

CASE NO.:
Appeal (crl.) 749 of 1999

PETITIONER:
MUNNA

RESPONDENT:
STATE (N.C.T. OF DELHI)

DATE OF JUDGMENT: 27/08/2003

BENCH:
S. RAJENDRA BABU & G.P. MATHUR

JUDGMENT:
JUDGMENT

2003 Supp(2) SCR 1048

The Judgment of the Court was delivered by

G.P. MATHUR, J. 1. This appeal has been preferred under Section 19 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short 'TADA') against the judgment and order dated 26.9.1997 of Additional Designated Court II, Delhi, by which the appellant Munna and co-accused Ravi and Rakesh @ Ravi were convicted under Sections 392/120-B IPC and Section 120-B IPC and were sentenced to 7 years R.I. and a fine of Rs. 500 under the first count and 4 years R.I. and a fine of Rs. 500 under the second count. Ravi accused was further convicted under Section 397 IPC and Section 5 of TADA and was sentenced to 7 years R.I. under the first count and 5 years and a fine of Rs. 500/- under the second count. In default of payment of fine under each count, the accused were to undergo 3 months R.I. and all the sentences were ordered to run concurrently. It appears that Ravi and Rakesh @ Ravi accused did not prefer any appeal challenging their conviction and sentence and only the appeal preferred by Munna accused is before us.

2. The case of the prosecution, as disclosed from the evidence, in brief is that PW6 Shri Prakash Bablani and his wife PW3 Smt. Sadhna Bablani were residing on the first floor of house no. 27/21, Shakti Nagar, Delhi. The incident took place at about 11.00 a.m. on 5.10.1991, when the maid servant had left after finishing her daily work and the front door of the house was open. Smt. Sadhna Bablani who was alone in the house was talking to someone on telephone when four boys entered the house and bolted the door from inside. They enquired about the keys of the almirah and tied her hands on the back side and a portion of a lungi was forcibly inserted in her mouth so that she may not be able to make any noise. One of the robbers who was holding a country-made pistol was constantly holding out threats that he would shoot her. The robbers broke open the lock of the steel almirah by using a curtain rod and a screw driver and removed currency notes worth about Rs. 1.5 to 2 lakhs and some silver coins and other articles. One of the robbers removed the golden bangles from the hands of Smt. Sadhna Bablani. When the robbers were still inside the house, Prakash Bablani came from outside and started ringing the electric bell. Not getting any response from his wife, he kept on ringing the bell for a long time. Smt. Sadhna Bablani then somehow gathered courage and shouted. Thereafter, Prakash Bablani broke open the door and came inside. Seeing him one of the robbers kept the currency notes in a polythene bag and jumped down on the road from the balcony of the house. Amongst the robbers, one person namely, Ravi was caught by Prakash Bablani. The remaining two also succeeded in jumping from the balcony of the house to the road and managed to escape. Hearing the commotion and noise PW5, Mohd. Akbar, Head Constable, who was on patrol duty, had also arrived at the scene and had seen the robbers jumping from the balcony and running away. He helped Prakash Bablani in apprehending Ravi accused. In order to free himself, Ravi had given blows

by the country-made pistol on the forehead of Prakash Bablani and in that process the same fell down on the ground. Thereafter, information was sent and the local police came to the spot who took Ravi accused in their custody. On the basis of the statement of Smt. Sadhna Bablani, an FIR was lodged on the same day at P.S. Roop Nagar. The investigation of the case was done by PW10 Satya Pal, S.I., P.S. Roop Nagar. He summoned the crime team and dog squad. The country-made pistol was taken into possession and a cartridge was unloaded from the same. One cartridge was found on the floor and the same was also taken into possession. The articles were sealed and their seizure memo was prepared. He also took in his possession the lungi which had been used in gagging Smt. Sadhna Bablani and the same was sealed. Ravi made a disclosure statement on the next day that his companions in the crime were Munna, Rakesh @ Ravi and Sat Narain. Rakesh was then arrested from Mandolia Park and a country-made pistol was recovered from his possession. On the basis of a disclosure statement made by him on 9.10.1991 a bundle of currency notes amounting to Rs.10,000/- was recovered from under some cloth from Jhuggi No.55 in Lal Bagh. This bundle of currency notes bore a stamp of "Bablani Plywood Traders Pvt. Ltd." and also of Vijaya Bank. The appellant Munna was arrested on 14.2.1992 and a knife was recovered from his possession for which a case under the Arms Act was registered against him. He was produced with his face muffled in the Court of Metropolitan Magistrate, Delhi on 15.2.1992 and a prayer was made for holding his test identification parade, but he declined to participate in the same. Similar application had also been moved by the investigating officer earlier on 14.10.1991 for holding test identification parade of Rakesh @ Ravi accused, but he had also declined to participate in any test identification parade. After completing investigation, PW10 Satya Pal, S.I., initially submitted a charge-sheet against two accused, namely, Ravi and Rakesh @ Ravi. A supplementary charge-sheet was submitted against Munna accused, as he had been declared as absconder and had been arrested later on.

