ALLAHABAD HIGH COURT

Asharfi

Vs.

State (Allahabad)

Criminal Appeal No. 1026 of 1959. , against order of S.J. Fatehpur, in S.T. No. 51 of 1958

(B.R. James and J.N. Takru, JJ.)

30.04.1959. 19.05.1960

JUDGMENT

B.R. James, J.

1. This appeal by Asharfi and Ram Dhani against their conviction and sentence of life imprisonment each for an offence under Section 396 Indian Penal Code has arisen in the following circumstances. Gaya prasad Kurmi was a well-to-do man of village Takoli, police-circle Jalianabad in the district of Fatehpur. He owned a large double-storeyed house, with a court-yard in the middle and an entrance door which at night used to be chained from the inside. On the night between the 29th and 30th January 1958, which was a moonlit one, Gaya Prasad was sleeping in the upper storey while the other inmates of the house slept in various rooms or varandahs on the ground floor. A lantern was burning in the upper storey and another in the court-yard. According to the un-rebutted evidence of eye-witnesses, that night at about 11-30 p.m. a gang of about fourteen bandits, armed with pistols, daggers and other weapons, and carrying electric torches, raided the house. Some of then scaled over the outer wall, jumped into the inner court-yard and opened the entrance door. Four of the robbers stood outside keeping guard, while the rest entered the house and started1 plundering the goods. They stripped the womenfolk of the ornaments. They beat Gaya Prasad's wife for disclosing where her valuables were concealed. Some went up to the upper storey, and tortured Gaya Prasad by stabbing him with daggers, and indeed he was struck eight blows as a result of which he was killed on the spot. A number of shots were also fired, though luckily no one was injured with these. The criminals kept going in and out of the house. Gaya Prasad's son Debi Charan managed to slip out of the house with his electric torch, but note before a shot had been aimed at him. He raised an alarm, thereby attracting to the scene a large number of village people. These men took their stand at three points close to the house and watched the progress of the dacoity. One of them, Ram Narain, flashed his own electric torch at the robbers. Another villager set fire to a large heap of straw lying outside the house. Confronted by the large crowd of hostile villagers the miscreants

bolted with their booty, which comprised ornaments and clothes worth about Rs. 2,100/-.

2. Debi Charan lodged a report of the occurrence that very night at 2 O' clock. Since the dacoits were total strangers no mention of their names could be made, but the report asserted that in the various sources of light their features had been marked. Some description of them was also attempted, but was not of any consequence.

3. Investigation by the police started without delay. The appellant Asharfi, who belongs to police-circle Ghatampur, district Kanpur, was arrested on the 3rd March, 1958. He was escorted to the District Jail at Kanpur, where his test identificationy along with that of another suspect, was held on the 3rd April by Mr. Nuzhat Ali, first class Magistrate. Twenty undertrials were mixed with the two suspects. In what he thought were distinctive marks likely to affect identification, the Magistrate pasted five slips of paper on Asharfi's face, and a similar number on the faces of ten men in the parade. Asharfi objected that he had been shown to the witnesses at the police station. Out of the twelve witnesses called he was correctly pointed out by seven, viz., Debi Charan, Mata Prasad, Ram Sarup, Sukh Lal, Sheo Prasad, Bhullo and Aziz, Debi Charan having been an inmate of the house and the rest having seen the diacoits from vantage points outside it. Sukh Lal made one mistake but the others none. The appellant Ram Dhani, who hails from village Sikandarpur, police-circle Chandpur in district Fatehpur, was arrested on the 4th July, 1958. He was taken to the District Jail at Fatehpur where on the 24th July his test identification, along with that of three other suspects, was conducted by Mr. A.B. Sharma, First Class Magistrate. He included forty undertrials in the parade. He thought it necessary to conceal various marks of Ram Dhani with eleven slips of paper, and treated ten undertrials similarly. Ram Dhani objected both that the witnesses knew him from before and that earlier he had been shown to them by the police. Out of the nine witnesses who appeared at the parade he was picked out by six, viz., Ram Adhar, Mata Prasad, Ram Narain, Ram Sarup, Sheo Prasad and Aziz, all of whom had stationed themselves outside the house during the commission of the crime. Sheo Prasad was 75 per cent, correct and the rest 100 per cent, correct. Both the Magistrates had taken necessary precautions and prepared memos of the proceedings in Form 34 (Part IX, No. 65) prescribed by the High Court General Rules (Criminal). As a result of the test identification Asharfi and Ram Dhani were prosecuted. It may be noted that no stolen property or illicit arms were recovered from either of them.

4. In view of the delayed arrest of Ram Dhani their commitment proceedings took place separately. In the proceedings against Asharfi the prosecution no doubt taking advantage of clause (4) of Section 207-A Cri. P.C., examined) only Debi Charan and Mata Prasad from among the eye witnesses, and both identified Asharfi as one of the dacoits. In the commitment proceedings against Ram Dhani the prosecution called only four eye witnesses, viz., Debi Charan, Ram Adhar, Mata Prasad and Sheo Prasad. The last three picked out Ram Dhani. Both men were committed for trial to the Court of Session, and they were tried together along with two other men.

5. The sessions trial followed the usual pattern. The prosecution led evidence to show that from the time of arrest to the time of their admission into the District Jail precautions were taken to ensure that no outsider saw the faces of the accused. The eyewitnesses repeated their identification and swore that they had seen the person concerned participating in the dacoity, except that Debi Charan was not specifically questioned as to whether he had seen the two appellants or either of them among the miscreants. The appellants did not challenge the factum of the crime.
Asharfi pleaded that the witnesses had identified him because the police had shown him to them at the police station, while Ram Dhani contended both that the witnesses knew him from before and that he had been shown to them. Asharfi did not produce any evidence in defense, but Ram Dhani called one Shiv Narain of village Mirzapur. The trial Judge, while acquitting the other two accused, overruled the defence of the appellants and accepting the evidence of identification as true convicted and sentenced them both.

6. Inasmuch as the case rests purely on evidence of personal identification it may be taken as typical of the numerous cases of dacoity which owing to the worsening crime situation fire being increasingly dealt with by Magistrates and Sessions Judges of Uttar Pradesh every year. Before us the stock objections against identification evidence have been raised On behalf of the appellants. Such evidence has been the subject of numerous decisions by various High Courts, many of which are in conflict with each other, and what is particularly unfortunate is that many rulings have accentuated the difficulties of honest investigating officers and truthful witnesses. This type of evidence is a subject which peculiarly attracts the warning given by the Supreme Court of the United States in *Aldridge v. United States*[1], and quoted with approval by Desai, J. in *Satya Narain v. State*[2],

> "Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material, to promote order, and not to hinder it by excessive theorizing or by magnifying what in practice is really not important."

The task of those who are called upon to deal with cases based on evidence of identification has been rendered hard not only by the conflict in many decisions but also by the facts that they are often loosely worded and that relevant matters are found scattered over numerous; Law Reports and hence are not handy. Accordingly we propose to take advantage of the instant case by examining the theory and practice of identification evidence in an attempt to ascertain principles which might help to make the appropriate law and procedure more uniform and thereby serve as a definite guide to the Bar and the subordinate Courts in this State. We think this judgment will be more useful if we divide it into suitably captioned sections.

7. THEORY OF IDENTIFICATION EVIDENCE :

Facts which establish the identity of any person or thing whose identity is relevant are, by virtue of Section 9 of the Evidence Act, always relevant. The term 'identification' means proving that a person subject or article before the Court is the very same that he or it is alleged, charged or reputed to be identification is almost always a matter of opinion or belief. With regard to a criminal offence identification has a two-fold object : first, to satisfy the investigating authorities, before sending a case for trial to Courts that the person arrested but not previously knows to the

[1](1930) 283 US 308

[2] AIR 1953 All 385

witnesses was one of those who committed the crime, or the property concerned was the subject of such crime; second, to satisfy the Court that the accused was the real offender or the article was concerned with the crime which is being tried. Identification proceedings are therefore as much in the interest of the prosecution as in the interest of the accused. As was explained by the Supreme Court in *Ramkishan Mithanlal v. State of Bombay*[3], an identification parade is held by the police, or at their request, in the course of their investigation of an offence for the purpose of enabling the witnesses to identify the persons who are concerned with the offence or the properties which are its subject-matter; they are not held merely for the purpose of identifying persons or property irrespective of their connection with the offence; the witnesses are explained the purpose of holding these parades and are asked to identify the persona or the properties which are concerned in the offence.

