

Court No. - 43

**Case :-** JAIL APPEAL No. - 1043 of 2015

**Appellant :-** Ram Sewak @ Baura

**Respondent :-** State of U.P.

**Counsel for Appellant :-** From Jail, Uttar Kumar Goswami

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

Hon'ble Ashwani Kumar Mishra, J.

Hon'ble Shiv Shanker Prasad, J.

(Per-Hon. Shiv Shanker Prasad, J.)

1. This jail appeal has been preferred by accused-appellant, namely, Ram Sewak @ Baura against the judgment and order dated 21<sup>st</sup> January, 2015 passed by the Additional Sessions Judge, Court No.1, Banda in Sessions Trial No. 188 of 2013 (State Vs. Ramsewak @ Baura) arising out of Crime No. 363, 308 and 376 I.P.C., Police Station-Pailani, District-Banda, whereby the accused-appellant has been convicted and sentenced to undergo to (i) life imprisonment under Section 376 I.P.C. with fine of Rs. 40,000/-, in default thereof, he has to further undergo eight months' additional simple imprisonment and (ii) five years rigorous imprisonment under Section 363 I.P.C. with fine of Rs. 10,000/-, in default thereof, he has to further undergo two months' additional imprisonment, with the observations that the total amount of fine which was to be recovered from the accused was to be paid in favour of victim as compensation and also all the sentences were to run concurrently.

2. We have heard Mr. Virendra Pratap Yadav, learned Amicus Curiae appearing for the accused-appellant no.1 and Mrs. Archana Singh, learned A.G.A. for the State. We have also perused the materials available on record.

3. The prosecution story, as reflected from the records, is as follows:

On the basis of written report submitted by the informant-P.W.1, namely, Chunni wife of Rajava on 17<sup>th</sup> September, 2001 at 2115 hours for the alleged incident dated 15<sup>th</sup> September, 2001 between 10:00 a.m. to 11:00 a.m. (Exhibit-Ka/1), a first information report has been lodged on 17<sup>th</sup> September, 2001 as Crime No. 65 of 2001, under Sections 363/308/376

I.P.C. at Police Station-Pailani, District-Banda (Exhibit-Ka/2) alleging therein that on 15<sup>th</sup> September, 2001 between 10:00 a.m. to 11:00 a.m. while seducing the daughter of the informant (hereinafter referred to as the "victim"), who was about six years of age, the relative of her neighbour, namely, Ram Jiyavan son of Ramnath, who was not known and recognized by her, took the victim to jungle where he beat her due to which she fainted and thereafter she was brutally raped by him due to which bleeding occurred from the genitals and ears of the victim. In the written report dated 17<sup>th</sup> September, 2001 addressed to the Superintendent of Police, Banda, it has been alleged that when the informant, just after the said incident, reached the Police Station for lodging of the first information report, the Station House Officer of the Police Station concerned refused to lodge the same. After lodging of the first information report, the victim was taken to the Women Hospital, Banda by the Constable Madhuri Dubey, Police Station-Women Cell, Police Office, for her medical examination, where Dr. Rekha Rani (P.W.-4), the then Medical Officer, Women Hospital, Banda on 17<sup>th</sup> September, 2001 has medically examined the victim.

4. On external examination of the victim, the Doctor found that there was no external injury on the body of the victim. On internal examination, the Doctor has opined that:

*"Full circumferential recent tear of hymen with reddened brownish margin present post vaginal wall torned at 6 o'clock position in peroneal region with diamond shaped raw area of about 1 cm. x 1.5 cm dimension. Base is bluish white filled with whitish mucoid discharge. Vagina admits one finger easily whose negotiation was very painful and smeared with blood mixed discharge when taken out. Vagina smears taken and sent for pathological examination of spermatozoa. Advised X-ray Right Wrist Joint including all carpel bone and Right Shoulder Joint for confirmation of age. Supplementary report pending till X-ray report and smear report is received from District Hospital, Banda and District Women Hospital, Jhansi."*

5. In the vaginal smear report of the victim (Exhibit-Ka/5), it has been reported that vaginal smear is negative for spermatozoa. On examination of vaginal smear report (Exhibit-Ka/5), the Doctor (P.W.-2) has opined that:

*“No opinion about rape can be given. Injury in private part is simple in nature and caused by hard and blunt object . Her age is about 6 years.”*

