Ranvir Singh . vs The State Of Madhya Pradesh on 12 January, 2023

Author: M. M. Sundresh

Bench: M. M. Sundresh, B. R. Gavai

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REPORTABL

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1384-1385 OF 2009

Ranvir Singh etc. etc. ... Appella

Versus

The State of Madhya Pradesh ... Respond

WITH CRIMINAL APPEAL NO. 700 OF 2011

JUDGMENT

M. M. Sundresh, J.

1. The application for condonation of delay in filing the application for restoration as well as the application for restoration are allowed in Criminal Appeal No.700 of 2011.

2. Conviction and sentence rendered by the High Court of Madhya Pradesh, Bench at Gwalior, confirming the life imprisonment rendered by the 2nd Additional Sessions Judge, Shivpuri, while modifying a similar sentencing to that of seven years, is under challenge before us.

THE CASE AS UNFOLDED THROUGH THE PROSECUTION'S EYES IS:

3. The appellants, along with his group of men, and the deceased, were having prior enmity. It arose pursuant to a water dispute, as the appellants and the villagers allegedly did not appreciate entry into their village facilitated by the purchase of properties by the deceased. The occurrence took place on 25.07.1992 at about 10.00 a.m. The first information was recorded by P.W.20, the Police Officer,

who also conducted the investigation, from one of the deceased, Hukum Singh, who subsequently died on 28.07.1992.

4. Under Ex. P-28, Dehati Nalishi, which was recorded as the first information report, the deceased Hukum Singh allegedly made a statement about the prior incident. The Dehati Nalishi further proceeded to state that when he along with the other deceased Kishori Kachi and the eye witness P.W.12, Hakim Singh, went out to attend the nature's call, the accused persons armed with weapons, including truncheon and axe, attacked them indiscriminately. In pursuance of the said common objective, all three of them were taken by the attackers to their place, as witnessed by their family members and relatives. This was done despite the request made by one Bhogiram and Bhaggo Bai, P.W.18. They were also attacked, but Bhogiram was dumped on the way. The family members of the deceased Hukum Singh, inclusive of his daughters-in-law, daughters, Bacchu (P.W.13) and Sirnam Kachi were not present at the place of occurrence, during the time of the offence. Complaint could not be lodged as the deceased Hukum Singh was not allowed to leave, while Kishori died.

5. The statement made by the deceased Hukum Singh was recorded by P.W.20 at the place of occurrence. He died subsequently on 28.07.1992, after three days in the hospital. It is to be noted that no attempt was made to record the statement either before the Jurisdictional Magistrate or in the presence of a doctor. On a perusal of the records, we find that the thumb impression of the deceased was affixed in the middle of Dehati Nalishi, and words have been written over it, thus giving an impression that it was an after-thought.

6. The appellants namely, Sardar Singh and Dhola Ram, were convicted along with the other accused for the offences punishable under Sections 148, 302/149 and 324/149 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), by the Trial Court for committing the murder of two persons. However, the High Court, while confirming the life imprisonment for the death of the deceased Kishori Kachi, modified the same qua the deceased Hukum Singh, to one punishable under Section 304 Part II IPC. Three of the accused convicted by the Trial Court died during the pendency of the present proceedings, while five of them had completed their sentence, and were therefore released. The appellants have undergone incarceration for a period of nine years.

7. Before the Trial Court, the prosecution examined 21 witnesses, out of which 6 of them were eye witnesses. One eye witness, Bhogiram, died during the pendency of the proceedings, and hence not examined as a witness.

8. We now proceed to discuss the depositions of the prosecution witnesses.

P.W.1:

9. This witness is the wife of the deceased Hukum Singh. She identified the accused persons only in the Court. Admittedly, no test identification parade was done. Her deposition was recorded three years after the incident. Though, she asserted that she was an eye witness, it was obviously contrary to the Dehati Nalishi of the deceased Hukum Singh. In her deposition, she has also stated that there were others who egged on the accused persons to continue with the assault. It was her evidence that

the accused carried both the deceased and Bhogiram to their place. A further deposition has been given that she was not told about the names of the accused, and therefore she did not know any of them by name. It is her further evidence that the accused persons present in the Court cannot be named. She admits that there are number of contradictions between the statement made by her under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") and her deposition. One of her statements is to the effect that the village watchman was present, but he was also prevented from reporting the incident to the police. Both the deceased and Bhogiram were in a state of unconsciousness. At the time of the assault, about 60 to 70 persons belonging to the group of the accused were present.