8. But it is obvious that if before the Court a witness pointed to a stranger and stated that he was the offender, or pointed to an article and affirmed that it was his property which had been stolen, there would be no guarantee of the truth of his assertion. Consequently in order to have some assurance of the truth a test identification is held that is to say, the witness at an earlier stage is confronted with the alleged offender not standing alone but mixed with a number of innocent persons of the same age-group and of similar build and features; or the suspected stolen article is mixed with a number of other articles which resemble it. That is to say, it is to give credence to the evidence of a witness who does not know the accused from before, or who has not seen the article subsequent to the commission of the offence, that a test identification is held, since, without it the evidence of the witness concerned would have little value. Of course, the substantive evidence, i.e., evidence on which alone the Court can base its order of conviction or acquittal, is that given by the witness before the Court. But the value of his deposition there of having identified the accused in the act of the crime, or identified the article, is of little consequence; before the Court can accept such identification as sufficient to establish the identity of the accused or article it is very necessary that there be reliable corroborative evidence, and the corroborative evidence which the Court is entitled to accept in such cases is that of a test identification conducted with due precautions - if no proceedings for identification have been held, the witness' reliability has not been put to a test. In short, a test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court.

9. But of all evidence of fact, evidence about the identification of a stranger is perhaps the most elusive, and the Courts are generally agreed that the evidence of identification of a stranger based on a personal impression, even if the veracity of the witness is above board, should be approached will constable caution, because a variety of conditions must be fulfilled before evidence based on the impression can become worthy of credence. What these conditions are, and what the duty of the Court is in considering them, will be examined presently. We shall endeavor to do so without recourse to excessive theorizing or ambiguous language. Here we should like to add that there is one basic difference between the identification of an accused

[3] AIR 1955 SC 104 at pp. 113-114

person, and that of property : whereas in the case of the former the identification is of one stranger by another, in the case of the latter it is invariably by the owner or by those who had been familiar with it prior to the crime, for example, stolen property - an owner may not be able to give a meticulously accurate description of his property, nevertheless common experience shows that he seldom has difficulty in picking it out from a number of similar articles, so that identification of property by the owner or his associates can always be approached with a greater degree of confidence.

10. WHO CAN HOLD A TEST IDENTIFICATION ? This depends on what is the true nature of a test identification. On this point there was a conflict between the views of several High Courts, but this conflict has been resolved by the Supreme Court in the case of AIR 1955 Supreme Court 104 (supra), wherein their Lordships have observed :

> "It is clear that the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject matter of the offence or the person identified was concerned in the offence. All these statements express or implied, including the signs or gestures, would amount to a communication of the fact of identification by the identifier to another person."

and; they proceed to point out that the communication thereof by the identifier to the person holding the proceedings is tantamount to a statement made by the identifier to that person. The note or memo of the proceedings prepared by the person in question is therefore a record of the statement of the identifying witnesses. But since there is no legal bar to any person recording the statement of another (provided the statement has been voluntarily made) any person can conduct a test identification. This is the theory underlying the judgment in AIR 1955 Supreme Court 104 (supra) wherein, other conditions being satisfied, identification proceedings by panch witnesses -

witnesses who are all ordinary citizens - were given the seal of approval.

11. But for obvious reasons it is scarcely desirable for private persons to have a hand in proceedings held in the course of the investigation of an offence, hence in Uttar Pradesh it is the universal practice to Lave identification proceedings conducted by Magistrates. This practice is based on sound reason. Magistrates are more conversant with the procedure to be followed to ensure their proper conduct; they can be more relied upon; they are less amenable to extraneous influences; they are more easily available, they can act with great authority over the police and the jail staff who have to arrange for the parade. Experience too is invaluable, and accordingly we find that the U.P. Government in para 496 of the Manual of Government Orders, 1954, have laid down that identification proceedings should be conducted by experienced Magistrates and that they should attend at least six identification parades for instructional purposes before they can hold one unaided.

12. LEGAL EFFECT OF IDENTIFICATION MEMO : We have already seen that a test identification furnishes evidence to corroborate the evidence which the witness tenders before the Court, and that the identification memo is nothing more than a record of the statement which the witness has expressly or impliedly made before the person who conducted the identification. Determination of the legal effect of the memo should therefore present little difficulty. The persons who can conceivably hold identification proceedings are (a) the police, (b) ordinary citizens, and (c) Magistrates. The laws applicable to these categories of persons are different, hence we proceed to deal with their cases separately.

13. In theory there is no objection to a test identification being held by the police. But in such an event the express or implied statement made by the identifier before them would be a statement which would immediately be hit by Section 162, Criminal Procedure Code whereunder it can be used only for the purpose of contradicting him under Section 145 of the Evidence Act and cannot at all be used for corroborating him. Consequently a test identification held by the police nullifies the object of using the identification for corroborating the testimony given by the identifier before the Court. It is for this reason that such proceedings should never be held by the police.

14. As to ordinary citizens, there is no legal objection to their holding identification proceedings even though these are arranged for by the police. But, as pointed out by the Supreme Court in AIR 1955 Supreme Court 104 (supra), it is essential that the process of identification be carried out under the exclusive direction and supervision of the citizens themselves and the police should completely obliterate themselves from the parade before the statements made by the identifiers could fall outside the purview of Section 162 Cri. P.C. Nevertheless, on the practical plane, the desirability of getting test identifications conducted by private persons is seriously open to question.

15. But perhaps all this is unnecessary theorizing, for in practice identifications in this State are

never held by the police or ordinary citizens but invariably by Magistrates. Hence we pass on to consider the law applicable to Magistrates. Now, many authorities, for instance, *Abdul Aziz v. The Crown*[4], *Kanai Lal v. State*[5], *Nagina v. Emperor*[6], *Samiuddin v. Emperor*[7], *Sheik Pinju v. State*[8], have held that the statement express or implied made by a witness at a test identification is nothing but a statement under Section 164, Cri. P.C. With great respect to their Lordships who have held thus, we venture to point out that the proposition has been too loosely expressed. For our part we have no doubt whatever that only that is a statement under Section 164 where the proceedings have been held (so far as U.P. is concerned) by a Magistrate of the first class or a Magistrate of the second class specially empowered in this behalf by the State Government. We hold so on the strength of the well-known decision in *Nazir Ahmed v. King Emperor*[9], which is authority for the proposition that where these classes of Magistrates

[4]51 Cri LJ 1350: (AIR 1950 Lah 167) [6] AIR 1921 All 215, 8 AIR 1952 Cal 491

[5]51 Cri LJ 1520: (AIR 1950 Cal 413) [7] AIR 1928 Cal 500; 9 AIR 1936 PC 253

act they must do so under Section 164 or not at all.

Where the proceedings have been held before a Magistrate of the 2nd class not specially empowered, or a Magistrate of the 3rd class, the statement is one under the unwritten general law. There is a difference between the legal status of the two kinds of statements, as will be shown presently. Nevertheless the statement, irrespective of the powers of the Magistrate before whom it is made, remains a formal statement of the witness and can be used, not only for the purpose of contradicting him under Sections 145 or 155 of the Evidence Act, but for corroborating him under Section 157 of that Act.

16. Our reasons for this view may be indicated briefly. As a record of the statement of the witness the identification memo can of course be utilized under Section 159, Evidence Act for refreshing the memory of the person who prepared it. But Section 157 is of greater consequence, for it provides specifically for corroborating of the testimony of the witness, if; reads :

> "In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved". For purposes of the present discussion the term "any authority legally competent to investigate the fact" in the second part of the section can be safely ignored. But what is material is the first part, viz., "any former statement made by such witness relating to the same fact, at or about the time when the fact took place". Now, what is "the fact" in the subject we are dealing with ? It is not that the accused is guilty of the offence; it is that before the Court the witness identifies the accused, that is to say points to him in the clock and states on oath that in his opinion he was the offender. But at the test identification held earlier he had expressly or impliedly stated the same, and this "former statement" of his was recorded in the identification memo prepared by the person who conducted the proceedings. Indisputably, the memo was prepared "at or about the time" of the identification. It clearly follows that by virtue of the first part of Section 157 the identification memo becomes admissible for corroborating the witness's testimony given before the Court. We might add that in

Bhogilal Chunilal v. State of Bombay[8], although the point at issue before the Supreme Court was somewhat different they arrived at a similar conclusion.

