# Amitsingh Bhikamsing Thakur ... vs State Of Maharashtra ..Respondent on 5 January, 2007

## Equivalent citations: AIR 2007 SUPREME COURT 676, 2007 AIR SCW 286, (2007) 50 ALLINDCAS 6 (SC), 2007 CRI. L. J. 1168, 2007 (2) AIR BOM R 97, (2007) 2 RAJ CRI C 424, (2007) 1 RECCRIR 619, (2007) SC CR R 617, (2007) 3 CALLT 23, (2007) 2 MAD LJ(CRI) 216, (2007) 1 CURCRIR 221, 2007 (2) SCC 310, 2007 CRILR(SC MAH GUJ) 381, (2007) 1 ALLCRIR 543, 2007 ALLMR(CRI) 1393, (2007) 1 BOMCR(CRI) 193, 2007 CHANDLR(CIV&CRI) 608, (2007) 2 CRIMES 40, (2007) 36 OCR 648, (2007) 2 RAJ LW 884, (2007) 1 GCD 710 (SC), (2007) 1 ALD(CRL) 181, (2007) 57 ALLCRIC 595, (2007) 2 ALLCRILR 120, 2007 CRILR(SC&MP) 381, (2007) 1 SUPREME 717, (2007) 1 SCALE 62, 2007 (1) SCC (CRI) 582

## Author: Arijit Pasayat

## Bench: Arijit Pasayat, Lokeshwar Singh Panta

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           CASE NO.:
Appeal (crl.)  13 of 2007

PETITIONER:
Amitsingh Bhikamsing Thakur                                  ..Appellant

RESPONDENT:
State of Maharashtra                                         ..Respondent

DATE OF JUDGMENT: 05/01/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
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J U D G M E N T (Arising out of SLP (CRL.) No.1114 of 2006) Dr. ARIJIT PASAYAT, J.

Leave granted.

Appellant calls in question legality of the judgment rendered by a Division Bench of the Bombay High Court Aurangabad Bench. By the impugned judgment, the High Court dismissed four appeals which arose out of a common decision against them. All four accused before the High Court were tried by learned Additional Sessions Judge, Ahmad Nagar. Learned trial judge had held all the four accused persons to be guilty of offences punishable under Sections 396, 506, 341, 379 read with

Section 120 B of the Indian Penal Code, 1860 (in short the 'IPC') and sentenced each of them to suffer life imprisonment and to pay a fine of Rs.3,000/- with default stipulation in respect of conviction relatable to Section 396 IPC read with Section 120 B IPC. Learned trial judge was of the view that offence relatable to Sections 506 and 341 IPC is covered by the main offence and no separate sentence was required to be passed. So far as offence relatable to Section 379 read with Section 120 B IPC is concerned, each of the accused persons was sentenced to suffer two years rigorous imprisonment and a fine of Rs.1000/- with default stipulation. Accused No. 4 i.e. present appellant alone was found guilty of offence punishable under Section 5 read with Section 27 of the Arms Act, 1950 ( in short the 'Arms Act') and was further sentenced to undergo 5 years rigorous imprisonment and to pay a fine of Rs.3,000/- with default stipulation. It was also recorded that offence under Section 3 read with Section 25(1-B) of the Arms Act is covered under Section 5 read with Section 27 of the said Act and therefore, no separate sentence was passed.

Challenge to the judgment before the High Court in the four appeals did not yield any relief.

The accusations filtering out unnecessary details which led to the trial of the four accused persons are essentially as follows:

> The incident in question took place on 1.5.1999 at about 8.15 p.m. Complainant Abhijit Dhone (PW-1) is an eye witness of the same and therefore, criminal law was set into motion by the complaint lodged by said Abhijit at Topkhana Police Station, Ahmed Nagar, on the same day at about 9 p.m. Complainant Abhijit was working with the victim Santoshkumar Kirjichand Bakliwal (hereinafter described as 'deceased') in his shop of gold and silver situated at Ganj Bazaar, Ahmednagar, since about 15 to 20 days prior to the incident. His working hours started around 9 a.m. He alongwith his master Santoshkumar used to come to the shop and used to have break in the afternoon. The shop used to be closed at about 8 p.m. and the two used to return home some times by rickshaw and some times on feet. It was the routine of Santoshkumar to bring home the daily earnings in a chocolate coloured cloth bag at the end of every day.

