HIGH COURT OF MADHYA PRADESH BENCH AT GWALIOR

DIVISION BENCH

(S.A. Dharmadhikari & Anand Pathak, J.J.)

Criminal Appeal No.812/2008
Durga @ Raja
Versus
State of Madhya Pradesh

&

Criminal Appeal No.866/2008
Nandu @ Nandkishore
Versus
State of Madhya Pradesh

Shri Anil Kumar Shrivastava, learned counsel for appellant (for Cr.A. No.812/2008).
Shri Dharmendra Rishiswar, learned counsel for appellant (for Cr.A. No.866/2008).
Shri Vivek Bhargav, learned Public Prosecutor for the respondent-State.

JUDGMENT
(Pronounced on 06th day of July, 2018)

Per Justice Anand Pathak,

Whether approved for reporting : Yes

Law laid down:

(I) If because of poor investigation and tainted prosecution, the accused suffers and it is apparent that he is innocent then he deserves compensation from the State under Right to Life.

(II) Right to Life is a Fundamental Right enshrined under Chapter III of the Constitution of India and Preamble of our Constitution gives priority to secure Justice to citizen at the top of all virtues, therefore, it is incumbent upon the State to take care of its citizens, when a citizen is severely bruised by

the organs of the State therefore, appellants deserve compensation because of poor investigation and tainted prosecution.

****

The instant criminal appeal is being preferred under Section 374 of Cr.P.C. against the judgment of conviction and order of sentence dated 17/10/2008 passed in S.T. No.04/2007 by the Special Judge, Datia whereby appellant-Durga (appellant of Cr.A. No.812/2008) and appellant-Nandu (appellant of Cr.A. No.866/2008) have been convicted under Section 364-A of IPC r/w Section 11/13 of Madhya Pradesh Dacoity Vipran Prabhabit Khestra Act and awarded sentence for Life Imprisonment with fine of Rs.25,000/- each with default stipulation.

2. Since both the appellants/ accused (Durga @ Raja and Nandu @ Nandkishore) have been convicted by the common order dated 17/10/2008 but appeals have been separately preferred by them, therefore, both the appeals are heard analogously and decided by this common order.

3. As per the case of the prosecution, FIR was registered on dated 24/08/2006 vide Crime No.90/2006 at Police Station Badoni, District- Datia by the complainant Munna Kushwaha (PW-2) in respect of an incident dated 04/07/2006 when around 11 pm in the night, Laxman alias Jhagga s/o Ramcharan Kushwaha while lying over in his agriculture field, caught hold of by some miscreants wielding fire arms and was taken by them as hostage to the forest. Midway, while reaching to the well of one Ramkishan Kushwaha took him also after putting a blind fold over his eyes and taken to some distant place where Ramkishan Kushwaha was released but abducted Laxman was taken to the forest and beaten up. Next day morning on 05/07/2006, brother(Munna) of abducted Laxman came to the field, but could not find his brother therefore, missing persons report was lodged and case was

taken into investigation.

4. After one month, on 04/08/2006, abducted Laxman got scot free from the clutches of abductors on which Dastyabi Panchnama at Police Station Badoni (recovery memo, Ex.P-3) was prepared. Thereafter statements of Laxman and other witnesses were taken. Since the present appellants-accused Durga and Nandu were already under arrest in some other case, therefore, they were formally arrested by the police. Thereafter, Test Identification Parade (TIP) was conducted for identification of accused Durga and Panchnama vide Ex.P-1 was prepared. Statements of other witnesses were taken by the police and charge-sheet was filed.

5. Appellants- accused abjured their guilt and trial was conducted. Trial Court after considering the evidence led by the prosecution found the appellants guilty of offence as referred above and awarded sentence for Life Imprisonment (L.I.) and fine of Rs.25,000/- was imposed. Therefore, appellants are before this Court. On behalf of both the appellants, Shri Anil Kumar Shrivastava, learned counsel advanced arguments in detail and Shri Dharmendra Rishishwar adopted the arguments advanced by him for appellant-Nandu also.

