HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

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DB:- Hon'ble Shri Justice S. A.Dharmadhikari &
Hon'ble Shri Justice G. S. Ahluwalia, J.J.

CRA 894/2006
Kamlesh
Vs.
State of MP

A N D
CRA 204/2010

Mithlesh
vs.
State of MP

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Shri Rohit Mishra, counsel for appellant Kamlesh in Criminal Appeal No. 894/2006 & Shri Ashok Kumar Jain, counsel for appellant Mithlesh in Criminal Appeal No.204/2010.

Shri B.P.S.Chauhan, Public Prosecutor for the State in both Criminal Appeal Nos.894/2006 and 204/2010.

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JUDGMENT

(Delivered on ..07/03/2018)

Per G. S. Ahluwalia, J:-

This judgment shall also dispose of Criminal Appeal No.204/2010 filed by appellant- Mithlesh.

(2) The appellants- Kamlesh and Mithlesh have filed these two Criminal Appeals under Section 374 of Cr.P.C. challenging the proprietary and correctness of judgment and sentence dated 3-10-2006 passed by Special Judge (M.P.D.V.P.K.Act), Sheopur in Special Sessions Trial No.14/2003, by which the appellants have been convicted under Section 364-A of I.P.C. read with Section 11/13 of M.P.D.V.P.K.Act and have been sentenced to undergo the Life Imprisonment and a fine of Rs.1,000/- with default imprisonment.

(3) The necessary facts for the disposal of the present appeal in short are that on 11-12-2002, at about 9 in the evening, the abductees Buddhu and Bhagwan Singh had gone to their fields. Buddhu had taken meals for Vidhyaram, who is the brother-in-law of his brother Prakash. After keeping the meals in the hut, the abductee Buddhu, went to the well, whereas Bhagwan Singh was in

his hut. Till 12:30 in the night, the abductee Buddhu had irrigated his fields and thereafter came back to the hut, where Prakash, Vidhya and Bhagwan Singh were sleeping. At that time, about 6 persons armed with guns and 2 persons armed with lathi came there and surrounded the abductee Buddhu. They instructed him to show the way for devara and took the abductees Buddhu and Bhagwan Singh with them. They went on walking for the whole night and did not release the abductees. The miscreants who were having lathi left them whereas six persons who were carrying guns remained with the abductees. Thereafter, 3 persons out of 6, also left them, and 3 persons remained with the abductees. The miscreants, forced Bhagwan Singh to write two letters demanding ransom of Rs.5 lacs. When the miscreants were sleeping in the night, Buddhu and Bhagwan Singh tried to run away. Although Bhagwan Singh succeeded in escaping from their custody, whereas Buddhu was once again caught by the miscreants. Thereafter, Bhagwan Singh went to Police Station and lodged a report on 18-12-2002. A spot map was prepared and the statements of the witnesses were recorded. During this time, the abductee Buddhu remained as hostage with the dacoits, and remained with them in the forest for several days. On one day, one of the miscreants informed that 3 persons have died in a police encounter and therefore, they changed their place. On 18-1-2003, it is alleged that the appellants started saying that since, 3 persons have died in police encounter, therefore, Budhhu may also be killed, however, as Buddhu was an innocent person, therefore, he was not killed and was left. The statement of Buddhu was recorded and after completing the investigation, the police filed the charge sheet for offence under Section 364-A of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act.

(4) The Trial Court framed charges for offence under Section 364-A of I.P.C. read wih Section 11/13 of M.P.D.V.P.K. Act.

(5) The appellants abjured their guilt and pleaded not guilty.

(6) The prosecution in order to prove its case, examined Thakur Lal (P.W.1), Fosu (P.W.2), Buddhu (P.W.3), Bhagwan Singh (P.W.4), Babulal (P.W.5), and C.S. Jadon (P.W.6). The appellants did not examine any witness in their defence.

(7) The Trial Court, by judgment and sentence dated 3-10-2006,

convicted the appellants for offence under Section 364-A of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act.

