Dana Yadav @ Dahu & Ors vs State Of Bihar on 13 September, 2002

Equivalent citations: AIR 2002 SUPREME COURT 3325, 2002 (7) SCC 295, 2002 AIR SCW 3867, 2002 AIR - JHAR. H. C. R. 1147, 2002 (3) BLJR 2372, (2002) 4 CURCRIR 513, (2002) 3 JLJR 348, 2002 (5) SLT 296, 2002 SCC(CRI) 1698, 2002 (9) SRJ 251, (2002) 4 CRIMES 307, (2002) 7 JT 68 (SC), 2002 (6) SCALE 447, 2002 ALL MR(CRI) 2548, 2002 BLJR 3 2372, (2002) ILR (KANT) (4) 5025, (2003) 1 RAJ CRI C 25, (2002) 2 JCR 396 (JHA), (2002) 3 JLJR 208, (2003) 1 ALLCRIR 120, (2002) 4 PAT LJR 129, (2002) 3 EASTCRIC 261, (2003) 1 ACC 460, (2002) 4 RECCRIR 314, (2002) 4 SCJ 296, (2002) 4 CURCRIR 11, (2002) 6 SUPREME 508, (2002) 6 SCALE 447, (2003) 47 ALLCRIC 467, (2003) 1 BLJ 148, (2003) 1 CAL HN 66, (2002) 2 CHANDCRIC 213, (2002) 4 ALLCRILR 1010, 2002 (2) ALD(CRL) 729, 2003 (1) ANDHLT(CRI) 248 SC

Author: B.N. Agrawal

Bench: Umesh C. Banerjee, B.N. Agrawal

```
           CASE NO.:
Appeal (crl.)  1156-57 of 2001

PETITIONER:
DANA YADAV @ DAHU & ORS.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT: 13/09/2002

BENCH:
UMESH C. BANERJEE & B.N. AGRAWAL

JUDGMENT:
```

JUDGMENT 2002 Supp(2) SCR 363 The Judgment of the Court was delivered by B.N. AGRAWAL, J. The appellants along with accused Rajendra Yadav and Madan Dusadh were convicted by the trial court under Sections 302/149 of the Penal Code and sentenced to undergo imprisonment for life. They were further convicted under Sections 307/149 and 436 of the Penal Code and sentenced to undergo rigorous imprisonment for a period of ten years and seven years respectively.The sentences were, however, directed to run concurrently. The other five accused were acquitted by the trial court. On appeals being preferred, convictions and sentences of the appellants have been upheld by the High Court whereas accused Rajendra Yadav and Madan Dusadh have been acquitted.

The prosecution case, in short, is that the informant Shambhu Prasad Komal (PW.14), who was worker of Revolutionary Group of Forward Bloc, along with his companions was undertaking a padyatra from 22nd April, 1983 to 27th April, 1983 which was led by their leader Balmukund Rahi. In the evening of 25th April, 1983 they held a meeting at Guraru and after the same was over PW-14 along with 150 workers went to Village Karma for night halt where they stayed in the house of one Ramratan Yadav (PW.12) and after taking dinner when some of them were sitting inside the Baithaka and Ors. outside, at about 9-9.15 P.M., they heard slogans coming from towards South of the village. In the meantime, nearly 150-200 members of Naxalite group came, surrounded the house of PW-12, amongst whom accused Dara Singh @ Kamdeo Yadav and appellant Bindeshwar Yadav were carrying guns and pointing towards the prosecution party saying "be careful and raise your hands"

> whereupon out of fear some of the members of the prosecution party went inside the house and closed the door from within. Thereafter, they heard sounds of bullet firing and bomb explosion and the house in which they were hiding themselves was set on fire. When the members of the prosecution party found that they were exposed to the risk of being roasted alive as a result of fire, they came out of the house and at that point of time the accused persons surrounded them and took them to the south-eastem direction where they were forced to sit. Out of the members of the prosecution party, Balmukund Rahi, Chandradeo Yadav and Ganesh Yadav (PW.l) were taken to eastern direction by the appellants Bindeshwar Yadav and Bhuvneshwar Bind besides accused Dara Singh, Madan Dusadh, Dhudheshwar Dusadh and Gupta Yadav. Out of them appellants Bindeshwar Yadav and Bhuvneshwar Bind apart from accused Dara Singh and Dhudheshwar Dusadh were said to have cut throats of Balmukund Rahi and Chandradeo Yadav with pasuli whereas PW-1 was inflicted injuries on the head by phrasa but he managed to escape. Appellants Dana, Rambilas, Doman and Ramchandra along with eight other named accused persons and several other unknown were alleged to have surrounded other members of the prosecution party and assaulted Bal Govind (PW.8), Chandrika (PW.4) and Ramratan Yadav (PW.12) who received injuries. Thereafter the accused persons took to their heels. Motive for the occurrence disclosed was that members of the prosecution party had undertaken padyatra against terror spread by the naxalites. Stating the aforesaid facts, fardbayan of the informant (PW-14) was recorded by the Sub-Inspector of Police on the same day at 11 P.M. in the village on the basis of which formal first Information report was drawn up against 14 named accused persons, including the appellants, excepting Deo Nandan, and the police, after registering the case, took up investigation, during the course of which appellant Deo Nandan was also made accused in the case and on completion thereof, submitted charge sheet, on receipt whereof the learned Magistrate took cognizance and committed 14 accused persons, including the appellants, to the Court of Sessions to face trial.

