

CASE NO.:
Appeal (crl.) 1307 of 2006

PETITIONER:
Heera & Anr

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 20/06/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Rajasthan High Court at Jodhpur upholding the conviction of appellants for offence punishable under Section 395 of the Indian Penal Code, 1860 (in short the 'IPC'). Custodial sentence of 10 years with fine of Rs.2000/- each with default stipulation as imposed by the trial Court was maintained. However, five co-accused were acquitted.

2. Background facts in a nutshell are as follows:

On 24.1.1997 Prem Singh lodged an oral report alleging inter alia that he is working at Lavri Petrol Pump for last 3 years. In the night at about 2 0' clock, since vehicles were not coming for filling up petrol, they were taking rest in the office. Outside the office, two tankers were lying. In office, cook Kanhaiya Lal, Bhim Singh and Fateh Singh were sleeping. At that time, about seven persons wearing pant-shirt and sweater came there and started throwing stones towards the office, due to which the glasses were broken. On this they wake up. Three accused persons came towards them and started beating them with lathis, for which he lifted a lathi and started giving blows to the accused by lathi, on which all the accused fell on him. Two persons started breaking the cash box. Complainant Prem Singh raised hue and cry, hearing which neighbour Sh. Bhagwati Prasad Joshi came there. He was also beaten by the accused persons. The accused persons took away the cash lying in the cash box. Complainant received injuries on his face and hands. The accused persons had taken away a sum of Rs.10-12 thousand lying in the cash box.

3. On this report a case under Section 395 IPC was registered and investigation commenced. On completion of investigation, charge sheet was filed. Thirty seven witnesses were examined by the prosecution to further its version. Accused persons pleaded innocence and claimed trial. The trial court found evidence of witnesses to be credible and cogent. It is to be noted that in the Test Identification Parade (in short the 'TI Parade'). A1-Heera, A-6 Nopa i.e. the present appellants were identified. Recovery were also made pursuant to the information given by them in terms of Section 27 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The TI

Parade of the accused persons was conducted through Shri Mahendra Kumar, Civil Judge and Judicial Magistrate. PW-1-Prem Singh identified A1 and A6. PW-11- Bhanwar Singh identified A1- Heera. As noted above, trial Court convicted all the seven accused persons and in appeal conviction of present appellants was maintained by the High Court.

4. Learned counsel for the appellants in support of the appeal submitted that the seven persons were arrested. There was no reason as to why only appellants were held guilty. PW 4-Bhagwati Prasad was a neighbour of the victim. It was also submitted that the evidence of the PW 22- Puran Puri does not show that all the requisite formalities were adopted before the Test Identification Parade was conducted.

5. Learned counsel for the respondent on the other hand supported the judgment of the High Court.

6. As was observed by this Court in *Matru v. State of U.P.* (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See *Santokh Singh v. Izhar Hussain* (1973 (2) SCC 406)). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

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 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. 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. [See *Kanta Prashad v. Delhi Administration* (AIR 1958 SC 350), *Vaikuntam Chandrappa and others v. State of Andhra Pradesh* (AIR 1960 SC 1340), *Budhsen and another v. State of U.P.* (AIR 1970 SC 1321) and *Rameshwar Singh v. State of Jammu and Kashmir* (AIR 1972 SC 102)].

8. In *Jadunath Singh and another v. The State of Uttar Pradesh* (1970) 3 SCC 518, the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive considerations of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in *Parkash Chand Sogani v. The State of Rajasthan* (Criminal Appeal No. 92 of 1956 decided on January 15, 1957), wherein it was observed :- "It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person who is well-known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances."

9. The Court concluded:
"It seems to us that it has been clearly laid down by this Court, in *Parkash Chand Sogani v. The State of Rajasthan* (supra) (AIR Cri LJ), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the

course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case."

10. In Harbajan Singh v. State of Jammu and Kashmir (1975) 4 SCC 480, though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in Court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16th December, 1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held:-

"In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh v. State of U.P. (AIR 1971 SC 363) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant."

11. 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.

12. In Ram Nath Mahto v. State of Bihar (1996) 8 SCC 630 this Court upheld the conviction of the appellant even when the witness while deposing in Court did not identify the accused out of fear, though he had identified him in the test identification parade. This Court noticed the observations of the trial Judge who had recorded his remarks about the demeanour that the witness perhaps was afraid of the accused as he was trembling at the stare of Ram Nath-accused. This Court also relied upon the evidence of the Magistrate, PW-7 who had conducted the test identification parade in which the witness had identified the appellant. This Court found, that in the circumstances if the Courts below had convicted the appellant, there was no reason to interfere.

13. In Suresh Chandra Bahri v. State of Bihar (1995 Supp (1) SCC 80), this Court held that it is well settled that substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it

furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. From this point of view it is a matter of great importance, both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. Thereafter this Court observed:-

"But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TI parade."

14. In *State of Uttar Pradesh v. Boota Singh and others* (1979 (1) SCC 31), this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

15. In *Ramanbhai Naranbhai Patel and others v. State of Gujarat* (2000 (1) SCC 358) after considering the earlier decisions this Court observed:-

"It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of *State (Delhi Admn.) v. V. C. Shukla* (AIR 1980 SC 1382) wherein also Fazal Ali, J. speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye-witnesses. It, therefore, cannot be held, as tried to be submitted by learned Counsel for the appellants, that in the absence of a test identification parade, the evidence of an eye-witness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned Counsel for the appellants that the later decisions of this Court in the case of *Rajesh Govind Jagesha v. State of Maharashtra* (AIR 2000 SC 160) and *State of H.P. v. Lekh Raj* (AIR 1999 SC 3916), had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot

be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned Counsel for the appellants that the evidence of, these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhnbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eye-witnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well within imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them."

16. These aspects were recently highlighted in *Munshi Singh Gautam (dead) and Ors. v. State of M.P.* (2005 (9) SCC 631).

17. In the instant case the accused persons have been identified by PWs 1 and 11 and no infirmity was noticed in their evidence. Additionally, evidence of PW 22 clearly shows that all requisite formalities with regard to Test Identification Parade were adopted and followed. In that view of the matter there is no merit in the appeal which is accordingly dismissed.

18. We record our appreciation for the able manner in which Ms. Tanuj Bagga Sharma, learned Amicus Curiae assisted the Court.