(8) Challenging the judgment and sentence passed by the Trial Court, it is submitted by the Counsel for the appellants that the prosecution has failed to prove that the appellants had abducted Buddhu (P.W.3) and Bhagwan Singh (P.W.4). The demand of ransom has also not been proved by the prosecution. No Test Identification Parade of Kamlesh was got done, whereas the identification in the Court is a weak type of evidence. It is further submitted that the letter of ransom has not been proved by the prosecution. The appellants are innocent persons and they are in jail from the year 2003.

(9) *Per contra,* it is submitted by the Counsel for the State that the guilt of the appellants have been proved beyond reasonable doubt.

(10) Heard the learned Counsel for the parties and perused the record.

(11) It is the case of the prosecution, that when the abductee Buddhu was in the captivity of the appellants, two more persons were abducted. The prosecution has examined Thakur Lal (P.W.1) and Fosu (P.W.2) and they have stated that they were abducted by dacoits but did not support the prosecution case, on the question of identity of the appellants. Thakurlal (P.W.1) and Fosu (P.W.2) were declared hostile and were cross-examined by the Public Prosecutor, but nothing could be elicited from their evidence, which may make support their evidence, on the question of identity of the appellants as the accused persons. These two witnesses have not supported the prosecution case on the question of identity of the appellants, thus, it is clear that the evidence of Thakurlal (P.W.1) and Fosu (P.W.2) does not indicate towards the guilt of the appellants.

(12) Buddhu (P.W.3) and Bhagwan Singh (P.W.4) have supported the prosecution case, and the entire prosecution story hinges around the evidence of these two witnesses.

(13) Buddhu (P.W.3) has stated that he had gone to his fields where he was abducted by 6-7 armed persons and they took him towards the forest. The appellants were among those 6-7 persons, who had abducted him. After about 1 month and 8 days, he was

released by the accused persons. When he was in their captivity, the accused persons were saying that he would be released only after getting the ransom of Rs.5 lacs, however, had not stated that what the accused would do, in case, an amount of Rs.5 lac is not paid. He succeeded in running away, taking advantage of dark night. This witness could not name the other accused persons, except the appellants. Bhagwan Singh was also abducted by the accused persons, however, he succeeded in escaping after 4 days of captivity. During the period of 1 month and 8 days, he was provided with *chapatti* and water and it is also stated that during this period, he was tied. This witness was cross- examined. In cross-examination, this witness has admitted that he had seen the appellants in the Joura Court, where he had gone to attend a case and thereafter, he had seen the appellants on the date of recording of his evidence. Thus, it is clear that this witness has admitted that after escaping from the captivity, he had seen the appellants in the Joura Court premises also. Thus, it is clear that the appellants after their arrest were not kept *Baparda* by the police and no precautions were taken by the police to hide the identity of the appellants. Although the police had got the test identification of the appellant Mithlesh done on 25-4-2003 and Buddhu (P.W.3) is said to have identified the appellant Mithlesh, but this witness in his Court evidence, has stated that no accused was got identified by the police. Thus, this witness has disowned the Test Identification of the appellant Mithlesh. It is surprising that Kamlesh was also arrested by the police on 27-2-2003, and although the names of the appellants were told by Buddhu (P.W.3) but inspite of that the Test Identification of Mithlesh was got done by the police on 25-4-2003. If the appellant Mithlesh was already identified by Buddhu (P.W.3), then there was no need for the police to hold test identification of Mithlesh from Buddhu (P.W.3) and if the police was of the view that inspite of the fact that Buddhu (P.W.3) has named Mithlesh, but by way of abundant caution, it is necessary to conduct a Test Identification Parade of Mithlesh, then the same analogy would have applied for Kamlesh also, but for the reasons best known to the police, the test identification of Kamlesh, from Buddhu (P.W.3) and Bhagwan Singh (P.W.4) was not got done by the police. Furthermore, Buddhu (P.W.3) has admitted that he had

seen the appellants in the Joura Court premises when he had gone to attend a Court proceeding. Further, Buddhu (P.W.3) has specifically stated in his para 6 of his cross-examination, that he does not know the name of the appellants but he know them by their face. In Para 11 of his cross-examination, this witness has stated that in his case diary statement, he had disclosed the names of the appellants, merely because, the miscreants were calling them by their names. In view of this admission, made by Buddhu (P.W.3), in the considered opinion of this Court that the names disclosed by Buddhu (P.W.3) in his case diary statement, Ex. D.1 will be of no use for the prosecution.

