

Bombay High Court Ramcharan Bhudiram Gupta vs State Of Maharashtra on 14 July, 1995 Equivalent citations: 1996 (1) BomCR 190, 1995 CriLJ 4048 Author: V Sahai Bench: G Majithia, V Sahai JUDGMENT Vishnu Sahai, J.

1. Since both these Criminal appeals arise out of a common incident, we proposed disposing them of by a common judgment. 2. Vide judgment and order dated 20th October, 1993 passed by Shri S. B. Sonar, Additional Sessions Judge, Greater Bombay, in Sessions Case No. 426/87 the appellants were convicted and sentenced in the manner stated hereinafter :- Appellant Ramcharan Budhiram Gupta : i) Under Section 394, IPC to 6 years rigorous imprisonment; ii) Under Section 392, IPC read with 34, IPC to 6 years rigorous imprisonment; and iii) Under Section 452 read with 34, IPC to 5 years rigorous imprisonment and to pay a fine of Rupees 2000/-, in default to further undergo rigorous imprisonment for one year. Appellant - Amarsingh alias Babusingh s/o Santoshsingh Thakur. i) Under Section 394, IPC to 8 years rigorous imprisonment; ii) Under Section 392 read with 34 IPC to 7 years rigorous imprisonment and to pay a fine of Rs. 2000/- and in default of payment of fine to further undergo rigorous imprisonment for one year; iii) Under Section 392 read with 397, IPC to 8 years rigorous imprisonment; and iv) Under Section 452, IPC to 7 years rigorous imprisonment and to pay fine of Rs. 1000/- and in default of payment of fine to further undergo 6 years rigorous imprisonment. The substantive sentences of both the appellants were ordered to run concurrently. It is these convictions and sentences of the appellants which have been challenged in these two connected Criminal Appeals. 3. According to the prosecution, on 1-9-1986, between 12.15 to 12.45 hours, at Flat No. 5 Usha Sadan Woodhouse Road, Colaba, Bombay 5, a daring robbery took place, during the course of which gold ornaments, one two in one tape recorder, and wrist watch etc. belonging to Mrs. Theresa Julius Hill P.W. 1 were looted. It is alleged that unknown miscreants participated in the robbery and one of them who was armed with a knife during the commission of robbery, inflicted grievous hurt with it on the person of Mrs. Theresa Hill. After committing the robbery, the miscreants are said to have run away. 4. The FIR of the incident was lodged on 1-9-1986 at 2.30 hours by Mrs. Theresa Julius Hill at Police Station Colaba, against three unknown persons. On the basis of the FIR, C.R. No. 697/86 was registered at police station Colaba by S.I. Bhagwan Sawant P.W. 4. He sent the informant who was in an injured condition for medical examination to St. Georges' Hospital. 5. The injuries of the informant were immediately examined the same day at 2.15 p.m. by P.W. 2 Dr. Prakash Nalte. Dr. Nalte found that she had the following injuries on her person :- "Contusion below left eye. CLW right little finger, abrasion on the right side of the neck 1" x 1". Contusion on the left side of the neck and abrasion on the right fore hand 1/2" x 1/2". Dr. Nalte stated in the trial Court that the said injuries were possible by any hard blunt weapon. 6. On 11-11-1986, the appellants were arrested in connection with Crime No. 439 of 1986 of police station, Vakola. Their interrogation revealed their complicity in the present case. 7. The investigation of the case was conducted by Madhav Manechandar P.W. 3 Special Officer at Colaba police Station and P.I. Vikram Marathe, P.W. 11 of Police Station Vakola. P.W. 3 Madhav Machindar on

