

ALLAHABAD HIGH COURT

State of U.P

Vs.

Jagnoo

Criminal Appeal No. 376 of 1965. against judgement of Asst. Sessions J. Hardoi
(G.D. Sahgal and R. Chandra, JJ.)

09.02.1965. 02.08.1967

JUDGMENT

R. Chandra, J.

1. Jagnu and Mahesh Singh, residents of village Jamsara, Mina of Chandrapur, Mohan of Kantha, Rampal Singh and Ram Singh of Masurha, Jawahar, Chhotey Lal and Gayari of Virahimpur, Harihar Singh of Jagsura - all within the police circle Sandila - and Sumer of village Sahoria, within the police circle Baghaulti, in the district of Hardoi, were tried for the offences under Section 399/402, Indian Penal Code, by the Assistant Sessions Judge Hardoi. The charge against them was that on the night between the 18th and 19th December, 1963 they collected in the grove of Ram Nath in village Bhargahna after having made preparations to commit dacoity at the house of Khurram Chamar, Jagnu, Sumer and Jawahar were further charged under Section 25(a) of the Arms Act. Jagnu, Mohan, Sumer and Harihar Singh were acquitted. The remaining seven, namely, Mahesh Singh Minna, Ram Pal Singh, Ram Singh, Jawahar, Chhotey Lal and Gayari were convicted and awarded five years' rigorous imprisonment each under Sections 399 and 402 Indian Penal Code, (each count). Jawahar was also sentenced to one year's rigorous imprisonment under Section 25(a) of the Arms Act. The State has filed Criminal Appeal No. 376 of 1965 against the acquittal of Jagnu and Sumer. No Government Appeal has, however, been filed against the acquittal of Mohan and Harihar Singh. The three other represented Criminal Appeals - Nos. 92 of 1965, 109 of 1965 and 288 of 1965 - have been filed by Ram Singh, Ranipal Singh, Mahesh Singh, Jawahar and Minna against their conviction on the various charges. The remaining two appeals, namely Jail Appeals Nos. 317 of 1965 and 320 of 1965, are the unrepresented jail appeals of Chhotey Lal and Gayari. Since all these appeals arise out of the same trial we propose to dispose

them of together.

2. We have heard the learned counsel for the appellants and the Assistant Government Advocate for the State.

3. The case for the prosecution in brief is that on 18th December, 1983, at about 7-30 P.M. Raghubir Singh, Station Officer, Police Station Sandila, got the information from an informant that Jagnu, Mahesh Singh, Minna, Mohan, Rampal Singh, Ram Singh, Jawahar, Chhotey Lal, Gayari, Sumer and Harihar Singh were planning to collect in the grove of Ram Nath in village Bhargahna, police station Sandila that night after having made preparations to commit dacoity at the house of Khurram Chamar of village Pausra Kher, hamlet of Bhargahna. (An entry about that information was made in the general diary vide Extract Ext. Ka-16). He immediately deputed Bhagwati and Bajj Nath, constables, to guard the house of Khurram Chamar. (About that also an entry was made in the general diary, vide Extract Ext. Ka-17). At about 8-15 P.M. the Station Officer left the thana with the police party for the grove of Gulab Das situated near village Bhargahna. Some constables were sent to call respectable public witnesses. They brought eight witnesses including Kedar Nath P.W. 3, Shahzade P.W. 4, Bharosey P.W. 5, Rajja P.W. 7, Dayal Shanker P.W. 8, Bashir P.W. 9 and Mewa Lal P.W. 10. Thereafter the entire party was informed of the purpose of their collecting there and necessary instructions were also issued. They were further told that after it was satisfied that the dacoits had collected for committing the dacoity, signal would be given by firing a very light pistol. Then they left for the grove of Rani Nath. There, the entire party was divided into three groups. Party No. 1 was under the leadership of Station Officer Raghubir Singh P.W. 22, and was posted on the western side of the grove. Party No. 2 was headed by S.I. Mukhtar AIR P.W. 6 and was posted towards north of the grove. Similarly the third party was headed by S.I. Chandrapal Singh P.W. 2, and was posted towards east of the grove. The southern side was left open as according to the information received the dacoits were expected to come from that side. At about 11 P.M. the dacoits started coming and they collected by midnight. They were smoking bidis and talking among themselves. After all the badmashes had collected, one of the dacoits said, "Now is the time. There is no licence-holder in the village. Dacoity be committed" Thereupon, the other dacoit remarked. "We have sufficient ammunition. Khurram Chamar is a wealthy person and we would get sufficient booty". This talk was overheard by the members of the hiding party. When the Station Officer was satisfied that they were really dacoits and had collected there

