

Court No. - 46

A.F.R

**Reserved on:09.03.2022
Delivered on:27.05.2022**

Case :- CRIMINAL APPEAL No. - 388 of 1984

Appellant :- Rakesh

Respondent :- State

Counsel for Appellant :- R.B.Sahai,Amrish Sahai,R.B. Sahai

Counsel for Respondent :- D.G.A.,A.G.A.

Hon'ble Mrs. Sunita Agarwal,J.

Hon'ble Vikas Kunvar Srivastav,J.

(Delivered by Justice Sunita Agarwal.)

1. Heard Sri Amrish Sahai learned Advocate for the appellant and Sri Patanjali Mishra learned A.G.A for the State.

2. This appeal is directed against the judgment and order dated 06.02.1984 passed by the Second Additional Sessions Judge, Fatehpur in Sessions Trial no.145 of 1993 arising out of Case Crime no.139 of 1982 under Section 396 IPC, P.S- Malwan, District-Fatehpur whereby sole appellant Rakesh has been convicted for the offence punishable under Section 396 IPC and sentenced to undergo imprisonment for life.

3. The first report of the incident was given in writing by P.W-1 Naresh Chandra s/o Jagdish Chandra, a driver of the truck no.3901 URQ. The averments in the said report are that the first informant was driver of the aforesaid truck and on 14.10.1982, at about 2.00 a.m., while they were going to Bhogaon from Varanasi, three persons namely Suresh Chandra s/o Matadeen (second Driver) Shyam Singh s/o Puselal (Cleaner) and one Ram Sewak Dubey were sitting in his truck. At about 2.00 a.m., when they reached near the village Allipur in a convoy, about 3 kms away from the said village, the road was blocked by placing branches of Babool tree across the road. Seeing that, the first informant slowed down his vehicle (truck) and at that time, 8-10 miscreants armed with weapons gheraoed his vehicle pointing out Tamancha and Gun. The miscreants started looting money and then one of them fired which hit deceased Ram Sewak

Dubey who died in the vehicle itself. The cleaner Shyam Singh got injuries in his right leg. The police personnel on convoy duty present in the vehicle behind namely Truck no.UTM 2400 also fired. The miscreants looted Rs.3800/- from the first informant and the persons sitting in the truck. It is stated in the written report that this incident was witnessed by the drivers of the vehicle No.UTM2400, Bhagwan Singh s/o Bhupal Singh and Lalaram s/o Ulfat Singh as also the driver of vehicle no.8030HRU namely Laxman Singh s/o Chatur Singh as well as others present on the spot. It was stated in the written report that they all had seen and identified the assailants in the light of the trucks and they could identify the miscreants if they were brought before them. The body of the deceased Ram Sewak and the injured Shyam Singh (cleaner) were taken to the police station. The Check report and the GD entry of the report were proved by P.W-6 being in his writing and signature as Exhibit Ka-4 and 5. It was stated by P.W-6 that the written report was given by the first informant Naresh Chandra at about 2.30 a.m on 13/14.10.1982 who came along with the driver Suresh Chandra and injured cleaner Shyam Singh and also brought the dead body of Ram Sewak. Two constables Ramdeo Singh and Vinay Kumar who were on convoy duty came along with them.

4. The G.D entry of the movement of Constable Ramdeo Singh and Vinay Kumar from the Police Station on 13.10.1982 at about 9.30 p.m in Rapat no.32 was proved by P.W-6 being in his hand writing by bringing the original G.D and filing the copy with his signature proved as Exhibit Ka-3. In cross, P.W-6 stated that the convoy used to be prepared in front of the police station, one Constable used to make the convoy and two Constables accompany it. On confrontation, it was stated, in cross, by P.W-6, that G.D entries of the duty of the Constables, on convoy duty, was before him and as per the GD dated 17.10.1982, Constable Vinay Kumar was on Santri duty from 6.00 p.m till 9.00 p.m and Constable Ramdeo was on Convoy duty from 17.10.1982 at 19.00 hours till 18.10.1982 at 4.00 a.m. However, the movement of these constables from the police station on the said dates ie 17.10.1982-18.10.1982 was not recorded in the

GD.