10. P.W.1 has made a categorical statement that P.W.13, Bacchu, along with others went during the nighttime to report the incident to the police personnel. He brought them back to the place of occurrence. Of course, she retracted the statement to the effect that it is not correct to state that all the five victims were in a state of unconsciousness, and they gave their statements, except Kishori. P.W.4:

11. Even this witness has identified the accused by their faces only in the Court as she did not know their names. She could not even identify one of the accused whom she was asked to identify. Like P.W.1, her presence was also not recorded by the deceased, Hukum Singh. Claiming to be an eye witness, she narrated the incident. She also improved the prosecution version by placing certain facts which were not available. However, she has stated that the deceased was found lying at the door of the accused when the police party came. A statement has been made to the effect that both the deceased and the injured were lying unconscious. She has clearly stated that the police party arrived between 6.00 to 7.00 a.m. on 26.07.1992. The above deposition of P.W.4 is intrinsically contrary to the very case projected by the prosecution starting from the alleged dying declaration of the deceased, Hukum Singh.

P.W.12:

12. This witness is the eye witness even as per the Dehati Nalishi. He is also an injured witness. Strangely, he has not lodged any report of the incident, though his statement is stated to be recorded as per the prosecution version. He has stated on more than one occasion that his statement was not recorded by the police, and that he has come to depose in the court for the first time. He had also not narrated the incident to anybody from the date of the incident till his deposition. This witness again makes a clear statement that on the date of incident there were about 50 to 100 persons on the side of the accused. All of them were involved in the incident of assault. He could not clearly identify any of them, while attributing a specific overt act amongst the aforesaid persons. The entire crowd attacked the deceased. He did not tell the police that the named accused, tried to assault him. It is interesting to note that this witness did not speak about the presence of the other witnesses. Furthermore, reportedly he had seen the occurrence from a distance of one furlong, which is about 200 meters.

13. From the aforesaid narration, one cannot rely on the evidence recorded from P.W.12, as is the case of the other two witnesses discussed. It is also apparent that even this witness speaks about the

presence of scores of others, gathered to assault the deceased.

P.W.13:

14. This witness also claims to be an eye witness to the occurrence. According to him, he hid himself when the occurrence happened. Thereafter, he went to the police station, met the Superintendent of Police, and lodged a complaint. He is also a witness to the site plan, Ex. P-16 and the arrest memo, Ex. P-19. Even during his chief-examination, he deposed that he returned with the police personnel to the place of occurrence around 3.00 to 4.00 p.m., which is again a contra-statement to the case of the prosecution. In his cross-examination, he admits that what he deposed in its entirety was not found in his statement under Section 161 CrPC recorded as Ex. D-

4. He met the Station Officer as directed by the Superintendent of Police. It is his specific case that the statement was recorded at the police station.

15. This witness found both the deceased and the injured witness in an unconscious state when the police party reached the place of occurrence. The statements of the injured witness, and the deceased were recorded in the hospital at 5.00 p.m.

16. Needless to state that the evidence of this witness strikes at the very foundation of the prosecution's version. With his evidence there are three first information reports. P.W.18:

17. P.W.18 is the wife of one of the deceased, Kishori. Like others, she also claims to be an eye witness. After the occurrence, she went to the police station and lodged the first information report by affixing her thumb impression. She was accompanied by three persons, including her brother-in-law. She also did not know the accused by name.