17. It will have been noticed that on this reasoning, except for the police (in whose case the special law embodied in Section 162 Criminal Procedure Code would remain an insurmountable obstacle), an identification memo prepared by anyone, be he a private person or a Magistrate exercising any powers or jurisdiction, can be used for corroborating the testimony regarding identity subsequently given by the witness before the Court.

18. This reasoning will help to dispel certain doubts which have been expressed. First, it has been suggested that the identification memo in respect of the appellant Asharfi could not be used for corroborating the witnesses inasmuch as it was prepared by a

[8] AIR 1959 SC 356

Magistrate of Kanpur who had no territorial jurisdiction over Fatehpur, the district to which the present dacoity appertains. Section 157 repels the suggestion. Besides, the explanation appended to Section 164 Criminal Procedure Code provides that it is not necessary that the Magistrate recording the statement should be a Magistrate having jurisdiction in the case, so that Mr. Nuzhat Ali, though exercising jurisdiction only within Kanpur district, was entitled to hold Ashrafi's test identification. Second, in AIR 1928 Calcutta 700 (supra) the test identification had been held by a second class Magistrate not specially empowered, and the accused contended that although any Magistrate was competent to hold a test identification yet if he was not empowered to deal with the matter he could not under Section 157 prove the statements which were made before him; their Lordships of the Calcutta High Court overruled the contention but unfortunately did not give any reasons for their view. The proper reasons have been given by us in the preceding paragraph. Third, we recently came across a judgment wherein the Additional Sessions Judge of Jhansi held that the identification memo prepared by a second class Magistrate not specially empowered could not be used in evidence. The learned Judge's view is clearly wrong.

19. There remains to consider the legal status of an identification memo prepared on the one hand by a Magistrate of the first class or a Magistrate of the second class specially empowered, and on the other by the remaining kinds of Magistrates. In the case of the former the memo, as already shown, is the record of a statement taken under the provisions of Section 164 Criminal Procedure Code. It is therefore evidence given "before any officer authorized by law to take such evidence". In consequence Section 80 of the Evidence Act applies, where under the Court must presume the genuineness of the memo. And not only this. Under the same section there is also a legal presumption as to the circumstances under which the memo was prepared, so that it becomes evidence not only of the fact that the witness identified the suspect but also of the various steps or precautions taken by the Magistrate to ensure a fair and just identification proceeding. On the practical plane the result is that where a test identification has been held by a first class or a specially empowered second class Magistrate, it is not necessary to call him in evidence; his memo under the terms of Section 80 is evidence of everything that it contains.

Incidentally, the common practice in U.P. is to summon these Magistrates at the trial for proving the contents of their memos. This practice is a totally unnecessary one and causes needless waste of public time and money. They should be called only if it is desired to obtain clarification of doubtful matters in the memo or matters omitted therefrom. Even if a question is raised as to the identity of the witness who appeared at the identification, it is, unnecessary to call the Magistrate; the doubt can be resolved by summoning the police or jail official who produced him as was held in *Sadulla v. Emperor*[9],

20. As to the remaining kinds of Magistrates, their memo is not under Section 164 Criminal Procedure Code, hence Section 80 of the Evidence Act is not attracted to them, so that their deposition in Court is necessary. The same applies to ordinary citizens.

21. To sum up. Any person can conduct a test identification, but Magistrates are preferred. His identification memo is a record of the statement which the identified

[9]39 Cr LJ 864 : (AIR 1938 Lahore 477).

expressly or impledly made before him. The statement is a former statement of the identifier and in Court is usable not only for contradicting him under Section 145 or 155 of the Evidence Act but for corroborating him under Section 157, except that if it was made before the police it would be hit by Section 162 Criminal Procedure Code and would therefore not be admissible for purposes of corroboration. If the person holding the identification is a Magistrate of the first class, or one of the second class specially empowered, Section 164 Criminal Procedure Code applies and his identification memo is admissible in evidence under Section 80 of the Evidence Act without proof. But if other Magistrates, or private persons, hold it they must be called in evidence to prove their memo. Where Section 164 Criminal Procedure Code operates the proceedings are independent even of the territorial jurisdiction of the Magistrate concerned.

22. GENERAL PRECAUTIONS REGARDING IDENTIFICATION PROCEEDINGS : The mechanics, of identification proceedings are well-known and do not require to be repeated. In order to ensure that the proceedings are properly conducted and are entirely above suspicion the U.P. Government have issued elaborate instructions as to how they should be held. These instructions will be found given in Appendix 20 to the U.P. Manual of Government Orders, 1954, wherein Sec. A deals with accused persons and Sec. B with property. These instructions are mostly based on decisions of the High Court, and are admirable. Further, this Court in its General Rules (Criminal) has prescribed Forms in which the memorandum of the identification proceedings should be kept, Form No. 34 (Chapter VIII, rule 64) being the Form for suspected offenders and Form No. 37 for property. At the bottom these Forms enumerate the appropriate precautions that are essential.

=These precautions should invariably be adopted and the memorandum prepared on the appropriate Form, each column of the Form being faithfully filled up. The legal importance of these memoranda has already been discussed. Here we should like to emphasize that these

elaborate rules of conduct of test identifications of suspects and property are not mere mechanical devices but are calculated to guarantee against innocent persons or wrong property being pointed out, and accordingly it is imperative that they be scrupulously followed both in letter and in spirit.

23. MIXING OF SUSPECTS AND INNOCENT PERSONS : Sec. A of Appendix 20 of the U.P. Manual of Government Orders recites that where the number of suspects is one or two, the number of other under trials in the parade may generally be in the proportion of nine or ten per suspect, that where the number is larger they may be mixed in the proportion of not less than five under trials per suspect, but that care should be taken to avoid unnecessarily long parades and that this may be done by dividing up the suspects into two or three batches for identification. It is a matter of regret that this rule is followed by Magistrates more in its breach than in its observance - witness the parade of the appellant Ram Dhani which consisted of no less than fortyfour persons whereas in the dacoity lie was allegedly seen among fourteen dacoits only. Often the parade is much larger. What happens then is that even the most honest witness, confused by the length of the parade, becomes liable to make mistakes. Yet it is on the basis of his mistakes that his veracity is invariably judged. Large and unwieldy parades manifestly offer a serious handicap to an honest witness.
This defect was brought to the fore by Desai, J. in AIR 1953 Allahabad 385 (supra) in which he stressed that the practice of lining up several suspects together for identification was fundamentally wrong and was the root of all trouble that arises in the matter o? judging the identification results, and he further pointed out that the rules of practice evolved by Courts for evaluating the evidence of witnesses who pick out some right persons and some wrong ones are rules not based on reason or any principle of mathematics. We whole-heartedly endorse the following view which his Lordship expressed in the aforesaid judgment :

> "The proper way to hold identification proceedings is to put up each suspect separately for identification mixed with as large a number of innocent men as possible, in any case not less than nine or ten. As each witness comes up for identification it will be seen whether he identifies the suspect or not. He will either identify him, in which case there will arise no question of mistake (because there will be no mistake) or he will not identify him, in which case even if he makes a mistake in picking out an innocent man it will be immaterial because he will not have identified the suspect, and even if he gives evidence against him in Court it would not be believed."

His Lordship further stated that when several suspects are required to be identified, and they are put up for identification separately, care should be taken to see that the innocent persons mixed up are changed with every change of suspect, for otherwise the benefit of holding separate identification proceedings would vanish. We cannot emphasize too strongly that if this procedure is adopted the proceedings will be made as simple as possible, no complication would arise of innocent men being picked out, an honest witness will have every chance of displaying his

integrity and artificial means of judging veracity will be avoided. We should like the U.P. Government to incorporate this rule in its standing instructions by introducing an appropriate amendment in Sec. A of Appendix 20 of the Manual of Government Orders. We repeat that every test identification of suspects should be held with only one suspect mixed up with nine or ten innocent persons, the innocent persons being changed every time a fresh suspect is put up for identification.