3. The designated Court framed charges under Sections 120-B and 392 read with Section 120-B IPC against four accused, viz. Munna, Ravi, Rakesh @ Ravi and Kishan. Charges under Section 397 read with Section 392 IPC and under Section 5 TADA and 87/27 Arms Act was also framed against Ravi accused by the order dated 26.8.1995. The charges were read over and explained to the accused to which they pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 11 witnesses including three eye-witnesses and filed some documentary evidence. The material exhibits were also produced before the Court. The accused in their statement under Section 313 Cr.P.C. denied the case of the prosecution and submitted that they had been falsely implicated. However, they did not lead any evidence in their defence. The Designated Court believed the case of the prosecution and convicted and sentenced Munna, Ravi and Rakesh @ Ravi, as mentioned earlier. Kishan accused was, however, acquitted.

4. Before we consider the submissions made by learned counsel for the parties, it will be convenient to briefly notice the evidence, which has been adduced by the prosecution. The detailed version of the incident has been given by PW3 Smt. Sadhna Bablani. She has stated that after the maid had left that at about 11 a.m. on 5.10.1991, she had not bolted the door of the house from inside as she was talking to someone on telephone. She was all alone in the house as her husband had gone out. At that time, four boys entered the house and after bolting the door from inside enquired from her about the keys of the almirah. They dragged her inside the room, tied her hands on the back side and forcibly inserted a lungi in her mouth so that she may not be able to shout. The accused persons broke open the lock of the almirah by using a curtain rod and a screw driver and thereafter removed cash amounting to about Rs. 1.5 to 2 lakhs, some silver coins and other articles. After pointing towards Munna accused she stated that he had removed four golden bangles from her hands. After pointing towards Ravi accused, she stated that he was holding a country-made pistol in his hand and was threatening her that he would shoot her. During this process about half an hour elapsed and then the electric bell in the house started

ringing. She gathered courage and shouted loudly. After hearing the shouts, her husband Prakash Bablani, who was ringing the bell, broke open the door and came inside the house. Munna accused then put all the currency notes in a polythene bag and jumped down on the road from the balcony of the first floor of the house. Rakesh @ Ravi and Kishan accused also jumped down but Ravi accused collided with her husband who caught hold of him. She further stated that meanwhile one police constable also came there and soon thereafter neighbours also started collecting there. Ravi accused had hit her husband with a country-made pistol and a bullet had fallen down from the same on the floor. Her statement was then recorded by the police which she signed and the same was sent to the police station along with a Rukka. She identified the country-made pistol which Ravi accused was carrying and which had been sealed on the spot after the police had arrived on the scene. PW6 Prakash Bablani has stated that on 5.10.1991 at about 9.45 a.m. he had gone to the school for depositing the fee of his son and he returned from there at about 11.30 a.m. He pressed the electric bell and not getting any response from his wife continued to do so for 2-3 minutes. After some time, he heard the shouts raised by his wife and then he realised that there was something wrong inside. He then broke open the door of the house forcibly and saw four robbers there. He also raised an alarm and caught hold of one of them, namely, Ravi, who was carrying a country-made pistol. Hearing the alarm raised by him and his wife, Mohd. Akbar, Head Constable, who was nearby, came inside the house and helped him in catching hold of Ravi accused and in that process the pistol which he was carrying fell down on the ground. He has also stated that there was a practice of stamping the bundles of currency notes with the stamp of their firm. He identified the bundle of currency notes recovered on the pointing out of Rakesh accused on which there was a slip containing the stamp of the firm "Bablani Plywood Traders Pvt. Ltd." PW5 Mohd. Akbar, Head Constable stated that at about 11.00 a.m., he was near house no. 27/21, Shakti Nagar, when he heard some noise and shouts coming from the same. He immediately rushed to the house and saw four robbers who were present inside, three of whom jumped from the balcony and ran away. He had clearly seen the aforesaid three persons whom he identified as Munna, Rakesh @ Ravi and Kishan, who were present in the dock in the Court.