18. Once again, the aforesaid statement reiterated the factum of multiple first information reports given at different times leading to the conclusion that it would not be appropriate to place reliance on the official one. P.W.20:

19. The investigating officer is arrayed as P.W.20. His role assumes significance as it is he who recorded the Dehati Nalishi from the deceased, and converted it into a first information report. He puts up a totally different version. In the chief-examination, he says that he received a phone call from an unknown person. He has also recorded the statement of the deceased Hukum Singh in the hospital, but no one knows about its fate. Though he had stated that he also recorded the statement of P.W.12 (Hakim Singh), it was not done, as rightly deposed by the said person who was made to depose for the first time only before the Court. Contrary to the first information report, he has stated that the members of the victim's family were also present. Though, he has allegedly recorded the statement of Hukum Singh, P.W.12 (Hakim Singh), Bhogiram and P.W.18 (Bhaggo Bai), he did not mention the date and time, except with respect to the statement of the deceased Hukum Singh, which appears to be rather strange, giving credence to the contention that either they have been recorded at a different point of time or that there was no statement from Hukum Singh. He once again contradicted himself by stating that he did not record the statement of Hukum Singh on the

spot, while acknowledging that the statements of P.W.12 (Hakim Singh) and Bhogiram were not taken by him. A further statement has been given that he was given a verbal order.

20. As an Investigating Officer, this witness was expected to tell the truth. Though a report of the investigating officer would constitute an opinion, the very case of the prosecution that it is he who recorded the statement of the deceased taken in the form of the first information report creates a very serious doubt. It is apparent that his evidence is not only contradictory, but also destructive.

21. Having discussed the evidence available on record, we shall now consider the approach of the Trial Court and the High Court.

DECISIONS OF THE COURTS:

22. Both the Courts below have relied upon the prosecution witnesses heavily. The depositions of the eye witnesses found favour with the Courts. Much reliance was also placed on the statement by the deceased in the Dehati Nalishi. The contradictions pointed out were not taken due note of. The statements of the witnesses were corroborated with each other with respect to the occurrence. Having found that there were two homicidal deaths, a final conclusion was arrived at by holding the appellants guilty.

SUBMISSIONS OF THE APPELLANTS:

23. The learned counsel appearing for the appellants, placing reliance on the written arguments given, submitted that there are three different first information reports as per the prosecution version. The discrepancies in the statement of the prosecution witnesses are either self-contradictory or against each other.

24. No witness has spoken about recording of Dehati Nalishi, as deposed by P.W.20. The condition of the deceased Hukum Singh was unconscious. The language used in Ex. P-28 indicates that of a legally trained mind. The thumb impression of the deceased Hukum Singh was not proved, and its placement creates a serious doubt. P.W.20 contradicts himself on various counts. He did not disclose the name of the person who furnished the information. The earlier version of this report was suppressed on purpose.

25. There is absolutely no explanation for not examining P.W.12, who even under Ex. P-28 was shown as an eye witness. There were about more than 50 to 100 persons present and involved. The charge under Section 149 IPC is not made out as there was no explanation for not including the scores of other persons.

26. To substantiate the aforesaid contentions, the Learned Counsel has placed reliance on the following decisions of this Court:

Charan Singh and Others v. State of U.P., (2004) 4 SCC 205;

Najabhai Desurbhai Wagh v. Valerabhai Deganbhai Vagh and Others, (2017) 3 SCC 261;

Balmukund Sharma v. State of Bihar, (2019) 5 SCC 469;

Vyas Ram v. State of Bihar, (2013) 12 SCC 349;

Akbar Sheikh and Others v. State of West Bengal, (2009) 7 SCC 415; Nagarjit Ahir v. State of Bihar, (2005) 10 SCC 369;

Sherey and Others v. State of U.P., 1991 SCC (Cri) 1059 : (1991) Supp (2) SCC 437;

Musa Khan v. State of Maharashtra, (1977) 1 SCC 733;

Munna Chanda v. State of Assam (2006) 3 SCC 752 (paragraph 12); Debashish Daw and Others v. State of West Bengal, (2010) 9 SCC 111 (paragraph 25);

Manoj Kumar Sharma and Others v. State of Chhattisgarh and Another, (2016) 9 SCC 1 (paragraph 30);

