

Hari Nath and Another

Vs

State of U. P

Chhabi Nath

Vs

State of U. P

Raj Nath

Vs

State of U. P

Criminal Appeals Nos. 831, 635 and 649 of 1985

(M. N. Venkatachaliah, A. P. Sen JJ)

06.11.1987

JUDGMENT

VENKATACHALIAH, J. –

1. These appeals by special leave preferred against the judgment dated December 10, 1984 of the High Court of Allahabad in Criminal Appeal No. 14 of 1979 on its file, dismissing the appellant's appeal and affirming the conviction under Section 396, IPC and sentence of rigorous imprisonment for ten years dated December 22, 1978 passed against the appellants by the First Additional Sessions Judge, Jaunpur in S.T. No. 168 of 1974, raise the question of correctness of the principles applied to test the identification evidence.

2. On the night between November 3 and 4, 1973, at about 1.30 a.m. there was a dacoity in the house of Gangaram Yadav in Khuthana village in Jaunpur District. Eight to ten persons were alleged to have participated in its commission.

3. Gangaram Yadav was living in the house with his wife Keshri; his son Kamla Prasad (PW 1); his daughters Amrawathi (PW 2) and Chandravathi (PW 4); his father Mathura Yadav and his brother Rajdeo. That day Gangaram Yadav and one Sunder were sleeping in the bythak of the house, while Mathura Yadav and Kamla were sleeping in another portion of the house. Gangaram's wife and daughters were asleep in an adjacent new construction put up by PW. 1 Rajdeo was also sleeping there.

4. A lantern was lit in the bythak. At the site of the pump house on a side of the house, a 100 watts electric bulb was burning.

5. At 1.30 a.m. the household was rudely woken up by the barking of dogs and dacoits armed with

weapons, including fire arms, raided the house, in the course of which, apart from the looting of property, both the brothers Gangaram Yadav and Rajdeo were seriously injured. Both the brothers succumbed to the injuries soon thereafter. In response to the commotion and the alarm raised by the household a number of villagers including Sanktha is stated to have assembled at the spot with torches and lathis. They challenged the dacoits, who hastened away with the loot under cover of gun fire, injuring Sanktha.

6. The FIR (Ex. 1) was lodged at the station house at Jalalpur at 3.45 p.m. that day. The identity of the culprits was not disclosed; but some general physiognomic features which could be of universal application, were mentioned. Post-mortem examinations of the deceased persons were conducted on the following day i.e. November 5, 1973.

7. In the course of the investigations, on November 9, 1973 appellants and one Pheku Singh, who has not appealed against the confirmation of his conviction by the High Court, were arrested from the villages of Mai and Mathurapur which are said to be in close vicinity of the place of occurrence. But they were put up for test identification in an identification parade only on March 5, 1974 - nearly four months after their arrest - held by the Executive Magistrate (PW 6). The accused persons were stated to have been picked out by PWs 1 to 4. Appellants, along with the said Pheku Singh, were arraigned for the offence. Their defence was one of denial. In the trial Kamla (PW 1), Amrawathi (PW 2), Chandravathi (PW 4) gave, what according to them, was an eye-witness account of the incident and identified the appellants as the culprits. They claimed to have been able to recall the identity of the appellants by the perception made at the time of the occurrence with the aid of the light of the lantern and the electric bulb. However, Sital (PW 3) who was also put up as an eye-witness did not support the prosecution.

8. The trial culminated in a conviction and sentence of imprisonment for life which have, since, been affirmed in appeal by the High Court.

9. Shri Yogeshwar Prasad, learned senior counsel, urged in support of the appeals, a short, but not ineffective contention, touching the acceptability of the evidence as to identity of the culprits. Appellants, it transpired, were residents of and arrested from, the village of Mai and Mathurapur which, undisputedly, were situate in close vicinity of the village Khuthana where the incident took place.

10. Appellants' endeavour in the cross-examination of PWs 1, 2 and 4 was directed to show that appellants being residents of a village close by, the eye-witnesses had seen and known them earlier and the omission to mention their names in the FIR detracted from the credibility of the indictment. However, the eye-witnesses PW 1, PW 2 and PW 4 asserted ignorance on their part of any prior familiarity with the appellants.

