

HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE**D.B.: Hon'ble Shri J.K. Maheshwari**
Hon'ble Shri Prakash Shrivastava, JJ.**Criminal Appeal No.1275/2006**Suraj Nath s/o Ratanlal Nath
Funda Nath s/o Amar Nath
Shaku Nath s/o Heera Nath
Piru Nath s/o Nahar**Versus**

The State of Madhya Pradesh

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Shri Vivek Singh, Advocate (amicus curiae) for the appellants.

Shri Amit Singh, Public Prosecutor for the respondent / State of Madhya Pradesh.

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J U D G M E N T(Pronounced on this 9th day of month July, 2018)**Per J.K. Maheshwari, J.**

Being aggrieved by the judgment of conviction of the appellants namely Suraj Nath s/o Ratanlal Nath, Funda Nath s/o Amarnath, Shaku Nath s/o Heera Nath and Piru Nath s/o Nahar, this criminal appeal under Section 374 of the Code of Criminal Procedure, 1973 has been filed, challenging the judgment dated 18.10.2006 passed by the learned 3rd Additional Sessions Judge, Ujjain in Sessions Trial No.248/2005. All the appellants have been convicted for the charge under Sections 395, 396 read with Section 397 and 458 of the Indian Penal Code, 1860 and were directed to undergo sentence of life imprisonment for charge under Sections 396/397 of IPC with fine of Rs.5,000/- each; separate sentence for charge under Sections 395 and 396 of IPC has not been awarded; in case of default in payment of fine, they were

directed to undergo one year rigorous imprisonment; while for the charge under Section 458 of IPC, each of the appellants has been sentenced to undergo 7 years rigorous imprisonment with fine of Rs.5,000/-; and in default of payment of fine, they were directed to undergo further one year rigorous imprisonment.

2. The case of the prosecution, as alleged, is that on 09.01.2003 at about 03.45 AM, complainant Mukesh (PW-2) lodged First Information Report in Police Station, Badnagar, District Ujjain (MP) alleging that there was a hut situated in the field where light was on and the said hut was not having the door. After irrigating their field, his father Mohanlal, daughter-in-law Mamtabai wife of Santosh, and maternal uncle Badrilal were sleeping. He heard the sound of Spade (Fawda) by which he woke up and saw that four accused persons had entered in the hut and beaten his father. When he reached on spot to save him, one of the accused assaulted with bamboo stick (Lathi) and due to the said injury he became unconscious. Accused persons tied him by rope and leaving there ran away from the spot. Accused persons were wearing underwear (Chhadi) and Jersey (Sweater) and were about thirty years of age. He further explained that in the loot, Rs. 6,000/- in cash, two male wrist watches, one lady wrist watch and one Mangalsutra of gold were looted from his house. It is said from the house of neighbour Girdhari, accused persons looted Rs.1,000/- in cash and two wrist watches;

and from the house of Gopal – one pair ear-ring, Mangalsutra and one pair anklet were looted by them. It is further said that if the looted articles were shown to them, they would identify them.

3. The first information report was registered at Crime No.03/2004 in Police Station Badnagar, District Ujjain (MP) and offence punishable under Sections 458, 395 and 397 of the Indian Penal Code, 1860 was registered by the Police against unknown persons. As the names of the accused persons were not in FIR, however, they could not be traced out for a long time. On 14.07.2004, some accused persons were formally arrested in the present case when they were in custody in one another offence. On interrogation, commission of the offence was confessed to which memo u/s 27 of the Evidence Act was prepared. The identification parade of the accused persons were conducted by Naib Tahsildar Vijay Prakash Saxena (PW-9) as Ex.P/7 and identification of the articles Ex.P/6 was conducted by Mumtaj Ali (PW-11) vide Ex. P/6. Thereafter, challan was filed on 11.10.2004 before the Competent Magistrate joining thirteen persons as accused; out of them, Pappu Nath @ Jitendra s/o Ratan Nath was minor and his case was tried by the Juvenile Court being juvenile. Accused persons Padam Nath s/o Dhanna Nath, Guddu Nath s/o Baij Nath @ Sarlal, Bhanwar Nath s/o Panna Nath, Dharmendra @ Ramesh s/o Heera Nath were tried along with the appellants, but they have been acquitted.

Accused persons Kalu Nath s/o Heera Nath, Dhan Singh s/o Baij Nath, Rukhmabai w/o Kalu Nath and Ganesh @ Ganiya s/o Nahar were absconding since trial.

