Pramod Mandal vs State Of Bihar on 17 September, 2004

Equivalent citations: AIRONLINE 2004 SC 759

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Bench: P. Venkatarama Reddi, B.P. Singh

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           CASE NO.:
Appeal (crl.)  174 of 2003

PETITIONER:
Pramod Mandal

RESPONDENT:
State of  Bihar

DATE OF JUDGMENT: 17/09/2004

BENCH:
P. VENKATARAMA REDDI & B.P. SINGH

JUDGMENT:
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JUDGMENT B.P. SINGH, J.

In this appeal by special leave the sole appellant is Pramod Mandal who alongwith six others was put up for trial before the 6th Additional Sessions Judge, Bhagalpur in Sessions Case No. 739 of 1990 charged of the offence under Section 396 IPC. It is not necessary to refer to the charges framed against the remaining accused since they are not appellants before us. The trial court by its judgment and order of April 24, 1995 found the appellant guilty of the offence under section 396 IPC and sentenced him to undergo rigorous imprisonment for 10 years. The appellant preferred Criminal Appeal No.125 of 1995 before the High Court of Judicature at Patna which was dismissed by the High Court by its impugned judgment and order of April 5, 2002.

We may only observe that of the seven persons put up for trial before the learned 6th Additional Sessions Judge one Deepak Yadav was given the benefit of doubt and acquitted. One Parsuram Paswan was sentenced to life imprisonment both under sections 396 and 302 IPC, while Rajesh Kumar Yadav was sentenced to life imprisonment under section 396 IPC. The remaining accused were sentenced to 10 years rigorous imprisonment under section 396 IPC. The appeals preferred by the remaining accused have also been disposed of by the High Court by the impugned judgment.

The case of the prosecution is that the informant Dr. Balmiki Singh is a resident of Mohalla Sahebganj, Nathnagar. On January 13, 1989 at 2010 hours he lodged a first information report at P.S. Nathnagar in which he stated that on that date at about 7.30 p.m. while he was watching the television, other members of the family were in the house. His son Priyadarshi Ashok, PW-1 had

gone to the fields and had not returned. While he was watching the television he saw that three persons entered his house with concealed faces. Of them two were armed with pistols and they demanded the keys from him. He could identify accused Parsuram Paswan by his voice, stature and eyes. He then heard the cries of his daughter-in-law coming from another room and when he rushed to her room he found that two other persons were threatening her, of whom one was armed with country made pistol. His daughter-in-law handed over to them whatever ornaments she was wearing at that time. Two other persons then entered the room who picked up some articles. Those two persons had not concealed their faces. Some other dacoits also entered the room of his daughter-in-law and started making demands from her. A relative of his, namely Rajiv Kumar Mishra, PW-4, who was residing with him, told his daughter-in-law to handover the keys to the dacoits. Thereafter the dacoits asked Rajiv to open the almirah but he was unable to do so. One of the dacoits threatened to kill him if he did not open the almirah. Seeing this, the informant rushed and caught that hand of the dacoit in which he was holding the pistol and pushed him towards the verandah. Thereafter the informant's daughter, Rani Purnashri started raising alarm. Some of the dacoits were in the courtyard of the house and he recognized one of them as Rajesh Yadav who was armed with a pistol. Rajesh Yadav exhorted Parshuram to fire and thereafter Parshuram fired hitting his daughter Rani Purnashri. The dacoits also exploded bombs. The informant claimed to have recognized one of the miscreants as Deepak Yadav who assaulted him on his back with the barrel of his pistol as a result of which his grip over one of the dacoits, whom he had caught, loosened and that dacoit slipped away. Thereafter the dacoits fled away. His daughter Rani Purnashri succumbed to her injuries. By this time his son Priyadarshi Ashok, PW-1 had also come. He mentioned in his report that Aruni, Rajiv Kumar Mishra, PW-4 and Madan Sriharsha, PW-2 were also injured. In the report he also gave descriptions of other dacoits whom he had not recognized.

A motive was suggested in the report itself. The informant stated that he had a dispute with Rajesh Yadav and Deepak Yadav over the demolition of a ridge in his field. An incident took place in August, 1988 when he had been threatened by them.