(14) Bhagwan Singh (P.W.4) has partially not supported the prosecution story. Bhagwan Singh (P.W.4) has not stated anything against Kamlesh and has also not identified him, in the Court. Bhagwan Singh (P.W.4) has stated that he had identified Mithlesh in Test Identification Parade, Ex.P.3, conducted by the police. This witness has also stated that after 4 days of captivity, taking advantage of the fact that the accused persons were sleeping, he succeeded in escaping. However, this witness has not stated that Buddhu had also tried to run away, along with this witness, but again he was taken in captivity by the accused persons. Although this witness has stated that he was forced to write a letter demanding ransom of Rs.5 lacs, but for the reasons best known to the prosecution, the said letter was not got identified in the Court from this witness. Letter Ex.P.4 was got proved from the Investigation Officer, C.S. Jadon (P.W.6). Although no objection was raised by the defence Counsel at the relevant time, but still the prosecution was under obligation, to get the letter Ex.P.4, identified from this witness, that whether it was the same letter, Ex.P.4, which was written by this witness or not? The report of the handwriting expert has not been produced, and even the letter was not sent to the handwriting expert, to find out that who was the author of the letter Ex.P.4. This witness has proved that he had lodged the F.I.R., Ex.D.4.Babulal (P.W.5) was the witness of seizure of Inland Letter from the possession of Cheu, but he has not supported the prosecution case and was declared hostile.

(15) C.S. Jadon (P.W.6) is the investigating officer. This witness had written the F.I.R., Ex. D.4. The spot map, Ex.P.8 was prepared.

While escaping from the captivity of the dacoits, Bhagwan Singh (P.W.4) had left his one shoe on the spot, which was also seized. One container of red colour was also seized vide seizure memo Ex.P.9. On 26-12-2002, he had seized an inland letter, Ex.P.4 on production of the same by Cheu. The said letter was seized vide seizure memo Ex.P.5. On the same day, Ratiram had also produced another inland letter, Ex.P.6 which was seized vide seizure memo, Ex.P.7. On 27-2-2003, the appellant Kamlesh was arrested.

(16) If the entire evidence which has been led by the prosecution, the following circumstances would emerge against the appellant Kamlesh :-

1. Kamlesh was named by Buddhu (P.W.3) in his case diary statement, Ex. D.1 as one of the members of gang of dacoits.
2.Kamlesh has been identified by Buddhu (P.W.3) in the Court.

The following circumstance would emerge against the appellant- Mithlesh :-

1.Mithlesh was named by Buddhu (P.W.3) in his case diary statement, Ex.D.1 as one of the members of the gang of dacoits.
2.Mithlesh was identified by Bhagwan Singh (P.W.4) in the Test Identification Parade conducted by the police during investigation.
3.Mithlesh was identified by Buddhu (P.W.3) and Bhagwan Singh (P.W.4) in the Court.

Another circumstance which appears against the appellants :-

1.Recovery of letters of ransom Ex.P.4 and P.6 seized on production of the same by Cheu and Ratiram on 26-12-2002.

(17):-- (1) Involvement of Kamlesh:-

It is submitted by the Public Prosecutor that since, Kamlesh was named by Buddhu (P.W.3) in his case diary statement and he had already identified Kamlesh, therefore, there was no need for conducting test identification Parade of Kamlesh and Kamlesh has also been identified by Buddhu (P.W.3) in the Court, therefore, the involvement of Kamlesh in the abduction of Buddhu (P.W.3) and Bhagan Singh (P.W.4) is proved beyond reasonable doubt.

The submission made by the Counsel for the State, on its face value, appears to be very impressive, but on deeper scrutiny, the same cannot be accepted. Buddhu (P.W.3) in his case diary

statement, Ex.D.1 had named Kamlesh and Mithlesh, and if the submission made by the Counsel for the State, that since, Kamlesh was named by Buddhu (P.W.3) in his case diary statement, Ex.D.1, and therefore, it was not necessary for the police to hold the Test Identification of Kamlesh, is accepted, then the same analogy would apply to the case of Mithlesh. However, for the reasons best known to the police, the Test Identification Parade of Mithlesh, was got done by the police during investigation. If the police, inspite of the fact that Buddhu (P.W.3) had already named Mithlesh and Kamlesh in his case diary statement, Ex.D.1, was of the view that the Test Identification of Mithlesh is necessary, then it should have also put the appellant Kamlesh for Test Identification Parade.