24. CONCEALMENT OF DISTINCTIVE MARKS : We have stated earlier that at his identification parade the suspect should be mixed up with persons of the same age-group and of similar build and appearance. The same age-group and similar build present little difficulty. But how is it to be ensured that persons in the parade are of similar appearance? Section A of Appendix 20 of the Manual of Government Orders enjoins :

> "If any of the suspects is possessed of a scar, a mole, a pierced nose, pierced ears, a blinded eye, a split lip or any other distinctive mark efforts should be made to conceal it by pasting slips of papers of suitable size over it, similar slips being pasted at corresponding places on the faces of a number of other under-trials standing in different places in the parade."

Every-day experience shows that this rule is followed by Magistrates so literally, and with such lack of intelligence, that it often makes the test a farce, for so many slips of paper are pasted on the face that the suspect looks like a scarecrow and what the witnesses are called upon to identify is not a human face but a mask. In *Mohammad Ali v. State*[10], (by a Bench of this Court of which one of us was a member) it was observed :

> "The identification memo prepared by the Magistrate shows that the appellant has a large number of scars and marks of various kinds and sizes on his face. In fact, the Magistrate has noted no less than seventeen such scars or marks. He save that he pasted a slip of paper on each one of these, and similarly treated eight other persons who had taken part in the parade, Thus at his test identification the appellant had pasted on various parts of his face no less than seventeen pieces of paper of various sizes. In other words, practically the whole of his face was covered with bits of paper. It follows that what the witnesses identified was not a human face but a virtual mask covering it. The result of an identification held under such conditions can scarcely be expected to inspire confidence".

Recently Desai, J. in *State v. Madan Lal Juggi*[11], declared that the covering of marks should be within reasonable limits and should not be carried out to such an extent as to disfigure the face or to make its identification practically impossible or extremely difficult, and thereby defeat the very object of identification.

25. We think that if Magistrates and Sessions Judges understood the real object of the covering of

marks their difficulties would be eased considerably. This object was recently explained by one of us in *Dhani v. State*[12], in these words :-

> "The object of covering the marks with slips of paper is only to ensure that the marks in question are not described by interested police officials to the witnesses waiting outside the jail gate. From this it necessarily follows that only such marks should be concealed which are so prominent that a description of them can be given in words - faint marks or marks which are commonly found on faces of persons hailing from the rural area cannot be described in words and consequently do not require to be concealed under slips of paper."

That is to say, for each mark the Magistrate should ask himself the question: is this mark so prominent or noteworthy that it is likely to be recognized by a verbal description? He should proceed to cover only those in respect of which the answer is on the affirmative. We wish to under-score this principle by giving as a practical illustration the case of the appellant Ram Dhani. On discovering from his identification memo Ex. Ka-27 that eleven slips of paper had been pasted on his face, we summoned both him and the Magistrate, Mr. A.B. Sharma, before us. We first of all asked Mr. Sharma to point out to us the various marts which he had concealed, and we examined each mark for ourselves. The following table enumerates the marks pointed out by Mr. Sharma and our own observation with regard to each :

Mark pointed out by Mr. Sharma Our observation

[10] Criminal Appeal No. 1631 of 1955, D/-12-4-1956 121960 All LJ 301

[11] 1959 All LJ 252 : (AIR 1959 All 504)

1. Mole above the right eye-brow Insignificant
2. Boil mark on centre of forehead 1/3? in diameter; visible
3. Boil mark on left temple Visible
4. Both ear-lobes bored Visible and of common type
5. Wart on right cheek Prominent
6. Mole on right side of nose Insignificant
7. Mole on centre of nose Insignificant
8. Boil mark on bridge of nose Visible but faint
9. Mole on left nostril Insignificant
10. Boil mark on left cheek Prominent.

Nos. 1, 6, 7 and 9 were so small and faint that Mr. 'Sharma himself could discover them after holding Ram Dhani's face up to the light and peering closely into it. None of them could possibly be described in words so as to enable witnesses to spot them from the description. Nor could any oral description be given of the bored ears. Only Nos. 2, 3, 5, 8 and 10 were such as might conceivably have been described. We are firmly of opinion that only these five should have been concealed. That is to say, a maximum of five slips of pacer would have sufficed. In this connection we should like to emphasize that during the commission of an actual offence a

witness seldom has a chance of peering closely into the face of the offender, so that if at an identification parade an identifier was found doing so the Magistrate should not hesitate to make a note of this in his memo, in which eases the Court will immediately view the witness Identification with deep suspicion. We shall deal with the bored ears in the next section.

26. After we had inspected the above-mentioned eleven marks on Ram Dhani's face we asked "Mr. Sharma to conceal them as he had done at the original parade. He did so by pasting slips of paper, each ?"x ?" in size, over each of them. There were thus nine slips on the face and two on the ear-lobes. As a result we have come to the conclusion that a maximum of ten slips of the size employed by Mr. Sharma would be sufficient to just preserve the general contours of the face. Any number over and above ten would markedly alter the contours and in consequence genuine identification would become hazardous. We are accordingly of opinion that whenever marks are concealed with more than ten slips of paper of the size mentioned above, the identification would cease to inspire confidence. Nevertheless, we wish to emphasize that in the vast majority of cases such a number of slips would not be necessary it only Magistrates bore in mind that insignificant marks, or marks which cannot be described in words, do not stand in need of any concealment.

27. The slips of paper on Ram Dhani's face having been nine in number, they have not detracted from his authentic identification. This is more so in the case of Asharfi, on wham only (sic) slips were pasted.

28. The question then arises as to how to treat a suspect who has a large number of prominent marks on his face. Desai, J., in 1959 All LJ 252 : (AIR 1959 Allahabad 504) (supra), has suggested that in such a case the marks should not be covered at all. We are inclined to agree, and we think that if witnesses have really seen an offender bearing a great many prominent marks they should be able to give a general description of them in the first information report or in a statement made under Section 164, Civil Procedure Code. In such an event any test identification would possess little utility, and for establishing his identity the prosecution should do the best they can with the description of the marks given by the witnesses.

29. Small-pox marks deserve separate mention, for we have actually come across a case where the Magistrate had scrupulously pasted slips of paper on each pox- mark of the suspect. Such marks are usually so large in number that any attempt at concealing them with slips of paper would make the face totally unrecognizable. Nonetheless it is a fact that people with pox-marked faces are to be found in all jails, hence what the Magistrates should do is not to attempt to conceal the pox-marks of the suspect but instead to make sure that a number of innocent men in the parade bear such marks.

30. BORED OR PIERCED EARS : The decision of a single Judge of this Court in *Gokul v. State*[12], obliges us to add a separate section on this subject, for that decision has given the impression that unless lobes of pierced ears of a suspect are concealed, the presence of innocent

persons with such ears notwithstanding, the identification is vitiated. As emphasized in *State of U.P. v. Randhir*[13] the case illustrates the danger of following precedents without understanding the facts on which they are based. The facts in Gokul's case, AIR 1958 Allahabad 616, were these :

> Gokul accused and two other persons, all of whom had bored ears, were put up for identification. In the parade twenty-five under trials, ten of whom had bored ears, were mixed with them; no steps were taken to cover up the bored ears of any person in the parade, so that the witnesses had really to pick out three men out of thirteen; five witnesses correctly identified Gokul. His Lordship held that, in view of the small number of under trials with bored ears who had been mixed up at the parade, "the assurance which flows from the mixing of a larger number was not available in the case"; he accordingly gave Gokul the benefit of doubt and acquitted him.

With deep respect to his Lordship, on the theory of mathematical probability the picking out of Gokul from among thirteen persons by five witnesses meant that the chance of an innocent person being picked out was infinitesimal. Besides, what must not be overlooked is that the matter of bored ears was not the sole ground on which his Lordship acquitted Gokul for doing so he also took into account the nature of the available light, the circumstances existing at the time of the crime and the period which had elapsed between the crime and the identification parade. Hence Gokul's case, AIR 1958 Allahabad 616, cannot be deemed to be an authority for the proposition that the concealment of bored ears is imperative. As already explained by us, prominent marks require concealment so as to obviate all chance of identification being made through such marks being described to the witnesses earlier. But surely it cannot be maintained that any description of a suspect's bored ears can be given in

[12] AIR 1958 All 616

[13] 1959 All LJ 519 : (AIR 1959 All 727)

order to enable witnesses to pick him out from among a number of other persons with similarly bored ears. Nor would a police officer be so stupid as to take the risk of instructing witnesses to pick out a man with such ears. We are therefore of opinion that no concealment of bored ears is required and that all that is necessary is for the Magistrate to make sure that the parade contains a number of innocent men much less than the usual proportion of one to nine or ten-with similarly bored ears. In no jail is there any dearth of such men. Concealment is necessary only when such men are not available.