> Defence of the accused persons, including the appellants, was that they were innocent and had no complicity with the crime, but were falsely implicated.

During trial, the prosecution examined 15 witnesses in all and several documents were exhibited whereas defence failed to adduce any evidence. Upon the completion of trial, the learned Additional Sessions Judge convicted the accused persons, as stated above, and the High Court upheld the convictions and sentences of the seven accused and acquitted two of them, as mentioned above. Hence these appeals by special leave. Out of seven appellants, name of appellant no. 5 Bhuvneshwar Bind was deleted, as such we are required to consider in these appeals cases of six appellants.

Shri Prabha Shankar Mishra, learned Senior Counsel appearing on behalf of the appellants in support of the appeals raised several points. It has been submitted that Deo Nandan (appellant No. 3) was not named in the first information report and neither known to the informant nor to any of the prosecution witnesses and although no test identification parade was held, he was identified in court for the first time, as such no reliance should have been placed upon such an identification more so when there was no exceptional circumstance to place reliance upon his identification for the first time made in Court without the same being corroborated by previous identification in the test identification parade or any other evidence. Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce relevant facts. U says, inter alia, facts which establish the identity of any thing or person whose identity is relevant, in so far as they are necessary for the purpose, are .relevant. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused at his trial. The identification of an accused by a witness in court is substantive evidence whereas evidence of identification in test identification parade is though primary evidence but not substantive one and the same can be used only to corroborate identification of the accused by a witness in court. This Court has dealt with this question on several occasions. In the case of Vaikuntam Chandmppa and Ors. v. State of Andhra Pradesh, AIR (1960) SC 1340 which is a three Judge Bench decision of this Court, Wanchoo, J., with whom A.K. Sarkar and K. Subba Rao, JJ. agreed, speaking for. the Court, observed that the substantive evidence of a witness is his statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding or any other evidence. The law laid down in the aforesaid decision has been reiterated in the cases of Budhsen and Anr. v. State of U.P., [1970] 2 SCC 128, Sheikh Hasib alias Tabarak v. The State of Bihar, [1972] 4 SCC 773, Bollavaram Pedda Narsi Reddy and Ors. v. State of Andhra Pradesh, [1991] 3 SCC 434, Ronny alias Ronald James Alwaris and Ors. v. State of Maharashtra, [1998] 3 SCC 625 and Rajesh Govind Jagesha v. State of Maharashtra, [1999] 8 SCC 428. It is well settled that identification parades are held ordinarily at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject matter of alleged offence or the persons who are alleged to have been involved in the offence.

Such tests or parades, in ordinary course, belong to the investigation stage and they serve to provide the investigating authorities with material to assure themselves if the investigation is proceeding on right lines. In other words, it is through these identification parades that the investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits. Reference in this connection may be made to the decisions of this court in the cases of Budhsen, (supra), Sheikh Hasib (supra), Rameshwar Singh v. State of Jammu & Kashmir [1972] l SCR 627 and Ravindra alias Ravi Bansi Gohar v. State of Maharashtra and Ors., [1998] 6 SCC 609.

It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous Identification in the test identification parade or iny other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by catena of decisions of this Court in the cases of Kanta Prashad v. Delhi Administration, AIR (1958) SC 350, Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan and Ors. v. State of Kerala, [1979] 3 SCC 319, Mohanlal Gangaram Gehani v. State of Maharashtra, [1982] l SCC 700, Bollavaram Pedda Narsi Reddy (supra), State of Maharashtra v. Sukhdev Singh and Anr., [1992] 3 SCC 700, Jaspal Singh alias Pali v. State of Punjab, [1997] l SCC 510, Raju alias Rajendra v. State of Maharashtra, [1998] l SCC 169, Ronny alias Ronald James Alwaris, (supra), George and Ors. v. State of Kerala and Anr., [1998] 4 SCC 605, Rajesh Govind Jagesha, (supra), State of H.P. v. Lekh Raj and Anr., [2000] l SCC 247 and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat, [2000] l SCC 358.