Another submission of the Public Prosecutor, that since, Kamlesh has been identified by Buddhu (P.W.3) in the Court, therefore, the identity of the appellant Kamlesh, is not beyond reasonable doubt, cannot be accepted, for the simple reason, that Buddhu (P.W.3) in his cross-examination has accepted, that he had seen the appellants Kamlesh and Mithlesh in the Joura Court premises, when he had gone to attend the Court Case. Thus, it is clear that Buddhu (P.W.3) had already seen Mithlesh and Kamlesh, prior to his evidence in the Court, and he had seen the appellants in the Joura Court premises, therefore, under the facts and circumstances of the case, the identification of the appellant Kamlesh and Mithlesh by Buddhu (P.W.3) in the Dock becomes suspicious and hence, the same cannot be relied upon, unless and until, it is corroborated by any other evidence.

It is well-established principle of law, that the Test Identification Parade conducted by the police, during investigation is not the substantive piece of evidence, and the substantive piece of evidence is the identification of the accused, in the Court, however, the Test Identification Parade, conducted by the Police, during investigation, can be treated as a corroborative piece of evidence.

The Supreme Court in the case of **Prakash Vs. State of Karnataka,** reported in **(2014) 12 SCC 133** has held as under :-

> **"13.2.** Secondly, why is it that no test identification parade was held to determine whether Prakash was actually the person who was seen by PW 6 Gangamma and by

Ammajamma?

14. Two types of pre-trial identification evidence are possible and they have been succinctly expressed in *Marcoulx* v. *R. [*(1976) 1 SCR 763 (Can SC)] by the Supreme Court of Canada in the following words:

> "An important pre-trial step in many criminal prosecutions is the identification of the accused by the alleged victim. Apart from identification with the aid of a photograph or photographs, the identification procedure adopted by the police officers will normally be one of two types: (*i*) the show up—of a single suspect; (*ii*) the line-up presentation of the suspect as part of a group."

14.1. With reference to the first type of identification evidence, the Court quotes Prof. Glanville Williams from an eminently readable and instructive article in which he says:

> "… if the suspect objects [to an identification parade] the police will merely have him "identified" by showing him to the witness and asking the witness whether he is the man. Since this is obviously far more dangerous to the accused than taking part in a parade, the choice of a parade is almost always accepted."

14.2. With reference to the second type of identification evidence, Prof. Glanville Williams says:

> "Since identification in the dock is patently unsatisfactory, the police have developed the practice of holding identification parades before the trial as a means of fortifying a positive identification…. The main purpose of such a parade from the point of view of the police is to provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual prosecution. The advantage of identification parades from the point of view of the trial is that, by giving the witness a number of persons from amongst whom to choose, the prosecution seems to dispose once and for all the question whether the defendant in the dock is in fact the man seen and referred to by the witness."[1963 Cri Law Review 479]

14.3. A similar view was expressed by the Canadian Supreme Court in *Mezzo* v. *R. [*(1986) 1 SCR 802 (Can SC)*]*

15. An identification parade is not mandatory [*Ravi Kapur* v. *State of Rajasthan*, (2012) 9 SCC 284] nor can it be claimed by the suspect as a matter of right. [*R. Shaji* v. *State of Kerala*, (2013) 14 SCC 266] The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. [*Rameshwar Singh* v. *State of J&K*, (1971) 2 SCC 715] If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable [*Mulla* v. *State of U.P.*, (2010) 3 SCC 508] unless the suspect has been seen by the witness or victim for some length of time. [*State of U.P.* v. *Boota Singh*, (1979) 1 SCC 31] In *Malkhansingh* v. *State of M.P. [*(2003) 5 SCC 746*]* it was held: (SCC pp. 751-52, para 7)

> "*7*. … The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure 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 of Criminal Procedure. 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."