5. PW1 Mrs. Beena Thakur, ASI has stated that she was posted at P.S. Roop Nagar on 5.10.1991 and on the basis of the Rukka sent by S.I. Satya Pal, she recording the formal F.I.R. PW4 Om Prakash has deposed that he had kept the country-made pistol and cartridges in sealed condition in the malkhana of the police station on 5.10.1991. PW7 Ram Kumar, ASI, has deposed that he had arrested Rakesh @ Ravi accused on 9.10.1991 who made a disclosure statement that he had kept Rs. 10,000 in his jhuggi at Lal Bagh. He recorded his disclosure statement and thereafter at his pointing out a bundle of currency notes was recovered from jhuggi no.B-55, Lal Bagh and the said bundle contained a slip with stamp of "Bablani Plywood Traders Pvt. Ltd." and also of Vijaya Bank. PW8 Jagdish Kumar is brother of PW6 Prakash Bablani and had accompanied the police party when the bundle of currency notes was recovered on the pointing out of Rakesh @ Ravi accused. He identified the stamp of his firm on the slip which had been tied over the bundle of currency notes. PW9 Hari Ram, Head Constable has deposed that Ravi accused had made a disclosure statement on 6.10.1991 giving out the names of his accomplices namely Rakesh @ Ravi and Munna who had taken part in the commission of the crime. PW10 Satya Pal was posted as S.I. at P.S. Roop Nagar on 5.10.1991 and in his statement he has given details of the various steps taken by him during the investigation of the case. After pointing out towards Ravi accused he stated that he had seen him in the house of Prakash Bablani soon after he reached after getting information about the robbery and he had formally taken him into custody. PW11 Davinder Singh has deposed that he was posted as S.I. of the crime team R.K. Puram and after getting call from P.S. Roop Nagar on 5.10.1991, he had gone to the spot and thereafter he had submitted his report.

6. The testimony of PW3 Smt. Sadhna Bablani, PW6 Prakash Bablani and PW5 Mohd. Akbar, Head Constable conclusively establishes that four persons

committed robbery in the house 27/21, Shakti Nagar, Delhi at about 11.00 a.m. on 5.10.1991 in which four golden bangles, about Rs.1.5 to 2 lakhs in cash and some other articles were carried away. In fact, the commission of robbery has not at all been challenged from the side of the accused. PW3 and PW6 are the inmates of the house and their presence on the spot is most natural and there is no reason to doubt the same. PW5 Mohd. Akbar, Head Constable has also given a very plausible explanation for his presence near the house and his reaching the spot after hearing the shouts is also most natural in the circumstances of the case. Both PW3 and PW6 have made a categorical statement that PW5 came inside the house and was also instrumental in apprehending Ravi accused. All these three witnesses have clearly stated that the appellant Munna was one of the robbers who took part in the commission of the crime and thereafter jumped from the balcony of the first floor to the ground and succeeded in running away. PW3 Smt. Sadhna Bablani has assigned a very specific role of removing her golden bangles to the appellant. She saw him from very close distance. The testimony of these witnesses fully establishes the participation of appellant Munna in the crime in question. Neither the appellant has led any evidence nor he has succeeded in bringing out anything in the cross-examination of the aforesaid prosecution witnesses which may cast even a slightest doubt regarding his participation and taking an active role in the crime in question.

7. Learned counsel for the appellant has submitted that Munna accused (belonged to Khurja town in the district of Bulandshahar and was not at all known to the witnesses from before. He was neither named in the FIR nor was named in the statements of the witnesses under Section 161 Cr.P.C. In these circumstances, the statement of the witnesses given in Court for the first time where they identified and pointed towards accused Munna as being one of the robbers who had participated in the commission of the crime, was of no value and could not be relied upon. In support of his submission, learned counsel has referred to Ramanbhai Naranbhai Patel & Ors. v. State of Gujarat, [2000] 1 SCC 358, wherein it has been observed that identification of a named accused only in Court when the accused was not known earlier to the witnesses had to be treated as valueless. In the said case reference was made to an earlier decision of this Court in State (Delhi Admn.) v. V.C. Shukla, [1980] 2 SCC 665, wherein it was observed that the evidence of the witness in Court and his identifying the accused only in the Court without previous identification parade was a valueless exercise.

8. It is true that the normal rule is that testimony of a witness, who does not know an accused from before and identifies him for the first time in the Court as a person who had participated in the commission of the crime, without holding a previous identification parade does not carry much weight. The substantive evidence of a witness is the statement in Court but as a rule of prudence earlier identification proceedings are held in order to corroborate the testimony of a witness given in Court as regards the identity of the accused who is not known to him from before. However, this normal rule can have no application in the present case on account of own conduct of the appellant. The investigating officer produced appellant Munna 'baparda' (with his face muffled) in the Court of Metropolitan Magistrate on 15.2.1992 and an application was given praying that necessary orders be passed for holding his test identification parade. It was mentioned in the application that after his arrest Munna had been kept 'baparda' and is being produced in Court in that condition. However, the appellant categorically refused to participate in a test identification parade. Thereafter, the learned Metropolitan Magistrate passed the following order :

"Accused Munna in muffled face in police custody is produced and identified before me by SI Satpal Singh P.S. Roop Nagar. Accused was questioned whether he wanted to join test identification parade. He refused to join. He is warned that his refusal to join TIP may be interpreted in evidence against him. Still he does not want to participate in the TIP. Let his

statement be recorded."