Jai Prakash Singh v. State of Bihar and Another, (2012) 4 SCC 379 (paragraph

12);

Rajeevan & Anr. v. State of Kerala, (2003) 3 SCC 355 (paragraph 12, 13); Thulia Kali v. The State of Tamil Nadu, (1972) 3 SCC 393 (paragraph 12); Mukhtiar Ahmed Ansari v. State (NCT of Delhi), (2005) 5 SCC 258; Raja Ram v. State of Rajasthan, 2005 SCC (Cri) 1050 : (2005) 5 SCC 272
SUBMISSIONS OF THE RESPONDENT:

27. The Learned counsel appearing for the State while acknowledging the fact that there were reportedly three first information reports, submitted that two injured witnesses have spoken about the occurrence, of whom one was the author of the first information report. The contradictions are minor in nature, and therefore, to be eschewed.

28. The deceased Hukum Singh has made a statement before P.W.20, which has to be treated as a dying declaration. Both the Courts below concurrently found that the appellants committed the offence, and therefore, the evidence need not be re- appreciated by this Court.

DISCUSSION:

Investigating Officer's Role:

29. We have already dealt with the statement given by the prosecution witnesses. To sum it up, we find the witnesses speak about three first information reports. Even on the recording of the

statement of the deceased Hukum Singh, P.W.20, the Investigating Officer was not very clear. The discrepancy also extends to the place where the body was found when the statement was recorded. An investigating officer is expected to act in an un-biased, fair and in a manner that is required of a public servant. His concern is to find out the truth. The suppression of the statement given by the other witnesses would obviously go to the root of the matter. One does not know the clear picture, and therefore the benefit shall be extended to the appellants. We wish to place reliance on the decision of this Court in State of Madhya Pradesh v. Ratan Singh and Others, (2020) 12 SCC 630:

> "8. As emphasised by this Court in Amitbhai Anil Chandra Shah v. CBI, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309, only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154, and consequently there cannot be a second FIR.

Rather it is absurd or ridiculous to call such information as second FIR. In Subramaniam v. State of T.N., (2009) 14 SCC 415 : (2010) 1 SCC (Cri) 1392, this Court observed that if an FIR is filed after recording the statement of the witnesses, such second information would be inadmissible in evidence. Moreover, in Nallabothu Ramulu v. State of A.P., (2014) 12 SCC 261 : (2014) 6 SCC (cri) 673, the Court was of the view that the non- treatment of statements of injured witnesses as the first information cast doubt on the prosecution version.

9. Thus, not only was there a delay in filing of the FIR (which remained unexplained) which was taken as the basis of the investigation in this case, but also there was a wilful suppression of the actual first information received by the police. These factors together cast grave doubts on the credibility of the prosecution version, and lead us to the conclusion that there has been an attempt to build up a different case for the prosecution and bring in as many persons as accused as possible.

10. Additionally, the so-called eye witnesses to the incident have described different places as the scene of offence. None of the eye witnesses are consistent so far as the scene of offence is concerned. This means that each of the eye witness must have allegedly seen the incident at different places and happening in a different manner. The suppression of the actual FIR, coupled with the conflicting versions of the so-called eye witnesses relating to different scenes of offence and different stories collectively would reveal that the prosecution wanted to suppress and has suppressed the real incident and culpability of real culprits. The origin and genesis of the prosecution is clearly suppressed in the case."

30. In Arvind Kumar @Nemichand v. State of Rajasthan 2021 SCC OnLine SC 1099 : 2021(14) SCALE 6, "Fair, Defective, Colourable Investigation

40. An Investigating Officer being a public servant is expected to conduct the investigation fairly. While doing so, he is expected to look for materials available for coming to a correct conclusion. He is concerned with the offense as against an offender. It is the offense that he investigates. Whenever a homicide happens, an investigating officer is expected to cover all the aspects and, in the process, shall always keep in mind as to whether the offence would come under Section 299 IPC sans Section 300 IPC. In other words, it is his primary duty to satisfy that a case would fall under culpable

homicide not amounting to murder and then a murder. When there are adequate materials available, he shall not be overzealous in preparing a case for an offense punishable under Section 302 IPC. We believe that a pliable change is required in the mind of the Investigating Officer. After all, such an officer is an officer of the court also and his duty is to find out the truth and help the court in coming to the correct conclusion. He does not know sides, either of the victim or the accused but shall only be guided by law and be an epitome of fairness in his investigation.