16. However, if the suspect is known to the witness or victim [*Jadunath Singh* v. *State of U.P.*, (1970) 3 SCC 518] or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media [(2014) 4 SCC (Cri) 185] no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In *Visveswaran* v. *State [*(2003) 6 SCC 73] it was held: (SCC p. 78, para 11)

> "*11*. … The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."

17. What happened in the present case? Both

> PW 6 Gangamma and Ammajamma saw Prakash for the first time on the afternoon of 5-11-1990 and they had seen him, if at all, briefly if not fleetingly. It is true that these witnesses had identified Prakash when he was produced before them on his apprehension about five or six days after the incident and also while he was in the dock in court, but the circumstances under which the dock identification took place are not quite satisfactory inasmuch as both the witnesses entered the witness box almost 4½ years after they are said to have first seen Prakash only briefly and without any identification parade having been conducted.
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> **18.** Given the law laid down by this Court, it would have been more appropriate for the investigating officer to have conducted an identification parade so that it becomes an effective "circumstance corroborative of the identification of the accused in court". [(2014) 4 SCC (Cri) 185] However, that was not done. The trial court was of the view that the evidence on record did not inspire confidence as far as fixing the identity of the suspect as Prakash is concerned. The trial court took into account the long lapse of time between the incident and the identification of Prakash in court, the absence of any distinguishing features of Prakash, the brief time for which the witnesses saw him and the fact that he was a total stranger to the witnesses. The High Court was satisfied that Prakash was suitably identified but completely overlooked the fact that even if the trial court had come to an erroneous conclusion, at best, it placed Prakash at the place of occurrence at 1.00 p.m. and not later. We are of the opinion that given the facts of the case, it would have been more appropriate for an identification parade to have been conducted, but its absence in this case is not necessarily fatal, there being other reasons also for not accepting the case set up by the prosecution. However, the absence of an identification parade certainly casts a doubt about Prakash's presence at Gangamma's house on 5-11-1990.''

The Supreme Court in the case of **Prahlad Singh Vs. State of M.P.,** reported in **(1997) 8 SCC 515,** has held as under :-

> **''5.** The learned counsel for the appellant further urged that the only other item of evidence to prove the complicity of the appellant with the offence is the substantive evidence of the prosecutrix in the Court inasmuch as she identified the appellant to be the person who committed the sexual assault on her on the date of occurrence. But that evidence is also wholly

unacceptable in view of the statement of the prosecutrix in the cross-examination wherein she stated:

> "Today, I have come along with my father. The police uncle was also with me outside. Now when the accused entered the court, then the policewala and my father had told me that he is the accused and that is why I have stated that he is the accused. The policewala uncle had tutored my statement outside today and accordingly I am deposing my same tutored statement."

6. In view of the aforesaid evidence of the prosecutrix, in our opinion the learned counsel for the appellant is wholly justified in making his submission that the substantive evidence of the prosecutrix in court identifying the accused is absolutely of no relevance and is wholly unacceptable and no conviction can be based on the same. Mr Shukla, the learned Senior Counsel appearing for the respondent, however, submitted that the accused being an army jawan and a colleague of the father of the prosecutrix and the prosecutrix having been sexually assaulted by the accused, there is no reason for the prosecutrix to unnecessarily involve an innocent man and since the fact of rape on the prosecutrix has been established beyond reasonable doubt the High Court rightly convicted the appellant. We are, however, unable to accept this contention since until and unless there is reliable and acceptable evidence to come to a conclusion that it is the accused-appellant who committed rape he cannot be convicted even if the factum of rape on the prosecutrix is established beyond reasonable doubt. In our considered opinion, therefore, the High Court interfered with an order of acquittal on mere surmises and conjectures without having an iota of acceptable evidence bringing complicity of the accused and as such the said conviction and sentence cannot be sustained in law. Accordingly we set aside the conviction and sentence passed by the High Court of Madhya Pradesh and acquit the appellant of the charges levelled against him. The criminal appeal is allowed. The bail bond furnished by the appellant shall stand discharged.''