6. According to counsel for the appellants, the case mainly hinges upon the test identification of Durga by alleged abductee-Laxman. Although Laxman has identified Durga in the test identification parade but that was not the identification as required by law. From the deposition of Laxman, it appears that abductee-Laxman has already seen the accused Durga alias Raja at Police Station therefore, when TIP was conducted infront of competent authority at jail then it had no meaning because accused-Durga was already known to the victim Laxman and the purpose of TIP was diluted. It is further submitted that TIP of appellant-accused Nandu was never been held at the instance of police during investigation. Appellant-Nandu is the case of Dock Identification wherein

Laxman identified Nandu while standing in the Dock therefore, the investigation reveals the casualness in implication of the appellants that too on false pretext. He relied upon the judgment of the Hon'ble Apex Court in the case of **Daya Singh Vs. State of Haryana, AIR 2001 SC 1188.**

7. Another point advanced by counsel for the appellants, was the delay caused in conducting TIP because the date of incident was 04/07/2006 whereas TIP was held on 04/12/2006 therefore, delay of 5 months is sufficient to allow witness to forget about the face of a person whom the victim has seen in night without explanation of availability of light in the prosecution story. It is further submitted that some inconsistencies and contradictions are crept in the statements made by the witnesses under Section 161 of Cr.P.C and thereafter made as Court statement because Laxman himself showed contradictory and inconsistent statement in police statement and Court statement. Statement under Section 161 of Cr.P.C. was recorded by the police in respect of Ramkishore Kushwaha also but he did not make court statement on oath. Total 18 witnesses were referred in the charge-sheet but only six witnesses were deposed. Similarly, witness of arrest memo (Ex.P-4) and witness of seizure memo under Section 27 of the Indian Evidence Act were never examined. The case appears to be of circumstantial evidence wherein TIP was only important piece of evidence but doubtful nature of evidence tried to be created by the prosecution, renders the TIP tainted.

8. Learned counsel for the appellants raised the point that Mukunda and Bihari who were allegedly the middle man between the police and the victim, were not examined and therefore, theory propounded by Mukunda and Bihari that they went to get the victim released while paying Rs.5,00,000/- (Rs. Five Lacs) was not established by the trial Court, nor money allegedly paid to abductors was seized from accused persons.

9. On the other hand, learned counsel for the respondent-

State opposed the prayer made by the appellants and on the basis of evidence and record submitted in respect of culpability of the appellants and prayed for dismissal of the appeal.

10. Heard the learned counsel for the parties at length and perused the record.

11. Here in the present case, no eye witness is available to witness the incident since inception other than the victim Laxman himself. Victim was allegedly taken by the appellants Durga and Nandu alongwith other abductee Ramkishore Kushwaha on 04/07/2006 around 11 pm. When the victim was abducted, he did not know the appellants. Abductors took Ramkishan also alongwith them to cover some distance but later on released him on same day but Laxman was kept allegedly by the abductors till 04/08/2006. Therefore, best witness to identify and recognize the abuductors was Ramkishore, beside abductee Laxman, but here prosecution did not produce Ramikishore in the Court to make statement. This is material omission. Laxman slipped out from clutches of abductors and returned back to his village. Dastyabi Panchnama (Ex.P-3) indicates the date of return as 04/08/2006. Appellants were already in jail in some other case therefore, they were formally arrested on 29/09/2006.

12. Victim Laxman after coming back from abduction on 04/08/2006, filed a complaint for the first time on 24/08/2006 in which name of two unknown miscreants were referred therefore, TIP was conducted. The case is of circumstantial evidence and only on the basis of TIP, appellants have been convicted. In respect of appellant-Durga, TIP was conducted on 04/12/2006 after delay of 5 months whereas victim Laxman already reached home on 04/08/2006, whereas FIR was registered on 24/08/2006 and appellants-Durga and Nandu both were formally arrested on 09/09/2006, for this case (as they were already behind the bar) therefore, police had sufficient time in between for conduction of TIP but the same was not done. Besides that TIP was vitiated if the evidence of

Laxman is seen alongwith evidence of Naib Tahsildar, Datia-P.P. Parasar (PW-3).

13. Laxman @ Jhagga (PW-1) in his cross-examination in para 11 admitted the fact that he did not know the accused-appellants from the beginning but he referred the name of Durga and his accomplice while giving police statement. In para-14, he admits the fact that after his release, police caught Durga and taken him to the Police Station where he informed the police that the person who is caught hold by the police is Durga @ Raja and after one month, eye witness went to jail for identification and identified Durga @ Raja. He also admitted the fact that police has taken signature over certain documents. Witness is not sure about about his signature whether marked at police station or at somewhere else. Deposition of Laxman (PW-1) in respect of test identification reveals that victim-Laxman (PW-1) had already seen Durga at Police Station and therefore, the purpose of test identification at later stage in jail had no meaning and the same is vitiated by the mischief of the police authorities. The purpose of test identification is not to identify the already identified person. Here police has shown the accused Durga to victim-Laxman, therefore, said test identification cannot be relied upon. The factum of test identification parade does not figure in the testimony of inquiry officer- Yogendra Singh Jadon (PW-6) therefore, the story of test identification is not at all established by the prosecution beyond reasonable doubt rather it creates doubt about the motive of police authority and the plea of false implication intensifies.