Thereafter, the statement of appellant Munna was recorded where he stated that he did not want to participate in the test identification parade because the witnesses had already seen him in the police station.

9. In a case where an accused himself refuses to participate in a test identification parade, it is not open to him to contend that the statement of the eye-witnesses made for the first time in Court, wherein they specifically point towards him as a person who had taken part in the commission of the crime, should not be relied upon. This plea is available provided the prosecution is itself responsible for not holding a test identification parade. However, in a case where the accused himself declines to participate in a test identification parade, the prosecution has no option but to proceed in a normal manner like all other cases and rely upon the testimony of the witnesses, which is recorded in Court during the course of the trial of the case.

10. The effect of not holding a prior test identification parade has been recently examined in considerable detail by a three-Judge Bench in *Malkhansingh and Ors. v. State of Madhya Pradesh, JT (2003) 5 SC 323* and after review of practically all the earlier decisions, it has been held as under:

"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. 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.

It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

The substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine."

11. It may be pointed out that in the above noted case, it was the prosecution which did not hold a prior test identification parade and for this lapse the accused were not responsible in any manner as they had never declined to attend or participate in a test identification parade. However, on the finding that the prosecuterix appeared to be a witness on whom

implicit reliance could be placed and there was no reason why she should falsely identify the appellants as a perpetrator of the crime if they had not actually committed the offence, coupled with other circumstances of the case, the accused were convicted and sentenced under Section 376 IPC. What this authority holds is that there is no straight jacket formula that in a case where the accused is not named in the F.I.R. or in statement under Section 161 Cr.P.C. or is not otherwise known from before, the testimony of a witness for the first time in Court, without a prior test identification parade, becomes valueless. The testimony of such a witness has to be judged like that of any other witness having regard to the facts and circumstances of the case and also keeping in view the fact that prior identification proceedings had not been held.

12. The case in hand stands on much better footing. Though the prosecution moved an application before the Metropolitan Magistrate to hold a test identification parade, but it was the appellant who declined to participate in the same. In his statement under Section 313 Cr.P.C. the appellant Munna stated that he was arrested from his house in Khurja on 14.2.1992. He was produced in the Court of Metropolitan Magistrate on 15.2.1992 by the investigating officer of the case. In the application it was stated that he had been kept 'baparda' and was produced in Court 'baparda' as a test identification parade had to be held. Had he not been produced in 'baparda' condition, the learned Metropolitan Magistrate would have recorded the said fact. It is not a case where there was a long time gap between the time of the arrest and his production in Court, as according to the own statement of the appellant, he had been arrested only on the previous day. In his statement under Section 313 Cr.P.C., he did not state that he had been shown to the witnesses at the police station.

13. The appellant has not been able to show any reason whatsoever much less establishing it as to why PW3, PW5 and PW6 have falsely implicated him. So far as PW3 and PW6 are concerned, they are residing in Delhi and the appellant is resident of Khurja town in the district of Bulandshahar. Both the prosecution witnesses are respectable persons having a reasonable good status in society. There is absolutely no reason why they would falsely implicate the appellant. The incident took place during day hours at about 11.00 a.m. when there was sufficient light. The hands of PW3 Smt. Sadhna Bablani were tied and a lungi had been inserted in her mouth and naturally in this process, the robbers were very close to her. She has specifically assigned the role of removing her golden bangles to the appellant. Her testimony shows that the robbers remained inside her house for about half an hour. During all this time, she had ample opportunity to closely see and identify the appellant. Similarly, her husband PW6 Prakash Bablani had got complete opportunity to see the robbers when he entered inside his house after breaking open the door. The process of jumping from the balcony of the first floor to the ground would have taken some time. PW5 Mohd. Akbar is a Head Constable who, by the very nature of his work and duty, is trained to recognise and apprehend criminals. The manner in which the crime was committed and the manner in which the appellant escaped after jumping from the first floor of the house clearly shows that the three witnesses got full opportunity to see and identify him. In these circumstances, there is no reason at all for not placing reliance upon their testimony. We have given careful consideration to the submissions made by learned counsel for the parties and the evidence on record. In our opinion, the prosecution has succeeded in establishing the case against the appellant beyond any shadow of doubt and the learned Designated Court rightly convicted and sentenced him.

14. The appeal is accordingly dismissed and the conviction and sentence of the appellant, as recorded by the learned Designated Court, is affirmed. The appellant is on bail. He shall surrender forthwith to undergo the sentences imposed upon him. The concerned Magistrate shall take immediate steps to take the appellant into custody.