5. The written report of the incident reported by P.W-1 was read over to him during his deposition before the Court, who admitted his signature and handwriting on the same, it was proved as Exhibit Ka-1. After lodging of the report, blood from inside the truck, found on the seat and near the engine and plain soil which came there from the foot of the people entering in the truck found near the window of the truck, were collected and sealed, and the recovery memo of the same was proved as Exhibit Ka-18. The blood stained clothes of deceased Ram Sewak Dubey were seized and recorded in the recovery memo Exhibit Ka-9. The inquest was conducted on 14.10.1982, which commenced at 6.30 am and ended at 8.30 am. The injured Shyam Singh was sent to the Sadar hospital, Fatehpur on 14.10.1982 for investigation of his injuries. Two gunshot wounds with blackening and tattooing were found on the lower limb (right) of injured Shyam Singh.

6. One gun shot wound of entry on left side of neck behind the left ear cavity deep below occipital area with blackening and tattooing was present on the person of deceased Ram Sewak Dubey. One wadding piece and 23 small pellets were recovered from the neck muscles and two small pellets from left lung. The post mortem report exhibited as Exhibit Ka-7 indicates that the death was caused due to shock and hemorrhage as a result of fire arm injuries.

7. P.W-1, the first informant stated on oath that on 13.10.1982 his truck no.3901 URQ was looted and at that time carrying coal in the truck he was going to Bhogaon from Varanasi and in the truck three persons namely second driver Suresh Chandra, Cleaner Shyam and one Ram Sewak were sitting. Other trucks were also coming behind him in the convoy and police was accompanying them. At about 2.00 a.m., 3 kms away from Village Allipur on GT Road, branches of wild babool were lying on both sides of the road blocking it. He had to slow down the truck and then 7-8 miscreants came and gheraoed the truck from all four sides.

The dacoits were carrying weapons and they started loot. From the right side one dacoit opened fire which hit at the back of the head of the deceased Ram Sewak Dubey and he fell in the cabin below the back seat. One fire which came from the left side hit the cleaner Shyam Singh. The miscreants looted Rs.3800/-.

8. In the meantime, two constables posted on the convoy duty reached with their truck, they fired and the miscreants ran away with the money towards North South. P.W-1 stated that when his truck reached the place of the incident, the truck light was on but when the loot was started then they forced him to put off the light. The light of the truck behind him were, however, 'On'. Ramsewak Dubey died inside the truck. The report was written and signed by him and was lodged in P.S-Malwan at about 2.30 a.m. The report was read over to him and he proved it as Exhibit Ka-1.

9. The injured Shyam Singh was sent to the Sadar hospital, Fatehpur. P.W-1 stated that the Investigating Officer interrogated him and took out the dead body from the truck, conducted inquest and sent it for the postmortem. He categorically stated in chief that he did not participate in the identification parade of the accused persons.

10. In cross, P.W-1 stated that he did not mention the appearance of the assailants in the report nor he disclosed anything about this to the Investigating Officer. The night of the incident was dark and when his truck was stopped the miscreants forced him to put off the light. On a suggestion, he stated that when the trucks are parked, the lights get dim. He then stated that the trucks which were behind him in the convoy, their headlights were on. He could not see the miscreants and that is why, their appearance was not disclosed in the report nor was disclosed to the Investigating Officer in his statement. Lastly, P.W-1 stated that he could not get intimation of the date of identification parade in time and whenever it was held, he was somewhere else on duty.

11. P.W-2 is Constable Ramdeo Pandey C.P-324 P.S Malwan, District-Fatehpur who on 13.10.1982 was on convoy duty. He stated that he

moved from the police station at about 9.30 p.m on convoy duty accompanied with Constable Vinay Kumar. They both were sitting on the front seat of the truck. Two-three trucks were in front of their truck and some were behind. At around 2.00 a.m, they reached at the G.T. road between Village-Allipur, and Village Saura, a road jam was created there by the branches of Babool tree. The dacoits were looting the truck on the front and the head light of the truck in which they were sitting was on. The headlights of the truck which was looted and all other trucks in the convoy were also on. P.W-2 stated that he had 12 bore personal gun and his companion was carrying official rifle. They both challenged the dacoits and fired, who ran towards the North and could not be nabbed. P.W-2 stated that he had seen the faces of the dacoits in the headlight of the truck and identified them. They were unknown, 8-10 in number.

12. P.W-2 further stated that he went to the District Jail-Fatehpur in the identification parade and identified two dacoits, and then stated that they were also present in the Court. P.W-2 then went to the place where the accused persons were standing, touched two of them and said that those were the persons who were identified by him in the jail. On being asked to give names of the dacoits, he stated that one of them was Ram Kishun @ Kripali, and then said that he was Ram Ashrey @ Ghonchey. P.W-2 further stated in chief that he had seen the said dacoits for the first time at the place at the time of the incident and then in jail, and that he had never seen them in between.