Apart from the ordinary rule laid down in the aforesaid decisions, certain exceptions to the same have been carved out where identification of an accused for the first time in court without there being any corroboration whatsoever can form the sole basis for his conviction. In the case of Budhsen (supra) it was observed:-

"There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration."

In the case of State of Maharashtra (supra), it was laid down that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. In the case of Ronny alias Ronald James Alwaris and Ors. (supra), it has been laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test Identification parade was held. In that case, the concerned accused had a talk with the identifying witnesses for about 7/8 minutes. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the first time in court without the same being corroborated either by previous identification in the test identification parade or any other evidence, was upheld by this Court. In the case of Rajesh Govind Jagesha (supra), it was laid down that the absence of test identification parade may not be fatal if the accused is sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately after the occurrence and in either eventuality, the evidence of witnesses identifying the accused for the first time in court can form the basis for conviction without the same being corroborated by any other evidence and, accordingly, conviction of the accused was upheld by this Court. In the case of State of H.P. (supra), it was observed that "..test identification is 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. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration." In that case, laying down the aforesaid law, acquittal of one of the accused by High Court was converted into conviction by this Court on the basis of identification by a witness for the first time in court without the same being corroborated by any other evidence. In the case of Ramanbhai Naranbhai Patel and Ors. (supra), it was observed "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 eyewitness 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." The Court further observed ".the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light." In these circumstances, conviction of the accused was upheld on the basis of solitary evidence of identification by a witness for the first time in court.

In the present case, appellant No.3-Deo Nandan was undisputedly not named as one of the accused in the first information report, though names of several other accused persons were enumerated therein. In statement made before the police, no prosecution witness has named him. He was named in court by Balroop Prasad (PW 3), Chandrika (PW 4), Bal Govind (PW 8) and Shambhu Prasad Komal (PW 14) but PW-4 and PW-8 identified another person as this appellant and thus these two witnesses wrongly identified this appellant. So far the other two witnesses, namely, PW-3 and PW-14 are concerned, though they have identified this appellant in court, but they did not disclose his name before the police. There may be a case where an accused is known to a prosecution witness

who did identify him at the time of the occurrence but for manifold reasons, he could not have divulged his name to the informant before the first information report was lodged. One of the reasons may be that such a witness could not meet the informant before the first information report was lodged and no sooner, after lodging of the first information report, without any reasonable delay, when he was examined by the police, name of the accused was disclosed. The other reason may be where such a witness received injuries during the course of the occurrence and became unconscious, as such he could not get opportunity to disclose name of the accused to the informant before the lodging of the first information report and no sooner he regained consciousness, name of the accused was disclosed by him in his statement made before the police. These instances are by way of illustrations and cannot be exhaustive. In view of these and similar other circumstances, it can be said that merely because the accused was not named in the first information report, though he was known to some of the prosecution witnesses, no adverse inference can be drawn against the prosecution for not naming such an accused in the first information report. Likewise there cannot be an inflexible rule that if a witness did not name an accused before the police, his evidence identifying the accused for the first time in court cannot be relied upon. There may be a case where a witness has received injury during the course of occurrence, became unconscious and remained as such for few months while in the meanwhile, charge sheet was submitted by the police. In such an eventuality, statement of the witness could not have been recorded by the police and his Identification for the first time in court may be relied upon. In the present case, there is no evidence that this appellant was known to PWs 3 and 14 from before. The occurrence is said to have taken place on 25th April, 1983 whereas PW-3 was examined after two years in the year 1985 and PW-14 after more than two and a half years after the occurrence, i.e., in the month of June, 1986. Thus, it would not be safe to place reliance on the identification of this appellant for the first time in court by these witnesses after an inordinate delay of more than two years from the date of the incident, especially when the identification in court is not corroborated either by the previous identification in the test identification parade or any other evidence. This being the position, we are of the view that the High Court was not justified in upholding conviction of Deo Nandan (appellant No. 3).