4. As the case was triable by the Court of Sessions, however, committed against appellants, and four others to the Sessions Court, Ujjain, who made over the case for trial to 3rd Additional Sessions Judge, Ujjain where charges were framed under Sections 395, 396/397 and 458 of the Indian Penal Code, 1860 against the accused persons. The accused abjured their guilt and took the defence of false implication in the alleged offence.

5. Learned trial Court relied upon the test identification of accused persons Ex.P/7 identified by Mukesh (PW-2), Girdharilal (PW-3), Mamta Bai w/o Santosh (PW-7), Mamta Bai w/o Sunil (PW-12) and Sarju Bai @ Saku Bai (PW-17) and also relied upon the identification of Articles Ex. P/6 conducted by Mumtaj Ali (PW-11) and convicted the present four appellants for the charge under Sections 395, 396/397 and 458 of the Indian Penal Code, 1860 and directed them to undergo the sentence, as described herein above while accused Padam Nath, Guddu Nath, Bhanwar Nath and Dharmendra @ Ramesh were acquitted.

6. Shri Vivek Singh, Advocate, learned *Amicus Curiae* appearing on behalf of the appellants has strenuously urged that identification of the accused persons Ex.P/7 is not sufficient to convict the appellants,

because the said identification was conducted after more than two months and seven days from the date of arrest. While conducting the identification of the accused persons, other persons having similar marks and common features were not included or otherwise, the features must be hidden in the other persons included in the identification parade, particularly Shaku Nath (who was not having left eye) and Piru Nath (who was having mole over nose). In addition, the prosecution witnesses have not identified the accused persons in the Court. Therefore, in absence identification of the accused in Court, the Test Identification Parade relied by the learned trial Court, is not sufficient to convict them. In support of the aforesaid contention, reliance has been placed on judgments of the Supreme Court in the case of **Dana Yadav @ Dahu and others v. State of Bihar reported in (2002) 7 Supreme Court Cases 295** and **Murli & another v. State of Rajasthan reported in 2010 Criminal Law Journal 2228**.

7. It is further contended that articles which were seized, their descriptions were not given in the FIR and in the statements of the witnesses. These articles have not been identified by the prosecution witnesses except a few vide Test Identification Parade of Articles Ex.P/6. Those articles, which were identified by the prosecution witnesses, have not been produced to identify by them in Court. In absence thereof, the test identification of articles is not sufficient to convict the appellants. In

support of the said contention, reliance has been placed on the judgment of the Supreme Court in the case of ***Mohammad Aman and another v. State of Rajasthan*** reported in ***AIR 1997 Supreme Court 2960*** and a Single Bench Decision of this Court in the case of ***Shiva @ Shivlal v. State of Madhya Pradesh*** reported in ***2003 Criminal Law Reporter (MP) 103***.

8. It is urged that identification of accused persons and articles conducted by the Investigating Agency is not a substantive piece of evidence unless the prosecution witnesses identify those accused persons and articles in Court, otherwise it can not form the basis to convict the appellants.

9. It is the contention of the learned *amicus curiae* that in FIR or in statement, name of any of the accused persons has not been given and the description of the characteristics of the accused persons were also not written in the FIR. In absence thereof, if the accused persons have been taken into custody (in the present case, when they were in custody in another case) and after recording their confessional statement and relying upon their Test Identification Parade without identifying them in Court by witnesses, conviction of the appellants is without any cogent evidence which is unsustainable.

10. It is urged that in instant case, where offence was committed on 09.01.2003 and the accused persons were taken into judicial custody on 14.07.2004/

03.08.2004, and their identification parade was conducted on 10.10.2004 and during such period, the accused persons were not kept Ba-parda, as reveal from the proceedings of the committal. In this regard, reliance has been placed on a judgment of the Allahabad High Court in the case of ***Bhagwan Dass v. State of Uttar Pradesh*** passed on 09.07.2010 in Criminal Appeal No.317/1982. In view of the said submissions, it is urged that conviction of the appellants may be set aside and the appellants may be acquitted from the said charge.

11. On the other hand, learned Public Prosecutor representing the State submits that the trial Court, in the facts of the case, has rightly relied upon the Test Identification Parade of the accused persons Ex.P/7 and identification of the articles Ex.P/6, which is corroborated by the oral testimony of the witnesses in the Court. However, analyzing the testimony of the prosecution witnesses, finding as recorded is based on the cogent evidence, therefore, the finding of fact recorded by the learned trial Court do not suffer from any perversity or illegality, warranting interference in this criminal appeal.