13. When confronted by the accused, in cross, about his posting, P.W-2 admitted that two of the accused person namely Ram Kishun and Ghonchey were residents of the Mohalla Lahauri wherein P.S-Bindki situated. PW-2 denied the suggestion that he knew both the above named accused persons before the incident and that the accused persons were caught from their homes by the Investigating Officer and then detained in the Police Station Malwan for two days and, thereafter, challaned in the case. He then narrated as to how the identification parade was conducted

in the jail.

14. It is further stated by P.W-2, that on the fateful day, his convoy duty was from Malwan to Nawabag and it was his 6th round. It was further stated by P.W-2 that the truck of Naresh (P.W-1) was ahead in the convoy, there were 15-20 trucks and there were 10-15 trucks behind the truck wherein he was sitting.

15. The headlights of all the trucks which were behind were on and the truck in which he was sitting was brought forward and parked besides the truck which was looted and the assailants fled away towards the North. It was a dark night.

16. On a query, P.W-2 stated to the Court that he gave appearance of the miscreants in his statement on the next day when he was interrogated by the Investigating Officer.

17. P.W-3 is Constable Vinay Kumar who was also on convoy duty on the fateful night. He narrated the incident in the same manner as has been stated by P.W-2 Ram Deo Pandey and stated that he was on convoy duty along with P.W-2. P.W-3 stated that all dacoits were unknown, and when they ran away, the witnesses reached near the truck and saw that one person was killed and cleaner was injured in his right leg. The identification of the dacoits was made in the District jail Fatehpur and he had identified three of them. P.W-3 stated that he had seen the dacoits firstly at the spot of the incident and then during the identification parade in jail and did not see them in between. He also identified three accused persons standing in the Court stating that they were the same persons who had been identified by him in the jail.

18. On a suggestion, P.W-3 stated that when the accused persons were earlier caught by the police and brought to the police station, he was not present there. He further stated that he heard the sounds of two fires. On a suggestion to P.W-3 he denied that he was posted in the police station Bindki before the incident and admitted that at the time of incident he was posted in the Police Station Malwan. He further denied the suggestion that

the accused were shown to him when they were brought from the jail to the Court.

19. He expressed ignorance to the suggestion that accused Rakesh was brought without veil in the Court on the date of his appearance, before the identification parade. He denied that accused Kripali and Ghonchey were identified by him earlier as they were without veil behind the bar. On confrontation by the accused, P.W-3 stated that he identified three accused persons correctly and 3-4 wrongly.

20. He stated, in cross, that the headlight of the truck at the front was on and lights of all other trucks were also on. He stated that the entire incident occurred in about 2-3 minutes and as soon as they reached and fired the assailants fled away. They came down from their truck and challenged the assailants and fired at them, the assailants, however, escaped. The suggestion that he did not see or identify any of the assailant was denied. P.W-3 also denied that he had seen the accused persons before the identification parade. He said that he identified the accused persons in jail during the actual identification parade. The suggestion that there was no light at the time of the incident was denied by P.W-3.

21. P.W-4 is Constable Harnath Singh who was posted in the Police Station Malwan in October, 1982. He was produced in the witness box to prove that, two accused namely Ram Kishun @ Kripali, Gonchey were brought with their covered faces handed over in his custody and Constable Chandra Bhan. His testimony is not relevant as the said two accused persons have been acquitted by the trial court.

22. P.W-5- Lal Singh Chandel is the Investigating Officer, who stated that initially the investigation was made by one Sub-Inspector, Phool Singh Sachan. On 15.10.1982, the investigation was handed over to him under the orders of the Superintendent of Police. He recorded the statement of witnesses and the police officials posted in convoy duty on the date of the incident.

23. On 16.10.1982, on the clue of the informant who told that the

perpetrators of the crime was a gang of Chandrapal Khatik, search was conducted, but no one could be nabbed. He then stated that he came to know that the incident was carried out by the brother of Chandrapal Khatik and it was verified by the statement of other witnesses.

24. On 17.10.1982, accused Ram Kishun @ Kripali was arrested. He brought in the police station by covering his face. On his interrogation he confessed the crime and disclosed the names of other accused persons. The accused Ram Kishun was lodged in the lockup in the police station at 3.15 p.m and instructed to keep him under veil. The accused Ghonchey was arrested on 17.10.1982 at about 8.30 p.m from another place. The said accused also confessed the crime and disclosed the names of his co-accused and he was lodged in the police station covering his face. P.W-5 came to know on 22.11.1982, that the accused appellant Rakesh had surrendered and was sent to jail under veil. The result of the identification parade was received on 07.01.1983 and the chargesheet was submitted against the above named three accused persons in his handwriting and signature which was proved as Exhibit Ka-2.