6. After the medical examination of the victim was conducted, initially one Uma Shanker Singh Chandel, the then Station House Officer, Police Station-Pailani, District-Banda (P.W.-6) investigated the matter and recorded the statements of informant (P.W.-1), the victim (P.W.-2) and other witnesses, thereafter Mr. K.L. Sagar, Station House Officer of Police Station-Pailani (P.W.-5) has investigated the matter. After conclusion of the statutory investigation in the matter under Chapter-XII Cr.P.C., P.W.-5 has submitted Charge-sheet no. 78 of 2001 dated 24<sup>th</sup> December, 2001 (Exhibit-Ka/6) against the accused-appellant under Sections 363/308/376 I.P.C. The Magistrate concerned took cognizance of the charge-sheet and as the offence was triable by the court of Sessions, the same was committed to the Court of Sessions. Consequently, Sessions Trial No. 188 of 2013 (State of U.P. vs. Ramsewak) was registered in the matter. The trial proceeded in the matter.

7. On 21<sup>st</sup> November, 2013, the concerned Court framed following charges against the accused-appellant:

*“मैं बृजलाल चौरसिया, विशेष न्यायाधीश (आ०व०अधि०)/ अपर सत्र न्यायाधीश, बांदा आप अभियुक्त रामसेवक उर्फ बौरा उर्फ चन्देल पर निम्नलिखित आरोप लगाता हूँ-*

*1. यह कि दिनांक 15.9.2001 को समय 10.00 व 11.00 बजे के बीच स्थान जंगल बहद ग्राम नरी अन्तर्गत थाना पैलानी जिला बांदा पर आप अभियुक्त द्वारा वादिया मुकदमा श्रीमती चुन्नी की नाबालिग पुत्री कु० कमलेश उम्र 6 वर्ष का व्यपहरण किया गया। इस प्रकार आपने ऐसा कृत्य किया जो भा०दं०सं० की धारा 363 के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।*

*2. यह कि उपरोक्त वर्णित तिथि, समय व स्थान पर आप अभियुक्त द्वारा वादिया मुकदमा की नाबालिग पुत्री कु० कमलेश उम्र 6 वर्ष को ऐसी परिस्थिति में बुरी तरह से मारपीट कर बेहोश कर दिया जिससे यदि कु० कमलेश उम्र 6 वर्ष की मृत्यु हो जाती तो आप हत्या की कोटि में न आने वाले आपराधिक मानव वध के दोषी होते। इस प्रकार आपने ऐसा कृत्य किया जो भा०दं०सं० की धारा 308 के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।*

*3. यह कि उपरोक्त वर्णित तिथि, समय व स्थान पर आप अभियुक्त द्वारा वादिया मुकदमा की नाबालिग पुत्री कु० कमलेश उम्र 6 वर्ष का व्यपहरण करके उसकी इच्छा के विरुद्ध उसके साथ बलात्संग किया गया। इस प्रकार आपने ऐसा कृत्य किया जो भा०दं०सं० की धारा 376 के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।*

*अतएव एतद्द्वारा निर्देशित किया जाता है कि उक्त आरोपो का विचारण  
इस न्यायालय द्वारा किया जायेग”*

The charges were read out to the accused-appellant, who denied the accusation and demanded trial.

8. The prosecution in order to establish the charges levelled against the accused-appellant relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:

(i) the written report given by the informant (P.W.-1) dated 17<sup>th</sup> September, 2001 has been marked as Exhibit-Ka-1;

(ii) the first information report registered on 17<sup>th</sup> September, 2001 on the written report of P.W.-1, has been marked as Exhibit-Ka-2;

(iii) Injury/medical examination report of the victim dated 17<sup>th</sup> September, 2001 has been marked as Exhibit-Ka-4;

(iv) Supplementary medical examination report of the victim dated 15<sup>th</sup> October, 2001 has been marked as Exhibit-Ka-5;

(v) Charge-sheet dated 24<sup>th</sup> December, 2001 has been marked as Exhibit-Ka-6; and

(vi) Site plan with index has been marked as Exhibit-Ka-7.