Now, we proceed to consider cases of the other five appellants, namely, Dana Yadav (appellant No.1), Doman Yadav (appellant No.2), Rambilas Yadav (appellant No. 4), Bindeshwar Yadav (appellant No. 6) and Ramchandra Yadav (appellant No. 7). It has been submitted that the informant and the prosecution witnesses claimed that they knew these appellants from before the occurrence which was challenged by them, as such on prayer being made by the appellants, the learned magistrate directed for holding test Identification parade but curiously enough, no test identification parade was held. Shri Mishra submitted that in case accused challenges his identity, it was incumbent upon the prosecution to hold test Identification parade and on its failure to do so, the court was not justified in convicting him on the basis of his Identification in court by the witnesses. Thus, question arises, if an accused denies the fact that he is known to the prosecution witnesses and challenges his identity by them by filing a petition in court and making a prayer therein for holding test Identification parade, what course a court should adopt? The answer to the question cannot be put in a straitjacket. For example, if an accused is relation of prosecution witnesses who are residing in the same village, it can be reasonably inferred that they are known to each other. Likewise there may be a case where an accused is on visiting terms with the prosecution witnesses or there are cases between them, and they used to attend the same in court whereby had

occasion to see each other. These instances are only by way of illustration and in these circumstances, if an accused challenges his Identification by prosecution witnesses, court ordinarily would not grant the prayer for holding test Identification parade. On the other hand, even if accused and prosecution witness are full brothers or close relations, they may not be knowing each other, i.e., where they are residing in different countries or distant places and had never occasion to meet each other after they attained senses. Likewise in case of a relation also, a witness may not know the accused by face as he had never met him and had known him by name only. In these eventualities, if an accused challenges the Identification and prayer for holding test Identification is made, the same may be granted.

This question was subject matter of consideration before different High Courts as well as this Court. It is well settled that no test identification parade is called for and it would be waste of time to put him up for identification if the victim mentions name of the accused in the first information report or he is known to the prosecution witnesses from before. Reference may be made in this regard to the cases of Dharamvir & Anr. v. State of M.P., [1974] 4 SCC 150 and Mehtab Singh v. State of M.P., [1975] 3 SCC 407. In the case of Sajjan Singh v. Emperor, AIR (1945) Lahore 48 where the Court while examining the case in similar circumstances observed at page 50 thus:

> "If an accused person is already well-known to the witnesses, an Identification parade would of course, be only a waste of time. If, however, the witnesses claim to have known the accused previously, while the accused himself denies this, it is difficult to see how the claim made by the witnesses can be used as reason for refusing to allow their claim to be put to the only practical test. Even if the denial of the accused is false, no harm is done, and the value of the evidence given by the witnesses may be increased. It is true that it is by no means uncommon for persons who have been absconding for a long time to claim an Identification parade in the hope that their appearance may have changed sufficiently for them to escape recognition. Even so, this is not in itself a good ground for refusing to allow any sort of test to be carried out. It may be that the witnesses may not be able to identify a person whom they know by sight owing to some change of appearance or even to weakness of memory, but this is only one of the facts along with many others, such as the length of time that has elapsed, which will have to be taken into consideration in determining whether the witnesses are telling the truth or not."

In the case of State of U.P. v. Jagnoo, AIR (1968) Allahabad 333, the view taken by Lahore High Court in the case of Sajjan Singh (supra) has been referred to with approval.

In the case of In re Sangiah AIR (1948) Madras 113, the decision of the Lahore High Court in Sajjan Singh's case (supra) was dissented from and Rajamannar, J. observed thus:

> "I am unable to find any provision in the Code which entitles an accused to demand that an identification parade should be held at or before the enquiry or the trial. An identification parade belongs to the stage of investigation by the Police. The question whether a witness has or has not identified the accused during the investigation is not

> one which is in itself relevant at the trial the actual evidence regarding identification is that which is given by the witness in Court. The fact that particular witness has been able to identify the accused at an Identification parade is only a circumstance corroborative of the identification in Court. If a witness has not identified the accused at a parade or otherwise during the investigation the fact may be relied on by the accused, but I find nothing in the provisions of the Code which confers a right on the accused to demand that the investigation should be conducted in a particular way."

In Parkash Chand Sogani v. The State of Rajasthan, an unreported decision of this Court in Criminal Appeal No. 92 of 1956 decided on 15th January, 1957 in connection with the point regarding Identification, it was observed:

> "Much is sought to be made out of the fact that no identification parade was held at the earliest opportunity in order to find out whether PW-7 Shiv Lal could have identified the appellant as the person who was at the wheel of the car and drove it and reliance is placed upon Awadh Singh and Ors. v. The Patna State, AIR (1954) Patna 483, Provash Kumer Bose and Anr, v. The King, AIR (1951) Calcutta 475 and also Phipson on the Law of Evidence, 9th Ed., p. 415 to justify the contention that in criminal cases it is not sufficient to identify the prisoner in the dock but the police should have held an identification parade at the earliest possible opportunity to show that the accused person had been connected with the crime. It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of PW-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."