to commit a dacoity, he fired five shots from a very light pistol. This produced sufficient light. The members of the raiding party also possessed torches and firearms. They all immediately rushed towards the badmashes and after inflicting some injuries succeeded in arresting Jagnu, Sumer, Jawahar, Gayari and Chhotey Lal on the spot. Their other companions however managed to escape. The members of the raiding party claimed to have seen and identified those badmashes in the light of torches and very light pistol. The arrested persons were searched on the spot. From the possession of Chhotey Lal, one bag Ex. 1 containing Chheni (chisel) Ext. 2, iron bar Ext. 3, hammer Ext. 4, and a torch Ext. 5, were recovered under the memo. Ext. Ka-3. Similarly, from the possession of Jawahar, one country made pistol Ext. 8, two live cartridges Exts. 9 and 10, one empty cartridge from the barrel of the pistol Ext. 11, and one torch Ext. 12, were recovered under the memo. Ext. Ka-4. From the possession of Sumer, one country-made pistol Ext. 16, two live cartridges Exts. 17 and 18 and one torch Ext. 19 were recovered under the memo. Ext. Ka-6. From the possession of Jagnu, one country-made gun Ext. 32 and four live cartridges Exts. 33 to 36 were recovered under the memo. Ext. Ka-9, Similarly, from the possession of Gayari, one kanta Ext. 37 was recovered under the memo. Ext. Ka-10. Jawahar, Sumer and Jagnu held no licence for the firearms and ammunition recovered from them. From the grove of Ram Nath, some empty cartridges, three lathis and other miscellaneous articles, such as matchboxes, match-sticks and the burnt pieces of bidis were recovered under memos. Exts. 5 and 7. The arrested persons with the seized property were removed to the thana where a report Ext. Ka-20 was lodged by the Station Officer Raghbir Singh at 7 A.M. The distance of the police station from the scene of occurrence was about three miles. The arrested persons and the witnesses were interrogated. Ruin Singh and Ram Pal Singh were arrested on 15th January, 1964, Mahesh Singh was arrested on 25th December, 1963 Minna was arrested on 21st December, 1963. They were put up for identification on 1st February, 1964 and 22nd February, 1964. After due investigation and obtaining sanction for the prosecution under the Arms Act, charge-sheets were submitted against all the eleven accused persons.

4. The prosecution in support of its case in all examined 23 witnesses. Out of them, Chandrapal Singh P.W. 2, Kedar Nath P.W. 3, Shahzad P.W. 4, Bharosey P.W. 5, Mukhtar Ali P.W. 6, Rajja P.W. 7, Daya Shanker P.W. 8, Bashir P.W. 9, Mewa Lal P.W. 10, Surendra P.W. 11, Ram Singh P.W. 12, Sohan Lal P.W. 13, Mohd. Kazim P.W. 21 and Raghbir Singh P.W. 22 are the eye-witnesses of the occurrence. The remaining witnesses are mostly of a formal nature.

5. The accused pleaded not guilty and denied the charges. They attributed their false prosecution to enmity.

6. The defense of Jagnu was that he had been earlier acquitted in a case under Sections 399 and 402 Indian Penal Code, and for that reason he had been falsely roped in.

7. The defense of Mahesh Singh was that he was arrested from his house and brought to the thana. He was also prosecuted in several cases, but was acquitted and so he had been falsely roped in. He further pleaded that Mukhtar Ali knew him from before.

8. The defense of Minna was that the witnesses saw him at the thana. He further pleaded that he was on inimical terms with Angnoo and he got him falsely implicated in the case.