31. OTHER RELEVANT FACTORS : Of course the ideal test identification would be one held under conditions identical with those of the crime under enquiry, but such a notion bears no relation to the actualities of life, for the crime can never be adequately re-enacted. Nevertheless steps can be taken to encourage conditions approaching those of the crime. Now, dacoity or robbery or an act of violence is essentially a crime involving movement and activity, whereas at a test identification every person in the parade stands like a statue and his identification done in that position. It is possible for an honest witness to be unable to identify a suspect standing still

but to be able to do so when he is walking or running. Consequently, if such a request is made it would be perfectly admissible for the Magistrate to direct the persons in the parade to walk or run. Similarly if the witness wants the people in the parade to stand in a particular way, or wear their caps at a certain angle, or turbans in a certain manner, this should be directed.

32. Beards or clean-shaven faces furnish frequent cause for trouble, for sometimes in order to avoid recognition a bearded criminal after committing the crime gets himself shaved, or vice versa. It is notoriously difficult to recognize a bearded man who has got himself shaved, or a clean-shaven man who has grown a beard. If therefore the Magistrate comes to entertain good cause for the belief that the suspect has indulged in such a trick, it is open to him to defer the identification of the clean-shaven suspect until he has grown a beard of the appropriate size, or to get the bearded suspect shaved. No violation of Article 20(3) of the Constitution occurs if the Magistrate does so - see *Ram Swarup v. State*[14]*,*

33. CONDITIONS NECESSARY FOR ACCEPTABLE IDENTIFICATION EVIDENCE : The Court is bound to follow the rule that evidence as to the identification of an accused person must be such as to exclude with reasonable certainty the possibility of an innocent person being identified. In the very recent case of *State of Madhya Pradesh v. Manka*[15]*,* a Division Bench of the Madhya Pradesh High Court, after examining some Indian, English and American rulings, held :

> "The evidence of identity must be thoroughly scrutinized, giving benefit of all doubt to the accused; but if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not to fight shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification."

[14] AIR 1958 All 119
[15] 1960 MPC 216

With great respect we agree with their Lordships. The following twelve questions are apt to arise and must be answered by the Court to its satisfaction before it can accept the evidence :-

(1) Did the identifier know the accused from before ?
(2) Did he see him between the crime and the test identification ?
(3) Was there unnecessary delay in the holding of the test ?
(4) Did the Magistrate take sufficient precautions to ensure that the test was a fair one ?
(5) What was the state of the prevailing light ?
(6) What was the condition of the eye-sight of the identifier ?
(7) What was the state of his mind ?
(8) What opportunity did he have of seeing the offenders ?
(9) What were the errors committed by him ?
(10) Was there anything outstanding in the features or conduct of the accused which impressed him ?

(11) How did the identifier fare at other test identifications held in respect of the same offence ?
(12) Was the quantum of identification evidence sufficient ?

We proceed to discuss these questions ad seriatim, but before we do so we should like to utter the warning that no hard and fast rules can be laid down and that each case must be dealt with on its own merits, for rules cannot be so worded as to include every conceivable case - it is sufficient that they apply to those things which most frequently happen.

34. (1) DID THE IDENTIFIER KNOW THE ACCUSED FHOM BEFORE ? For reasons which are obvious the identification of an accused who is already known to the identifier is futile, hence the Court must address itself to the question : is there reasonable ground for the belief that the witness knew the accused from before ? If the accused happens to belong to his own village, identification is useless and his name must be expected to be mentioned in the first information report or shortly afterwards. If he resides in a place situate within a radius of two miles of the habitation of the witness, it is safe to assume that he was already known. If the distance is between two and seven or eight miles the presumption, rebuttable no doubt, is that he was a stranger. In such cases the usual pleas are that the witness and the accused visited the same bazar or that now and again they passed through each other's villages or that they had relatives in a certain village whom they customarily visited. In considering such pleas it should constantly be borne in mind that unless a specific incident has occurred in which the one has come to the notice of the other, it cannot be said that they knew each other, for it is universal experience that a casual glance at passersby hardly ever leaves an impression on the mind. If the accused bails from a distant place it can be unhesitatingly assumed that he was a total stranger. It might be stressed that in all such cases the Court is not required to satisfy itself positively that the witness knew the accused from before but only that there is reasonable ground for the belief that this was so.

35. (2) DID HE SEE HIM BETWEEN THE CRIME AND THE TEST IDENTIFICATION ? It is the duty of the prosecution to show that from the time of the arrest of an accused person to the time of his admission into the jail precautions were taken to ensure that he was not seen by any outsider. Once evidence has been led to show this, the burden shifts on the accused to show otherwise. It is invariably assumed at the Bar that in such matters the police do not play fair but instead show the accused to the witness before his identification, either by detaining him for a number of days and then formally arresting him or by calling the witness to the police-station after the arrest and showing him before he is sent off to the jail. It is even argued that evidence to show that he was kept veiled throughout is merely a formality or that if his veil is removed to allow him to be seen he cannot be expected to put up resistance. Even Courts have been known to have acted on such assumptions; for instance, in *Baliram Tikaram v. Emperor*[16], There the accused pleaded that the Sub-Inspector had managed to show him to the witnesses before his identification parade was held; the trial judge summarily rejected this plea with the remark that

there was no evidence to support it; their Lordships of the Nagpur High Court stated that they failed to see what evidence a man in the custody of the police could get to prove such a plea. With the utmost respect to their Lordships, we venture to point out that this is sentiment, not law. There is no presumption that police officers act dishonestly see ***Dwarka v. State, AIR 1954 Allahabad 106.*** Where a witness gives evidence on oath the presumption is that he is speaking the truth. If therefore the prosecution have led evidence to show that from the time of arrest of an accused to the time of his admission into the jail precautions were taken to ensure that he was not seen by any outsider, and if the identifying witnesses depose that they never saw him at any time between the crime and the identification parade, the burden lying on the prosecution has been discharged. If is then for the accused to establish that he was shown. The law does not require him to do so affirmatively; it is sufficient if he can succeed in creating a reasonable doubt in the mind of the Court. Direct evidence may not be available, but he may discharge his burden by showing, for example, that he and the witnesses were present in the police-station at the same time, or that he was marched through the village of the witnesses or that the witnesses were present at the office of the Prosecuting Inspector when his jail warrant was being prepared. But if he fails to raise a reasonable doubt the law enjoins that the prosecution evidence on the matter be accepted. In dealing with such questions it is often ignored that the accused is a total stranger to the witnesses and that save for exceptional cases he is a stranger to the police too, hence neither the witnesses nor the police have any motive for incriminating him falsely.

36. WAS THERE UNNECESSARY DELAY IN THE HOLDING OF THE TEST ? Since human memory is apt to get dulled with the passage of time it is desirable both in the interest of the honest witness and of the suspect himself that the latter be put up for identification without delay. Frequently reliance is placed on cases like *Daryao Singh v. State*[17], to contend that because the identification has been held with delay its results should be rejected out of hand. In order to properly appreciate such a contention the facts of Daryao Singh's case AIR 1952 Allahabad 59 require to be examined. There the identification proceedings of the accused Mahendra Singh were

[16] AIR 1945 Nag 1
[17] AIR 1952 All 59

held fifteen months after the crime, and a Division Bench of this Court ruled that the value of the evidence is very much minimized if the proceedings are held long after the occurrence, and observed that human memory is fallible and that it is sometimes difficult to identify a person not very well-known whom one sees with a rather different appearance about fifteen months after the crime has occurred. But at the same time they noted that whereas Mahendra Singh at the time of the occurrence had a beard and long hair and had tied a piece of cloth round the beard, at the identification he had no beard and the hair on his head was cropped. There were other factors in his favor besides. It was in the totality of these circumstances that their Lordships decided to acquit him. We are therefore unable to hold that Daryao Singh's case, AIR 1952 Allahabad 59 is authority for the proposition that delay nullifies an identification. With great respect we prefer the

following view expressed by a Division Bench of the late Chief Court of Oudh in *Khilawan v. Emperor*[18],

> "The only argument put forward upon this point has been that it stands to reason that no man can identify after four or five years a man whom, he had only seen once. We do not accept the argument. It is based on pure assumption and contradicted by the fact of the identification itself Men differ very largely in their powers of observation. One man will remember a face for a very long period though he has only seen its possessor once, and for a very short time. Other men who are unobservant may not be able to identify persons whom they had a good opportunity of identifying even a short time afterwards. The power to identify varies according to the power of observation and the observation may be based upon small minutiae which a witness cannot describe himself or explain. It has no necessary connection with education or mental attainments."