25. The papers pertaining to the deceased such as inquest, site plan and the recovery memo were proved by P.W-5, having been prepared in his writing and signature. P.W-5 further stated that he recorded statement of the first informant, injured witness Shyam Singh and another witness Suresh Chandra and blood found inside the truck was seized. On a suggestion, P.W-5 denied that the accused persons were first identified by two constables on convoy duty and that they were kept in the police station with bare faces. On another question, P.W-5 stated that he came to know that accused Rakesh had surrendered in the Court on 22.11.1982 through Pairokar and that the fact that he was sent to jail under veil came to his knowledge through papers. He denied that accused appellant Rakesh appeared bare face in the Court on 22.11.1982 and then he was identified by the Constables on convoy duty.

26. P.W-7 is the Constable posted in the Police-station Malwan and

stated that the accused Ram Kishun @ Kripali and Ghonchey, were lodged in the lockup under veil.

27. Before we enter into further discussion, it may be noted that the trial court had acquitted two accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey on the ground that the prosecution did not produce any positive evidence that the identification of the aforesaid two accused persons by the witnesses P.W-2 and P.W-3 was independent and that these witnesses had no occasion to see the accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey from the time when they were arrested on 17.10.1982 up to when they were taken out from the police station lock up and sent to the District jail Fatehpur on 18.10.1982 at about 8.30 am. However, for the third accused Rakesh namely the appellant herein, it was opined by the trial court that since the appellant Rakesh had surrendered in the Court there was no chance for the witnesses P.W-2 and P.W-3 to see him on any of such occasion, between his surrender and lodging in the jail.

28. The controversy in the present case, thus, revolves around the issue of identification of appellant Rakesh by two constables on convoy duty namely Ram Deo Pandey and Vinay Kumar, examined as P.W-2 and P.W-3; respectively.

29. To challenge the conviction of the appellant Rakesh, it was vehemently argued by the learned counsel for the appellant that the identification of the appellant was made by the police personnels and the eye witness P.W-1 who had the best chance to identify the miscreants and stated that he witnessed the assailants clearly in the headlight of the truck and could identify them, did not participate in the identification parade. The prosecution has very conveniently withheld the best evidence by not getting identification of the accused persons from the first informant, namely P.W-1. The appellant Rakesh herein had taken a categorical stand in his examination under Section 313 that the Investigating Officer got him identified by the witnesses (P.W-2 and P.W-3) on the date when he

was brought in the Court and that he was kept bare face.

30. The submission is that the procedure for conducting identification parade of unknown accused as provided in the U.P. Police Regulations and the procedure laid down for test identification by this Court in *Asharfi vs State* reported in *AIR 1961 Alld 153* had not been followed. No explanation could be offered by the prosecution as to why the identification of accused appellant was not made by P.W-1 who was the eye-witness and the first informant of the case. Even according to the testimony of P.W-1, there was no chance for anyone else to identify the accused persons as the assailants were over 7-8 in number and they ran away after committing loot as soon as the Police Personnel on convoy duty reached near his truck. The statement of P.W-2 and P.W-3 that they identified the assailants/ dacoits clearly on the spot, is unbelievable in view of the statement of P.W-1 and their own statement that when they reached at the site of the incident and fired, the miscreants ran away. There is nothing on record nor any whisper in the statement of P.W-2 and P.W-3, Constables on convoy duty, that they chased the assailants rather they both admitted that the dacoits were not known to them and that they did not chase them.

31. In the statement of P.W-3, it has clearly come that the entire incident happened within 2-3 minutes. In such a short gap of time, it was not possible for the police personnels on convoy duty who were behind the truck of P.W-1 to identify the accused persons.

32. Learned A.G.A in rebuttal had defended the judgment of the trial court with the contention that the trial court had committed no illegality in distinguishing the case of the appellant Rakesh from that of other two accused persons who were arrested by the police.

33. As the appellant herein had surrendered in the Court and he was lodged in the jail directly, there was no occasion for the police personnels (P.W-2 and P.W-3) to see him or identify him before his identification in the identification parade. No infirmity can be found in the identification

parade and the conviction of the appellant cannot be set aside.

34. Having heard learned counsel for the parties and perused the record. Before entering into the controversy in light of the facts of the present case it would be apt to note the law pertaining to test identification parade, i.e the procedure prescribed in law and the legal pronouncements pertaining to the matter.