9. The evidence of Rampal Singh was that since he did not give evidence in the Lam bamau case, he had been falsely implicated.

10. The defense of Ram Singh was that he was the brother of Rampal Singh and since the police was displeased with him, they also got him falsely implicated.

11. The defense of the other accused was that the witnesses knew them from before and they had also been shown by the police. The witnesses gave evidence against them under pressure of the police.

12. It appears that out of the five persons arrested on the spot, all except Jagnu claimed identification. Out of them, the Sessions Judge acquitted Jagnu and Sumer mainly on the ground that either they were not put up for identification or the evidence of identification against them was insufficient. Out of the other group who were not arrested on the spot and the evidence against whom was purely of identification, the trial Judge acquitted Mohan and Harihar Singh for want of sufficient proof. He, however, convicted the remaining seven accused persons and sentenced them to various terms of imprisonment.

13. The defense in short was that the entire prosecution case was a pure concoction.

14. So, the questions that arise for consideration are (i) whether on the night between the 18th and 19th of December 1963, the appellants or any of them had collected in the grove of Ram Nath in village Bhargahna after making preparations to commit dacoity at the house of Khurram Ghamar, (2) whether the raid was made by the police as alleged by the prosecution, and the appellants or any of them were arrested on the spot, and (3) whether the conviction of the appellants or the acquittal of Jagnu and Sumer was justified.

(After discussing evidence and repelling various contentions based on facts, their Lordships proceeded :)

23. Next we shall examine the cases of the accused who were not arrested on the spot, and against whom the evidence was purely of identification. They are Ram Singh, Rampal Singh, Mahesh Singh and Minna. -- (After discussing evidence and ordering acquittal of these accused their Lordships proceeded :)

28. Next we shall deal with the cases of the accused who are alleged to have been arrested on the spot. They are Jagnu, Sumer, Jawahar, Gayari and Chhotey Lal. All of them except Jagnu claimed identification. They moved an application dated 7th February, 1964 which was granted on 19th February, 1964, and they were put up for identification on 25th June, 1964. The trial Judge relying on a single Judge decision of this Court *reported in Balwant v. State* ⁻¹ held that the identification of the accused even if they were arrested on the spot was necessary and the absence of such identification was a fatal weakness to the prosecution. Mainly on the (this ?) ground he acquitted Jagnu and Sumer. As already stated earlier, Jagnu never claimed identification, but the Assistant Sessions Judge following the view taken in the above cited case came to the conclusion that the charges against him could not be proved as there was no identification. As regards Sumer, he held that he could not be identified by any of the prosecution witnesses. He however, accepted the identification evidence against Jawahar, Gayari and Chhotey Lal and convicted them. The view adopted by the trial Judge is no longer good law.

29. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of the occurrence are to identify them from the midst of other persons without any aid or any other source. The identification test is usually

adopted during the investigation of a crime by the police, when the witnesses are interrogated for the first time and state that they had seen some persons committing the crime but do not know their names and would be able to identify them if they would see them again. The identification test is a check upon their veracity. These proceedings are in the nature of tests and the Courts regard them as record of facts which establish the identity of any thing or person. The facts are to be proved according to law, and in the absence of such proof the identification proceedings are valueless. The fact if proved can be used both for purposes of corroboration as well as for contradiction, *State v. Ghulam Mohiuddin*,² Apart from the investigation utilizing these tests for checking up their own evidence and affording the Courts later on to rely upon them as corroborative evidence, the accused may in certain cases demand the holding thereof. Where the prosecution has omitted to hold a test identification, possibly on the theory that the witnesses know the accused from before or for some other reason the accused may apply to the Court for the holding of a test identification to check up the veracity of the witnesses who claim to know him from before. In a Lahore case in *Amar Singh v. Emperor*,³ the Court held that whenever an accused disputed the ability of the prosecution witnesses to identify him, the Court should direct an identification parade to be held save in the most exceptional cases. In another case of the same High Court reported in *Sajjan Singh v. Emperor*,⁴ the accused, before being sent up for trial, applied to have the veracity of the witnesses tested by means of an identification parade. The request was however refused by the magistrate to whom it was made. The application was sent first to the police for report. It was reported that the statements of witnesses showed that they knew the accused from before and that the application had 'been made only for the purpose of delay. The reason of delay however was incorrect. The application had been made more than a week before the proceedings came up so that it should have been possible to arrange for a parade which would not have involved any delay. About the other reason that was given, the High Court thought that even to be unsound. It held : "If an accused person is already well known to the witnesses an identification parade would, of course, be only a waste of time. If, however, the witnesses claim to have known the accused previously while the accused himself denies this, it is difficult to see how the claim made by the witnesses can be used as a reason for refusing to allow their claim to be put to the only practical test. Even if the denial of the accused is false, no harm is done, and the value of the evidence given by the witnesses may be increased. It is true that it is by no means uncommon for persons who have been absconding for a long time to claim an identification parade in the hope that their appearance may have changed sufficiently