1-9-1986, visited the scene of offence and prepared the spot panchanama etc. He recovered the knife which was lying there under a panchanama. 8. On 12-11-1986, P.I. Vikram Marathe requested the Special Executive Magistrate, P.W. 6 Bagambal Shetty on phone to hold the test identification parade of the appellants co-accused Medha Jagganath Dhobi and Miachel Mary, the same day. He also telephonically informed the informant Mrs. Theresa Hill about this test identification. The same day, P.W. 6 Bagambal Shetty, came to police station Vakola and held two parades viz. one in connection with the appellants and Medha Jagganath Dhobi and other with that of co-accused Mary Miachel. At the test identification parade, the informant is said to have identified both the appellants as well as Medha Jagganath Dhobi and Marry Miachel. 9. On 14-11-1986, P.I. Marathe interrogated the appellant Amarsingh who promised to get some of the robbed articles recovered. Consequently, P.I. Marathe prepared a panchanama and along with the panchas and the appellant proceeded to room No. 23 in Rashida Chawl. After the aforesaid room was opened, at the instance of the appellant, from a blanket, one two-in-one tape recorder, two table watches, currency coins of copper and white metal of different countries, 2 ladies purses, one copper chain having pendant, two towels and one jacket were recovered. On 15-11-1986, during the course of interrogation, appellant Ramoharan Gupta offered to get some of the robbed articles recovered. Consequently, P.I. Marathe prepared a panchanama. Thereafter, along with the panchas and the appellant went to Malvani at Gate No. 6. They came to room No. 354 of a Municipal Chawl, wherein one lady claiming to be the sister of the appellant namely P.W. 7 Shanti Gupta, produced one calculator of casio make from a steel cupboard. Thereafter, appellant Ramcharan Gupta led them to a shop by the name of Geeta Jewellers where a person by the name of Ramprakash Soni, P.W. 5 was present. At the instance of the appellant, he produced one gold piece, and purchase Bill Book of his shop, which was taken in charge by drawing a panchanama. Thereafter, the appellant Ramcharan Gupta led them to another shop known by the name of M. L. Jewellers. In that shop, one Laxman was present. At the instance of the appellant he is alleged to have produced one gold piece and a note book containing the entry about the said gold piece. On 15-11-1986, P.I. Marathe recorded the statement P.W. 5 Ramprakash Soni and P.W. 7 Smt. Shanti Gupta. On 23-11-1986, P.I. Marathe called the informant for recording her further statement. At the police station, the informant is alleged to have identified article No. 1 namely the tape recorder, 10. After completing the investigation, PI Marathe filed the charge sheet against the appellants in the Court of Metropolitan Magistrate, 21st Court, Bandra, Bombay. 11. The case was committed to the Court of Sessions in the usual manner where charges under Section 392, read with Section 34 IPC, 392 read with Section 397 IPC 394 read with Section 34 IPC 397 read with Section 34 IPC and 452 read with Section 34 IPC were framed against the appellants to which they pleaded not guilty and claimed to be tried. The defence of the appellants was that of denial. In the trial Court, apart from tendering voluminous documentary evidence, the prosecution examined as many as 11 witnesses. Out of them P.W. 11 Theresa Hill is the solitary eye witness of the incident. The remaining witnesses

included P.W. 6 Bagambal Shetty, the Executive Magistrate, who conducted the test identification parade of the appellants and P.W. 11 PI Vikram Marathe who investigated the case. In defence no witness was examined. 12. The learned trial Judge believed the evidence adduced by the prosecution and passed the impugned judgment. 13. We have heard Mr. Prakash Naik for the appellants and Mr. B. R. Patil, Additional Public Prosecutor for the State of Maharashtra. We have also perused the oral evidence and the various Exhibits, including the identification memo of the appellants, produced by the prosecution. After giving our anxious consideration to the matter, we are of the opinion that these appeals deserve to be partly allowed. 14. Mr. P. D. Naik learned counsel for the appellants made a solitary submission before us namely that the identification proceedings in the instant case are a big farce, and that being so, the conviction of the appellants on the various counts cannot be sustained. We find considerable merit in the aforesaid submission of Mr. Naik. 15. It is well settled that the evidence of identification can only be relied upon if all the chances of the suspects being shown to the witnesses prior to their test identification are eliminated. To ensure that firstly, the prosecution has to adduce link evidence to the effect that right from the time of arrest till being lodged in jail, the faces of suspects were kept veiled and no one had the opportunity to see them. This has not been done in the instant case. No link evidence has been adduced by the prosecution to prove this fact. Since the burden of showing that right from arrest till being lodged in jail, the faces of the suspects were throughout kept veiled was on the prosecution and as it has failed to discharge this burden the evidence of identification is rendered worthless in the instant case. We are reinforced in our view by the decision *Asharfi v. The State*, wherein in paragraph 35, James, J. spoke for the Division Bench, thus "it is the duty of the prosecution to show that from the time of the arrest of an accused person to the time of his admission into the jail, precautions were taken to ensure that he was not seen by any outsider" Secondly, a perusal of the evidence of P.W. 6 Mr. Shetty, the Executive Magistrate who conducted the identification of the appellants, shows that when on 12-11-1986, he visited police station Vakola in connection with conducting the identification parade, he found that the appellants were confined in a lock up room and that the identifying witness, who was a lady, Mrs. Theresa Hill, was already sitting in the police station. In such a situation, there was a reasonable possibility of Mrs. Theresa Hill seeing the appellants prior to the identification parade. In our view, this alone is sufficient to discard the identification evidence against the appellants. In *Asharfi v. The State* (supra), the Court observed in paragraph 35 that the plea of shown does not require to be affirmatively established; it is sufficient if the accused can create a reasonable doubt in the mind of the Court. "Direct evidence may not be available but he may discharge his burden by showing, for example that he and the witnesses were present in the police station, at the same time" In our view, the aforesaid observations are tailor made for this case. 16. We strongly deprecate the practice of conducting identification at police stations; a practice which we are informed at the Bar is only prevalent in Greater Bombay. The sooner it is abandoned the better it is because, the probability of the suspects