9. The prosecution has also adduced oral testimony of following witnesses:-

“i). The informant, namely, Chunni mother of the victim has been adduced as P.W.-1;

ii). The Victim has been adduced as P.W.-2;

iii) Head Constable-274 Ramnaresh, who has proved the Chik first information report has been adduced as P.W.-3;

iv) Dr. Rekha Rani, who has conducted the medical examination of the victim has been adduced as P.W.-4;

v). Inspector K.L. Sagar who has investigated the matter and submitted the charge-sheet has been adduced as P.W.-5;

vi). Sub-Inspector Uma Shanker Singh Chandel, who initially investigated the matter, has been adduced as P.W.-6.”

10. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellant Ramsewak @ Baura for recording his statement under section 313 Cr.PC. In his statement recorded U/s 313 Cr.P.C. on 6<sup>th</sup> January, 2015, the accused appellant denied his involvement in the crime. Accused appellant has also stated that the statements of the Prosecution witnesses are incorrect, as he has been falsely implicated due to rivalry. No witness on behalf of defence has been produced.

11. While passing the impugned judgment of conviction, the trial court after relying upon the documentary as well as oral evidence adduced by the prosecution has recorded its following finding:

(i) qua the statement given by accused-appellant under Section 313 Cr.P.C. that the oral as well as documentary evidence produced by the prosecution are false, as he has been falsely implicated due to rivalry, the trial court has recorded that neither any evidence with regard to enmity or rivalry has been produced before the court below nor any fact has been borne out from the oral or documentary evidence of prosecution which would prove any fact of implicating the accused due to rivalry. As such, the aforesaid plea of the defence has no legs to stand.

(ii) with regard to the ground taken by the defence that there is delay of two days from the date of incident in lodging of the first information report for which no explanation has been given by the prosecution, therefore, the entire prosecution version is doubtful, the trial court has recorded that the same has also no legs to stand on the ground that on perusal of the evidence it is apparent that the informant (P.W.-1) went to the Police Station for lodging of the first information report on the same day i.e. date of incident but the Station House Officer of the Police Station concerned refused to lodge the same. Such delay of two days in lodging of the same has satisfactorily been explained by the prosecution.

(iii) qua the ground taken by the defence that no case under Section 308 I.P.C. is not proved against the accused-appellant, the trial court finds

substance in the same by recording that the necessary ingredients for the offence punishable under Section 308 I.P.C. is not made out against the accused-appellant, as the medical examination report of the victim does not support the prosecution version.

(iv) so far as the offence punishable under Section 363 I.P.C is concerned, the trial court has recorded that it is an admitted fact that the place of occurrence is one kilometre away from the house of victim. As per the statement of the victim, the accused-appellant took her on his shoulder to the place of occurrence from her house. At the time of occurrence, the victim was 6 to 7 years of age and minor and was in lawful guardianship of her parents. The accused-appellant had not taken any permission from the parents of the victim to take her to the place of occurrence. As such, the offence punishable under Section 363 I.P.C. is proved against the accused-appellant.

(v) with regard to the offence punishable under Section 376 I.P.C., the trial court has recorded that from the statement/evidence of the victim, the opinion of the doctor and the medical examination report of the victim prepared by the doctor and the investigation of the investigating officer and evidence, the same is also proved against the accused-appellant.

12. After recording such finding, the trial court has come to the conclusion under the impugned judgment of conviction that the prosecution has been able to fully prove that the accused-appellant, committed the offence of rape upon the victim (P.W.-2). As such, the trial court has found the offence under Sections 363 and 376 I.P.C. to have been committed by the accused person Ramsewak.

13. Aggrieved by the aforesaid judgment and the order of conviction and sentence, the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellants is too severe.

14. Questioning the impugned judgment and order of conviction, learned Amicus Curiae appearing for the appellant submits that the first information report is highly belated for which no plausible explanation has been given by the prosecution, which makes the entire prosecution story doubtful. It is

also noteworthy that there is no disclosure of name and address of the accused-appellant in the F.I.R. Informant-P.W.-1, namely, Chunni wife of Rajava has stated in her cross-examination that she had not disclosed the name of the accused-appellant to the Investigating Officer at the time of recording of statement under Section 161 Cr.P.C. that is why she was unaware of the name of the accused-appellant. She has also stated that she had not seen the accused-appellant taking her daughter (victim) along with him. She has further stated that she had not seen the incident. She has stated that her daughter had told her about the incident and after that she knew the name of the accused-appellant. Victim (P.W.-2) has also not identified the accused-appellant in her statement given before the court below. The identification parade had also not been done by the Investigating Officer at the time of the investigation. The said offence has not been committed by the accused-appellant, hence, the prosecution story is wholly improbable as also the same has not supported by the evidence that is why the accused-appellant is not guilty of the offence punishable under Sections 363 and 376 I.P.C.