41. There is a subtle difference between a defective investigation, and one brought forth by a calculated and deliberate action or inaction. A defective investigation per se would not enure to the benefit of the accused, unless it goes into the root of the very case of the prosecution being fundamental in nature. While dealing with a defective investigation, a court of law is expected to sift the evidence available and find out the truth on the principle that every case involves a journey towards truth. There shall not be any pedantic approach either by the prosecution or by the court as a case involves an element of law rather than morality.

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44. We would only reiterate the aforesaid principle qua a fair investigation through the following judgment of Kumar v. State, (2018) 7 SCC 536:

> "27. The action of investigating authority in pursuing the case in the manner in which they have done must be rebuked. The High Court on this aspect, correctly notices that the police authorities have botched up the arrest for reasons best known to them. Although we are aware of the ratio laid down in Parbhu v. King Emperor [Parbhu v. King Emperor, AIR 1944 PC 73], wherein the Court had ruled that irregularity and illegality of arrest would not affect the culpability of the offence if the same is proved by cogent evidence, yet in this case at hand, such irregularity should be shown deference as the investigating authorities are responsible for suppression of facts.
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> 28. The criminal justice must be above reproach. It is irrelevant whether the falsity lie in the statement of witnesses or the guilt of the accused. The investigative authority has a responsibility to investigate in a fair manner and elicit truth. At the cost of repetition, I must remind the authorities concerned to take up the investigation in a neutral manner, without having regard to the ultimate result. In this case at hand, we cannot close our eyes to what has happened;

regardless of guilt or the asserted persuasiveness of the evidence, the aspect wherein the police has actively connived to suppress the facts, cannot be ignored or overlooked."

45. A fair investigation would become a colourable one when there involves a suppression. Suppressing the motive, injuries and other existing factors which will have the effect of modifying or altering the charge would amount to a perfunctory investigation and, therefore, become a false narrative. If the courts find that the foundation of the prosecution case is false and would not conform to the doctrine of fairness as against a conscious suppression, then the very case of the

prosecution falls to the ground unless there are unimpeachable evidence to come to a conclusion for awarding a punishment on a different charge." xxx xxx xxx Falsus In Uno-Falsus in Omnibus

48. The principle that when a witness deposes falsehood, the evidence in its entirety has to be eschewed may not have strict application to the criminal jurisprudence in our country. The principle governing sifting the chaff from the grain has to be applied. However, when the evidence is inseparable and such an attempt would either be impossible or would make the evidence unacceptable, the natural consequence would be one of avoidance. The said principle has not assumed the status of law but continues only as a rule of caution. One has to see the nature of discrepancy in a given case. When the discrepancies are very material shaking the very credibility of the witness leading to a conclusion in the mind of the court that it is neither possible to separate it nor to rely upon, it is for the said court to either accept or reject.

49. The said principle of law has been dealt with by this court in Anand Ramachandra Chougule v. Sidarai Laxman Chougala, (2019) 8 SCC 50, which states thus:

> "9. We have considered the respective submissions and perused the materials on record. The relationship between parties and the existence of a land dispute regarding which a civil suit was also pending are undisputed facts. The fact that a verbal duel followed by scuffle took place between the parties culminating in injuries is a concurrent finding of fact by two courts. The fact that the accused also lodged an FIR with regard to the same occurrence stands established by the evidence of PWs 19 and 22, the investigating officers, who have admitted that the respondent-accused had also lodged BRPS Cr. No. 79/02 — marked Ext. D-10, which was not investigated by them. Similarly, PW 11, the police constable, deposed that two of the accused were admitted in the District Hospital, Belgaum and that he was posted on watch duty. The occurrence is of 7-6-2002 and respondent-Accused 1 and 2 were discharged on 11-6-2002. Their injury report has not been brought on record by the prosecution and no explanation has been furnished in that regard.
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> 10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.""
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> 31. P.W.20 is the one who recorded the statement. On the discussion made, it is highly doubtful as to whether the deceased would be conscious enough to give the statement, particularly in light of the injuries suffered by him. There are not only incise wounds, but there must have also been continuous bleeding, which would have naturally occurred, as the case was registered a day after the occurrence. The

