SUPREME COURT OF INDIA

Md. Kalam @ Abdul Kalam

Vs.

State of Rajasthan

Crl.A.No.489 of 2008

(Dr.Arijit Pasayat and P.Sathasivam,JJ.)

14.03.2008

JUDGMENT

Dr. Arijit Pasayat, J.

(Arising out of SLP (Crl.) No. 4178 of 2006)

1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Rajasthan High Court, Jaipur Bench. Challenge in the appeal before the High Court was to the judgment and order dated 10.4.2002 passed by learned Additional Sessions Judge (Fast Track) Class II, Jaipur. By the said judgment, the appellant was convicted for offence punishable under Section 395 of the Indian Penal Code, 1860 (in short 'IPC'). He was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1, 000/- with default stipulation.

3. Background facts in a nutshell are as follows:

> "In the intervening night of 8-9th May, 1994 when Vishwas (PW-3) and his wife Renu Jain (PW-1) were sleeping in their house situated in Mauji Colony, Malviya Nagar, Jaipur, five persons entered the house and tied their servant Chaturbhuj who was sleeping in the basement of the house. Thereafter, the accused also tied the mouth, hands and legs of Vishwas Jain (PW-3) and his wife Renu (PW-1) and then bolted them inside the bathroom and having threatened them at the point of pistal and knife, the accused looted the gold and silver ornaments, coins and cash. The miscreants stayed in their house for about an hour. Complainant Vishwas managed to come out of the bathroom through a window and then telephonically informed the police personnel of Police Station, Malviya Nagar, and Jaipur. On receiving the information, the police party reached the house of complainant, where complainant submitted a written report, whereupon a case for offence under Section 395 IPC was registered.

At the very outset it may be stated that case was registered against five accused. The investigating agency arrested three accused, namely, Mohd. Babul, Mohd. Jalal and Mohd. Ansari and after completion of investigation submitted charge sheet against them for offence under Section 395 IPC. At the conclusion of trial, the leaned trial Judge vide its judgment dated 31.3.1997 held the accused appellant guilty and accordingly convicted and sentenced them. These three accused challenged their conviction by filing appeals before the High Court. Vide judgment dated 13.4.1998 the High Court dismissed the appeals of Mohd. Jalal and Mohd. Babul and maintained their conviction under Section 395 IPC and partly allowed the appeal of accused Ansari by altering his conviction from Section 395 IPC to Section 411 IPC. Investigation as against the appellant and co-accused Saidulla was kept pending under Section 173(8) of the Code of Criminal Procedure, 1973 (in short the 'Code'). Appellant Mohd. Kalam was arrested on 27.3.1998. Co-accused Saidulla was also arrested but he absconded during trial and is still absconding. After arrest, Test Identification Parade was conducted and after completion of investigation, police submitted charge sheet against the appellant. The basic challenge before the High Court was to the possibility of identification. With reference to the statement of Renu Jain (PW-1) and Vishwas Jain (PW-3) it was contended that there was possibility of the appellant having been shown to the complainant and his wife. It was stated that the Test Identification Parade (in short 'TI Parade') was done after a period of over 7 days. High Court did not accept the plea. It held that the trial Court had analysed this aspect. The High Court also considered the evidence of PWs 1 and 3 and came to hold that it was crystal clear that PW-3 had ample opportunity to identify the appellant. It was also noted that the said witness was believed in respect of the identification of three other accused persons who had earlier faced trial and had been convicted for offence punishable under Section 395 IPC and on appeal their conviction had been upheld by the High Court. The appeal was accordingly dismissed.

4. Learned counsel for the appellant submitted that only on the basis of identification by PW-3 the conviction should not have been recorded. It was pointed out that PW-1 had accepted that his wife, PW-1 had not gone for the identification.

5. Learned counsel for the respondent-State supported the judgment of the trial Court.

6. The TI Parade was done on 3.4.1998; the accused was arrested on 27.3.1998 and on 28.3.1998 the accused was produced by the SHO at the residence of Additional Chief Judicial Magistrate No.6 and prayer was made for police custody remand. On the application for remand, the Magistrate allowed the police custody till 31.3.1998. On 31.3.1998 the SHO again produced the appellant before the Magistrate and on both occasions the Magistrate recorded that the accused was produced 'Baparda'. The TI Parade was held on 3.4.1998 and the appellant and other accused were correctly identified by PW-3. The evidence of Shri Ratish Kumar Garg (PW-12) the Judicial Magistrate, First Class, Jaipur shows that on 3.4.1998 he was working as Judicial Magistrate and on the direction of the Chief Judicial Magistrate, Jaipur the accused-appellant along with others were brought for the TI Parade.

Vishwas Jain (PW-3) correctly identified the appellant. It is also specifically stated in his evidence that it was not correct to say that the accused "might have told to him that accused was shown to the witness earlier."

7. As was observed by this Court in *Matru v. State of U.P*[1]. 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 *Santosh Singh v. Izhar Hussain*[1] 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.

8. 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 Indian Evidence Act, 1872 (in short 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[3] *Vaikuntam Chandrappa and others v. State of Andhra Pradesh*[4] *Budhsen and another v. State of U.P*[5]*. and Rameshwar Singh v. State of Jammu and Kashmir*[6]

9. In *Jadunath Singh and another v. The State of Uttar Pradesh*[7] 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."

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."

11. In *Harbhajan Singh v. State of Jammu and Kashmir*[8] 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*[9]. 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."

12. 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.

13. In *Ram Nath Mahto v. State of Bihar*[10] 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 demeanor 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.

14. In *Suresh Chandra Bahri v. State of Bihar*[11] 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."

15. In *State of Uttar Pradesh v. Boota Singh and others*[12] 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.

16. In *Ramanbhai Naranbhai Patel and others v. State of Gujarat*[13] 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*[14] 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* [15]and S*tate of H.P. v. Lekh Raj*[16] 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 Vallabhbhai 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."

17. These aspects were also highlighted in *Malkhansingh and Others v. State of M.P*[17]. and *Munshi Singh Gautam (dead) and Ors. v. State of M.P*[18].

18. In view of the evidence which the trial Court and the High Court have analysed and the identification by PW-3 in the TI Parade, there is no infirmity in the conclusions of guilt of

the accused. The appellant's conviction is accordingly maintained. The sentence also does not warrant interference.

19. The appeal is without merit and is dismissed.

Judgment Referred.

[1]*(1971 (2) SCC 0075*
[2]*(1973) 2 SCC 0406*
[3]*AIR 1958 SC 0350*
[4]*AIR 1960 SC 1340*
[5]*AIR 1970 SC 1321*
[6]*AIR 1972 SC 0102*
[7]*(1970) 3 SCC 0518*
[8]*(1975) 4 SCC 0480*
[9]*AIR 1971 SC 0363*
[10]*(1996) 8 SCC 0630*
[11]*(1995) Supp (1) SCC 0080*
[12]*(1979) 1 SCC 0031*
[13]*(2000) 1 SCC 0358*
[14]*AIR 1980 SC 1382*
[15]*AIR 2000 SC 0160*
[16]*AIR 1999 SC 3916*
[17]*(2003) 5 SCC 0746*
[18]*(2005) 9 SCC 0631*