PW.11 Indradeo Singh the investigating officer was examined by the prosecution. Dr. Kailash Jha, PW-6 was the doctor who had conducted the post-mortem examination on the body of the deceased. PWs-8, 9 and 10 were the three Magistrates who conducted Test Identification Parades on different dates. Apart from these witnesses, several eye witnesses were examined, namely PW-1, Priyadarshi Ashok, son of the informant, PW-2, Madan Sriharsha, another son of the informant, PW-3 Vijayshree, daughter of the informant and PW-4 Rajiv Kumar Mishra, relative of the informant. PW-5, Dr. Balmiki Singh is the informant himself. All the witnesses have supported the case of the prosecution and there is nothing in the evidence to discredit them. The trial court as well as the High Court have carefully scrutinized the evidence of these witnesses and have concluded that the prosecution had proved that a dacoity took place in the house of the informant at about 7.30 p.m. on January 13, 1989 and in the course of the commission of the dacoity the daughter of the informant was shot dead by one of the dacoits.

Learned counsel for the appellant did not even attempt to persuade us to hold that the prosecution case was false and such an occurrence had not taken place at all. He rightly drew our attention to the

evidence on record in support of the defence that on the date of occurrence there was no electricity supply in that area between 6.55 p.m. and 7.55 p.m. and, therefore, identification of the appellant in electric light was not possible, and that there was no light from any other source which could have made his identification possible. It was further submitted that the conviction of the appellant is based on the sole identification by PW-4 Rajiv Kumar Mishra. It is not safe to convict the appellant on the basis of his identification.

We shall first consider the evidence adduced by the defence to establish that on the date of occurrence between 6.55 p.m. and 7.55 p.m. there was no supply of electrical energy to Mohalla Sahebganj in Nathnagar. To prove this fact DW-1 Naval Kishore Yadav was examined. He was a correspondence clerk in the Area Electricity Board, Nathnagar, Bhagalpur. He produced a register and claimed that supply of electricity to different areas was noted in the said register by the Switch Board Operator, Arun Kumar Sah. From the register it appeared that from 6.55 p.m. to 7.55 p.m. on the date of occurrence there was no supply of electricity to the area in question. The entry referred to by him was in the handwriting of Mr. Arun Kumar Sah. He further stated that the entry had been certified by the Assistant Engineer Shri B.K. Srivastava. This witness admitted in cross-examination that the entry sheets were not bound. He also admitted that the register did not show in which areas electricity was being supplied.

The High Court has attached no weight to the evidence of this witness. He was neither the author of the entry in the register nor was he the certifying officer. The Switch Board Operator who is stated to have made the entry and the Assistant Engineer who is stated to have certified that entry were not examined. There was overwhelming evidence of witnesses to the effect that there was supply of electricity at the time when the occurrence took place. Indeed PW-5 stated that he was watching the television when the dacoits entered his house. The High Court, therefore, rejected the evidence of DW-1 and held on the basis of the evidence on record that there was supply of electricity at the time when dacoity was committed in the house of PW-5 and the witnesses, therefore, had sufficient light and opportunity to identify the dacoits.

The next question is whether the evidence of PW-4 Rajiv Kumar Mishra must be accepted. The courts below have concurrently found Rajiv Kumar Mishra, PW-4 to be a reliable and trustworthy witness. It has been noticed that Rajiv Kumar Mishra had suffered as many as 5 injuries in the course of the occurrence, three of them being incised injuries and the remaining two were abrasions. This has been proved by Dr. Mirtunjay Kumar, PW-7 who examined PW-4. It will thus appear that PW-4 was in the forefront trying to defend the members of the family from the onslaught of the dacoits. It is in that process that he was severely injured by the dacoits. Obviously he had sufficient opportunity to notice the features of the dacoits from close quarters. He has been mentioned in the first information report as the person who had advised the informant's daughter-in-law to handover the keys to the dacoits. It is also stated that thereafter the dacoits wanted him to open the almirah and when he was not able to open the almirah, he was threatened with death by the dacoits. We are, therefore, quite clear in our mind that Rajiv Kumar Mishra, PW-4, being a young man tried his level best to resist the dacoits to the extent possible in the circumstances and in that process he was severely assaulted.

So far as the appellant is concerned, PW-4 had a special reason to remember his features. He deposed that he identified the dacoits in the light of electric bulb. He further deposed that Tuntun Choudhary had assaulted him on his left leg. Similarly the appellant Pramod Mandal had tried to assault him with an iron rod. It also appears from the record that this witness had stated these facts before the Judicial Magistrate who conducted the Test Identification Parade and this fact had been noted by the Magistrate in the Identification Chart. It cannot, therefore, be said that the role assigned to the appellant by PW-4 was an after thought.

It was then submitted that the appellant was arrested on January 17, 1989 and he was put up for Test Identification Parade on February 18, 1989. Thus there was a delay of one month in holding the Test Identification Parade and, therefore, the identification by witnesses in such an identification parade belatedly held was not reliable, particularly when there was only one identifying witness against the appellant.