statement of witnesses contradicts each other on this aspect. Furthermore, as rightly submitted by the counsel for the appellants, on a perusal of the records, we do find that there were writings over the thumb impression made under Ex. P-28. It is rather strange as a thumb impression would normally follow the statement; it has to find place at the conclusion of the statement. We find, on our scrutiny, that even after the thumb impression over which there were obviously writings found, there were some more sentences written. This obviously lends credence to the view that thumb impression must have been obtained on a blank paper and in a hurry, the contents were filled up subsequently.

32. From the above analysis, we are not inclined to treat the so-called statement as the one actually given by the deceased to P.W.20. In any case, it cannot be taken as a dying declaration, particularly in the light of the evidence adduced by the other prosecution witnesses. We do find force in the submission made by the counsel for appellants that Ex. P-28 does appear to be created by a legally trained mind. The deceased Hukum Singh merely knows how to put a signature, leave alone the fact that he put his thumb impression, which could have been possible because of the injuries suffered by him. A reading of the statement would clearly show that a legal mind was at work, as the deceased may not know the difference between a common object and common intention. The statement also excludes others specifically for reasons which we do not know. The excluded persons were shown as witnesses by the same investigating officer.

Dying Declaration:

33. There is absolutely no explanation given by P.W.20 as to why he has not utilized the services of either a Magistrate or a doctor, even after his first recording. We have already discussed the fact that he deposed that the statement was recorded once again which, however, was not a part of the record. If the deceased Hukum Singh was so badly injured, and therefore died within few days of his admission into the hospital, nothing prevented P.W.20 to record the statement in the presence of a Judicial Magistrate and duly certified by the doctor. The irresistible conclusion which we have arrived at already, is that the deceased was not in a state of consciousness fit enough to make a statement, and that is the reason why the thumb impression was obtained subsequently, and thereafter a statement was created. On the issue of recording of dying declarations by the investigating officer, we would like to reiterate the decision of this Court in Munnu Raja and Another v. The State of Madhya Pradesh (1976) 3 SCC 104:

“11. We might, however, mention before we close that the High Court ought not to have placed any reliance on the third dying declaration, Ex. P-2, which is said to have been made by the deceased in the hospital. The investigating officer who recorded that the statement had undoubtedly taken the precaution of keeping a doctor present and it appears that some of the friends and relations of the deceased were also

present at the time when the statement was recorded. But, if the investigation officer thought that Bahadur Singh was in a precarious condition, he ought to have requisitioned the services of a magistrate for recording the dying declaration. Investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We have therefore excluded from our consideration the dying declaration, Ex. P-2, recorded in the hospital." This Court in State of Jharkhand v. Shailendra Kumar Rai 2022 SCC OnLine SC 1494 "45. There is no rule to the effect that a dying declaration is inadmissible when it is recorded by a police officer instead of a Magistrate. Although a dying declaration ought to ideally be recorded by a Magistrate if possible, it cannot be said that dying declarations recorded by police personnel are inadmissible for that reason alone. The issue of whether a dying declaration recorded by the police is admissible must be decided after considering the facts and circumstances of each case." Test Identification Parade:

34. Having found that Ex. P-28 cannot be believed, we are inclined to hold that the evidence adduced by the prosecution through the eye witnesses also is not trustworthy. The witnesses are not able to name the accused over which we do not wish to say anything. However, they have identified the accused, only after 2 to 3 years for the first time in the Court. We are quite conscious about the evidentiary value of a test identification parade. Certainly, in a case of this nature, it ought to have been done. Though a test identification parade is not a substantive piece of evidence, at times, it adds strength to the case of the prosecution by giving more credibility to the statements of the eye witnesses which we find as grossly lacking.