Accordingly the test is not that the identification parade was held after a long period but whether the power of observation of the witness was adequate. Were delay alone to be made the test, a premium would manifestly be placed on absconding, and all that would be necessary for a criminal for evading justice would be to promptly abscond and to appear only after the lapse of a long period of time. We refuse to believe that this could be the intention of the law. At the same time we must stress that whenever a test identification is discovered to have been held with delay, the prosecution should explain it, and that the absence of a reasonable explanation will detract from the value of the test. The police can seldom be blamed for arresting a suspected criminal with delay, but once his arrest has been effected there can be no excuse for failure to hold his identification within two or three weeks.

37. (4) DID THE MAGISTRATE TAKE SUFFICIENT PRECAUTIONS TO ENSURE THAT THE TEST WAS A FAIR ONE ? We have already dealt with the various precautions the Magistrate should take. There is no presumption that the necessary precautions were taken, and it is always for the prosecution to prove that they were. As already shown, where the test identification has been held by a first class Magistrate or a specially empowered second class Magistrate the identification

[18] AIR 1928 Oudh 430

memo is evidence of everything that it contains, and his appearance in the witness-box is not necessary unless it is required to explain ambiguities or omissions there from. In the case of others, they must be called as witnesses.

38. (5) WHAT, WAS THE STATE OF THE PREVAILING LIGHT ? In the case of every offence committed during the hours of darkness the prevailing light is a matter of crucial importance. In such cases the stock argument is that owing to inadequate light the witnesses could not see the faces of the culprits. The argument frequently finds favor with Courts, and we have seen it held

that merely because no source of light was mentioned in the first information report the crime was committed in darkness so that its perpetrators could not be seen. Difficulties would be alleviated if those who have to deal with such arguments kept certain basic facts in mind. To begin with, a crime like dacoity by its very nature cannot be committed in pitch darkness, for the criminals (being strangers) have to find their way about, have to discover the whereabouts of goods, have to sort out those articles which they intend to appropriate, and have to take precautions to guard against counter-attacks by the villagers. All this makes the presence of adequate source of light imperative. Then, rising standards of living have enabled villagers to replace their old-fashioned divas with kerosene lamps and also to provide themselves with electric torches. Again, increasing lawlessness in the countryside has obliged village-dwellers, specially those in more affluent circumstances, to keep lights burning all night, as every town-dweller can see for himself while motoring at night. Such lights are not kept burning, as has been argued before us, to enable criminals to be identified, but to keep them away. The existence of the sources of light just mentioned must therefore be taken as normal these days. Moonlight too cannot be ignored, and the Court should always consult the calendar in order to determine the state of the moon at the time of the offence. Dacoits invariably arm themselves with electric torches both for enabling them to see their way and to facilitate their work of plunder. It is perfectly true that if a dacoit flashes his torch into the face of a witness, the latter will get dazzled and for some moments will not be able to see anything. But inevitably a torch has to be flashed in various directions, so that frequently some o? the dacoits themselves come in the way of its beam and must therefore be seen by some of the witnesses. As to the flashing of a torch inside a room, more specially the small rooms which characterize village houses, the light diffused by the walls is bright enough for the offenders' features to be marked - as any one can satisfy himself by a simple experiment. Also, when village people rush to the scene of the crime those who own electric torches invariably bring them, and further for the purpose of scaring off the bandits, some villager sets alight a convenient heap of straw, thereby illuminating the entire area. Thus no scene of dacoity can be without sources of light sufficient to enable the witnesses to see the faces of miscreants. We should of course not be understood to be laying down that there is a presumption of the existence of such sources of light - that has always to be proved by the prosecution; but what we do wish to emphasize is that if evidence with regard to them is led it is prima facie believable. As to burning straw, perhaps its strongest proof is a patch of ash found by the police when they visit the scene of the occurrence. With regard to the recital in the first information report, any omission from it of a normally existing source of light (as explained above) should never be deemed to be a fatal defect.

39. (6) WHAT WAS THE CONDITION OF THE EYE-SIGHT OF THE IDENTIFIER ? Before the Court can rely on the evidence of an identifier it must satisfy itself as to the condition of his eye-sight. There is no difficulty at all if it is found to be normal. But complications arise if it is not so. If his vision is discovered to be dim, his claim to have marked the features of the suspect becomes doubtful if at the time of the crime he saw the suspect from a distance, he must not be short-sighted; if he saw him from close quarters, he must not lie long-sighted; if he saw him at

night, he must not be night-blind; if he noted some color, he must not be color-blind.
Luckily, with the exception of night-blindness, these are matters which, if occasion arises, the trial Court can verify for itself, by testing the witness in the Court-room. Cataract is a wide-spread ailment among elderly people in the countryside and must be guarded against, though what the Court should consider is not the state of the cataract at the time the witness appears in the witness-box but at the time of the crime, for cataract usually gets aggravated with passage of time.

40. (7) WHAT WAS THE STATE OF HIS MIND ? This subject lies more within the province of the psychologist than the 'Court, hence in a criminal trial undue stress cannot be laid on it. Nevertheless some observations on our part may not be out of place. It cannot be disputed that calm minds view a thing better than emotionally stirred persons, for excitement or fear or terror may subvert the mind. Yet a witness's mind may all the time be riveted on the object or the incident that; impresses his mind and thus a close detachment may follow in his observing connected matters even though these happen simultaneously. We think that witnesses who stand at convenient places outside the house of the victim of a dacoity and watch the progress of the crime do on the whole view it with a detachment sufficient to lend assurance to their identifications. With regard to the victims themselves it would broadly speaking be true that the features of their tormentors would get photographed in their minds - we are unable to conceive of a man who has been tortured or a lady who has been stripped of her jewellery forgetting the faces of the persons who perpetrated such atrocities. All the same, since relevant data will hardly be available, in the case of each witness the Court will have to judge for itself whether or not his state of mind was such as to give credence to his identification, and this judgment will have to be based on personal observations in the Court-room.

41. (8) WHAT OPPORTUNITY DID HE HAVE OF SEEING THE OFFENDERS ? We have never acceded to the argument sometimes raised that as soon as a gang of dacoits raids a house the rest of the villagers scuttle inside their houses or hide in their fields until the coast is clear. Our villagers are not so chicken-hearted. Had this not been so we would never have found them boldly facing bandits with primitive weapons, suffering and inflicting casualties and sometimes capturing dacoits - see the facts in *Tahsildar Singh v. State*[19], Villagers assemble in groups near the house of the victim as a measure of self-protection and for offering resistance whenever possible, and for this watch the miscreants carefully. Consequently it is inevitable for many of them to see the criminals. Now, the identification of a miscreant by a witness depends on the opportunity the latter has of seeing his face and marking his features. This in turn, depends on where the witness was posted, what the distance was from which he

[19] AIR 1958 All 255

saw the accused and what amount of time was available for doing so. These are matters the Court is bound to enquire into. The place where the witness stationed himself must be one from where be could, whenever he wished, obtain an unobstructed view of the scene of the crime. In this behalf the inmates of the house are always at an advantage, and so are those villagers who

participate in an encounter with the dacoits, for in both events the parties come face to face. The distance of the witness must be short enough for features to be marked in the available light. With regard to the time element, it is patent that the longer the time available for the witness to see the face of the miscreant, the greater are the chances of the face being impressed upon 'his mind. An inmate of the house or a witness who watches the crime from a vantage point outside is able to see the criminals for a considerable space of time and is accordingly in a far more favorable position to see their faces than one who merely views them fleeing with their booty. And the over-riding consideration in all cases is the state of the prevailing light.