Shri B.B. Singh, learned counsel for the State submitted that the evidence in this case discloses that the witnesses had ample opportunity to see the accused in electric light since the place of occurrence was the house of PW-5. They had abundant opportunity to notice their features from close quarters and, therefore, it could not be said that only a month after the occurrence their memory faded to such an extent that they could not have identified the culprits on account of lapse of time. Secondly it is submitted that in this case, having regard to the evidence on record, the quality of evidence of PW- 4 is such that even if the Test Identification Parade was not held, his identification in court could be acted upon. Lastly he submitted that there is no complaint by the appellant that he was either shown to the witness before the holding of the Test Identification Parade or that there was any irregularity in the holding of the Test Identification Parade. He further emphasized the fact that having regard to the nature of occurrence, it was not as if the witnesses had only a fleeting glimpse of the accused. The evidence on record proves that the occurrence continued for about 25 minutes and, therefore, the witnesses had ample opportunity to notice the physical features of the dacoits which must have got imprinted in their memories. So far as PW-4 is concerned, he submitted that this witness had deposed in court, and had also earlier stated before the Magistrate conducting the Test Identification Parade, that the appellant Pramod Mandal had attempted to assault him with an iron rod. This statement was not even challenged in his cross-examination.

The parties have relied upon the decisions of this Court which we shall consider hereafter.

Learned counsel for the appellant placed considerable reliance on the decisions of this Court in 1981 (Supp.) SCC 28 :

> Wakil Singh and others vs. State of Bihar. In that case the trial court had acquitted the appellants but the High Court on appeal reversed the order of acquittal and convicted them. The judgment of the High Court was impugned before this Court. Wakil Singh, the first appellant in the appeal, had been convicted by the High Court on the basis of the testimony of PW-9 who was the sole identifying witness. This Court noticed that the Test Identification Parade was held about 3 = months after the dacoity and observed that in view of such a long lapse of time it is not possible for a

human being to remember the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict the accused for such a serious offence on the testimony of a single witness. This Court also noticed the fact that though PW-9, the identifying witness was present on September 4, 1965 when a Test Identification Parade was held, he was not asked to identify the appellant, but the witness identified the accused four days later. This circumstance also threw some doubt on the complicity of the appellant. Moreover it was observed that since the High Court was reversing an order of acquittal it failed to consider the fact that there being only one witness who identified the accused concerned, the view taken by the trial court could not be said to be not a reasonable possible view. This Court, therefore, upheld the order of acquittal.

It will thus be observed that this Court in the aforesaid judgment has not laid down an invariable rule that if Test Identification Parade is held after 3 = months or if there is only one identifying witness, "it would be unsafe to convict the accused" because the court prefaced this observation by the words "In these circumstances unless the evidence is absolutely clear". It is well settled that it is open to a court of fact to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. If the court comes to the conclusion that the evidence does not prove conclusively the guilt of the accused the court may order his acquittal. Such an order of acquittal cannot be set aside by a court sitting in appeal unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record. In Wakil Singh's case this Court found that the view of the trial court could not be said to be not a reasonable possible view and, therefore, interference by the High Court was not justified. It also noticed the fact that the identifying witness though present was not asked to identify on the first day, but was asked to do so on the fourth day. Moreover, the Test Identification Parade was held after 3-1/2 months. These features which existed in the case of Wakil Singh (supra) are absent in the instant case and, therefore, the said decision is clearly distinguishable.

Learned counsel for the appellant also relied upon the decision of this Court in (1987) 3 SCC 331 : Subhash and Shiv Shankar vs. State of Uttar Pradesh, wherein this Court held that a long interval of nearly 4 months before the Test Identification Parade was held, made it doubtful whether inspite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the Test Identification Parade. In the instant case the Test Identification Parade was held only a month after the occurrence and not after four months as in the case of Subhash and Shiv Shankar (supra). The delay in the instant case is not such as would cast a doubt on the ability of the witnesses to identify the accused.

Learned counsel for the appellant also relied upon the decision of this Court in (1982) 3 SCC 368 : Soni vs. State of Uttar Pradesh. The said judgment is a brief judgment

> where on the facts of the case the court doubted the identification by the witnesses in view of the delay in holding of the Test Identification Parade. However, this judgment does not lay down any principle of law which may be applied to the facts of the present case. It is a decision on the facts of the case and cannot be treated as a binding precedent. In fact the said judgment was noticed by this Court in (2003) 3 SCC 569 : Anil Kumar vs. State of Uttar Pradesh and this Court after extracting the relevant part of the judgment observed :-
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> "It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal."