In Awadh Singh (supra), it was held that the accused person may or may not have legal right to claim for test Identification and the holding of test identification may or may not be a rule of law, but it is a rule of prudence. Test Identification parade should be held especially when the accused persons definitely assert that they were unknown to the prosecution witnesses either by name or by face and they requested the authorities concerned to have the test Identification parade held.

In the case of Jadunath Singh and Anr. v. The State of U.P., [1970] 3 SCC 518, a three Judges Bench of this Court after referring to the above said decisions observed thus at page 523:

> "It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra), 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. It seems to us that if there is any doubt in the matter the prosecution should hold an identification parade specially if an accused says that the alleged eye-witnesses did not know him previously. It may be that there is no express provision in the Code of Criminal Procedure enabling an accused to insist on identification parade but if the accused does make an application and that application is turned down and it transpires during the course of the trial that the witnesses did not know the accused previously, as pointed out above the prosecution will, unless there is some other evidence, run the risk of losing the case on this point."

This Court in that case, after referring to the evidence adduced on behalf of the prosecution, came to the conclusion that as accused was known to the prosecution witnesses from before, identification by witnesses in court was not affected by the fact that prayer for holding test identification parade made by the accused on the ground that he was not known to the prosecution witnesses was not granted and accordingly conviction of the accused was upheld.

In the case of Surendra Narain alias Munna Pandey v. State of U.P., [l998] l SCC 76, accused moved an application before the leamed magistrate claiming that he was not known to the witness and test identification parade should be ordered. The prayer was rejected on the ground that offence was exclusively triable by court of Session, as such the learned Magistrate could not pass any orders thereon. When the said order was challenged before the sessions court, the prayer was granted and it was directed that the accused shall be put on the test identification parade but the said order was not carried out. During the course of trial, the accused was identified by the witnesses and he was convicted for the charge of murder and the same having been upheld by the High Court, the matter was brought to this Court in appeal by special leave. In that case, this Court referred to the observations of Rajamannar, J. in the case of re Sangiah (supra) quoted above. It noticed the following observations in the case of Public Prosecutor v. Sankarapandia Naidu (1932) Madras Weekly Notes 427:-

> "Identification parades are held not for the purpose of giving defence advocates material to work on, but in order to satisfy investigating officers of the bona fides of the prosecution witnesses."

The Court further noticed the observations in the case of Amar Singh v. Emperor, AIR (1943) Lahore 303 where Blacker, J. held thus:

> "Whenever an accused person disputes the ability of the prosecution witnesses to identify him, the Court should direct an identification parade to be held save in the most exceptional circumstances."

In relation to the aforesaid observations of Blacker, J., this Court observed thus at page 80:

> "With great respect to the learned Judge I am unable to find any provision of law which compels the Court to so direct a parade. It is not clear from the judgment whether the Court making the enquiry or holding the trial should itself hold the parade or if the Court should stay its proceedings and direct the parade to be held before another Magistrate. In my opinion it does not take into account the important fact that an identification parade is a part of the investigation and once the case has reached the stage of an enquiry before the Magistrate the investigation is at an end and all that takes place thereafter should take place in Court and form part of the record of the case.
>
> Now it is quite clear that statements made at an identification parade are not substantive evidence at the trial. It must be very embarrassing to the Magistrate making an enquiry to listen to statements made by the witnesses ac an identification parade which will not be evidence at the enquiry, Further It is not incumbent on the prosecution to examine all the witnesses cited by them and all those who took part In the Identification parade, It will then mean that the Magistrate has heard the statements of witnesses who will not be examined at the enquiry. If on the other hand it is suggested that a different Magistrate should hold the Identification parade it appears to me that there is no provision whatever for such a course when a particular Magistrate is seized of the case."

Further, in relation to the case of Sajjan Singh (supra), it was observed thus at page 80:

> "The observations in Sajjan Singh v. Emperor (supra) are really obiter because that case dealt with a regular appeal against the conviction by a Court of Session. In that case the Magistrate who made the enquiry refused an application by the accused to arrange for an Identification parade on the following grounds, viz., that the witnesses knew the accused before and that the application was made only for the purpose of delay. The learned Judges held that the reasons given by the Magistrate were not sound. It is true that they went on to observe that should any serious question of identity arise during the course of the trial the ability of the witnesses to identify the accused may be put to test before the trial. With great respect I do not agree. If a case is posted for trial any test as to the ability or credibility of the witnesses should be decided only in Court and not by means of an identification parade, the proceedings at which will not form part of the record of the Court."