42. Here we might refer to another objection which is often advanced, namely, that the dacoits were putting on dhatas - pieces of cloth tied round the face - hence the witnesses could not see their faces. We are prepared to concede that where the dacoits are well-known to the village people, they may wear dhatas - support is lent to this view by the case of *Ram Shanker Singh v. State of U.P*[20]*.,* But we are confident that this does not happen in the vast majority of cases, for there the dacoits hope to avoid detection by the fact of being total strangers. The simple reason for this is that dacoity is essentially a crime requiring physical activity and agility and a dhata if used would come off within very short time - anyone apprehensive on this point may try playing a vigorous game of hockey or tennis with a dhata on and test for himself how long it remains effective.

43. (9); WHAT WERE THE ERRORS COMMITTED HY HIM ? We have already dealt with this point at some length, and we reiterate that no question of error would arise if identification parades were held with only one suspect at a time. It is therefore unnecessary to pass any opinion on the practice, wholly arbitrary, of evaluating a witness's testimony by the number of right and wrong identifications that he made.

44. (10) WAS THERE ANYTHING OUTSTANDING IN THE FEATURES OR CONDUCT OF THE ACCUSED WHICH IMPRESSED HIM ?

As pointed out in *Lachhman v. State*[21]*,* if among the criminals there were persons with outstanding features or peculiarities which were noticeable to the witnesses who saw them, the witnesses should be able to mention them. This would lend assurance to their identification. The same applies to any special conduct of any of the miscreants which came to the notice of the witnesses, for this enables their mind to retain a clearer picture of the persons concerned. The witnesses should also be able to state what weapon the man they identified was armed with or what particular part he played in the dacoity.

45. (II) HOW DID THE IDENTIFIER FARE AT OTHER TEST

[20] AIR 1956 SC 441

[21] 1956 All LJ 718

IDENTIFICATIONS HELD IN RESPECT OF THE SAME OFFENCE ? It used to be thought that in appraising the evidence of witnesses who identified a particular accused the Court should take into account the result of their identification in all other parades held in connection with the same offence. The error of this view has been exposed by Division Benches of this Court in *State v. Wahid Bux*[22], and *Ram Autar v. State, 1958 All LJ 431*. The correct law is that normally the. result of identification proceedings in which a particular accused is put up must alone be taken into consideration in deciding the value of identification of a particular witness with respect to that accused; other test identifications, provided they were held within a short period of the test under consideration, can be taken into account solely for judging the memory and power of observation of the witness concerned.

46. (12) WAS THE QUANTUM OF IDENTIFICATION EVIDENCE SUFFICIENT ? Before the Court holds an accused guilty it must make certain that chance has not been responsible for his identification. If a suspect is mixed with nine innocent persons and is identified by a witness, the mathematical probability of the witness picking him out by chance is one in ten. Hence only one identification cannot eliminate the possibility of the pointing out being purely through chance, and for this reason is insufficient to establish the charge. If the same suspect is identified by two witnesses, the probability of his being pointed out by chance is one in a hundred.
The possibility of chance playing a part in his identification is therefore slight, and, other conditions being satisfied, two good identifications should be enough to establish his guilt beyond reasonable doubt. If three witnesses identify the same suspect, the probability of this being done by chance becomes one in one thousand. In such a case it can safely be assumed that his identification was perfectly genuine. Needless to say, if the Identification is by even more than three witnesses, the Court cannot have the slenderest doubt about his being the culprit.

47. WITNESS UNABLE TO GIVE REASONS FOR IDENTIFICATION : Sometimes defence counsel ask a witness the reasons why he identified a particular accused or article, and when he fails to do so argue that his identification cannot be trusted. In reply we may cite *In re Govinda Reddy*[23], wherein it has been held that many a witness would not be able to formulate his reasons for the identification of a person or thing since it is based upon general untranslatable impressions on the mind and that it would be fatuous to discredit such identification on the ground that reasons were not being formulated for them.

48. NON-IDENTIFICATION BY OTHER WITNESSES : It has been suggested that since in the jail parade the appellant Asharfi was identified by only seven out of twelve witnesses and Ram Dhani by only six out of nine, in judging their guilt we should counter-balance the identifiers by those who failed to identify them. The decision in *Sunder v. State*[24], with which we are in respectful agreement, shows the argument to be ill-conceived. Therein their Lordships stated that it cannot be said that the number of witnesses who failed to identify an

[22] AIR 1953 All 314
[23] AIR 1958 Mys 150
[24] AIR 1957 All 809

accused should be set-off against those who identified him so that if an accused was identified by two but not by two others he should be deemed to have been identified by none; and they emphasised that a witness should be judged on the strength of what he himself has seen and not on the inability of somebody else to see it.

49. WITNESS NOT ABLE TO IDENTIFY AN ACCUSED IN THE SESSIONS COURT : It sometimes happens that owing to the delay in holding the sessions trial a witness is unable to identify an accused whom he had pointed out at the jail parade, the lapse of time having resulted in the vision of the witness being affected or the appearance of the accused having undergone a change. In such an event are we to understand that the value of his identification in the jail parade is nil ? The question came up for consideration before a Division Bench of this Court in *Abdul Wahab v. Emperor*[25], Their Lordships observed :

> "If the witness at the trial is no longer able to recognise the accused, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the Committing Magistrate may be brought on the record under Section 288 Criminal Procedure Code. This was the course adopted in AIR 1921 Allahabad 215. It is only available where the witness was able to pick out the accused before the Committing Magistrate though he could not do so before the Judge. The other method is to elicit from the witness at the trial a statement that he identified certain persons at the jail and that the persons whom he identified were persons whom he had seen taking part in the dacoity. If the witness is prepared to swear this, then it is open to the Court under section 9 of the Evidence Act to establish by other evidence the identity of the accused whom the witness identified at the jail. For this purpose the best evidence will be that of the Magistrate who conducted the identification, and his evidence will be strictly relevant under the provisions of the Evidence 'Act.' We respectfully concur and we hold that the jail| identification by the witness has a positive value, though we agree that the value is reduced by the fact of his non-identification at the trial. Standing by itself the jail identification cannot form the basis of a conviction, but it can be used for augmenting the force of other evidence.

50. EXAMINATION OF IDENTIFIER IN THE COMMUTING MAGISTRATE'S COURT : We have seen that in the Committing Magistrate's Court the prosecution, taking advantage of Section 207A(4) Criminal Procedure Code, examined only a few of the witnesses who had identified the present appellants in the jail. Upon this a possible argument can be built up along the following lines : without corroboration a witness's pointing out an accused in the dock is of little consequence; this corroboration is supplied by the test identification held in the jail; a second corroboration is his identification in the Committing Magistrate's Court; but both these identifications can also be used for contradicting the witness; witness sometimes fail to identify an accused in the Magistrate's Court; but if a witness has not been produced in the committing Court the accused is deprived of material which he could have used to his advantage; hence,

Section 207A(4) notwithstanding, every

[25] AIR 1925 All 223

identifying witness should be produced in the committing Court, so that if he makes a mistake there the accused may be enabled to utilize it for discrediting him. The argument is plausible and merits consideration. Now, the accused has a right to use a witness's statement before the Committing Magistrate for contradicting him, and that right cannot be abridged, provided the legislature itself does not decide otherwise. But what has the legislature done ? By introducing Section 207A in the Code by Act No. XXVI of 1955 it has considerably altered the law relating to the procedure to be adopted in commitment proceedings instituted on a police report, and by virtue of clause (4) has given to the prosecution absolute discretion in the matter of production of eye-witnesses, and indeed this Bench has held in *State v. Yasin*[26], that if in a particular case the prosecution do not choose to call a single eye-witness they cannot be compelled to do so. It is clear therefore that the legislature itself has conferred a power upon the prosecution which results in the curtailment of the right of the accused to utilise a witness's statement in the committing Court for his own benefit. Since this is the outcome of a specific statutory provision, no grievance can be made of the fact that by the non-production of an identifying witness in the Magistrate's Court the accused has been deprived of a possible chance of discrediting him in the event of his failure to identify him in that Court we are not aware of any principle of law by which the prosecution can be penalized for exercising a right conferred Upon them by the statute. Besides, it is seriously open to question as to why an identifier's testimony in a sessions trial must be subjected to a double check, to wit, first, his identification in the jail parade, and second, his identification in the Magistrate's Court. Now, if an offence happens to be one cognizable by a Magistrate and yet rests on evidence of identification, only one check on it is permissible namely, the jail identification parade. Yet all that the law requires is that the charge should be proved beyond reasonable doubt, and the standard of proof required is the same whether the offence is triable by the Sessions Court, for example, dacoity, or triable by a Magistrate, for example, theft. Hence, if in a theft case the law considers a single check sufficient, there can be no legal jurisdiction for demanding a double check in dacoity. It might also be pointed out that to think that a witness who has identified the accused in the jail parade and in the Court of Session would have failed to do so had he been produced before the Committing Magistrate, is pure speculation - it is extremely rare to find this happening in practice. Under these circumstances we are unable to agree that in Sessions cases resting on identification evidence the Court should insist that every identifying witness be produced in the committing Court, or that if any such witness is withheld his evidence in the Sessions Court becomes clothed with suspicion. It should be noted that, by virtue of the second part of clause (4) of Section 207-A, if the Magistrate is of opinion that it is necessary in the interest of justice to take the evidence of any particular prosecution witness, he is empowered to do so, so that the possible doing of injustice can be avoided where the accused succeeds in persuading the Magistrate to examine the identifiers before himself.