for them to escape recognition. Even so, this is not in itself a good ground for refusing to allow any sort of test to be carried out. It may be that the witnesses may not be able to identify a person whom they knew by sight owing to some change of appearance or even to weakness of memory. But this is only one of the facts along with many others such as the length of time that has elapsed, which will have to be taken into consideration in determining whether the witnesses are telling the truth or not." The Court further held that when such requests are refused and for no valid reason the case would more often than not end in acquittal, should any serious question of identity arise during the course of the trial; for the witnesses' claim to identify the accused will remain subject to a doubt which might easily have been removed if their ability had been put to the test before the trial. It is too late to do anything after the trial has begun, for by that time the witnesses will have become accustomed to the appearance of the accused in Court.

30. These cases of the Lahore High Court have been dissented from in a case of the Madras High Court reported in AIR 1948 Madras 113, *In re, Sangiah*, 49 Cr LJ 89, and a case of the Allahabad High Court reported in AIR 1951 Allahabad 475 : 1951 All LJ 437. In the Madras case the Court held : "I am unable to find any provision in the Code which entitles an accused to demand that an identification parade should be held at or before the enquiry or the trial. An identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which in itself is relevant at the trial. The actual evidence regarding identification is that which is given by the witnesses in Court. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court. If the witness has not identified the accused at a parade or otherwise during the investigation the fact may be relied on by the accused, but I find nothing in the provisions of the Code which confers a right on the accused to demand that the investigation should be conducted in a particular way. Identification parade is a part of the investigation and once the case has reached the stage of an enquiry before the magistrate the investigation is at an end and all that takes place thereafter should take place in Court and form part of the record of the case. If a case is posted for trial any test as to the ability or credibility of the witnesses should be decided only in Court and not by means of an identification parade the proceedings of which will not form part of the record of the Court". The Court, however, held that if the accused, makes a request that he be mingled with other persons in the dock, and then the P.Ws. may be asked to

pick him up, that request would be granted in all course.

31. The case in the Allahabad High Court, AIR 1951 Allahabad 475 : 1951 All LJ 437, also proceeds on the same lines. It held that in cases where a magistrate takes cognizance of an offence upon a police report or upon a private complaint, the accused may inform the Court that he is not known to the prosecution witnesses, and even suggest that the prosecution may arrange for an identification parade for his identification, but he cannot ask the Court to direct the prosecution to arrange for such a parade: and the Court cannot make an order for the holding of a regular identification parade obviously because there is no provision of law under which the Court can issue any such direction. The Court may, however, in such cases satisfy itself by asking the accused to stand among other persons present in Court and then call upon the witnesses, who appear before the Court, to identify the accused and make note of the result on the record. The argument that if no test identification is held at the request of the accused and he has been thus deprived of an opportunity to test the veracity of the prosecution witnesses will mean a serious prejudice to him in his trial was held as not tenable. The Court held that one had to proceed on assumptions that there had been no identification proceedings in the case, and it is not permissible to speculate what would have been the position if certain things might have happened.

