband by threatening them. At that time, he and Kulwinder Singh were armed with a pistol. Mukhwinder Singh @ Mukha, Dharam Pal and Faqir Singh went inside the house, whereas Jaswinder Singh and Kulwinder Singh stood outside the house. He had kept those ornaments wrapped in an envelope and had

concealed the same by digging earth from the northern corner of his house and he could get the same recovered from that place. In pursuance of the said disclosure statement, the stolen ornaments were recovered from his house in village Rawal Pindi, which were taken into possession by ASI Karamjit Singh in the presence of HC Swarna Ram and PHG Pritam Dass. Charanjit Singh, complainant, came to know that some persons had been arrested by the police and they have got the ornaments recovered. Consequently, on 17.05.1996, he came to the police station and identified his gold jewellery on which 'C.S.' was inscribed and a memo Ex.PA was prepared in this regard. On the statement of Charanjit Singh, a formal FIR was registered in the instant case. After necessary investigation, the challan was filed against the accused persons.

Since the case was triable by the Court of Session, the same was committed to the court of learned Sessions Judge Kapurthala. The learned trial Court ordered the framing of charge against the accused/appellants under Section 397 IPC, to which they pleaded not guilty and claimed trial. After the conclusion of the trial, accused Jaswinder Singh @ Billa was ordered to be acquitted, whereas the present appellants were convicted under Section 397 IPC and were sentenced accordingly.

To prove the charge, the prosecution examined six witnesses i.e. PW-1 Kewal Singh, PW-2 Charanjit Singh, PW-3 Raj Rani, PW-4 ASI Karamjit Singh, PW-5 HC Swarna Ram and PW-6 Durga Dass.

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 also 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 have vehemently argued that in the instant case, the occurrence had allegedly taken place at about 12.00 noon on 03.03.1995, when the complaint, namely, Charanjit Singh (PW-2) was present at his house with his wife Raj Rani (PW-3) in their village. Their house was surrounded by other houses in the village. They neither raised the noise after the departure of accused nor bothered to report the matter to anyone. Even the complainant used to go to his shop every day, still he opted not to lodge the FIR with the police and ultimately the FIR in the instant case was registered on 17.05.1996 after a delay of more than 1 year and 2 months. It is surprising that the complainant, who is a property dealer, did not lodge any FIR for such a long period and even during the course of trial, no prosecution witness could offer any explanation for the said delay. The said submissions have been opposed by the learned State counsel on the ground that on 10.05.1996, the police registered a case against the accused, in which they were arrested. Accused-appellant No.1 Mukhwinder Singh suffered a disclosure statement on 12.05.1996 with regard to snatching of the ornament from the complainant and his wife Raj Rani on 03.03.1995 from their house and thereafter the stolen jewellery was recovered from the accused. When the complainant came to know that his stolen jewellery was recovered from the accused, he reported the matter to the police without any delay. Thus the delay in registration of the FIR stood

explained properly.

I have considered the submissions made by learned counsel for the parties and find sufficient force in the submissions made by learned counsel for the appellants. PW-2 Charanjit Singh (complainant) is admittedly a property dealer, who used to go to his shop daily and used to come back in the evening. The complainant was examined as PW-2 and admitted that his house was situated in the *abadi* of the village. He did not raise any noise after the departure of accused. He had been going to a shop after the occurrence. However, he did not move any application or complaint to anybody till the lodging of the FIR after more than 1 year and 2 months. Even his wife Raj Rani was examined as PW-3 and she could not offer any explanation about the delay in registration of the case. She stated that the police enquired from her after about 1 year of the occurrence. Thus, even till the conclusion of the trial, the prosecution could not offer any explanation for the delay of more than 1 year and 2 months in registration of the FIR and renders the case of the prosecution unbelievable.

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 Valenjiaraju 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.”

It requires to be mentioned at this stage that the learned trial Court overlooked this important aspect of the matter, while delivering the impugned judgment.

In the instant case, the accused were arrested on 10.05.1996 and the present FIR was registered on 17.05.1996. From a perusal of the FIR Ex.PB, it is apparent that the complainant had given detailed physical description of all the accused, including their approximate ages. The complainant has also mentioned the specific role of the each of the accused in the FIR Ex.PB. Since the complainant was well aware of the physical description and role of the each of the accused, nothing prevented him from lodging the FIR for a period of 1 year and 2 months. From this, one fact is also established that before the registration of the present FIR, the accused were probably shown to the complainant and he was able to give such a detailed physical description and approximate age of each of the accused. Otherwise, after a period of about 1 year and 3 months, it was impossible for any person to give such detailed account of each of the accused. This also raises a doubt about the genuineness of the prosecution story.

Still further, admittedly, the accused were not known to the

complainant and the complainant had mentioned the detailed physical features of all of the accused. Thus it was mandatory for the police to hold the test identification parade in the instant case.

While discussing the evidentiary value of identification of an accused during the course of the trial, the Hon'ble 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)

In the instant case, the prosecution failed to hold the test identification parade of the accused-appellants. The learned trial Court wrongly held that the refusal of the accused to participate in the test identification parade showed the bonafides of the investigating agency and no blame could be put on the police in this respect. However, the findings in this regard are apparently unsustainable. The learned trial Court overlooked the testimony of PW-1 Kewal Singh, who clearly stated that he along with Charanjit Singh, complainant, went to the police station on 17.05.1996 for identification of the articles. He clearly stated that the accused were present in the police station at that time. Since PW-1 Kewal Singh and PW-2 Charanjit Singh had already seen the accused in the police station on 17.05.1996, i.e. on the date of the registration of the FIR itself, the accused Faqir Singh and Dharam Pal rightly refused to participate in the identification parade vide their statement Ex.PJ on the ground that before producing them in the court, they were shown to the witnesses. Apart from that, Mukhwinder Singh @ Mukha was never asked about holding the test identification parade. Thus, a big question has arisen about the correctness of the identification of the accused by the witnesses and it is unsafe to rely upon the identification of the accused by the witnesses for the first time in the witness box. In fact the police was under a legal obligation to hold the test identification parade at the first available opportunity and such

procedure would have lent corroboration to the ultimate statements made by the witnesses before the Court.

Apart from that, the prosecution could not lead any valuable evidence to show that the stolen articles i.e. gold ear rings, gold chain and a nose-pin actually belonged to the complainant PW-2 Charanjit Singh and his wife Raj Rani PW-3. To prove the ownership of the stolen articles, the prosecution examined PW-6 Durga Dass, a Jeweller, resident of Phagwara. To substantiate the case of the prosecution, he exhibited a receipt Ex.P5, issued by him to the complainant. However in cross-examination PW-6 Durga Dass admitted that the receipt Ex.P5 was not signed by him, however it was in his hand. He admitted that he did not maintain any receipt book and it was a simple slip (parchi) relating to the weighment and was not relating to the sale of the ornaments, but he had sold the same to the witnesses. He feigned ignorance as to for what amount these articles were sold and the receipt Ex.P5 was issued from a book. However those receipts in the books are not numbered. Even the receipt Ex.P5 was dated 10.07.1990 and was exhibited in the Court on 25.09.2001 i.e. after about 11 years. This clearly shows that the prosecution miserably failed to prove that the stolen articles belonged to the complainant and PW-6 Durga Dass appears to be a planted witness and his testimony does not inspire any confidence.

Looking into all the circumstances, I am of the considered view that it is not possible to sustain the conviction of the accused/appellants on the evidence produced in the present case. As a consequence thereof, the present appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence dated 04.12.2001 passed by the learned Additional

Sessions Judge, Kapurthala are set aside. The bail bonds of 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