35. It is settled that the test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court. It is held in *Ashrafi vs State* (supra) that 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 with considerable caution, because a variety of conditions must be fulfilled before evidence based on the impression can become worthy of credence. While discussing general precautions regarding identification proceedings, it was held that 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. The Division Bench judgment of the Madhya Pradesh High Court was noted in para-'33' of the report to put a note of caution and lay down a guideline to accept the evidence as to the identification, in the shape of 12 questions.

36. The relevant portions of para-'33' is quoted as under:-

"The evidence of identity must be thoroughly scrutinised, 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."

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.

37. In the case of ***Rameshwar Singh vs State of Jammu and Kashmir*** reported in ***(1971) 2 SCC 715***, it was held that before dealing with the evidence relating to identification of the accused it may be remembered that the substantive evidence of a witness is his evidence in the court but when the accused person is not previously known to the witness concerned, then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. Much emphasis has been laid that such identification shall be held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards must be effectively taken so that the

investigation proceeds on correct lines for punishing the real culprit. It was observed that it would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It was held that it is thus and thus alone that justice can be fairly assured both to the accused and to the prosecution. The identification during police investigation is not a substantive evidence in law and it can be used for corroborating or contradictory evidence of the witness concerned as given in the Court. It was further stated that the identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the Court to safely form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in Court of the identifying witness (emphasis added).

38. In ***Ram Babu vs State of Uttar Pradesh*** reported in **(2010) 5 SCC 63** while dealing with the case for the commission of the offence of dacoity punishable under Section 395 of the Penal Code, it was held that :-

“14. As per Section 9 of the Evidence Act, facts which establish the identity of an accused are relevant. Identification parade belongs to investigation stage and if adequate precautions are ensured, the evidence with regard to test identification parade may be used by the court for the purpose of corroboration. The purpose of test identification parade is to test and strengthen trustworthiness of the substantive evidence of a witness in court. It is for this reason that test identification parade is held under the supervision of a magistrate to eliminate any suspicion or unfairness and to reduce the chances of testimonial error as magistrate is expected to take all possible precautions.”

39. In ***R. Shaji vs State of Kerala*** reported in **(2013) 14 SCC 266** while referring to the various decisions of the Apex Court, it was noted in para-'58' that the evidence from a test identification parade is admissible under Section 9 of the Evidence Act, 1872. The test identification parade is conducted by the police. The actual evidence regarding identification is that which is given by the witnesses in Court. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in Court.

40. It was discussed in *Munshi Singh Gautam and others vs State of M.P* reported in (2005) 9 SCC 631 that the identification test did not constitute substantive evidence and the identification during investigation can only be used as corroborative of the statement in Court. Reference had been made to the decision of the Apex Court in case of *Matru vs State of U.P* reported in (1971) 2 SCC 75 and *Santokh Singh vs Izhar Hussain* reported in (1973) 2 SCC 406. Relevant paragraphs '16' and '17' of the said report are to be extracted hereunder:-

"16. As was observed by this Court in Matru v. State of U.P. (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain (1973 (2) SCC 406). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

17. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen

*the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Administration* (AIR 1958 SC 350), *Vaikuntam Chandrappa and others v. State of Andhra Pradesh* (AIR 1960 SC 1340), *Budhsen and another v. State of U.P.* (AIR 1970 SC 1321) and *Rameshwar Singh v. State of Jammu and Kashmir* (AIR 1972 SC 102).*

41. Considering the above principles, in light of the language employed in Section 9 of the Evidence Act, it is settled that the test identification of the accused in test identification parade is an evidence which requires corroboration from the testimony of the witnesses in the Court and without corroboration, the result of test identification parade cannot be made sole basis of conviction.

42. Before relying upon the evidence of identification of suspects in the test identification parade, the Court is required to determine as to whether prosecution had taken all necessary precautions to ensure that the identity of the suspect be kept concealed before the parade.

43. It is duty of the prosecution to show that from the time of the arrest of 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 laid to show this, the burden shifts on the accused to show otherwise.

44. It was held in *Asharfi (supra)* that where a witness gives evidence on oath the presumption is that he is speaking the truth. If,

therefore, the prosecution has 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. It is then for the accused to establish that he was shown. The law does not require him to do so affirmatively; it is sufficient 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.

45. Another precaution to be taken by the prosecution and the test laid down to assess the evidence as to the identification of an accused person is, which is for the Court to answer, Was there unnecessary delay in the holding of the test ?

46. It was held in *Asharfi's case (supra)*. that 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.

It was further observed in para-'36' that:-

"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."