The Supreme Court in the case of **Mohd. Iqbal M. Sheikh and Others Vs. State of Maharashtra,** reported in **(1998) 4 SCC 494** has held that if the witness knew the accused persons either by name or by face, the question of the police showing him the accused persons becomes irrelevant. If the witness did not

know the accused persons by name but could only identify from their appearance then a test identification parade was necessary, so that, the substantive evidence in court about the identification, which is held after a fairely long period, could get corroboration from the identification parade. If the police shows the accused persons in the police lock-up to the identifying witness then the so-called identification loses its value, inasmuch as it is only because of the police showing the persons the witness is being able to identify the alleged accused. If the accused has been shown to him in the course of investigation then the so-called identification in court is of no consequence and cannnot form the basis of conviction.

The Supreme Court in the case of **Sheo Shankar Singh Vs. State of Jharkhand,** reported in **(2011) 3 SCC 654** has held as under :-

> **''46.** It is fairly well settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation.
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> **47.** The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration.
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> **48.** The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in *Malkhansingh* v. *State of M.P.*

[(2003) 5 SCC 746]: (SCC pp. 751-52, para 7)

> "*7*. 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 of Criminal Procedure 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 of Criminal Procedure. 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 Admn*. [AIR 1958 SC 350], *Vaikuntam Chandrappa* v. *State of A.P. [*AIR 1960 SC 1340], *Budhsen* v. *State of U.P. [*(1970) 2 SCC 128] and *Rameshwar Singh* v. *State of J&K [*(1971) 2 SCC 715].)"

49. We may also refer to the decision of this Court in *Pramod Mandal* v. *State of Bihar [*(2004) 13 SCC 150] where this Court observed: (SCC p. 158, para 20)

> "*20*. It is neither possible nor prudent to lay

> down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."
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> **50.** The decision of this Court in *Malkhansingh case [*(2003) 5 SCC 746]: and *Aqeel Ahmad* v. *State of U.P. [*(2008) 16 SCC 372] adopt a similar line of reasoning.''

Thus, if the facts of this case are considered, then it is clear that the identification of the accused Kamlesh in the Court by Buddhu (P.W.3) cannot be relied upon for the simple reason, that not only, no Test Identification Parade was conducted by the Police during the investigation, but also, the witness Buddhu (P.W.3) had seen the appellant Kamlesh in the Joura Court premises, prior to recording of his evidence, as well as there is no other evidence which may corroborate the identification of the appellant Kamlesh in the Dock. Thus, the identification of Kamlesh by Buddhu (P.W.3) in the Court cannot be relied upon. If the identification of Kamlesh by Buddhu (P.W.3) in Court is ignored, then there is no other evidence against Kamlesh. Accordingly, this Court is of the

considered opinion, that the prosecution has failed to prove the guilt of the appellant Kamlesh beyond reasonable doubt.

(2) Recovery of letter of Ransom:-

According to the prosecution, Ex.P.4 and Ex.P.6 are the two letters of Ransom which were written by Bhagwan Singh (P.W.4) under the instructions of the dacoits and these two letters were sent to Cheu and Ratiram through Post. Bhagwan Singh (P.W.4) has stated that he had written letters on the instructions of the Dacoit Rajputa. However, for the reasons best known to the prosecution, these two letters were not shown to Bhagwan Singh (P.W.4) and were got proved by Investigation Officer, C.S. Jadon (P.W.6) and they have been marked as Ex.P.4 and P.6. Although no objection was raised by the Counsel for the appellants at the relevant time, but the crux of the matter is that these two letters, i.e., Ex.P.4 and Ex.P.6 were not proved by Bhagwan Singh (P.W.4). Even these two letters, Ex.P.4 and Ex.P.6 were not shown to Bhagwan Singh (P.W.4), to prove that whether these letters are the same letters which were written by him or not? Even the report of the handwriting expert has not been filed to show that these two letters, Ex.P.4 and Ex.P.6 were in the handwriting of Bhagwan Singh (P.W.4). C.S. Jadon (P.W.6) has stated that he had seized these two letters on production of the same by Cheu and Ratiram, but for the reasons best known to the prosecution, neither Cheu nor Ratiram has been examined. Thus, there is nothing on record to show that these letters are in the handwriting of Bhagwan Singh (P.W.4) and these letters were ever received by Cheu and Ratiram and they had made these letters available to the police. In view of the above mentioned facts and circumstance, this Court is of the considered opinion, that the prosecution has failed to prove that any letter demanding ransom was ever written by Bhagwan Singh (P.W.4) on the instructions of Dacoit Rajputa and were ever received by Cheu and Ratiram. Thus, this circumstance has remained not proved.