14. TIP of Nandu was never held. Only Dock identification was made. The reason for not conducting TIP of Nandu was not explained by the prosecution. Victim Laxman in his court statement referred the name of two Nandu (s), one is; Nandu Kadera and another is Nandu Dheemar. Whether abductee knew these abductors previously or whether the accused Nandu was the same Nandu as referred by the victim, could

only be discerned through TIP but in respect of accused Nandu, no TIP was conducted. It is possible that both these accused were already in custody and to get wriggle out of the pressure of incident and abduction, both these arrested persons have been framed for the charge of abduction of Laxman. From the submissions of counsel for the appellants, it appears that appellants never sought their custody. If police did not want to interrogate the appellants for recovery of arms, recovery of money and for arrest of other alleged co-accused then it raises doubt over the motive of the police to reach to the truth and exact incident. This renders the investigation doubtful.

15. Another circumstance which renders the case doubtful is the fact that Ramkishan Kushwaha who was initially abducted by the appellants, for the time being, but he did not depose on oath whereas he was the best witness not only to substantiate the story of abduction but for identification of the accused persons. Ramkishan neither identified the accused by way of TIP nor he deposed on oath before the trial Court. Why the Star witness was kept behind the curtains by the prosecution is the question which was not explained by the prosecution for proving its case beyond reasonable doubt. This aspect is further accentuated by the fact that out of total 18 witnesses referred in the charge-sheet, only 6 witnesses were examined. Interestingly, name of Ramkishan Kushwaha does not figure in the list of witnesses at all. Therefore, it appears that story of Ramkishan was created by the Police and prosecution to implicate the appellants on false pretext. This further creates doubt about the motive of police regarding false implication.

16. One more circumstance goes against the case of prosecution is that as per the story of the prosecution, Mukunda and Bihari tried to mediate allegedly between the abductors and family of abductee by which Munnalal Kushwaha (PW-2) who was brother of abductee gave Rs. 5 lacs to Bihari and Mukunda for release of his brother which

according to abductee-Laxman was given by them to Nandu Kadera and Nandu Dheemar but they sought Rs.40,00,000/- as ransom amount. This fact came in his examination-in-chief. In cross-examination, he admitted the fact about the said attempt made by the family. Victim-Laxman in para-8 of the cross-examination also admitted the fact that this fact has not been disclosed by him while giving statement under Section 161 of Cr.P.C. to the police and discloses this fact for the first time in his court statement. The said improvement is a material improvement in the fact situation of the case. Prosecution could not establish the fact about the fate of said 5 lac rupees; whether the 5 lacs as allegedly given by the family of the victim to the abductors for release of the victim, were recovered from the accused persons or not. This fact could have been explained and substantiated, if Mukunda and Bihari would have deposed before the Court to lead evidence on behalf of prosecution. Although Investigating Officer in his court statement referred the fact that Mukunda was one of the accused in the instant case and died in an encounter but when Mukunda was one of the accused in the instant case then how he could have been a middle man and why the police authority has not referred him alongwith Bihari as accused persons in the charge-sheet or prior to it, why their names were not taken by the police for consideration for investigation purpose. These all facts create strong suspicion against the motive of the police authorities wherein they wanted to frame the present appellants for the offence referred above. The omission of story of 5 lacs in the statement of Laxman under Section 161 of Cr.P.C. *vis a vis* court statement and the fact of no recovery of amount from the accused, stares at the prosecution and renders the story of prosecution severely doubtful.

17. Witness of arrest memo (Ex.P-4) and witness of seizure memo (Ex.P-9) under Section 27 of the Indian Evidence Act were never examined before the trial Court. Therefore, seizure of weapons was not proved beyond reasonable doubt.

18. Another loop in the story is reference of several miscreants while conducting abduction by the victim-Laxman, but police never cared for reaching to them or to nab them to bring them to books, when the statements of witnesses reveal presence of several persons while performing abduction then why the prompt action of the police confined only to the extent of present appellants and no explanation was offered about other alleged accomplice like Mukunda, Bihari and other Nandu (s) as referred in the complaint and statements. Why they were not arrested or made accused in charge-sheet the question which haunts the police and prosecution. This aspect further creates doubt about the motive of prosecution to falsely implicate the appellants because either the complaint filed by the complainant and the victim was bereft of truth or prosecution could not able to discharge its functions properly and just to cover up their fallacy, falsely implicated the present appellants, who were already in the jail in some other case and that is the travesty of justice.