47. While answering the question as to whether the witness did have

opportunity of seeing the offenders, the requirement of holding test identification parade at the earliest opportunity without avoidable and unreasonable delay after the arrest of the accused has been insisted by the Courts from time to time. The idea behind such insistence is that the witness concerned would get fair opportunity of identifying the suspect leaving the possibility of his memory being faded and rule out all chances of suspect having been seen during the period, i.e from the date of arrest till the date of identification.

48. Reverting to the instant case, which rests purely on evidence of personal identification of the accused appellant Rakesh, we may note that there are three witnesses of the occurrence, amongst whom, P.W-1 driver of the truck refused to identify any of the accused persons and admitted in his testimony that he did not participate in the identification parade. In cross, P.W-1 stated that he could not see the miscreants who attacked and looted his vehicle as it was a dark night and when the truck was parked the miscreants asked him to put off the light. He further stated that even otherwise as soon as the vehicle was parked, headlights got dim. Though headlights of vehicles behind his vehicle were on but he could not see miscreants and as such he did not narrate appearance (huliya) of the miscreants to the Investigating Officer nor stated any thing in his previous statements.

49. P.W-2, the Constable on convoy duty, did not identify the accused appellant Rakesh though he had identified two other accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey who have been acquitted by the trial Court giving benefit of doubt as the test identification parade with respect to the said accused persons was doubted by the trial court with the finding that the prosecution had not been able to prove by positive evidence that the witnesses P.W-2 and P.W-3 had no occasion to see the accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey from the point of time, when they were arrested up to the time when they were taken out from the police lockup and sent to the District Jail Fatehpur.

50. Only evidence of P.W-3 is against the accused appellant Rakesh who stated on oath that he had clearly identified the accused appellant Rakesh as also co-accused Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey.

51. From the testimony of P.W-3, it may be noted that he categorically stated that he had seen the faces of the miscreants (dacoits) in light of the truck and there was sufficient light as headlights of all trucks behind the looted truck were 'On'.

52. As to the occurrence, P.W-2 and P.W-3 the Police Personnel who were on convoy duty, stated that they reached at the spot on hearing the sounds of fire and challenged the miscreants. P.W-3 stated that both of them (P.W-2 and P.W-3) opened one-one fire but both the witnesses admitted that they did not chase the miscreants who were 8-10 in number.

53. It is stated by P.W-3 that when he along with P.W-2 reached at the looted truck, after the miscreants ran away, they saw that one person was killed inside the truck and another got injured in his right leg, who was cleaner, two drivers in the truck told that the miscreants had looted Rs.3800/-. It was stated by P.W-2 that there were 15-20 trucks in the convoy and there were 10-15 trucks behind the truck in which he was sitting. The looted truck was at the front of the convoy and all the trucks behind were parked as soon as the truck at the front stopped. He then stated that the truck in which they were sitting was taken ahead and was parked besides the looted truck and all other trucks were parked behind them. From the statement of P.W-2, it seems that the truck in which the Constables (P.W-2 and P.W-3) were on duty, was in between the convoy. As from the statement of P.W-2, it is evident that the looted truck was at the front and out of the total 15-20 trucks in the convoy, 10-15 were behind the truck, in which the constables on convoy duty namely P.W-2 and P.W-3, were sitting, whereas as per the statement of P.W-3, there were total 10-15 trucks in the convoy. P.W-3, however, stated that he could not remember as to whether number was ten or fifteen. As per the version of

P.W-3, they opened fires as soon as they reached near the looted truck and the miscreants ran away and before that the incident occurred for about 2-3 minutes, P.W-3 stated that when their truck stopped besides the looted truck, the loot was going on and they got down from the truck to challenge the miscreants and fired at them, then they ran away.

54. In the entire scenario of the occurrence as narrated by P.W-2 and P.W-3, possibility of them seeing the miscreants clearly in the lights of the trucks of the convoy seems remote. However, before forming any opinion on this part of the evidence, two questions are required to be answered by the Court. Firstly, as to whether there was any delay in conducting the identification parade and if there was delay whether the same has been explained by the prosecution to the satisfaction of the Court. The second question is as to whether there was any possibility of identifying witness P.W-3 to see the accused appellant between the time of his lodging in the jail and the date of the identification parade.

55. As to the first question, we may record that certain dates are relevant to be noted from the record. We have, therefore, gone through the original record pertaining to the test identification parade namely (Exhibit Ka-22) on record and the case diary.