(3) Involvement of Mithlesh:-

So far as the involvement of Mithlesh is concerned, Buddhu (P.W.3) and Bhagwan Singh (P.W.4) are the witnesses, who have deposed against the appellant Mithlesh. Mithlesh was put for Test Identification Parade, and he was identified by Budhhu (P.W.3) and

Bhagwan Singh (P.W.4). So far as Buddhu (P.W.3) is concerned, he has not stated anything about the test identification parade. Bhagwan Singh (P.W.4) has stated that he had identified Mithlesh in the Test Identification Parade, Ex.P.3. There is nothing on record as to when the appellant Mithlesh was arrested. C.S. Jadon (P.W.6) has not stated that on what date, Mithlesh was arrested. Even the arrest memo of Mithlesh has not been proved by the prosecution. The appellant Mithlesh was put for Test Identification Parade which was held on 25-4-2003, Ex. P.3. However, in view of the admission made by Buddhu (P.W.3) to the effect, that he had seen both the appellants, namely, Kamlesh and Mithlesh in Joura Court when he had gone to attend a Court case, it is clear that the appellants were not kept *Baparda* and no precaution was taken by the police to hide their identity before holding the Test Identification Parade. Even the Naib Tahsildar, who had conducted the Test Identification Parade, has not been examined by the prosecution. Although Bhagwan Singh (P.W.4) has identified the appellant Mithlesh in the Court, but under these circumstances, this Court is of the considered opinion that the identification of Mithlesh by Bhagwan Singh (P.W.4) in the Court, also becomes doubtful, and it would be very unsafe to rely on the said circumstance in absence of any other corroborative piece of evidence. Unfortunately, there is no other evidence against the appellant Mithlesh, therefore, this Court is of the considered opinion, that it would be very unsafe to rely on the evidence led by the prosecution.

Another circumstance against Mithlesh is that he was named by Budhhu (P.W.3) in his case diary statement, Ex.D.1, as well in his Court evidence as one of the members of the dacoits gang. However, the police during investigation, thought it necessary to put the appellant Mithlesh for Test Identification Parade, thus, it is clear that even the investigating agency was not sure that whether the statement of Budhhu (P.W.3) was worth reliance or not? Further Buddhu (P.W.3) in para 11 of his cross examination had admitted that he did not know the names of the accused persons, and was knowing them from their faces. Under this circumstance, when this Court has already held that the Identification of the appellants was necessary, therefore, merely because Buddhu (P.W.3) had named Mithlesh in his case diary statement, Ex.D.1 as

well as in his Court evidence, it would be of no assistance to the prosecution and cannot be relied upon, as Buddhu (P.W.3) in his evidence doesnot say anything about the Test Identification Parade of the appellant Mithlesh and he is completely silent about Test Identification Parade, Ex.P.3.

(18) Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the prosecution has failed to establish the guilt of the appellants beyond reasonable doubt. Therefore, they are acquitted of the charges under Section 364-A of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act.

(19) Consequently, the judgment and sentence dated 3-10-2006 passed by Special Judge (M.P.D.V.P.K.Act), Sheopur in Special Sessions Trial No.14/2003 is hereby set aside. The appellants are acquitted of all the charges. The appellants are in jail. They be released immediately, if they are not required in any other case.

(20) The fine amount, if deposited, shall be returned back to the appellants and if the amount of Rs.1,000/-has been paid to Buddhu (P.W.3) and Bhagwan Singh (P.W.4) as per direction contained in Para 30 of the Judgment of the Trial Court, then the same shall be recovered from Buddhu (P.W.3) and Bhagwan Singh (P.W.4).

(21) The appeals i.e., Cr.A. No.894/2006 filed by Kamlesh and Cr.A. No.204/2010 filed by Mithlesh, hereby succeed and are **allowed**.

(S.A. Dharmadhikari)
Judge

(G.S. Ahluwalia)
Judge

MKB

Digitally signed by MAHENDRA KUMAR BARIK
Date: 2018.03.08 10:29:10 +05'30'