On the cumulative strength of the aforesaid arguments, learned Amicus Curiae appearing for the accused-appellant submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

15 On the other hand, Mrs. Archana Singh, learned A.G.A. for the State supports the prosecution version by submitting that the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the appeal filed by the accused-appellant who committed heinous offence is liable to be dismissed.

16. We have considered the submissions made by the learned counsels for the parties and have gone through the records of the present appeal especially, the judgment and the order of conviction and evidence adduced before the trial court.

17. The only question which is required to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the trial court

and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

18. In written report submitted by the informant-P.W.-1, namely, Chunni wife of Rajava has not disclosed the name of the accused Ram Sevak. From perusal of the first information report also, it is clear that in the column of accused, name of Ram Jiyavan son of Ramnath Kevat, resident of Nari, Police Station Pailani, District Banda has been mentioned. Name of the accused-appellant Ram Sewak has not been mentioned in the first information report as "accused". The informant who has given typed application to the Superintendent of Police. Banda in which she has admitted that she does not know the accused-appellant nor she recognizes him by his name, meaning thereby that at the time of lodging of the first information report, the informant as well as the victim were unaware of the name and identity of the accused-appellant. The informant has admitted in her cross-examination as P.W.-1 that she had not disclosed the name of accused-appellant to the Investigating Officer at the time of recording of her statement under Section 161 Cr.P.C. She has further stated in cross-examination that it has also not been disclosed by her to the Investigating Officer that the accused-appellant raped her daughter (victim). She has further stated that her daughter told her the name of the accused-appellant, whereas the victim in her statement before the court has not identified the accused-appellant. With regard to identification of the accused-appellant, no question about the manner as to how the victim and her mother P.W.-1 have recognized the accused-appellant, has been put by the prosecution. From perusal of the case diary, witnesses Phool Kevat and Ram Mohan have stated in their statements recorded under Section 161 Cr.P.C. while accused-appellant Ram Sevak was taking the victim along with him, they have seen the accused-appellant Ram Sevak but both the witnesses, namely, Ram Mohan and Phool Kevat have not been adduced before the court below to identify the accused-appellant. No identification parade has been done by the Investigating Officer. The informant-P.W.-1 denied to recognize the accused-appellant in her statement recorded under Section 161 Cr.P.C. by the Investigation Officer as well as in her statement recorded before the court below as P.W.-1.



Hence, it is clear that in the prosecution case the alleged offence has been committed by the accused-appellant, is doubtful.

19. For appreciating the aforesaid issue, it would be worthwhile to reproduce judgment of the The Apex Court in the case of **Kanan & Ors. Vs. State of Kerala** reported in 1979 (3) SCC 319 has opined as under:

*“.....It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. ....”*

20. The first informant-P.W.-1, namely, Chunni wife of Rajava has stated in her cross-examination that she had not seen the accused-appellant taking the victim to the forest along with him. She has further stated that her brother-in-law (Devar) namely, Budhram Sajivan and Ram Mohan etc. have seen the accused-appellant taking the victim along with him but all above are not examined in support of the prosecution version. The informant has accepted that she has not disclosed his name in her typed application which was given to Superintendent of Police, Banda. She has further stated that she had not seen the incident with her own eyes as she was not present on the spot when the incident occurred. She has further stated that neither she knew accused-appellant nor she recognized him by his name from before the incident. From the aforesaid it is apparently clear that the informant-P.W.-1 had not seen the incident with her own eyes. Even otherwise, there is inconsistency/improvement in the statements of the P.W.-1.

21. P.W.-2 Victim has stated in her examination-in-chief that the Investigating Officer had prepared site plan on her identification whereas the first informant-P.W.-1 has stated in her examination-in-chief that the site plan was prepared by the Investigating Officer on identification of herself. Therefore, it is not clear as to whose on identification, the

Investigating Officer had prepared the site plan of the place of occurrence. In the statements of P.W.-2 also, there is inconsistency/improvement.