The Court further noticed the earlier three Judge Bench judgment of this Court in the case of Jadunath Singh (supra) where it was held as stated above that failure to hold test identification parade of the accused is not fatal in all cases.

In the said case when certain observations by this Court in the case of Shri Ram v. State of U.P., [1975] 3 SCC 495 were relied upon on behalf of the accused, the Court while noticing the facts of that

case observed in relation thereto thus at page 79:

> "The Court said in that case that the circumstance that the accused had voluntarily accepted the risk of being identified in a parade but was denied that opportunity was an important point in his favour. In that case, the trial court was influenced by the aforesaid circumstance and acquitted the accused. On appeal the High Court rejected the same as inconsequential by observing that the oral testimony of witnesses, even if not tested by holding an Identification parade, can be made the basis of conviction if the request made by the accused is groundless and the witnesses knew the accused prior to the occurrence. This Court while holding that no rule of law requires that the oral testimony of a witness should be corroborated by evidence of identification and that such evidence is itself a weak type of evidence observed thus:
>
> 'But the point of the matter is that the court which acquitted Shri Ram was justifiably influenced by the consideration that though at the earliest stage he had asked that an identification parade be held, the demand was opposed by the prosecution and the parade was therefore not held.' Moreover, in that case there was serious infirmity in the testimony of the eyewitnesses who deposed against the accused and this Court found it to be unrealistic and unacceptable."

In the case of State v. Dhanpat Chamara, AIR (1960) Patna 582, it was held that if a witness does not disclose the name of an accused, it is necessary to hold a test identification parade, but where he discloses name of the accused, ordinarily, no such parade is necessary. The Court, however, said that if an accused holds out a challenge and says that he will not be identified by the witnesses or makes a prayer that he should be put upon a test identification parade, such a parade must always be held in order to meet the challenge. The Court also said that if the accused was arrested on the spot and was in custody from that time up to the date of trial, there could be no question at all about his identity.

In the case of Tek Chand v. State, AIR (1965) Punjab 146, a Division Bench of the Punjab High Court held that the accused cannot compel the prosecution to hold their identification during the investigation and there is no law or procedure under which the Magistrate could pass such an order. The Bench proceeded to hold that if such a prayer is made by the accused and the prosecution opposes the same, it exposes the witnesses of identification to a genuine criticism that they would probably not be able to identify the offenders correctly if the parade was held. The Court held that when the request for identification parade was refused for no valid reason and the court identification was made long afterwards, the identification evidence in court could not be relied on, unless it was corroborated.

In the case of State of U.P v. Rajju, [1971] 3 SCC 174, it was held that in the absence of request from the accused, the state is not bound to hold identification parade when they were arrested on the spot.

In the case of Golam Majibuddin v. State of W. B., [1972] 4(N) SCC 39, another three Judge Bench of this Court held that when the witness stated that he already knew accused before the day of the occurrence and it was not the case of the accused that he was not known to the witness previously, test identification parade would serve no purpose.

In the case of Surendra Narain alias Munna Pandey (supra) after referring to the aforesaid decisions, this Court observed thus at pages 84-85:

> "On a perusal of the above rulings it is clear that the failure to hold the test identification parade even after a demand by the accused is not always fatal and it is only one of the relevant factors to be taken into consideration along with the other evidence on record. If the claim of the ocular witnesses that they knew the accused already is found to be true, the failure to hold a test identification parade is inconsequential.
>
> Turning to the facts of this case, it is seen that PW l had mentioned the name of the accused in the FIR which was given within 15 minutes of the occurrence. The other two eyewitnesses, PW 2 and PW 3 also knew the accused previously. The crucial factor is that the accused was related to the deceased as a son of his "sala" and PW 1 was also related to the deceased. The accused had never denied the relationship. As the trial Judge has observed, "there is not a scintilla of evidence" that PW l had a grudge against the accused. There is also no evidence that the wife of the deceased had any enmity with the accused. She would not have allowed a false case to be foisted on her brother's son. The accused was not traceable from 7-4-1977 to 13-5-1977. On the facts of the case, his application for the test identification parade on his surrender after such a long time does not appear to be bona fide. In any event, the evidence on record as accepted by the courts below is sufficient to prove the guilt of the accused. Further the point does not seem to have been argued before the trial court or the High Court. On the facts of this case there is no doubt that the failure to hold a test identification parade in spite of an order passed by the Sessions Court is not fatal to the prosecution."

