

PETITIONER:

KISHORE AMARSINGH MAHESHKAR, RAVINDRA @ RAVI BANSI GOHAR

Vs.

RESPONDENT:

THE STATE OF MAHARASHTRA & ORS.

DATE OF JUDGMENT: 04/08/1998

BENCH:

M.K. MUKHERJEE, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

WITH
CRIMINAL APPEAL NO. 432 OF 1998
J U D G M E N T

M.K. MUKHERJEE. J.

Ravindra @ Ravi Banshi Gohar and Keshya @ Kishore Amarsingh Maheshkar, the appellants in these two appeals, along with tow others were arraigned before an Additional Sessions Judge of Greater Bombay to answer charges of rioting, two murders and other cognate offences. The trial ended in conviction of each of the appellants for those offences and sentence of death, imprisonment for different terms, including life, and fine. Against their convictions and sentences they preferred an appeal before the High Court, which was heard along with the case arising out of the statutory reference made by the trial Judge under Section 366 cr. P.C. In disposing of the reference case and the appeal by a common judgment, the High Court affirmed the convictions and sentences of the appellants and set aside those of the other two. Hence this appeal.

2. Shorn of details, the prosecution case is as under:

(a) On March 5, 1987 at or about 3.30 a.m. a number of persons were found approaching Satrasta police lock up of Agripada Police Station through an opening in the compound wall and hurling country-made bombs. One of the bombs hit and injured Manaji Mani, who was at the police post (guard chowki) near the lock up. Thereafter four of the, who were carrying fire-arms, came to the front entrance of the lock up where Uttam Vishnu Gharte, (PW2), a police Naik, was on duty. They asked him to had over the keys of the lock up but on his refusal to do so inspite of threats meted out to him, they retreated a few steps and hurled bombs towards the iron wire mesh which was in front of cell No. 1 on the ground floor of the lock up. Through that wire mesh they then fired in the direction of cell No. 1. Thereafter they entered the gate, went inside through the rear lobby of the lock up, and one of them broke open the lock of the gate of the front lobby. All of them then entered through that gate and went to cell No.1 wherein one Babu Gopal Reshim, a suspect was detained. After firing at him-which resulted in his instantaneous death- they came back shouting some slogans.

At the time of retreat they also threw bombs in the area under the staircase which is treated as resting room of the guards. In the process a number of police constables sustained injuries. All the miscreants then ran away towards Sane Guruj Path.

(b) On getting information of the incident over phone Shri Zende (PW17), Officer-in-charge of Agripada police Station rushed to the lock up. After making a preliminary survey of the scene of crime he recorded the statement of P.W.2, wherein he, besides detailing the incident, stated that he could identify Vijaya and Keshya as two of the miscreants. On that report (Ext.24), P.W.17 registered a case and took up investigation. He prepared a panchnama of the articles found there which included five live bombs and bullets. He also prepared a sketch map of the scene of offence. In the meantime he had arranged to send the injured constables, including P.W.2 and Ahire, to the hospital for treatment and the dead body of Babu Gopal Reshim for post mortem examination, after holding inquest. While in the hospital Ahire succumbed to his injuries.

(c) In course of investigation three of the accused persons including the two appellants were arrested on June 29, 1987 and they were placed in two Test Identifications (T.I) parades which were held on July 8, 1987 by Shri L.J. Parikh (P.W.18), Special Executive Magistrate. In those parades P.W.2 identified both the appellants and accused Rajendra (since Acquitted) and constable Ashok Dinkar Chakranarayan (P.W.12) identified appellant Ravi. Accused Vinod Bhika Maria (since acquitted), who was arrested after charge sheet was filed against the former three accused, was also placed in a T.I parade in which constable Chandrakant S. Sawant (P.W.4) identified him as one of the miscreants. Thereafter a supplementary chargesheet was filed against him.

3. The appellants pleaded not guilty to the charges framed against them and contended that they were falsely implicated at the instance of the police. Besides, they asserted that earlier they had been arrested by the Agripada police station and while they were in the lock up in question, their photographs were taken which were later shown to P.Ws.2 and 12 to enable them (the three witnesses) to implicate them in the incident in question.

4. In order to establish case the prosecution examined twenty eight witnesses and exhibited a number of documents. No witness was, however, examined P.W.2, P.W.4 and P.W.12, who, among others, were at the police lock up at the material time, gave an ocular version of the incident. Besides, Shakil Mohd. Ibrahim Ansari (P.W.21), who was also detained in the police lock up as a suspect, was examined by the prosecution to recount the incident. Though he supported the prosecution case as to manner in which the incident took place, he did not name or identify and of the four accused persons, for which he was declared hostile and cross examined with reference to his statement recorded under Section 161 Cr. P.C. On perusal of the record we find that the evidence of the above four witnesses regarding the occurrence stands corroborated by the evidence of the doctors who held post mortem examinations upon the dead bodies of Babu Gopal Reshim and Ahire and examined the injured constables. Besides, the reports of the forensic Science Laboratory also go a long way to corroborate their version. In such circumstances, we find no reason to disturb the concurrent findings of the learned Courts below in this regard. Indeed, the learned counsel appearing for the appellants did not seriously challenge this part of the prosecution case.