11. The question is, first, whether it is reasonably probable, that PWs 1, 2 and 4 had known appellants Rajnath, Chabbinath, Ram Lachman and their omission to mention them in the FIR stultifies the prosecution and, secondly, whether even on the view that there was no such prior familiarity - or more appropriately because of it - the evidence of identification pursuant to a test identification conducted after a lapse of nearly four months after arrest, inspires confidence.

12. To probabilise their prior acquaintance with the eye-witnesses, appellants relied not only upon what, according to them, would be a reasonable inference from the very circumstance of the parties being residents of villages in close vicinity of each other; but also on the circumstance that PW 1

himself was a contemporary of three of the appellants at 'Kutir Inter College'. PW 1 admits that he studied at that institution; but pleaded ignorance whether appellants Rajnath, Chabbinath and Ram Lachman were his contemporaries at that college. The answers of PW 1 to the relevant questions in cross-examination are these :

There is a Kutir Inter College, Chakke in the Khalispur village. This college is situated in village Chakke

I have studied in Kutir Inter College for 3-4 years

I do not know either these three accused have received their education in the Kutir Inter College and whether they were studying there at the time when I used to study there. I do not know as to whether these two accused Ram Lachman and Rajnath are the residents of village Mai and the third accused named Chhavi Nath is a resident of Mathurapur. I also do not know whether other two accused named Feku and Harinath are the residents of village Mai

13. Suresh Chandra Mishra (DW 2), the Head Clerk of the Kutir Inter College produced the "Scholar's Register" to show that appellants Ram Lachman and Rajnath Singh and Kamla Prasad (PW 1), deceased Rajdeo Yadav were all students at that institution. Exhibits Kha-5, 6, 7, 8 are extracts of that Register. DW 2 also speaks to the close proximity of these villages to each other.

14. What emerges from the evidence is that, at least, Kamla Prasad Yadav (PW 1) could reasonably be expected to have known some of the appellants, as residents of villages in close vicinity, and as students of the same institution is a statable probability and that his feigned ignorance of any prior familiarity with their identity becomes irreconcilable with what are incidents of ordinary human intercourse. The omission to disclose their identity in the FIR would raise a reasonable doubt about their complicity in the crime. The following observations of this Court in *Bali Ahir v. State of Bihar* (AIR 1983 SC 289 : 1984 Supp SCC 625 : 1983 SCC (Cri) 312) are apposite : [SCC p. 628, SCC (Cri) p. 315, Para 11]

This indicates that all was not well with the identification. The fact that the appellants belong to the neighbouring village at a distance of less than a mile, that the witnesses who came to identify the appellants had seen the accused from behind while escaping, that PW 2 had known Bali Ahir from before, yet he did not name him in the first information report and went to identify him when he fully knew Bali Ahir, that the identification of the two of the appellants took place after a gap of four days after their arrest, without explaining the cause for the delay, speaks for itself.

15. Even on the premise that there was no such prior acquaintance, the evidence establishing the identity of the culprits assumes particular materiality in a case, as here, of a dacoity occurring in the darkness of the night. The evidence of the test identification would call for a careful scrutiny. In a case of this kind where the eye-witnesses, on their own admission, did not know the appellants before the occurrence, their identification of the accused persons for the first time in the dock after a long lapse of time would have been improper. In *Halsbury's Laws of England* (Fourth Edition, Volume 11, para 363) this passage occurs and is worth recalling :

It is undesirable that witnesses should be asked to identify a defendant for the first time in the dock at his trial; and as a general practice it is preferable that he should have been placed previously on a parade with other persons, so that potential

witnesses can be asked to pick him out.

16. In such cases, it is needless to say, the test identification of an identification parade to test the power of recollection of the witnesses assumes added significance. Prosecution has, therefore, relied upon the result of the test identification (Ex. 30) where the appellants were picked out by PW 1, PW 2 and PW 4. The conduct of an identification parade belongs to the realm, and is part of the investigation. The evidence of test identification is admissible under Section 9 of the Evidence Act. But the value of the test identification, apart altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself, detracts from the credibility of the test.