On 1.5.1999 at the end of the day at about 8 p.m. Santoshkumar collected the daily earnings in the chocolate coloured bag. The master and complainant closed the shop and started home on feet. At about 8.15 p.m. they were walking in front of hospital of Dr. Deshpande, which is near the residence of the master. A vehicle overtook them and halted by going little ahead. The pillion rider jumped from the vehicle, approached the complainant and his master and demanded the money bag. The master gripped the bag with more firmness. The offender again angrily demanded the bag in threatening language. The threat was followed by the offender drawing out a pistol, which was kept underneath his shirt and near his stomach. He aimed the pistol at the master. Even upon complainant trying to see the registration number of the vehicle, he was threatened by the offender and a bullet was fired at the master at his chest from a close distance. The assailant immediate jumped on the M-80 motorcycle and the motorcycle fled away in the direction of Kothla Bus stand.

Inspite of bullet injury to the chest, the deceased ran towards residence, but dashed against the window and fell down. His relative Sanju came out from the hosue and took him to the hospital of Dr. Deshpande. As Dr. Deshpande was not available in the hospital, he was shifted to civil hospital. At this juncture, complainant waited at the residence of the master.

In the complaint, complainant stated that he is not able to give the registration number of motorcycle, but the person who fired at his master was slim of about 5ft. height, who had combed his hair to his right side and had no grown beard or mustache. He was wearing white shirt and black pant and he was of mild black complexion. The driver of the M-80 motorcycle was also of mild black complexion and had worn chocolate coloured shirt and black pant. The complainant has specifically recoded that if these two persons are shown to him he would be in a position to identify them.

The complaint was investigated and charge-sheet filed in the Court of Judicial Magistrate, Ahmed Nagar, was registered as RTC No.242 of 1999 and on committal by order dated 21.8.1999, it was registered as Sessions Case No. 150/1999.

There is another story in relation to the vehicle used in the commission of above referred offence, which comes out through evidence of Sk. Lalan (PW-6). He is owner of Bajaj M 80 motorcycle registration No.MH-16/G-5308. According to Sk. Lalan that was stolen on 1.5.1999 some time between 10 A.M. to 5.30 p.m. from the location where it was parked. A complainant was registered by Sk. Lalan. According to said complaint, on 1.5.1999 at about 10 a.m., he came to his shop in Ganjbazar area on said Bajaj M-80 motorcycle and he parked it in front of residence of Vijay Verma. He removed the plug cap of the same. He worked in the shop upto 5.30 p.m. and thereafter came to the location where motorcade was parked for the purpose of going to residence. The vehicle was missing and enquiries to people in the vicinity yielded no results. Being convinced that vehicle was stolen, he reported the matter to Kotwali Police Station on 2.5.1999 at 2.45 hours, which was registered as Crime No. 118/1999 u/s 379 IPC.

Investigation of this complaint by Sk. Lalan culminated into filing of chargesheet in the Court of CJM, Ahmed Nagar, on 28.6.1999. The same was registered as RTC No. 194/1999. This case was also committed to the Court of Sessions on 7.2.2000, whereafter it was registered as Sessions Case No. 18/2000 and ultimately it was amalgamated with Sessions Case No. 150/1999. The two Sessions Cases were so tried after amalgamation only after amending the charge. This was because theft of the vehicle was taken as part and parcel of the conspiracy, since the vehicle is used ultimately for committing the main offence i.e. threatening the complainant to deliver the cash bag and shooting at him as he did do so.

The trial court mainly relied on the evidence of PWs.1 and 10 and PW 3. PW 10 Mangala Chintamani is the wife of accused No. 1 i.e. Balu Ranganath Chintamani. It is to be noted that the High Court directed acquittal of A 2 (Vitthal Ramayya Madur) and A 3 (Intakhab Alam Abdul Salam Sain) but dismissed the appeal so far as the accused Nos.1 and 4 are concerned. The present appeal has been filed by only A 4 (Amitsing Bhikamsingh Thakur).

Primary stand of learned counsel for the appellant is that the so called confession has no evidentiary value it was extracted under duress. The discovery was made from an open space and therefore the confession cannot be of any consequence. Also identification of the accused through a test identification parade has no legal value. As was observed by this Court in Matru v. State of U.P. (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain (1973 (2) SCC 406). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code of Criminal Procedure, 1973 (in short the 'Code') and the Indian Evidence Act, 1872 (in short the 'Evidence Act'). It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

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 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. 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 Administration (AIR 1958 SC 350), Vaikuntam Chandrappa and others v. State of Andhra Pradesh (AIR 1960 SC 1340), Budhsen and another v.

State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v. State of Jammu and Kashmir (AIR 1972 SC 102).