Thus, we are of the view that in case an accused denies the fact that he is known to the prosecution witnesses and challenges his identity by filing a petition for holding test Identification parade, what a court is required to consider without holding any mini enquiry, is as to whether the denial is bona fide or a mere pretence and/or has been made with an oblique motive, to delay the investigation so as to make out a ground for grant of bail under proviso to Section 167(2) of the Code of Criminal Procedure. In case court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but, however, if it is of the view that the same is a mere pretence, question for grant of the prayer would not arise. However, grant or refusal of such a prayer unjustifiably would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so called claim that the accused was known to him from before and identification in court cannot be accepted. But in case either prayer is not granted or granted but no test

identification parade is held, the same ipso facto cannot be a ground for throwing out identification of an accused by a witness in court whose evidence is found to be unimpeachable. Thus the main thrust should be on answer to the question as to whether the evidence of a witness in court that he knew the accused from before and correctly identified the accused is trustworthy or not. If the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or if granted, no such parade was held is not material and would not in any manner affect the evidence of identification of an accused in court by a witness.

Shri Mishra, learned counsel appearing on behalf of the appellants, by referring to the evidence of the Investigating Officer (PW 15) pointed out that on prayer being made on behalf of the appellants, other than Deo Nandan, order was passed by the Sessions Court in revision for holding test identification parade, but for reasons best known to the police, same was not carried out. We find that the said prayer was not made on behalf of any of the aforesaid five appellants who were named in the first information report, but was made on behalf of other accused persons, namely, Tilakdhari and Sehdeo who have been already acquitted. Therefore, for not holding test identification parade in relation to the other two accused persons referred to above, the appellants cannot take any advantage therefrom. Learned counsel, however, could not point out any material from the record in support of the bold submissions advanced by him that no test identification parade was held in spite of order passed therefor. It appears as a matter of fact that no petition was filed on behalf of the appellants challenging their identification by the prosecution witnesses. The submission, in our view, has been made in vacuum without their being any foundation for the same, therefore, we find no option but to reject the same being devoid of any substance.

Shri Mishra then submitted that the High Court being the first appellate court, has not considered the evidence of witnesses in the manner in which it was required under law inasmuch as the evidence of identifying witnesses, namely, Balroop Prasad (PW 3), Chandrika (PW 4), Bal Govind (PW

8) and Shambhu Prasad Komal (PW 14), does not show that the accused persons were known to them from before and this being a vital question, the matter should be remitted to that Court for reappraisal of evidence. It is true that neither the High Court nor the trial court has considered the evidence from that angle. But instead of remitting the appeal to the High Court, we deem it expedient to ourselves consider the evidence of witnesses in this regard. Shri Mishra placed before us evidence of only some of the identifying witnesses but could not point out anything from their statements to show that the accused persons were not known to them from before while as a matter of fact in the evidence the witnesses have stated how and in what manner the accused persons were known to them and their evidence on this point is unassailable. After referring to the evidence of only some of the identifying witnesses, Shri Mishra could neither place any other evidence nor pointed out that there was any infirmity therein to show that they did not know the appellants from before. This being the position, learned counsel could not pursue the matter further.

In the backdrop of the aforesaid facts, we now proceed to consider the evidence of Identification against these appellants. So far as Dana Yadav (appellant No.1) is concerned, he was named in the first Information report by the informant and named and identified in court by Suresh Rajwar (PW

6), Chandradeo Bhagat (PW 9) and Ramratan Yadav (PW 12) besides the informant Shambhu Prasad Komal (PW 14). PWs 6 and 9 did not name this appellant in their statement made before the police for which no explanation is forthcoming. Therefore, it is not safe to place reliance upon identification made by them for the first time in court after more than two years from the date of the alleged occurrence. As far as PW-14 is concerned, he named this appellant in the first Information report. This witness and PW 12 stated even before the police that this appellant was arrested by the investigating officer at the place of occurrence immediately. These two witnesses have consistently supported the prosecution case disclosed in the first information report, their statements made before the police as well as court and no infirmity could be pointed out therein.

Doman Yadav (appellant No.2) was also named in the first information report. This appellant was not named by PWs 3 and 9 in their statements made before the police but in court they had named and identified him. No explanation whatsoever, is forthcoming for non-disclosure of his name before the police by these witnesses. Therefore, his Identification for the first time in court by these witnesses, as a rule of prudence and not rule of law, should not be relied upon. Next witness in relation to this appellant is Raj Kumar Yadav (PW 5) who named him before the police as well as in court but failed to identify him in court. Bal Govind (PW 8) who is another witness in relation to this appellant did not name him before the police whereas named him in court but failed to identify when this appellant was in dock. Another witness in relation to this appellant is the informant-PW14 himself who, though named him in the first information report as well as the statement made in court, but wrongly identified somebody else as this appellant in the dock. As such evidence of these witnesses can be of no avail to the prosecution. The last witness in relation to this appellant is Ramratan Yadav (PW 12) who named him before the police as well as in court and correctly identified him. Learned counsel appearing on behalf of the appellants could not point out any infirmity in his evidence, except saying that as the informant himself has wrongly identified another accused as this appellant, on this ground alone, the evidence of PW-12 should be discarded. In our view, the submission has been made only to be rejected.

