SUPREME COURT OF INDIA

Anil Kumar

Vs.

State of U.P.

Crl.A.No.139 of 1996

(S.N. Variava and B.N. Agarwal JJ.)

13.02.2003

JUDGMENT

S.N. Variava, J.

1. This Appeal is against a Judgment dated 22nd November, 1994.

2. Briefly stated the facts are as follows:

> "On 11th June, 1978 one Manoj Kumar (P.W.2) was returning to his home. At that time he was way laid by Chaman (the Appellant in Criminal Appeal Nos. 934-936 of 1995, which Appeals have been dismissed today by a separate Judgment) and four other persons way laid him and assaulted him with iron bars, knives and Dandas. On hearing his cries his younger brother Sanjay rushed forward to protect him and embraced Manoj in order to save his life. The younger brother was only 10 years old at that time. Even on seeing that a 10 years old boy has embraced Manoj the assailants did not stop but continued to inflict knife and Danda blows even on the young boy of 10 years. On hearing the cries of Manoj and Sanjay, their father Shri Sidheswar Dwivedi, mother Smt. Kaushalya Dwivedi and sister Sangeeta rushed to save them. They were also assaulted. Thereafter other people of the public came there and the assailants ran away."

3. A complaint was lodged by the father Shri Sidheswar Dwivedi. In the first information report he named Chaman as having first attacked along with certain unknown persons. He thereafter named certain other persons who were supposed to have come there and helped the assailants after he reached the spot. On the basis of this complaint an investigation was made by the police. Eight accused were put up for trial. As Sanjay had died the charges were under Sections 302, 323, 325 read with 149 and Section 148 of the Indian Penal Code.

4. The prosecution examined a number of witness of whom P.W.1, was the father, P.W.2, was Manoj and P.W.4, was the mother. They were eyewitnesses who narrated the incident and identified Chaman and the Appellant. In spite of detail cross examination their testimony

could not be shaken. Their evidence was corroborated by the evidence of the Doctor who disclosed that Sanjay had died a homicidal death and that Manoj, his father and the mother had also received injuries.

5. After trial six persons were acquitted by the trial Court. Chaman and the Appellant were convicted by the trial Court under Sections 325 read with 149 I.P.C. for which a sentence of 4 years was imposed. They were also convicted under Sections 324 read with 149 I.P.C. and a sentence of 2 years was imposed. For offence under Sections 323 read with 149 I.P.C. a sentence of 6 months was imposed. For offence under Section 148 I.P.C. a sentence of 1 year was imposed. All the sentences were directed to run concurrently.

6. The Appellant (as well as Chaman) filed two criminal Appeals in the High Court. The State also preferred an Appeal against the acquittal under Sections 302 read with 149 and against the acquittal of the 6 persons. The High Court heard all these Appeals together and disposed of the same by the impugned judgment. The High Court has confirmed the finding of the trial Court that the prosecution had proved its case beyond a reasonable doubt as against Chaman and the Appellant. It has also confirmed the conviction under Sections 325 read with 149, 324 read with 149, 323 read with 149 and 148 of the Indian Penal Code. But the High Court has concluded, and in our view rightly, that an offence was made out under Sections 304 Part II read with 149 I.P.C. and sentenced both Chaman and the Appellant to 5 years rigorous imprisonment. Hence this Appeal.

7. Mr. Tripurari Ray has submitted that both the trial Court and the High Court have erred in convicting the Appellant. He submitted that in the FIR the Appellant has not been named. He submitted that the scribe of the FIR was one Mr. Umesh Kumar Dixit who was the nephew of the complainant. He submitted that Umesh Kumar Dixit was a class-mate of the Appellate and he knew the Appellant. He submitted that as Umesh Kumar Dixit knew the Appellant he would have named the Appellant in the written complaint if the Appellant had actually been present at that time. He submitted that the prosecution did not examine Umesh Kumar Dixit and therefore the Appellant has been gravely prejudiced. He submitted that an adverse inference must be drawn against the prosecution that if Umesh Kumar Dixit had been examined the Appellant would have been able to establish that he was not present at the time of the incident. We are unable to accept the submission. Umesh Kumar Dixit was not an eye witness. He did not see the incident and did not know who were present or who the assailants were. He only scribed what was told to him by P.W.1. It has come in the evidence of P.Ws. 1, 2 and 4 that they did not know the Appellant prior to the incident. They therefore could not have named him in the F.I.R. As Umesh Kumar Dixit was not an eye-witness to the incident there was no necessity to examine him. Umesh Kumar Dixit could have showed no light. He could not have stated whether the Appellant was present or not. Therefore no prejudice has been caused to the Appellant.