17. The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. Indeed Prof. Borchard's *Convicting the Innocent* records several criminal convictions in which the accused was subsequently proved innocent. The major source of the error is to be found in the identification of the accused by the victim of the crime. Indeed the learned author refers to the source of mistaken identification thus :

The emotional balance of the victim or eye-witness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally - the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused.

(See *Identification Parades II - Criminal Law Review*, 1963 - page 546.)

18. Glanville Williams in *The Proof of Guilt - (Hamlyn Lectures)* - refers to the errors of recognition breeding an invincible assurance in the witnesses, highly deceptive for those who are not forewarned of such possibilities, and excerpts Gorphe's results of a continental investigation, thus :

There is no difference from the subjective point of view, between true and false recognition, so far as their intrinsic qualities are concerned, and there are no objective signs to distinguish one from the other The witness's certainty may not be immediate, without this delay being necessarily a sign of error. Nevertheless, error is more frequent when recognition comes some time after seeing..

The act of recognition is very open to suggestion in all its forms ...

Resemblance is a matter of relativity. For a white person, all negroes are like each other, and conversely. A person can much better distinguish those of his own age and condition than those of different ages and condition. Uniform is a cause of fallacious resemblance, above all for those who do not wear it.

19. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identify. In *Sheikh Hasib v. State of Bihar* (AIR 1972 SC 283 : (1972) 4 SCC 773 : 1972 Cri LJ 233) this Court observed : (SCC p. 777, para

5)

... the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding.

20. In *Rameshwar Singh v. State of J & K* (AIR 1972 SC 102 : (1971) 2 SCC 715 : 1971 SCC (Cri) 638) this Court observed : [SCC p. 718, SCC (Cri) p. 641, para 6]

... it may be remembered that the substantive evidence of a witness is his evidence in court, but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency 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.

21. It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. It is also rightly said that Courts ought not to increase the difficulties by magnifying the theoretical possibilities. It is their province to deal with matters actual and material to promote order and not surrender it by excessive theorising or by magnifying what in practice is really unimportant.

22. But what Shri Dalveer Bhandari contends for is that the test identification in the case was itself unnecessary and superfluous because there was sufficient opportunity and occasion for the witnesses to get a clear impression of the identity. This cannot be accepted. Indeed, the test identification is itself directed for the purpose of reassuring that clear impressions were gathered at the time of the occurrence.

23. We are afraid in the present case, there is a serious lapse on the part of the prosecution in putting up the suspected culprits for a test identification after a lapse of four months after their arrest. There is no explanation at all for the delay. There might conceivably be occasions when there could be justification, or acceptable explanation, for the delay. There are cases where the delay was at the instance of the accused persons themselves as they expressed a choice as to the venue for the test parade. There may be other causes, which in the very nature of things cannot be exhaustively enumerated. Cases can only be illustrative.

24. Under similar circumstances, this Court in *Soni v. State of Uttar Pradesh* ((1982) 3 SCC 368 (I) : 1983 SCC (Cri) 49 (I)) observed : [SCC p. 368, SCC (Cri) p. 49, para 2]

The conviction rests purely upon his identification by five witnesses; Smt. Koori, Pritam Singh, Kewal Chaitoo and Sinru, but it cannot be forgotten that the identification parade itself was held after a lapse of 42 days from the date of arrest of the appellant. This delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a long time the witnesses would be remembering the facial expressions of the appellant. We therefore allow the appeal and acquit the appellant.

25. The benefit of this regrettable and wholly unexplained lack of promptitude in holding the test identification, we are constrained to say, enures to the appellants. The evidence of test identification

lacks the requisite element of reassurance to support the conviction. A reasonable doubt arises.

26. Accordingly, these appeals are allowed, the conviction and sentence of the appellants in S.T. 168 of 1974 on the file of the First Additional Sessions Judge, Jaunpur, and affirmed in the Criminal Appeal No. 14 of 1979 on the file of the Allahabad High Court are set aside and the appellants are directed to be set at liberty forthwith. The conviction and sentence of the non-appealing accused, namely, Pheku Singh cannot also be sustained consistent with the findings in and the result of these appeals as the findings are interdependent and inextricably integrated. The conviction and sentence of Pheku Singh are also set aside and the said Pheku Singh, accused 3 in S.T. No. 168 of 1974 is also directed to be at liberty forthwith.

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