This Court in Gireesan Nair and Others v. State of Kerala, (2023) 1 SCC 180, held:

"28. We may, at the outset, note that the eyewitnesses questioned by the prosecution did not give out the names or identities of the accused participating in the riot and involved in the destruction of public property. Therefore, the IO (PW 84) had to necessarily conduct a TIP. The object of conducting a TIP is threefold. First, to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the crime. Second, to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Third, to test the witnesses' memory based on first impression and enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime (Mulla v. State of U.P. [Mulla v. State of U.P., (2010) 3 SCC 508, paras 44, 45 & 55 : (2010) 2 SCC (Cri) 1150]).

29. TIPs belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant (Matru v. State of U.P. [Matru v. State of U.P., (1971) 2 SCC 75, para 17 :

> 1971 SCC (Cri) 391] ; Mulla v. State of U.P. [Mulla v. State of U.P., (2010) 3 SCC 508, paras 41 & 43 : (2010) 2 SCC (Cri) 1150] and C. Muniappan v. State of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567, para 42 : (2010) 3 SCC (Cri) 1402]). The evidence of a TIP is admissible under Section 9 of the Evidence Act.

However, it is not a substantive piece of evidence. Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. Therefore, TIPs, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of an accused can be sustained (State of H.P. v. Lekh Raj [State of H.P. v. Lekh Raj, (2000) 1 SCC 247, para 3 : 2000 SCC (Cri) 147] and C. Muniappan v. State of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567, para 42 : (2010) 3 SCC (Cri) 1402]).

30. 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 a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before 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 an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. But reasons should be given as to why there was a delay (Mulla v. State of U.P. [Mulla v. State of U.P., (2010) 3 SCC 508, para 45 : (2010) 2 SCC (Cri) 1150] and Suresh Chandra Bahri v. State of Bihar [Suresh Chandra Bahri v. State of Bihar, 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60])." Section 149 of Indian Penal Code, 1860:

> 35. The witnesses clearly speak about the presence of a large group of persons belonging to the side of the accused. In fact, the evidence is to the effect that they also participated in the occurrence. In a case involving the applicability of Section 149 IPC, a little more scrutiny is required on the part of the Court as there may be a tendency to implicate persons along with the actual accused who committed the offence. The Courts will have to be very circumspect while sifting through the evidence in such cases. In the case on hand, we find that it would be unsafe to implicate the accused persons under Section 149 IPC which obviously deals with an element of vicarious liability, as held by this Court in Arvind Kumar (supra), "Scope of Section 149
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> 50. Section 149 of the Code deals with a common object. To attract this provision there must be evidence of an assembly with the common object becoming an unlawful one. The concept of constructive or vicarious liability is brought into this provision by making the offense committed by one member of the unlawful assembly to the others having the common object.

It is the sharing of the common object which attracts the offense committed by one to the other members. Therefore, the mere presence in an assembly per se would not constitute an offense, it does become one when the assembly is unlawful. It is the common object to commit an offense which results in the said offense being committed. Therefore, though it is committed by one, a

deeming fiction is created by making it applicable to the others as well due to the commonality in their objective to commit an offense. Thus, it is for the prosecution to prove the factors such as the existence of the assembly with a requisite number, the common object for everyone, the object being unlawful, and an offense committed by one such member. Courts will have to be more circumspect and cautious while dealing with a case of accused charged under Section 149 IPC, as it involves a deeming fiction. Therefore, a higher degree of onus is required to be put on the prosecution to prove that a person charged with an offense is liable to be punished for the offence committed by the others under section 149 IPC. The principle governing the aforesaid aspect is taken note of by this court in Ranjit Singh v. State of Punjab, (2013) 16 SCC 752:

> "35. Baladin v. State of U.P. [AIR 1956 SC 181 : 1956 Cri LJ 345] was one of the early cases in which this Court dealt with Section 149 IPC. This Court held that mere presence in an assembly does not make a person a member of the unlawful assembly, unless it is shown that he had done or omitted to do something which would show that he was a member of the unlawful assembly or unless the case fell under Section 142 IPC. Resultantly, if all the members of a family and other residents of the village assembled at the place of occurrence, all such persons could not be condemned ipso facto as members of the unlawful assembly. The prosecution in all such cases shall have to lead evidence to show that a particular accused had done some overt act to establish that he was a member of the unlawful assembly. This would require the case of each individual to be examined so that mere spectators who had just joined the assembly and who were unaware of its motive may not be branded as members of the unlawful assembly.
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> 36. The observations made in Baladin case [AIR 1956 SC 181 : 1956 Cri LJ 345] were considered in Masalti v. State of U.P. [AIR 1965 SC 202 :
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> (1965) 1 Cri LJ 226] where this Court explained that cases in which persons who are merely passive witnesses and had joined the assembly out of curiosity, without sharing the common object of the assembly stood on a different footing; otherwise it was not necessary to prove that the person had committed some illegal act or was guilty of some omission in pursuance of the common object of the assembly before he could be fastened with the consequences of an act committed by any other member of the assembly with the help of Section 149 IPC. The following passage is apposite in this regard : (Masalti case [AIR 1965 SC 202 : (1965) 1 Cri LJ 226], AIR p. 211, para 17) "17. ...The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in Baladin [AIR 1956 SC 181 : 1956 Cri LJ 345] assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be

shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly." (emphasis supplied)

37. Again in Bajwa v. State of U.P. [(1973) 1 SCC 714] this Court held that while in a faction-ridden society there is always a tendency to implicate even the innocent with the guilty, the only safeguard against the risk of condemning the innocent with the guilty lies in insisting upon acceptable evidence which in some measure implicates the accused and satisfies the conscience of the court.

39. That in a faction-ridden village community, there is a tendency to implicate innocents also along with the guilty, especially when a large number of assailants are involved in the commission of an offence is a matter of common knowledge. Evidence in such cases is bound to be partisan, but while the courts cannot take an easy route to rejecting out of hand such evidence only on that ground, what ought to be done is to approach the depositions carefully and scrutinise the evidence more closely to avoid any miscarriage of justice."

36. This Court in Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283, observed that:

"31. ...There is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful assembly. All the same, when the size of the unlawful assembly is quite large (as in this case) and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as a participant in the rioting. In Masalti v. State of U.P. [AIR 1965 SC 202 :

(1964) 8 SCR 133] a Bench of four Judges of this Court has adopted such a formula. It is useful to extract it here:

"... where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident."

Testimony of the Eye Witness:

37. Much reliance has been placed on the evidence of P.W.12. There is no difficulty in appreciating the submission that an injured witness has to be placed on a higher pedestal. However, P.W.12 has not been examined by P.W.20 at all. In his deposition, P.W.12 repeatedly makes this position clear. The statement of P.W.12 under Section 161 CrPC, if recorded, has also not been marked. Even P.W.20 at one stage acknowledges the said fact, though with some contradictions. This again brings us to the conclusion that it would be unsafe to rely upon the evidence of P.W.12, who once again identifies the accused for the first time before the Court. There is absolutely no explanation for not examining him during the investigation. Thus, we find that the evidence of P.W.12 cannot be relied upon, particularly in the light of the charges under Section 149 IPC, and insofar as the appellants are concerned.

38. Having found the above contradictions, we have no other option except to allow these appeals. We find that both the Trial Court and the High Court did not apply their mind to the various aspects, as we discussed above. In such view of the matter, we are constrained to set aside the aforesaid judgments by conferring the benefit of doubt to the appellants.

39. The appeals are allowed and the appellant (Dhola @ Dholaram) is directed to be released forthwith, if not required in any other case.

40. Pending application(s), if any, stand(s) disposed of.

.....J. (B. R. GAVAI) .....J. (M. M. SUNDRESH) New Delhi, 12th January, 2023