12. After hearing learned counsel appearing for both the parties and on perusal of the judgment of the learned trial Court, it is seen that conviction of the appellants is based on identification of the accused persons by Mukesh (PW-2), Gopal (PW-5), Mamta Bai w/o Santosh (PW-7) and Mamta Bai w/o Sunil (PW-12).

Their conviction is also based on the identification of the articles made by Mukesh (PW-2), Mamta Bai w/o Santosh (PW-7), Mamta Bai w/o Sunil (PW-12) and Sarju Bai @ Saku Bai (PW-17). However, in the light of arguments advanced by learned *amicus curiae* appearing for the appellants and Shri Amit Singh, learned Public Prosecutor for the respondent / State of Madhya Pradesh it is required to be adjudicated that in the identification of accused persons and property (articles) relied by the Court is justified and sufficient to convict the appellants.

13. Prior to adjudicating the rival contentions on facts, the legal position in this regard is required to be looked into that either the test identification parade of persons or articles conducted by the prosecution may be used for the purpose of bringing the necessary facts or to introduce the relevant facts to prove the charge. In this regard, Section 9 of the Indian Evidence Act, 1872 is relevant, which is reproduced as under:-

“9. Facts necessary to explain or introduce relevant facts.- Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

On perusal, it is clear that any fact which is necessary to explain or introduce the fact in issue or relevant fact either to support or rebut an inference suggested by fact in issue to the relevant facts which establishes the identity of any person which may be relevant made by a time or place showing relation with the parties, who transacted the same may be relevant in so far as they are necessary for that purpose.

14. In the said context the relevance of the test identification parade of a person or article essential to establish the fact in issue to prove the case of the prosecution has been considered by the Supreme Court in several judgments. In this regard the judgment of **Dana Yadav @ Dahu and others v. State of Bihar (supra)** is relevant. The Apex Court in the said judgment has held, as under: -

“Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce relevant facts. It says, *inter alia*, facts which establish the identity of any thing or person whose identity is relevant, insofar as they are necessary for the purpose, are relevant. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused at his trial. The identification of an accused by a witness in court is substantive evidence whereas evidence of identification in test identification parade is though primary evidence but not substantive one and the same can be used only to corroborate identification of the accused by a witness in court.

Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable despatch for the purpose of enabling the witnesses to identify either the properties which are subject matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

Failure to hold test identification parade 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 previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness. 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.

Belated Identification of accused in court for the first time after more than two years from the date of the incident should not form the basis of conviction, especially when the same is not corroborated by either previous statement made before the police or any other evidence. Where PW did not name an accused before the police but named and identified him in court and the prosecution has not furnished any explanation for non-disclosure of name of this appellant before the police by this witness, his belated identification in court for the first time after more than two years, should not be relied upon more so, when the same is not corroborated by any other evidence.”

15. In another case of **Murli & another v. State of Rajasthan** (supra), the Apex Court has observed that in case an accused person has been identified by prosecution witness in test identification parade, but in his Court statement, the witness does not identify the said person, it would not be a substantive piece of evidence. In paragraph 10 of the judgment, the Apex Court laid down the law, as under: -

“It is trite law that a previous statement of the witness, even if admissible in evidence, cannot be used against the witness,

unless the witness is confronted with the same and his attention is invited. In his substantive evidence, the witness has never made a statement that he had identified Bheru as Heera. So much so that there is nothing in the evidence, which suggests that Heera and Murli were ever identified by him. His admitted case was that he knew Heera and Murli even before the incident took place. It is an admitted position that Heera and Murli were never put in for identification in the Identification Parade. Under such circumstances, the insignificant circumstance in the Test Identification Panchanama to the effect that the witness had identified Bheru and named him as Heera, cannot amount to the substantive evidence and further it cannot be used, as that statement was never specifically put to the witness.”

16. In this context, judgment of the Supreme Court in the case of **Vaikuntam Chandrappa v. State of Andhra Pradesh** reported in AIR 1960 SC 1340 is relevant. The Apex Court in case of **Vaikuntam Chandrappa v. State of Andhra Pradesh** (supra) has observed, as under: -

“The substantive evidence is the statement of a witness in Court and the purpose of test identification is to test that evidence the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. If there is no substantive evidence about the appellant having been one of the dacoits when PW-10 saw them on Jan. 28, 1963 then the T.I. Parade as against him cannot be of any assistance to the prosecution.”