22. P.W.-3, Head Constable-274 Ramnaresh, who is the scribe of the first information report has stated in his cross-examination that inspection of the injury of victim was not done by him due to non-appearance of the victim at the police station. He has further admitted that during the course of scribing of the first information report, he did not ask about the victim as to why she did not come to the Police Station. Hence at the time of scribing of the first information report, he had not seen the injuries of the victim. There is also no disclosure in General Diary with regard to the same.

23. P.W.-4 Dr. Rekha Rani, Chief Medical Officer, Mahila Hospital, Budaun has examined the victim on 17.09.2001 and she found following injuries on the which are extracted hereinbelow:-

**1. Secondary sex character:-**

Breast rudimentary/ infantile. Pubic and axillary hairs absent. No external injury mark seen anywhere on external surface of body

**2. Internal Examination:-**

Full circumferential recent tear of hymen with reddened brownish margin present post vaginal wall torned at 6 O' clock position in perineal region with diamond shaped raw area of about 1 cm X 1.5 cm dimension. Base is bluish white filled with whitish mucoid discharge. Vagina admits one finger easily whose negotiation was very painful and smeared blood mixed discharge when taken out. Vaginal smear taken and sent for pathological examination of spermatozoa. Advised X-ray Rt. Wrist joint including all carpel bone and Rt. Shoulder joint for confirmation of age. Supplementary report pending till X-ray report and smear report is received from D.H. Banda and D.W.H. Jhansi.

24. In Supplementary medical report of the victim Doctor has opined that no opinion about rape can be given. Injury in private part is simple in nature and caused by hard and blunt object.

25. From perusal of medical examination report of the victim (Exhibit-Ka-4) it is evident that there is no signature of victim on the injury report. There is only a thumb impression of mother of the victim, which is attested by the Medical Officer, Women Hospital, Banda. This fact has been admitted by the Doctor Rekha Rani (P.W.-4) in her cross-examination that the right hand thumb impression of mother of victim has been verified by her (Exhibit-Ka-4). P.W.-4 has admitted that while preparing the report and verifying the thumb impression, inadvertently, she had not mentioned the name of the "*mother of victim*". She had only mentioned as "mother of the victim". She has further admitted that she had not asked the name of mother of the victim at the time of verifying the thumb impression that is why her name had not been mentioned. The Doctor has also stated in her cross-examination that she has not inquired about the name of the mother of the victim i.e. P.W.-1 at the time of medical examination.

26. In such circumstances, it is not clear whether the injuries shown in the said injury report are of the victim or are of her mother, Chunni Devi. There is no thumb impression or signature of the victim on this very report (Exhibit-Ka-4). Even otherwise, the Doctor has opined that no opinion about rape can be given as vaginal smear is negative for spermatozoa. As such, the said medical evidence of the prosecution is also doubtful.

27. P.W.-5 K. L. Sagar, Sub-Inspector has also been examined. He is a formal witness. He has submitted the charge-sheet before the court below. He has admitted in his cross-examination that he has prepared Parcha No. 13 on 26.11.2001. He has also admitted that in second line of Parcha no. 13 there is overwriting of date and by making such overwriting, the date "14.11.2001" has been mentioned.

28. P.W.-6 S.I. Umashanker Chandel is the second Investigating Officer. He has stated in his cross-examination that on 15.09.2021 the victim had not come along with her mother to the police station. He has also admitted that Inspector Indrajeet Singh had not written the injuries of the victim on Parcha No.1. He further admitted that he had not asked about the injuries of the victim. He further admitted that the first informant/ complainant had not disclosed the name of the accused-appellant. Indrajeet Singh, the first

Investigating Officer has not been examined by the prosecution to support the prosecution case.

29. It is also noteworthy that from the record it is not clear as to whether the victim has been produced before the Magistrate concerned for recording her statement under Section 164 Cr.P.C. and why such statement has not been recorded. It is also not clear that if such statement has been recorded, why the same has not been produced before the court below during the course of trial so that the same could be exhibited and kept on record.

30. It is also noteworthy that according to medical report the injuries found on the victim were not serious, hence the trial court has not found guilty the accused-appellant of the offence under Section 308 I.P.C.

31. We have examined the judgment and order of conviction passed by the trial court, which merely noticed the prosecution version to hold that the prosecution has established guilt of the accused-appellant based on prosecution evidence. The trial court has not carefully examined the statements of the prosecution witnesses so as to evaluate the correctness or otherwise of the same. We have noticed hereinabove that there is material contradictions, inconsistencies and discrepancies in the statements of the prosecution witnesses specially star prosecution witness i.e. P.W.-1 and P.W.-2.