32. The above ruling was however explained in a latter ruling of the same Court in *Lajja Ram v. State*,⁵ and it was held that provided it is not too late to do so, the accused can challenge the prosecution to an identification parade to falsify the claim of the eye-witnesses who profess to have known him and although there is no law which could be said either to confer any right upon the accused to throw such a challenge or to impose an duty upon the prosecution to take up the challenge, the prosecution that ignores that challenge without justification would be doing it at its peril. When the accused puts up a challenges that the witnesses do not know him and that an identification test should be held, unless the prosecution can nullify that claim of the accused (e.g. by showing, that even though the witnesses were not put to the test of identification, there is evidence aliunde which establishes without doubt that the accused was known to them), there would be an element of doubt attached to the testimony of witnesses in case the identification test is not held and the benefit of that doubt would go to the accused. The Court held that even if the prosecution tailed in its duty to hold the identification at the request of the accused, the Court concerned should order the holding of it if the accused persists before it.

33. In an unreported decision of this Court (Lucknow Bench) in *Criminal Mohd Husain v. State decided on* ⁶ Mulla, J, took a view contrary to that taken by Katju, J. in Balwant's case aforementioned. The accused before Mulla, J., was also charged under Section 399, Indian Penal Code. While dealing with the question of identification. Mulla J., observed :-

"In a case where suspects are arrested on the spot, the question of identification does not arise. The police would, therefore not collect the witnesses for the purpose of getting the arrested person identified the trial Court was right in its observations against the conduct of the Magistrate who granted the request of the appellants that in identification parade be held in those cases where persons are arrested on the spot the question of identification does not arise. An identification is held to test the memory and observation of a witness. In this case if the witnesses had picked out the suspects that would not have strengthened the prosecution case at All. The prosecution case depended upon the arrest on the spot and the contemporaneous enter relating to that arrest in the police papers. The Magistrate was, therefore, ill-advised when he directed that an identification parade would be held in this case."

34. In an unreported Division Bench decision of this Court (Lucknow Bench) - *State v. Neel Kanth*, ⁷ the Hon'ble Judges observed :-

". . . we are of the view that the case of *Balwant v. State, 1964 All Cri R 243 (Supra)*, does not lay down the correct law. Where in a case like the present one the accused is arrested at the spot, all that has to be proved is that he was in fact arrested at the place and in the circumstances alleged by the prosecution and the failure of the investigating agency to put him up for test identification is not at all a weakness in the prosecution case, much less a fatal weakness. As stated above, the respondents, in the case before us did not claim test identification and no question of holding a test identification parade at all arose in the present case and the case of the prosecution could not be rightly thrown out on the ground of absence of test identification parade."

35. The standard of judging the identification evidence of the persons arrested on the spot would be quite different from the general identification normally held of the

culprits arrested long after the crime in the latter case, the witnesses are required to identify the accused whom they saw committing the crime. Proper identification would depend on numerous factors, such as one's power of observation, distance, time and light etc. The result would also be affected if the identification was held long after the incident, but in the case of arrest on the spot, the identification would be directed mainly to test the credibility of the witness who actually helped on effected the arrest. In such a case, the attention of the witness would be solely concentrated on the person arrested. If several culprits are arrested by different persons, it is not necessary that such n witness must know about all the arrests. So even if some mistakes are committed in the identification of others, that would not detract from the value of evidence of such witness. For all these reasons it would not be necessary to assess the value of such identification on the basis of the results of earlier identifications held in respect of the persons not arrested on the spot. In the instant case, the earlier identifications were held long before the identification of these accused. So, on that ground too, their results could not be considered in assessing the value of the identification of the accused arrested on the spot.

36. Applying the same principles to the facts of the present case, it is clear that the acquittal of Jagnu by the Assistant Sessions Judge on the ground that he was not put up for identification was clearly erroneous. As already stated earlier he never claimed identification. There was ample direct evidence against him to show that he was arrested on the spot. No flaw it that evidence could be pointed out on his behalf. The charges under Sections 399 and 402 Indian Penal Code and Section 25(a) of the Indian Arms Act, have been fully established against him, and his acquittal must be set aside.