In Jadunath Singh and another v. The State of Uttar Pradesh (1970) 3 SCC 518), the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive considerations of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in Parkash Chand Sogani v. The State of Rajasthan (Criminal Appeal No. 92 of 1956 decided on January 15, 1957), wherein it was observed :-

> "It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person who is well- known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances."

The Court concluded:

> "It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra) (AIR Cri LJ), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case."

In Harbhajan Singh v. State of Jammu and Kashmir (1975) 4 SCC 480), though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in Court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16th December, 1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held:-

> "In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh v. State of U.P. (AIR 1971 SC 363) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant."

It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.

In Ram Nath Mahto v. State of Bihar (1996) 8 SCC 630) this Court upheld the conviction of the appellant even when the witness while deposing in Court did not identify the accused out of fear, though he had identified him in the test identification parade. This Court noticed the observations of the trial Judge who had recorded his remarks about the demeanor that the witness perhaps was afraid of the accused as he was trembling at the stare of Ram Nath - accused. This Court also relied upon the evidence of the Magistrate, PW-7 who had conducted the test identification parade in which the witness had identified the appellant. This Court found, that in the circumstances if the Courts below had convicted the appellant, there was no reason to interfere. In Suresh Chandra Bahri v. State of Bihar (1995 Supp (1) SCC 80), this Court held that it is well settled that substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. From this point of view it is a matter of great importance, both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. Thereafter this Court observed:-

> "But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TI parade."

In State of Uttar Pradesh v. Boota Singh and others (1979 (1) SCC 31), this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note

the features of the accused more carefully than on seeing the accused in a dark night for a few minutes. In Ramanbhai Naranbhai Patel and others v. State of Gujarat (2000 (1) SCC 358) after considering the earlier decisions this Court observed:-

> "It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of V.C. Shukla v. State (AIR 1980 SC 1382) wherein also Fazal Ali, J. speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye-witnesses. It, therefore, cannot be held, as tried to be submitted by learned Counsel for the appellants, that in the absence of a test identification parade, the evidence of an eye-witness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned Counsel for the appellants that the later decisions of this Court in the case of Rajesh Govind Jagesha v. State of Maharashtra (AIR 2000 SC 160) and State of H.P. v. Lekh Raj (AIR 1999 SC 3916), had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned Counsel for the appellants that the evidence of, these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eye-witnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well within imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them."

These aspects were highlighted in Malkhansingh and Others v. State of M.P. (2003 (5) SCC 746).

So far as the discovery under Section 27 of the Evidence Act is concerned it appears to be from open space. In that contest the observations of this Court in Anter Singh v. State of Rajasthan (2004 (10) SCC 657) need to be noted.

The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in Pulukuri Kotayya v. Emperor (AIR 1947 PC 67) in the following words, which have become locus classicus:

> It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the information to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which stabbed A.', these words are inadmissible since they do not related to the discovery of the knife in the house of the informant." (p.
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> 77) The aforesaid position was again highlighted in Prabhu v.

State of Uttar Pradesh (AIR 1963 SC 1113).

Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases in the background events proved therein is not always free from difficulty. It will, therefore, be worthwhile at the outset, to have a short and swift glance at Section 27 and be reminded of its requirements. The Section says :

> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Section 25 and 26. It is not necessary in this case to consider if this Section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information"

> as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban

against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. (See Mohammed Inayuttillah v. The State of Maharashtra (AIR 1976 SC 483). At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in Palukuri Kotayya's case (supra) and in Udai Bhan v. State of Uttar Pradesh (AIR 1962 SC 1116).

The various requirements of the Section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered. (3) The discovery must have been in consequence of some information received from the accused and not by accused's own act.

(4) The persons giving the information must be accused of any offence.

(5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

As observed in Palukuri Kotayya's case (supra) it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof and the other links must be forged in manner allowed by law. To similar effect was the view expressed in K. Chinnaswamy Reddy v. State of Andhra Pradesh and Another (1962 SC 1788) When the evidence of PW1 and the identifications made at the Test Identification Parade and discovery in terms of Section 27 are considered, conclusions of the trial court, so far as affirmed by the High Court, do not suffer from any infirmity. At this juncture it is to be noted that learned counsel for the appellant has submitted that PW 1 was related to the deceased and therefore his evidence should be rejected. The plea is clearly without substance. Relationship would not result in the mechanical rejection of the testimony of the witnesses. Settled norms of appreciation of evidence required that

the evidence of such witnesses is to be assessed with caution. In the instant case the trial court has analysed the evidence with care and caution and the High Court has also done so.

Above being the position the plea relating to alleged interestedness of the witnesses has also no substance. Looked at from any angle the appeal is sans merit, deserves dismissal which we direct.