Rambilas Yadav (appellant No. 4) was another accused named in the first information report. He was named by PW-12 before the police as well as in court. But when this appellant was in dock, he failed to identify him. Therefore, his evidence can be of no avail to the prosecution. Thus, the solitary evidence against this appellant is of the informant-PW14 who has named him in the first information report as well as before the police and in his presence, this appellant was arrested by the investigating officer at the place of occurrence itself. PW-14 has named this appellant in court and correctly identified him in the dock. The witness has consistently supported the prosecution case disclosed in the first information report and no infirmity could be pointed out. Merely because this witness has wrongly identified appellant No.2-Doman Yadav, his evidence in relation to identification of other appellants cannot be discarded.

Bindeshwar Yadav (appellant No.6), who was also an accused named in the first Information report, was not named by PWs 4, 8 and 9 before the police and for the first time after two years they named him in court. But none of them could identify this appellant in the dock. Therefore, their evidence can be of no avail to the prosecution as in their evidence in court which is substantive evidence, they could not identify this appellant. Next witness in relation to this appellant is PW 3 who did not name

him before the police and no explanation has been furnished for the same, though in court he has named and identified this accused for the first time, but after more than two years from the date of the alleged occurrence. Therefore, it is not safe to place reliance upon his evidence as it is well settled that belated Identification of accused in court for the first time after more than two years from the date of the incident should not form the basis of conviction, especially when the same is not corroborated by either previous statement made before the police or any other evidence. Other witnesses in relation to this appellant are PWs 5, 6 and 12. These witnesses have, though, named him before the police as well as in court, but failed to identify him in the dock. As such their evidence cannot be taken into consideration for convicting this appellant as the evidence of Identification in court, which alone is substantive evidence, is wanting. Now the only witness remains in relation to this appellant is the informant-PW14 who has named him in the first Information report as well as in court and correctly identified in the dock. No infirmity could be pointed out in relation to identification of this appellant by the informant.

Ramchandra Yadav (appellant No. 7) was not named before the police by Chandrika (PW 4), Raj Kumar Yadav (PW.5), Suresh Nabidas (PW 6) and Bindeshwar Prasad (PW 10) but named in court by them, though none of them could identify him in dock. Therefore, their evidence cannot form the basis of conviction. PW.12 had named this appellant before the police as well as in court but he failed to identify him in the dock. Thus, his evidence cannot be used against this appellant. PW 3 did not name this appellant before the police but has named and identified him in court. As prosecution has not furnished any explanation for non-disclosure of name of this appellant before the police by this witness, his belated identification in court for the first time after more than two years, should not be relied upon more so, when the same is not corroborated by any other evidence. Bal Govind (PW.8) is said to have named this appellant before the police as well as in court but he identified another accused to be this appellant. Therefore, evidence of this witness on the question of identification of this appellant has to be discarded. Now remains the solitary evidence of the informant-PW14 who has named him in the first information report as well as in court and correctly identified in the dock. His evidence being consistent and credible, no ground could be pointed out to discard the same.

Shri Mishra further submitted on the basis of the analyses of evidence of identification that so far as appellant Nos. 2,4,6 and 7 are concerned. there remains evidence of identification by a solitary witness in which event chances of mistaken identification cannot be ruled out. It may be stated that in cases where the accused is not known to the prosecution witnesses and is identified in the test identification parade as well as in court by a solitary witness, the evidence of identification by him has to be scrutinized with greater care and caution than in the case of known accused and should not be accepted unless free from all reasonable doubts. In the present case, these appellants were not unknown but were fully known to the prosecution witnesses. Therefore, their identification by a solitary witness can certainly form the basis of conviction, more so when the evidence is consistent and has been found to be credible. This being the position, in our view, the submission is devoid of any merit.

In view of the law analysed above, we conclude thus:-

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test Identification parade held, the same ipso facto can not be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

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

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first Information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.

In view of the foregoing discussion, in our opinion, the High Court has not committed any error in upholding convictions of appellant nos. l, 2, 4, 6 and 7 and sentences awarded against them, consequently their appeals fail and the same are dismissed. Appeal of appellant no. 3 is allowed, his convictions and sentences are set aside and he is acquitted of all the charges. This appellant is directed to be released forthwith, if not required in connection with any other case.