Learned counsel for the State submitted that in the instant case there was no inordinate delay in holding the Test Identification Parade so as to create a doubt on the genuineness of the Test Identification Parade. In any event he submitted that even if it is assumed that there was some delay in holding the Test Identification Parade, it was the duty of the accused to question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the Test Identification Parade. Reliance was placed on the judgment of this Court in (1973) 3 SCC 896 : Bharat Singh vs. State of Uttar Pradesh. In the aforesaid judgment this Court observed thus :-

> "In Hasib v. State of Bihar AIR 1972 SC 283; it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimize the chances of the memory of the identifying witnesses fading away due to long lapse of time.
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> Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the Police Officer who conducted the investigation should have been cross- examined in that behalf".

In the instant case we find that the defence has not imputed any motive to the prosecution for the delay in holding the Test Identification Parade, nor has the defence alleged that there was any irregularity in the holding of the Test Identification Parade. The evidence of the Magistrates conducting the Test Identification Parade as well as the Investigating Officer have gone unchallenged. Learned counsel for the State is, therefore, justified in contending that in the facts

and circumstances of this case the holding of the Test Identification Parade, about one month after the occurrence, is not fatal to the case of the prosecution as there is nothing to suggest that there was any motive for the prosecution to delay the holding of the Test Identification Parade or that any irregularity was committed in holding the Test Identification Parade.

Learned counsel for the State has also relied upon the decision of this Court in (2003) 3 SCC 569 : Anil Kumar vs. State of Uttar Pradesh wherein the Test Identification Parade was held 47 days after the arrest of the appellants. This Court after considering several decisions of this Court including the decisions in (1994) 1 SCC 413 : Brij Mohan vs. State of Rajasthan ; (2001) 3 SCC 468 : Daya Singh vs. State of Haryana and (2000) 1 SCC 471 : State of Maharashtra vs. Suresh concluded that since the identifying witness was attacked by the assailants including the appellant and another, he had a clear look at the assailants. When his younger brother came to save him he was killed by the assailants while the witness also received serious injuries. These were circumstances which would impress upon the mind of the witness the facial expressions of the assailants and this impression would not diminish or disappear within a period of 47 days. Similar was the case of the father and the mother of the identifying witness who had seen the assailants attacking their sons and one of their sons getting killed. In their memory also the facial expressions of the assailants will get embossed. A mere lapse of 47 days would not erase the facial expressions from their memory.

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.

Lastly in (2003) 5 SCC 746 : Malkhansingh and others vs. State of Madhya Pradesh a three Judge Bench of this Court of which one of us (B.P. Singh, J.) was a Member, after considering various decisions of this Court observed thus :-

> "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".

Learned counsel for the State submitted that having regard to the principles laid down in the aforesaid decisions it was open to him to contend that even in the absence of the Test Identification Parade the conviction of the appellant would be fully justified on the basis of the evidence of PW-4 alone who identified him in court. In this case, however, his identification in court is corroborated by his identification in the Test Identification Parade.

We find considerable force in the submission advanced by the learned counsel for the State. This is not a case where the testimony of PW-4 in court is not corroborated by an earlier identification in test identification proceeding. Since we have found no irregularity or unfairness in the holding of the Test Identification Parade, it must be held that the evidence of PW-4 is amply corroborated by the result of the test identification proceeding. Moreover we have found that the occurrence did take place in the house of PW-5. PW-4, is an eye witness, being a relative of PW-5, residing with him. There was sufficient light to enable the witnesses to identify the dacoits. The presence of PW-4 cannot be disputed because he bore the brunt of the attack by the dacoits having suffered three incised wounds and two other injuries. No reason has been suggested why this witness should have falsely implicated the appellant. The dacoity took place for about 25 minutes and PW-4, being in the forefront of the defence, had ample opportunity to notice the appearance and physical features of the culprits. So far as the appellant is concerned, PW-4 categorically stated that he had attempted to hit him with an iron rod. This fact he also stated before the Magistrate who conducted the Test Identification proceeding. We, therefore, find no reason to suspect the truthfulness and credibility of this witness. He appears to be a witness on whom the court can place implicit reliance. The courts below have found his evidence to be reliable after critical scrutiny of his testimony. The traumatic experience of that fateful day in which a young girl lost her life within his view, must have left the faces of the assailants imprinted in his memory which certainly would not have diminished or got erased within a period of only 30 days. There is, therefore, no reason to doubt either the genuineness of the Test Identification proceeding or the veracity of the witness.

We, therefore, find no merit in this appeal and the same is accordingly dismissed.