32. Apart from the above, neither any test identification parade of the accused-appellant has been carried out nor the accused-appellant was identified by the victim (P.W.-2). Statement of the victim under Section 164 Cr.P.C. is not on record. The first informant (P.W.-1) and the victim (P.W.-2) both did not know the name of the accused-appellant and they did not recognize him during the course of trial. There is no thumb impression or signature of the victim in the medical examination report (Exhibit-Ka-4). Hence it is not proved that the injury report is of the victim. Doctor has opined that no opinion about rape can be given as vaginal smear is found negative.

33. We may note that on 22<sup>nd</sup> March, 2014, when the victim has been adduced as P.W.-2 by the court below i.e. after more than 13 years from the date of alleged incident, she recognized him by his name for the first time in the Court, after she came to know about the accused-appellant from some villagers. As already noted above, no identification parade has been done in the present case. Hence it is not possible for a victim who was six years of age at the time of incident, to recognize the accused by his name after long lapse of time in the court.

34. In **Suresh Chandra Bahri Vs. State of Bihar**, reported in 1995 SCC (Crl.) 60, the Apex Court has observed that identification of accused by the witness in court is substantial piece of evidence. Where accused is not previously known to the witness, Test Identification Parade must be held at the earliest possible. The relevant portion of the said judgment reads as follows:

*“78. ....It is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned also who was a stranger to the accused because in that event the chances of his memory fading away are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of TI parade. ....”*

35. Again in the case of **Dana Yadav @ Dahu & Others Vs. State of Bihar** reported in 2002 (7) SCC 295, the Apex Court has opined as follows:

*“It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same*

*is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. **If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence.** We are fortified in our view by catena of decisions of this Court in the cases of of Kanta Prasad v. Delhi Administration, AIR (1958) SC 350, Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan & Ors. Vs. State of Kerala, [1979] 3 SCC 319, Mohanlal Gangaram Gehani v. State of Maharashtra, [1982] 1 SCC 700, Bollavaram Pedda Narsi Reddy (supra), State of Maharashtra Vs. Sukhdev Singh, [1992] 3 SCC 700, Jaspal Singh alias Pali v. State of Punjab, [1997] 1 SCC 510, Raju alias Rajendra vs. State of Maharashtra, [1998] 1 SCC 169, Ronny alias Ronald James Alwaris, (supra), George & Others Vs. State of Kerala & Anr., [1998] 4 SCC 605, Rajesh Govind Jagesha, (supra), State of H.P. Vs. Lekh Raj & Anr., [2000] 1 SCC 247 and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat, [2000] 1 SCC 358.”*

*(Emphasis added)*

36. In view of the above discussions, we find that the trial court was not justified in returning the finding of guilt against the accused-appellant on the basis of evidence led by the prosecution. Finding of the court below that the guilt of the accused-appellant has been proved beyond reasonable doubt is perverse. We hold that the prosecution has failed to prove the guilt of the accused-appellant beyond reasonable doubt.

37. Consequently, in view of the deliberation held above, this appeal succeeds and is allowed. The judgment and order of conviction 21.01.2015 passed by Additional Sessions Judge, Court No.1, Banda in S.T. No. 188 of 2013 cannot be sustained and is hereby set aside. The accused-appellant Ram Sewak @ Baura is clearly entitled to benefit of doubt. As he has already suffered incarceration of almost ten years since the trial was started, he is entitled to be released forthwith.

38. Accordingly, the present appeal stands allowed.

39. The accused-appellant Ram Sewak @ Baura shall be released on compliance of Section 437-A Cr.P.C., unless he is wanted in any other case forthwith.

40. We record out appreciation of the able assistance rendered in the case by Mr. Virendra Pratap Yadav, learned Amicus Curiae, who would be entitled to his fee from the High Court Legal Service Authority, quantified as Rs. 15,000/-

41. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Banda henceforth, who shall transmit the same to the concerned jail Superintendent for release of the accused-appellant Ram Sewak @ Baura in terms of this judgment.

(Shiv Shanker Prasad, J.)

(Ashwani Kumar Mishra, J.)

**Order Date :- 27.9.2022**

Sushil/-