37. The prosecution alleged that Sumer was arrested on the spot. He also claimed identification. His identification was held on 25th June, 1964. In the jail, only Shahzade could identify him correctly He picked out two persons correctly and committed two mistakes. In the sessions Court he even failed to identify this accused. Some of the witnesses who are alleged to have arrested him failed to identify him, while others were not produced by the prosecution. There being practically no identification evidence against this accused, it would not be quite safe to rely on the oral testimony of the witnesses against him. So, the charges have not been satisfactorily brought home to him and his acquittal is justified.

38. The remaining three accused, namely Jawahar, Gayari and Chhotey Lal were also

put up for identification on 25th June, 1964 Jawa bar was correctly identified by Kedar Nath, Bharosey, Rajja and Mewa Lal P Ws Kedar Nath correctly identified two persons and committed one mistake. Similarly, Rajja correctly identified three persons and committed one mistake Mewa Lal and Bharosey committed no mistakes, Similarly, Gayari was correctly identified by Kedar Nath arid Rajja P.Ws. and Chhotey Lal was correctly identified by Rajja and Mewa Lal P.Ws. There was ample direct evidence in the case to prove that these three accused were arrested on the spot. It has further been corroborated by the identification which was held at their own instance. The evidence of these witnesses was rightly believed by the trial Judge. Their conviction on the various charges is justified. The sentences awarded for the various offences do not err on the side of severity.

39. In the result, Criminal Appeal No. 376 of 1965 filed by the State against the acquittal of Jagnu is allowed. His acquittal is set aside and he is convicted under Sections 399 and 402, Indian Penal Code, and Section 25(a) of the Indian Arms Act under Sections 399 and 402, Indian Penal Code he is sentenced to undergo rigorous imprisonment for five years on each count and under Section 25(a) of the Indian Arms Act he is sentenced to undergo rigorous imprisonment for one year. The sentences shall run concurrently. The appeal against the acquittal of Sumer on the charges under Sections 399 and 402, Indian Penal Code, and under Section 25(a) of the Indian Arms Act, is however dismissed.

40. Criminal Appeal No. 92 of 1965 by Ram Singh and Rampal Singh against their conviction under Sections 399 and 402, Indian Penal Code is allowed and they are acquitted.

41. Criminal Appeal No 109 of 1965 by Mahesh Singh against his conviction under Sections 399 and 402. Indian Penal Code is allowed and he is acquitted of the charges.

42. The appeal against the conviction of Jawahar under Sections 399 and 402, Indian Penal Code, and under Section 5(a) of the Indian Arms Act, is however, dismissed and his conviction and sentences are maintained.

43. Criminal Appeal No. 288 of 1965 by Minna against his conviction under Sections 399 and 402, Indian Penal Code, is allowed and lie is acquitted of the charges.

44. Jail appeals, namely, Criminal Appeals Nos. 317 and 302 of 1965 by Chhotey Lal and Gayari against their conviction under Sections 399 and 402. Indian Penal Code, are dismissed and their conviction and sentences are maintained.

45. Ram Singh, Rampal Singh, Mahesh Singh, and Minna are on bail. They need not surrender and their bail bonds shall stand discharged.

46. Sumer is in jail. He shall be set at liberty forthwith unless his detention be necessary in connection with some other crime.

47. Jawahar is on bail. He shall surrender to his jail. The District Magistrate, Hardoi, is directed to get Jawahar arrested and sent to jail to serve out his sentences.

48. It Jagnu is also on bail, he shall surrender to his bail. The District Magistrate, Hardoi, shall see that Jagnu is arrested and sent to jail to serve out his sentences. The sentences of imprisonment shall run concurrently.

49. Compliance report shall be submitted by the District Magistrate, Hardoi, to this Court within a month.

50. Chhotey Lal and Gayari are already in jail and they may be informed about the result of their appeals.

Order accordingly.

Cases Referred.

1. 1964 All Cri C 243

2. AIR 1951 All 475

3. AIR 1943 Lah 303, 45 Cr LJ 98

4. AIR 1945 Lah 48, 46 Cri LJ 550

5. AIR 1955 All 671

6. Appeal No. 362 of 1956. 2nd September, 1958, (All)

7. Criminal Appeal No. 68 of 1965, decided on 3rd November 1956. (All)