17. In the case of **Bhagwan Singh & another v. State of Bihar** (supra), Allahabad High Court has observed that in the case, the prosecution, while adducing the evidence, has not brought any material to show that the appellant was made *Ba-parada* immediately after arrest, prior to test identification parade. The said test identification in the facts of the case is unjustified.

18. In view of the aforesaid legal position, it can very well be crystallized that identification of the accused by way of Test Identification Parade is primary evidence, but it is not a substantive piece of evidence. Such evidence can be used for the purpose of corroboration regarding identification of the accused by witness before the Court. In case, the accused has not been identified by the witness in Court, it may not be a substantive piece of evidence, but after his / her identification, it would be vice versa; and Court may rely on such evidence for the purpose of convicting the appellant. It can safely be observed that a witness is put to Test Identification Parade to contradict or corroborate his evidence in Court, but it cannot replace the evidence of the identifying witness on the question of identification as substantive evidence. When the witness fails to identify the accused in Court, there remains no substantive evidence at all on which a conviction can be based.

19. So far as identification of the articles is concerned, the decision of the Apex Court in the case of **Mohammad Aman and another** v. **State of Rajasthan** (supra) is relevant; the Apex Court observed that seized articles not produced and exhibited, conviction was based on the basis of finger-print report, when specimen finger-prints were not taken before the Magistrate, cannot be relied upon to convict the appellant.

20. This Court in the case of **Shiva @ Shivlal** v. **State of Madhya Pradesh** (supra) has observed, as under: -

“3. It leaves me with the alleged recovery of the stolen property from the accused persons and its identification by the witnesses. Certain ornaments were said to have been seized from the accused persons which were subsequently put to test identification and identified by the complainant party before the Executive Magistrate. It is, however, significant to note that neither of those ornaments were produced nor identified by the witnesses at the time of their evidence before the Court. The Court below in paras 34 to 36 of its judgment has held that since the evidence regarding test identification is reliable, the non-production of ornaments and their non-identification, before the Court made no difference in the case. I am afraid, the approach of the Court below was not in accordance with law. The test identification is a step in investigation but it is the identification before the Court, be it of a person or of a property, is the substantive evidence and the evidence regarding earlier test identification can only be used for corroborative purpose. (See Santosh Singh, AIR 1973 SC 2190). The earlier test identification solicitor could not be the basis for conviction and could at the best be pressed in service to corroborate the identification, if any made before the Court. In the instant case, admittedly the ornaments were never produced before the Court nor the same were got identified at the time of evidence of the witnesses. Under the circumstance, it cannot be said that the accused persons were found in recent possession of the stolen property removed in the said dacoity. There being no other evidence to connect the appellants with the crime in question, they are entitled to be acquitted and the impugned conviction is liable to be set aside.”

21. In view of the aforesaid, it can safely be crystallized in the case that the articles (which were seized) identified by the witnesses, has not been produced for exhibition and corroboration in Court, such test identification of the articles cannot be relied upon to convict the appellants and the said seizure of articles can be used for the purpose of corroboration with the witness in Court.

22. In the light of the aforesaid legal position, the facts of the present case are required to be analyzed. In the present case, the incident took place on 09.01.2003 at 12.30 AM in the night to which First Information Report Ex. P/3 was lodged at 03.34 AM by Mukesh (PW-2), but in the FIR, allegation of commission of loot with assault to Mohanlal and Badrilal (who died in the case) were alleged against 18-20 unknown persons, who came having covered their face, wearing underwear (*Chhadi*) and Jersey (*Sweater*), their age may be of 20-40 years. In the FIR, no mark of identification of those persons is on record or in their statement under Section 161 of the Code of Criminal Procedure, 1973. During investigation, some of the accused persons were formally arrested in this case on 14.07.2004 when they were taken in custody in another case. On inquest made with them, their confessional statements were recorded showing their regular arrest on 03.08.2004. They were produced before the Court asking police remand, which was granted by the committal Court on 07.08.2004. Proceedings of the committal Court do not reflect that they were kept *Ba-parada* up till their identification, which took place on 10.10.2004, after about two months and two days from the date of arrest. They were identified by Mukesh (PW-2), Gopal (PW-5), Mamta Bai w/o Santosh (PW-7) and Mamta Bai w/o Sunil (PW-12). In cross-examination of their testimony is ocular as some of them have stated that they were shown the accused