8. It was next pointed out that the Appellant was arrested on 12th June, 1978. It was submitted that on the same day the Appellant was taken to the hospital. It was submitted that while taking the Appellant to the hospital no precautions were taken. It was submitted that his face was not covered. It was submitted that for this reason itself the trial gets vitiated. In

support of this submission reliance was placed upon the case of *S.V. Madan v. State of Mysore reported in*[1] wherein this Court found that there was no evidence adduced by the prosecution to show that precautions were taken to ensure that the witnesses did not see the accused and/or that the witness had no opportunity to see the accused before the identification parade. On this ground it was held that reliance could not be placed on an identification parade. Thus this case was based on the fact that there was no evidence that precautions were taken. We however note that P.Ws. 8 and 9, i.e. the investigating officer and the officer in-charge of the police station, have deposed that they took the Appellant in a covered condition and that whilst the Appellant was in jail he was not shown to anybody. In cross-examination their testimony, that they had taken these precautions, could not be shaken. Thus in this case there is clear evidence that precautions were taken in order to ensure that the witnesses did not have the chance to see the Appellant.

9. It was next submitted that even though the Appellant was arrested on 12th June, 1978 the identification parade was held only on 27th July, 1978. It was submitted that there was a delay of about 47 days in holding the test identification parade. It was submitted that the test identification parade after such a delay cannot be relied upon and on this ground also the Appellant is entitled to be acquitted. In support of this submission reliance has been placed on the case of *Soni v. State of U.P. reported in*[2]. The entire Judgment consists of one paragraph which reads as follows:

> "After hearing counsel on either side we are satisfied that the conviction of the appellant for the offence of dacoity is difficult to sustain. 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 the 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. If this evidence cannot be relied upon there is no other evidence which can sustain the conviction of the appellant. We therefore allow the appeal and acquit the appellant."
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> It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal.

10. Reliance was also placed upon the case of *Hari Nath v. State of U.P. reported in*[3]. In this case the importance of test identification parade was being considered. It was held that the test identification parade only has corroborative value and that a test identification parade should be held with reasonable promptitude after the occurrence.

11. Based upon the aforesaid authorities it was submitted that the law, as laid down by this Court is that if there is delay in holding the test identification parade then it is difficult to believe that the witnesses would remember the facial expression of the accused. It was

submitted that the law is that such identification becomes suspicious and the accused must be given the benefit of doubt.

12. We are unable to accept these submissions. In the case of *Brij Mohan v. State of Rajasthan reported in*[4] the test identification parade was held after 3 months. The arguments was that it was not possible for the witnesses to remember, after a lapse of such time, the facial expressions of the accused. It was held that generally with lapse of time memory of witnesses would get dimmer and therefore the earlier the test identification parade is held it inspires more faith. It is held that no time limit could be fixed for holding a test identification parade. It is held that sometimes the crime itself is such that it would create a deep impression on the minds of the witnesses who had an occasion to see the culprits. It was held that this impression would include the facial impression of the culprits. It was held that such a deep impression would not be erased within a period of 3 months.

13. In the case of *Daya Singh v. State of Haryana reported in*[5] the test identification parade was held after a period of almost 8 years inasmuch as the accused could not be arrested for a period of 7-1/2 years and after the arrest the test identification parade was held after a period of 6 months. The cases of Hari Nath (supra) as well as Soni (supra) were relied upon on behalf of the accused in that case. Both these cases were considered by this Court. The injured witnesses had lost their son and daughter-in-law in the incident. It was pointed out that the purpose of test identification parade is to have the corroboration to the evidence of the eye witnesses in the form of earlier identification. It was held that the substantive evidence is the evidence given by the witness in the Court. It was held that if that evidence is found to be reliable then the absence of corroboration by the test identification is not material. It was further held that the fact that the injured witnesses had lost their son and daughter-in-law showed that there were reasons for an enduring impression of the identity on the mind and memory of the witnesses. Reliance was also placed upon the following paragraph in the case of *State of Maharashtra v. Suresh reported in*[6]:

> "We remind ourselves that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."
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> This Court therefore concurred with the High Court that the categorical evidence of the witnesses received corroboration from the test identification parade even though it was held late. The conviction of the Appellants in that case was upheld.

14. In the present case also Manoj was attacked by Chaman as well as the Appellant. He had a clear look at his assailants. Thereafter his younger brother came to save him and in that process got killed. Manoj also received serious injuries. These are circumstances which would impress upon the mind of Manoj the facial expressions of the assailants. This

impression would not diminish or disappear within a period of 47 days. Similar is the case of the father and the mother of Manoj. They have seen the assailants attacking their sons and one of the sons getting killed. In their memory also the facial expressions of the assailants would get embossed. A mere lapse of 47 days is not going to erase the facial expressions from their memory.

15. All these witnesses have identified the Appellant. We are in agreement with the trial Court as well as the Appellate Court that their evidence is believable. In this view of the matter we see no infirmity in the impugned Judgment. We see no reason to interfere. The Appeal stands dismissed. The bail bond stands cancelled. The Appellant should be taken into custody forthwith to serve out the remaining period of sentence.

Appeal dismissed.

[1]*(1980) 1 SCC 479*
[2]*(1982) 3 SCC 368*
[3]*(1988) 1 SCC 14*
[4]*AIR 1994 SC 739*
[5]*AIR 2001 SC 1188*
[6]*(2000) 1 SCC 471*