56. Before referring to the said documents, we may further record that the Investigating Officer namely P.W-5 did not give the date of the test identification parade in his testimony. He only stated that the report of the test identification parade was submitted by him and the result of the same was received on 07.01.1983 and on the same day chargesheet was submitted against three accused persons.

57. The case diary Parcha no.15 dated 22.11.1982 records that the appellant Rakesh and another suspect Sundar had surrendered on 22.11.1982 in the Court of Munsif Magistrate and had been sent to jail on remand. It was further recorded therein that the test identification report of the two above noted suspects and other suspects previously arrested would be given after conducting the said proceedings. Admittedly, other

accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey were arrested earlier. The case diary parcha no.16 dated 27.11.1982 further records that the test identification parade of the arrested suspects was to be held and the pairokar was directed to fix the date for conducting test identification parade so that further proceedings be held. Parcha no.18 dated 24.12.1982 of the case diary further records that one suspect Badlu s/o Shyam lal Khatik had surrendered on 09.12.1982 in the Court of CJM, Fatehpur and had been sent to jail. It further records that the report of the identification would be submitted after completion of the test identification proceedings.

58. Form no.55 in the record is the report of the test identification parade of six suspected persons which is dated 27.12.1982. The place of conducting the test identification parade as indicated therein is District jail Fatehpur. The report bears the signature of the Magistrate first class which also endorsed with the date 27.12.1982. The name of the officer namely Magistrate first Class has also been indicated therein. The report records that out of six suspected persons, three namely Ram Kishun @ Kripali, Ram Ashrey @ Ghonchey, residents of Bindki and Rakesh s/o Budhhu Khatik residents of Lohari P.S- Bindki were correctly identified by two witnesses namely Constable 324 CP Ramdeo Pandey and Constable Vinay Kumar CP 513 of Police Station-Malwan, namely P.W-2 and P.W-3 herein. It was noted that Constable 324 CP Ram Deo Pandey identified only two accused persons namely Kripali and Ghonchey and Constable Vinay Kumar-P.W-3 had identified three accused namely Ram Kishun @ Kripali, Ram Ashrey @ Ghonchey and the appellant Rakesh. There are two more papers nos.25/10 and 25/11 on form no.55 in the record, which contain thumb impressions of suspect accused appellant Rakesh identified on 27.12.1982 whereas the thumb impressions of two other accused identified by P.W-2 and P.W-3 namely Ram Krishun @ Kripali and Ghonchey finds place on Ka-22 namely Paper no.25/9, Form 55 which has been signed by the Magistrate first class. We may further note that paper nos.25/10 and 25/11 are not signed by the Magistrate first class and

the relevant columns therein are blank. All three documents namely paper nos.25/9, 25/10 and 25/11 contain the date of the proceeding of the test identification parade as 27.12.1982 held at the District Jail, Fatehpur. The case diary Parcha no.19 dated 07.01.1983 records that result of the test identification parade of six suspects, Ram Kishun @ Kripali, Ghonchey, Rakesh, Nanka, Sunder and Badlu was received on that day. As per the report, the identification parade was conducted on 27.12.1982 in the District Jail-Fatehpur. Two witnesses identified three suspects and with the completion of the investigation, charge sheet was submitted.

59. From the above, for the accused appellant herein namely Rakesh, at least, it is evident that he was put to test identification parade on 27.12.1982 whereas he had surrendered before the Magistrate on 22.11.1982 and was sent to jail on the same day whereas, other accused persons namely Kripali @ Ram Kishun and Ghonchey were arrested on 18.10.1982. No explanation could be offered by the Investigating Officer nor any question was put to him by the trial court as to why one month was taken by the Investigating Officer to conduct test identification parade of the appellant Rakesh, leaving behind the acquitted accused persons for whom test identification parade was conducted after two months.

60. It may be noted that, the trial court has committed illegality in noting a wrong date of test identification parade from Exhibit Ka-22 by reading the said document incorrectly. The date 07.01.1983 which has come in the evidence of P.W-5, the Investigating Officer is the date of submission of the report of the test identification parade.

61. The answer to the question whether there was opportunity for identifying witnesses to see the accused appellant Rakesh between the date of the arrest and the date of the test identification parade is in affirmative for the obvious reason that the identifying witness P.W-3 was a police personnel posted in the same Police Station Malwan wherein the report of the incident was lodged. The trial court itself did not believe the

results of the identification parade with regard to two suspected accused raising doubt that there were possibility of the witnesses to see the accused persons in the lock up as the witnesses were posted in the police station. Whereas a distinction was drawn that the accused Rakesh had surrendered in the Court and lodged in jail on the same day and, thus, there was no possibility of witnesses to see the accused appellant Rakesh in such a short time. The appellant accused Rakesh had taken a categorical plea in his statement under Section 313 Cr.P.C that he was shown to the identifying witness when he was brought in the Court by the Investigating Officer. No independent witness who was present on the spot, inside the truck, namely the Driver P.W-1 or the injured cleaner Shyam Singh was called to participate in the identification parade. All three accused persons who were put to trial resided in Bindki town. The zeal of the Investigating Officer to solve the crime and that of the Police personnel on convoy duty to prove them upright officers cannot be overlooked.