persons in Police Station prior to identification. These witnesses have not identified the accused in Court except Mamta Bai w/o Santosh (PW-7). The statement of Mamta Bai w/o Santosh (PW-7) was not seriously referred by the Court, because she deposed that she knows all the accused present in court, without identifying the individual accused. She in her cross-examination admitted that all the accused persons were covering their faces and there was no sufficient light; otherwise, the Court would not have acquitted accused persons Padam Nath s/o Dhanna Nath, Guddu Nath s/o Baij Nath @ Sarlal, Bhanwar Nath s/o Panna Nath, Dhamendra @ Ramesh s/o Heera Nath, who were also identified. In such circumstances without identifying the accused individually in Court, her statement is not sufficient to convict the appellant; hence, test identification parade of accused cannot be relied upon. In addition to the aforesaid, none of the other witnesses has identified the accused persons in Court, as reveal from their statements they were shown some of the accused by the Police, as reflected from the statement of Mukesh (PW-2) and Mamta bai w/o Sunil (PW-12) and in such circumstances, test identification parade of persons is of no assistance to the prosecution to bring the charge under Sections 458, 395/396 and 397 of IPC at home and the trial court has committed error of law.

23. It may also be seen in a perspective that Police could not search out the loot committed by the accused

persons, but they have been taken into custody by way of a formal arrest, when they were arrested in some other case and in the manner in which test identification parade was conducted, particularly as reveal from the statement of Vijay Prakash Saxena (PW-9), admitting that with respect to accused Shaku Nath, a person having similar characteristic of not having left eye or hiding the sign of left eye were not included. Similar is the position in the case of Piru Nath of having mole over left side of nose was not included in the test identification parade. Without considering the aforesaid, the trial court relied upon the test identification parade of the accused Ex. P/7 and convicted the appellants though not identified in the Court. In our considered opinion, the test identification parade conducted by Vijay Prakash Saxena (PW-9) cannot be used as substantive piece of evidence without identification of the accused in the court. In absence thereto, the finding recorded by the trial court is illegal and liable to be set aside.

24. So far as test identification of articles Ex.P/6 is concerned, it was supported through the witness Mukesh (PW-2), Shaku @ Sagarbai (PW-4), Mamta Bai w/o Santosh (PW-7), Mamta Bai w/o Sunil (PW-12) and Sarju Bai @ Saku Bai (PW-17). In their testimony except Mukesh (PW-2) and Mamta Bai w/o Sunil (PW-12), none of them have identified their articles. The articles, which were identified by Mukesh (PW-2) and Mamta Bai w/o Sunil (PW-12) have not been produced in Court for

exhibition and corroboration. In absence of producing the articles in Court to identify them by the said witnesses, test identification of the articles and testimony of Mukesh (PW-2) and Mamta Bai w/o Sunil (PW-12) cannot be relied upon to convict the appellants.

25. In view of the foregoing discussion, it is apparent that test identification of accused persons Ex.P/7 has not been proved in Court by the witnesses, however, it is not the substantive piece of evidence, which can form the basis of conviction. Similar is the position in the case of test identification of articles Ex.P/6. As discussed above, since lodging of the FIR till completion of the investigation, the prosecution witnesses have not named any of the accused persons, identifying them in Court; more so, characteristic of their identification has not been disclosed, thereby the Police may go on to conduct the investigation on the basis of those characteristic implicating the accused persons. However, merely having identification of the accused persons and articles by prosecution, which has not been proved, as discussed above, the conviction of the appellants, as directed by the learned trial Court, is unsustainable in law. In our considered opinion, the learned trial Court has committed an error of law to convict the appellants (Suraj Nath s/o Ratanlal Nath, Funda Nath s/o Amarnath, Shaku Nath s/o Heera Nath and Piru Nath s/o Nahar) in the present case. Therefore,

the impugned judgment of conviction and sentence passed by the learned trial Court stands set side.

26. In consequence of the above discussion, this appeal succeeds and is hereby allowed. Conviction of the appellants stands set aside. All the appellants are in jail, they be forthwith released, if not required in any other case. Copy of this order / judgment be sent by the Registry of this Court to concerned Court as well as to the Authorities to do the needful.

27. At the end, it is our duty to record the words of appreciation in favour of the *amicus curiae*, who has assisted this Court in the disposal of this appeal which was pending since 2006 wherein the accused persons are in custody since more than ten years, however, his assistance is hereby acknowledged.

(J.K. Maheshwari)
Judge

(Prakash Shrivastava)
Judge