5. The next and the most crucial question that now falls for our determination is whether the prosecution has succeeded in conclusively proving that the two appellants were among the miscreants. To prove this part of its case the prosecution relied solely upon the evidence of P.W.2 and P.W.12. P.W.2 testified that out of the four persons who came to the lock up site he could identify Vijaya (he died before the trial commenced) and Keshya and he pointed out to appellant Kishore as keshya. According to him he knew both of them for about 7/8 months prior to the incident. He also identified appellant Ravi and accused Raju (since acquitted) as two of the other miscreants, but admitted that he did not know them from before. He further stated that he identified the above three witnesses in a T.I. parade. The other witness, namely P.W.12 identified appellant Ravi as one of the miscreants and while identifying him deposed that he knew him and his name was Ravi Basal. He added that he came to know his name at the time of the T.I. Parade. The evidence of the above two witnesses regarding identification in T.I. parade was corroborated by that of P.W.18 who held the parade on July 8, 1987.

6. It is not in dispute-indeed, the prosecution case itself, as testified by two of the Investigating Officers is, - that the photographs of the four accused (including the two appellants) were shown to the above witnesses before the T.I. parade was held. Notwithstanding this glaring fact, which in our view, made the identification in T.I. parade and, for that matter, identification in Court worthless, the trial Court accepted the evidence of P.W.2 & P.W.12 and that of P.W.4 who identified another accused. The High Court, however, relying upon the judgment of this Court in Laxmipat Choraria & Others Versus State of Maharashtra, A.I.R. 1968 SC 938, held, that the evidence of the witnesses so far as it related to identification of the accused who were not known to them from before was unworthy of credit, as, admittedly, their photographs were shown to them before T.I. parade. Accordingly, the High Court acquitted the other two accused and also left out of consideration the evidence of P.W.2 regarding identification of appellant Ravi. The High Court, however, accepted the evidence of P.W.2 & P.W.12 regarding identification of appellants Kishore and Ravi respectively, as those witnesses claimed to have known them from before and drew the following conclusion to uphold their convictions and sentences:

"On the basis of the evidence on record we have come to the conclusion that accused No.3 (Kishore) was known to the P.W.2 and accused No.1 (Ravi) was known to P.W.12. In these circumstances if the police officers just to ensure earlier identity of accused showed the photographs of accused who were already known to the witnesses and further the said fact was confirmed by holding identification parade soon after and circumstances of the case we do not see that it creates any infirmity in the case of the prosecution so far as the identification of accused No.1 by P.W.12 and accused No. 3 by P.W.2 is concerned. We must emphasize the fact that the material on record in

our opinion clearly shows that high degree of probability of P.W.2 knowing the accused No.3 and P.W.12 knowing the accused No.1, the witness being police officers attached to the Agripade Police Station and the accused being inmates of the lock up in recent past of the occurrence of the incident in question."

7. We have heard the learned counsel for the parties at length and with their assistance gone through the evidence relevant to the question which we have to now answer. On going through the record we have found certain disturbing features in the prosecution case which remain unexplained and go a long way to discredit it. In his statement, which was recorded as the F.I.R. (EXT. 24) P.W.2 stated, that 'Vijaya' and 'Keshya' were among the miscreants. He, however, we find that in the formal F.I.R prepared on the basis of the statement of P.W.2 the following names have been shown in the column meant for recording the names of the accused:

- "1. Vijay alias Vijay Utkar
2. keshya alias Kishore Marrya, Laxa and other 9/10 persons".

When cross examined on this point, P.W.2 admitted that at the time he lodged the F.I.R. he did not know that the surname of Vijay was 'Utkar' and he came to know about his surname from the papers. So far as keshya is concerned he stated that he knew that he was residing in Kanjarwada and was gunda of the locality and that he had told the police at the time of lodging of the F.I.R. about those facts. He, however, admitted that in his statement he did not give the detailed particulars of whom he knew and saw among the miscreants and that there may be a number of persons by the name keshya. In view of the above admissions of P.W.2 we are at loss to understand how the surnames of Vijay and Keshya and the name of laxa could find place in the formal F.I.R. recorded on the statement of P.W.2. Equally surprising is that though P.W.2 named keshya, his name was also given as @ Kishore Marrya. While on this point it is also pertinent to mention that the full name of the appellant Kishore who, according to P.W.2, was named as keshya in his statement, is admittedly 'Kishore Kaheshkar'. From all these peculiar facts and circumstances, which remain unexplained, the only conclusion that can be drawn is that the F.I.R. was not at all prepared at the time alleged by the prosecution (4.15 a.m.). Indeed, in the instant case the F.I.R. was not the basis of the investigation-as it should be - but was the outcome of investigation.