62. From the above discussion, at least, it is proved that the prosecution has failed to explain the unnecessary delay in holding the identification test though the witnesses were very much available being the police personnel posted in the same police station wherein first information report was lodged. It is noteworthy that in the instant case, the prosecution had relied upon the results of the test identification parade, correctness of which had been examined above, to assert that the appellant Rakesh was one of the culprits identified by the police personnel (P.W-3) on convoy duty. Apart from the discussion above, we may further note that the result of the test identification parade was not corroborated with the evidence of implication of the appellant Rakesh in the Court. The statements of three witnesses of fact namely P.W-1, P.W-2 and P.W-3 were recorded on 24.11.1983 though the statement of P.W-3 could not be completed on that day.

63. P.W-1, the first informant, was driver of the looted truck, in cross examination, on behalf of the appellant Rakesh denied having seen the

miscreants as it was a dark night and lights of the truck were put off and the trucks behind him were parked with dim lights.

64. P.W-2, Ramdeo Pandey, one of the police personnel on convoy duty did not identify the appellant Rakesh either in the identification parade or in the Court though he had identified two accused persons who had ultimately been acquitted by the trial court. Only witness who allegedly had identified appellant Rakesh in the test identification parade also identified him in the Court but we cannot lose sight of the fact that this identification was only by the police personnel posted in the convoy duty on the fateful night and not by any other witness. As it is settled that the test identification report do not constitute substantive evidence and its corroboration from the surrounding circumstance is required. In the instant case, the circumstances discussed above, do no corroborate the result of the test identification parade, hence, we are afraid to convict the appellant solely based on the result of the test identification parade, as has been done by the trial court. The prosecution has not been able to prove by leading cogent evidence that there was no possibility of the identifying witnesses (P.W-3) to see the appellant from the time of his admission into the jail till the date of his identification. The circumstances noted above such as non identification by independent witnesses in the Court and vulnerability of the witnesses having been seen prior to the identification parade, create a reasonable doubt in the mind of the Court as to the fairness of the identification proceedings. The evidence of identification of the accused appellant is not such which would exclude with reasonable certainty the possibility of an innocent person being implicated.

65. The trial court has completely erred in returning the finding that since the accused appellant had surrendered on 22.11.1982 in the Court of Magistrate, he was sent to jail on the same day and as such there was no possibility of the witness P.W-3 having seen him, and by holding that the accused persons were put to test identification on 22.11.1992 and 27.12.1982. The trial court had simply drawn distinction in rejecting the plea of accused appellant that he was identified in the Court, solely on the

premise that the Magistrate before whom he had surrendered knowing that the accused appellant was wanted in a crime under Section 396 IPC must have taken precautions of sending him jail in veil, particularly when he was not named in the FIR.

66. Only evidence against the accused appellant being his identification by P.W-3 in the test identification parade held on 27.12.1982, reported in Exhibit Ka-22 which itself is under cloud, the inevitable conclusion that can be drawn in the facts of the instant case that the prosecution has failed to prove its case beyond all reasonable doubt for implication of the accused appellant Rakesh in the commission of the offence punishable under Section 396 IPC. The accused appellant Rakesh herein is entitled to be given benefit of doubt and is to be acquitted for the offence punishable under Section 396 IPC.

67. In view of the above discussion, the judgment and order dated 06.02.1984 passed by the Second Additional Sessions Judge, Fatehpur in Sessions Trial no.145 of 1993 arising out of Case Crime no.139 of 1982 under Section 396 IPC, P.S- Malwan, District-Fatehpur for the offence punishable under Section 396 IPC and sentence for life imprisonment is hereby set aside.

68. The appeal is, accordingly, **allowed**.

69. The appellant is in jail.

70. The appellant shall be released from jail forthwith, unless he is wanted in any other case.

71. The office is directed to send back the lower court record along with a certified copy of the judgment for information and necessary compliance.

72. The compliance report be furnished to this Court through the Registrar General, High Court Allahabad.

Order Date :- 27.05.2022/Harshita