being shown to the witnesses prior to the test identification is always there at the police station. At any rate, on account of such a practice, there is always a lurking suspicion in the mind of the court that the witnesses might have seen the suspects prior to the test identification. 17. In order to make identification evidence beyond reproach, it is high time that an end is put to the practice of holding of identification at police station and identification parades instead are held in jail. This practice would not only enable the police to wash the stigma of showing suspects prior to their identification; a stigma which more than often is unfounded, but has manifold other advantages. Jails have a large population these days. It would be easy there to find persons similar to the suspects sought to be put for identification. Such similar persons have to be mixed with the suspects at the time of identification. The identification in jail would not only actually be free from any taint or suspicion but equally importantly it would also appear to be so. It would instil a sense of confidence both in the minds of the suspects sought to be put for identification as well as the court. There are some other infirmities too in the evidence of identification, which render it unworthy of acceptance. Firstly, the procedure of holding the identification as laid down in the Criminal Manual issued by the high Court of Judicature, Appellate Side, Bombay has not been followed. The Manual provides that not more than two suspects at a time should be put for identification in one parade but, in the instant case, three persons viz, the appellants and Medha Jagganath Dhobi were put up together for identification in one parade. In fact, the Executive Magistrate went to the extent of saying that "I am not aware about the High Court Criminal Manual about the method of holding the parade." This is a shocking state of affairs. We expect that in future, it would be ensured that the Magistrates who conducted identification proceedings are at least aware of the High Court Criminal Manual which deals with the manner in which they are to be conducted. We would like to emphasise that little value can be given to the identification held in breach of provisions contained in criminal Manual of this court. Secondly, in the identification memo, there is no mention of the fact that the dummies mixed with the appellants bore similar physical appearance and hence, we do not think it safe to believe the Magistrate when he deposed to this effect in the trial court. Once the court entertains doubts about dummies bearing similar physical appearance being mixed with the appellants, at the time of their test identification, the court has no option but, to reject the evidence of identification. 18. The fall-out of the aforesaid discussion is that the identification evidence against the appellants does not inspire confidence and consequently, both the appellants have to be acquitted on all the counts. 19. However, one question which remains is as to whether the appellants can be convicted in respect of the property recovered at their pointing out. In our judgment, the answer to this question has to be in the affirmative and the appellants can safely be convicted under Section 411, IPC. Mr. P. D. Naik learned counsel for the appellants frankly conceded that he could not shatter the recovery made at the instance of the appellants. 20. It is true that in the instant case no charge under Section 411, IPC was framed against the appellants in the trial Court. However, in our view, that would make no difference. Both

the appellants were charged under Section 392 read with Section 34 IPC and S. 394 read with Section 34 IPC and the offence under Section 411, IPC is a minor offence in relation to those offences. That being so, even in the absence of a charge under Section 411, IPC, we can convict both the appellants on that count. 21. Coming to the question of sentence under Section 411, IPC, we are informed by Mr. Naik that the appellants are continuously in jail since the date of the impugned judgment i.e. 20-10-1993. In other words, the appellants have already been in jail for nearly one year and eight months. The maximum sentence under Section 411, IPC is 3 years. In our view, considering the circumstances, that the incident took place way back in the year 1986, it is fit case in which the sentence of both the appellants under Section 411, IPC be reduced, to the period already undergone by them. 22. Since in this judgment, we have pointed out some of the infirmities in the manner in which identification is being conducted, we direct the Registrar to send its copy to the Advocate General Maharashtra, the Director General of Police, Maharashtra, the Principal Secretary, Home Department, Government of Maharashtra, the Judicial Secretary (Law and Judiciary Department) Government of Maharashtra, and the Commissioner of Police, Greater Bombay. 23. In the result, these appeals are partly allowed and partly dismissed. Although we set aside the judgment and order dated 23-10-1993 passed by the Additional Sessions Judge, Greater Bombay and acquit the appellants on all the counts but we convict them under Section 411, IPC and reduce their sentence on that count to the period already undergone by them. The appellants are in jail. They shall be released forthwith unless wanted in some other case. 24. Before parting with this judgment, we would like to put on record our appreciation for the learned counsel of the parties for the enormous assistance which they have rendered us. Appeals partly allowed.