8. The next unusual feature of the case, is the showing of the photographs of the accused to the witnesses who were to identify them in T.I. parade. As noticed earlier, the High Court did not lay any importance on this aspect of the matter so far as the two appellants are concerned on the ground that those photographs were shown to P.Ws.2 and 12, who were already known to them to test whether their identification was correct or not and that fact was confirmed by holding identification parade immediately after their arrest. This finding of the High Court, in our view, is wholly unsustainable. The identification parades belong to the investigation stage and they serve to provide the investigating authority with materials to assure themselves if the investigation is proceeding on right lines. In other words, through these identification parades that the

investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits - and not by showing the suspects or their photographs. Such being the purpose of identification parades the investigating agency, by showing the photographs of the suspects, whom they intended to place in the T.I. parade, made it farcical. If really the investigating agency was satisfied that P.Ws2 & 12 did know the appellants from before and they were in fact amongst the miscreants, the question of holding T.I. parade in respect of them for their identification could not have arisen.

Another disturbing feature of the case is that the T.I. parade was held inside the lock up of C.I.D. department of the Bombay police which was investigating into the case at the material time. In *Hasib vs. State of Bihar* (A.I.R. 1972 SC 283) this Court observed that a vital factor for determining the value of an identification parade is the effectiveness of the precautions taken by those responsible for holding them against the identifying witnesses having an opportunity of seeing the persons to be identified by them before they are paraded with other persons and also against the identifying witnesses being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused concerned. The above observations aptly apply in the facts of the instant case for not only the photographs of the appellants and other accused were shown before the T.I. parades, but they were held in the lock up of the investigating agency thereby giving sufficient opportunity to the identifying witnesses of seeing the persons to be identified. Having regard to the fact that the above two identifying witnesses were police constables attached to the concerned police station, it was all the more necessary for the investigating agency to ensure that the T.I. parade was held in a manner and at a place (preferably in jail) so as to avoid any criticism about its legitimacy.

10. Coming now to the cases of the individual appellants we first take up that of Ravindra who, as earlier noticed, was identified by P.W.12. According to him he knew Ravi from before but he came to know about his name at the time of T.I. parade. He, however, in his testimony did not state how he knew him nor did he state in his statement recorded under Section 161 Cr. P.C. that amongst the miscreants he saw one whom he knew from before but did not know his name. Unfortunately, this vital omission which rendered his evidence regarding identification of appellant Ravi suspect in Court was not at all considered by the High Court or the trial Court.

11. As regards the other appellant the relevant evidence of P.W.2, who identified him, in his cross examination is that keshya, whom he named in his statement before the police, was residing in kanjarwada and was gunda of the locality. He further stated that he had told the police that keshya was resident of kanjarwada. If really P.W.2 knew about all those details, it was, in the fitness of things, expected of him to disclose them in the statement he made before the police so as to fix up the identity of keshya. That apart, P.W.2 did not assert that keshya, whom he named in the F.I.R, was the appellant Kishore before us. On the contrary, he said that there may be many persons by the name of Keshya. From these facts and circumstances the only reasonable conclusion we can legitimately draw is that to ascertain whether keshya named by P.W.2 in his statement really referred to the appellant Kishore Kaheshkar, that the police showed him his (Kishore's) photograph and placed him in T.I. parade. In

drawing this conclusion we have drawn inspiration from the mystery surrounding the F.I.R.

12. That the High Court felt it difficult to sustain the convictions of the appellants in absence of any foundation laid by P.Ws.2 and 12 to indicate as to how they came to know the appellants would be evident from the observations made by the High Court (quoted earlier) that there was a high degree of probability of P.Ws. 2 and 12 of knowing the two appellants respectively as they were attached to Agripada police Station and they (the appellants) were the inmates of the lock up for some time prior to the incident in question. we are constrained to say that the above reasoning of the High Court is convoluted and strained. It was for the above two witnesses to testify that they had seen them while they were in the lock up earlier and that is how they knew them from before the incident. In absence of any such assertion, the High Court was not at all justified in making the above observation on the basis of 'high degree of probability'. To sustain the conviction the High Court was required to record a positive finding on the basis of reliable and acceptable evidence that the two witnesses knew the appellants from before and not on the basis of high degree of probability. Rather, it appears to us, the defence of the appellants that while they were in the lock up earlier their photographs were taken and thereafter shown to the witnesses to implicate them in the case is probalised by the admission made by the investigating officers as also P.W.2, that they were shown their photographs.

13. For the foregoing discussion we are unable to sustain the impugned judgment on the basis of the sole identification of P.W.s. 2 and 12. The appeals are accordingly allowed and the convictions and the sentences of the appellants are set aside. The appellants, who are in jail, be released forthwith unless wanted in connection with any other case.