19. (The Hon'ble Apex Court in the case of **Sheo Shankar Singh Vs. State of Jharkhand, (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.*
>
> ***47.** The Code of Criminal Procedure does not oblige the investigating agency to necesssarly 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 indentification parade does not, in that view, have the effect of weakning the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the courts 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.

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 [(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."*

20. In the present set of facts, TIP was vitiated by its inherent procedural impropriety and except that, no reliable evidence is available to implicate appellants beyond reasonable doubt.

21. Resultantly, appeals preferred by the appellants-Durga

and Nandu deserves credence and acceptance and resultantly, Cr.A. No.812/2008 and Cr.A. No.866/2008 are hereby allowed. Judgment of conviction and order of sentence dated 17/10/2008 passed in S.T. No.04/2007 by the Special Judge, Datia passed against the appellants is hereby set aside. Since the prosecution has not proved its case beyond reasonable doubt and trial Court erred in relying upon the very weak evidence led by the prosecution and erred in convicting the appellants, therefore, appellants- Durga @ Raja and Nandu @ Nandkishore are directed to set free immediately if they are in confinement.

22. If appellants look in hindsight then the distance covered by them between this period is been full of painful memories, remorse and agony. At this juncture, this Court feels that valuable period of 12 years of appellants have been consumed at the altar of false implication due to defective investigation and casually conducted trial with poor appreciation of evidence by the trial Court.

23. The Right to Life is a Fundamental Right enshrined under the Fundamental Rights of the Constitution, in the most coveted chapter (Chapter III of Fundamental Rights) of the Constitution coupled with the enlightenment displayed by the Preamble of our Constitution wherein Securing Justice to Citizens has been placed at the top of all virtues and being a democratic and welfare State, it is incumbent upon the State to take care of its citizens with motherly tenderness specially, when a citizen is severely bruised by the organs of the State. Therefore, this Court finds the instant case, a fit case for grant of compensation of Rs.1,00,000/- (one lac only) each, to both the appellants to be granted as compensation for the injustice inflicted over them by way of false implication. Our criminal Juris prudence gives more stress over avoiding of false implication of an innocent to the extent where hundred guilty may go scot- free. The spirit behind the same is very pious. Even otherwise, by one case of false implication of an

innocent, rule of law loses one exponent (supporter) and a rebel with defiance towards rule of law is ready. Poor investigation with tainted prosecution is perfect recipe for such eventuality.

24. Although, no such provision exists in the Cr.P.C. for compensating the accused but certainly State cannot wriggle out from its constitutional and tortious liability, in the present set of facts. Fundamental right of a person cannot be sacrificed at the altar of mis-governance or at the whims or because of poor investigation. State Government would be at liberty to recover the said amount from the erring officers/ investigation officers, if appropriate authority decides so, after giving opportunity of hearing to them and if their casualness and negligence are proved in an enquiry.

25. Time has come when the Rule of Law is to be included as one of the essential components of infrastructure like road, water, electricity etc., otherwise these component of infrastructure and development would be sacrificed at the altar of mis-governance and lawlessness. Bridging of schism between rule of law and lawlessness is the need of the hours. It is expected from the Law Department, Home Department and Prosecution Department of the State Government that they will create a mechanism for scientific and methodical police investigation and scientific and methodical prosecution of the accused so that citizen may get justice and spirit of Right to Access Justice is fulfilled. A constant training programme or continuous education with latest technology be employed by the said authorities so that investigation and prosecution agency may march with the time and people at large be assured of their empowerment by way of Right to Access Justice. Therefore, before parting, this Court finds appropriate to direct the State of M.P. through Principal Secretary, Law and Legislative Affairs to coordinate and make arrangements with the appropriate department of State Government to grant compensation to the appellants-Durga @

Raja s/o Amarju Kori and Nandu @ Nandkishore s/o Shankari Rs.1,00,000/- each for the reasons stated above. Needful be done within two months from today.

26. Office is directed to send the copy of this order to the Principal Secretary Law and Legislative Affairs as well as Principal Secretary, Home Department for appropriate action, coordination and compliance, as referred in preceding paragraphs.

27. Appeal stands allowed in above terms. Release warrants of appellants be issued forthwith.

28. Copy of the the judgment be sent to the concerned trial Court for information and necessary compliance.

(S.A. Dharmadhikari)
Judge
06-07-2018

(Anand Pathak)
Judge
06-07-2018

vc