51. Since writing the above our attention has been drawn to the judgment dated the 3rd May 1960 in *Deep Chand v. State*[27], Therein the Bench has expressed an opinion different from ours.

With profound deference to their Lordships, we might point out that the legal aspects of the matter discussed by us

[26]1958 All LJ 413: (AIR 1958 All 861)

[27](Criminal Appeal No. 469 of 1959)

above were not brought to their notice, so that nothing that they have observed justifies any revision of our view.

52. IDENTIFICATION AT THE INSTANCE OF THE ACCUSED : It sometimes happens that witnesses claim to know an accused person, but be contends that they do not know him and applies to the Court for the holding of his test identification to check the veracity of the witnesses. The point came up before P.L. Bhargava, J. in *State v. Ghulam Mohiuddin*[28], The learned Judge held that the Court could not order the holding of an identification parade because there was no provision in the Criminal Procedure Code authorising it to do so, but he observed that it could in its discretion satisfy itself by asking the accused to stand among other persons present in Court and then call upon the witnesses to identify him. But in the later case of *Lajja Ram v. State*[29], a Division Bench of this Court went further and held that although the accused has no right to claim identification, if the prosecution turns down his request for identification they run the risk of the veracity of the eye-witnesses being challenged on that ground, and that the prosecution would be exposing the claim of such witnesses to the criticism that the test identification was shirked because the witnesses would not have been able to stand the test. It therefore appears to us that if the Court reasonably comes to the conclusion that there may be force in what the accused contends, it should direct the holding of a regular test identification in order that the witness's veracity may be tested. We have no doubt that the Court has ample power under Section 540 Criminal Procedure Code to secure this evidence.

53. PRESENCE OF COUNSEL AT TEST IDENTIFICATIONS : Since justice must not only be done but must be seen to be done, the accused must be afforded reasonable opportunity not only to safeguard his interest but to satisfy himself that the proceedings are conducted fairly and honestly. Hence if he requests for the presence of his counsel at the test identification, his request should never be turned down, though of course the counsel is not entitled to take any part in the actual holding of the test, Similarly the prosecution too have a right to be represented by counsel if they wish to do so.

54. TEST IDENTIFICATION OF AN ACCUSED ON BAIL. As pointed out earlier, there should be reasonable certainty that the accused was not seen by the witness at any time between his arrest and his identification parade. Sometimes an accused person prior to his identification proceedings succeeds in securing bail on giving the undertaking that he would take precautions to keep himself concealed from the prosecution witnesses and that he would not raise the plea that they had seen him before the identification parade. Such an undertaking, as pointed out by Roy, J. in *Ganga Singh v. State*[30], never acts as an estoppel and hence is worthless. In order to escape punishment a criminal may set himself released on such an undertaking and then go and

show himself to the witnesses. If he does so he commits no criminal offence, whereas any identification of him made subsequently becomes perfectly useless. Consequently Magistrates and Courts of appeal should be careful not to enlarge arrested persons on bail whose test identification is desired, though it is their

[28] AIR 1951 All 475 [30] AIR 1956 All 122

[29] AIR 1955 All 671

duty to sea that no undue delay in holding it is permitted. The question of bail should be considered only after the test has been accomplished.

55. SENTENCE FOR DACOITY : In *Om Prakash v. State*[31], this Court hag given reasons why the sentence in a case of dacoity should be heavy and deterrent. Technical dacoities aside, in an ordinary case of dacoity a sentence of seven years' rigorous imprisonment is necessary. Where firearms or other lethal weapons have been used, it should be even heavier. A Division Bench in *Khanzaday Singh v. State*[32], has held that the death sentence should be passed in a case of dacoity with murder where the accused is found to have used a gun even though it is not proved that he was the criminal who caused the death.

56. MERITS OF APPELLANTS' CASE : Having endeavoured to explain the law relating to evidence of identification, we turn to examine the liability of the two appellants. The evidence against both is purely of personal identification. In the jail seven of the eye-witnesses of the crime identified Asharfi, and six identified Ram Dhani. At Asharfi's parade none made any mistake except Sukh Lal (who was 50 per cent correct) and in Ram Dhani's parade none made any mistake except Sheo Prasad (who was 75 per cent correct). Slips of paper had been pasted on marks, but these were not such as to obscure the contours of the face. All the aforementioned witnesses repeated their identification before the trial Court and stated on oath that they had seen these persons participating in the crime. They also swore that the persons they identified were total strangers to them and had not been seen by them between the dacoity and the jail parades. In Asharfi's commitment proceedings Debi Charan and Mata Prasad were produced and correctly pointed him out. In Ram Dhani's commitment proceedings Debi Charan, Mata Prasad, Ram Adhar and Sheo Prasad were produced, and while Debi Charan failed to pick him out the other three did. But since Debi Charan neither identified him in the jail nor in the trial Court, this makes no difference. The available sources of light were highly satisfactory and the witnesses had stationed themselves between, eight and fifteen paces from Gaya Prasad's house. Hence their opportunity of marking the features of the miscreants was excellent.

57. Asharfi's defence is that he was shown to the witnesses after arrest and that he had a quarrel with his village chowkidar owing to which the police have turned hostile to him. But he has not led any evidence in support of these pleas. Considering that he was arrested in a village in Kanpur and that his test identification was held in the jail there, there can be no possible question of the witnesses ever seeing him between the crime and his test identification. His conviction must therefore be upheld.

58. Ram Dhani contends both that he was known to the identifying witnesses inasmuch as he used to visit Takoli (the village where this dacoity occurred) and that after arrest he was marched through Takoli and shown to the witnesses. We have never been impressed by the twin pleas that an accused was both known to the witnesses and wag shown to them, for if the former be well-founded no showing of

[31]1956 All LJ 206 : (AIR 1956 All 163)

[32]1959 All LJ 540 : (AIR 1960 All 190)

him would be needed. This appellant hails from a police-circle different from that within which Takoli lies and his village is-situate at a considerable distance from there. There is nothing to suggest that he had any legitimate business which required visits to that place. The police-constable who escorted him to headquarters examined on behalf of the prosecution has declared that he took him there on foot along the regular route which nowhere passes near Taloki, and he explains that only if a person were to travel on a bicycle he would pass through that village. A witness named Sheo Narain has been produced in defense. He asserts that he was proceeding to another village and on happening to pass through Taloki' saw Ram Dhani under arrest and residents of Takoli gathered round him. But apart from the fact that on his own showing Sheo Narain was a pure witness of chance, he turns out to be a relative of this appellant and therefore deeply interested in saving him. We therefore reject both the pleas advanced by Ram Dhani, and accepting the identification evidence against him, affirm his conviction.

59. Both the appellants have been awarded life sentences. The evidence does not disclose what actual part they played in the crime; nevertheless it is clear that they or their confederates killed Gaya Prasad in brutal fashion. These men also used fire-arms, and if casulties were not more numerous it was not for want of trying. No reduction in the sentences is therefore warranted. Accordingly the appeal fails and is dismissed.

Appeal dismissed.