Gireesan Nair vs The State Of Kerala on 11 November, 2022

Author: Pamidighantam Sri Narasimha

Bench: Pamidighantam Sri Narasimha, B.R. Gavai

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1864-1865 OF 2010

GIREESAN NAIR & ORS. ETC. ...APPELLANT(S)

VERSUS

STATE OF KERALA ...RESPONDENT(S)

JUDGMENT

PAMIDIGHANTAM SRI NARASIMHA, J.

1. These appeals are directed against the judgment of the High Court of Kerala upholding the conviction of Accused Nos. 1-7, 9-12, 14, 16 and 18 under Sections 143, 147, 148 of the Indian Penal Code, 18601, and Sections 3(2)(e) of Prevention of Damages to Public Property Act, 19842, read with Section 149 of the IPC. A sentence of four years of rigorous imprisonment and a fine of Rs. 10,000, as imposed by the Trial Court 3, was also upheld by the High Court.

Reason: 1 hereinafter referred to as 'the IPC'.

2 hereinafter referred to as 'the PDPP Act'.

3 Additional District and Sessions Judge (Fast Track-1), Thiruvananthapuram in Case Nos. 302 of 2001, 1786 of 2001 and 1313 of 2002 dated 15.02.2006.

2. Facts: The facts of the present case can be traced back to the year 2000 when the State of Kerala decided to delink pre-degree courses from colleges and start plus-two courses at the school level. There were protests against the implementation of the said policy. During one of the protests on 12.07.2000, it is alleged that the police officials were harsh, and several protesters, including girl students, were injured. To avenge the police atrocity, it is alleged that Accused Nos. 1-2 and 25-33 hatched a conspiracy to launch a protest the next day to create fear and terror in the city.

3. In furtherance of the alleged conspiracy, on 13.07.2000, about 1500 protestors armed with weapons proceeded towards the Government Secretariat. When the group was met with resistance

from the police force, they became violent and caused damage to as many as 81 buses belonging to the Kerala State Road Transport Corporation4. A few protestors even went inside the garage of KSRTC, and when the KSRTC workers repelled them, the protestors turned even more violent, leading to the death of one Mr. Rajesh, a bus conductor with KSRTC. 4 hereinafter referred to as 'the KSRTC'.

4. In the aftermath of this event, based on the statement given by Rajesh, an FIR was registered by PW-72 (head constable) under Sections 143, 147, 148, 307, 149 of the IPC, Section 3(2)(e) of the PDPP Act and Sections 3 and 5 of the Explosive Substances Act, 1908. As per the FIR, Accused Nos. 1-2 and 25-33 hatched a conspiracy and abetted acts of rioting. The Appellants herein and Accused Nos. 17 and 19 being part of the mob, formed an unlawful assembly which resulted in riots and wide-scale destruction of public property. Further, Accused Nos. 17 and 19 were also alleged to have caused the death of Rajesh.

5. Investigation: Pursuant to the lodging of the FIR, PW-78, Circle-Inspector, Fort P.S., as the investigating officer, arrested Accused Nos. 1-16 on 13.07.2000. Two days later, the investigation was handed over to PW-76. After taking over the baton, PW-76 was informed that Rajesh had succumbed to the injuries. Immediately upon receiving that information, PW-76 proceeded to the hospital to conduct an inquest. After concluding that the death was homicidal, he approached the concerned court, which had taken cognizance of the matter to alter the charge under Section 307 to that of Section 302 of the IPC. Considering the gravity of the subject and wide-scale repercussions, the Director General of Police constituted a Special Investigation Team headed by PW-84, the then Dy. S.P., Narcotic and Economic Offences Cell, CBCID, Thiruvananthapuram. After taking charge of the investigation, PW-84 arrested Accused Nos. 17-18 on 01.08.2000 and Accused Nos. 19 on 04.08.2000. It is PW-84 who completed the investigation and filed a charge sheet before the Trial Court. However, before getting into the details of the charges levelled and the consequent decision of the Sessions Court, it is essential to mention the two Test Identification Parades conducted by PW-47, Judicial Magistrate First Class – IV, Thiruvananthapuram, which have a direct bearing on the final decision in this matter.

6. 1st Test Identification Parade: Conducting a Test Identification Parade5 was crucial for the prosecution as there were more than 1500 people who were part of the mob, and only a handful of them were arrested and charge-sheeted. It is for this reason that the IO (PW-84) submitted a report before the Chief Judicial Magistrate6 and sought the consent of the CJM for conducting a TIP. The CJM accepted this request and, by his 5 hereinafter referred to as 'TIP'.

6 hereinafter referred to as 'CJM'.

order dated 24.07.2000, directed PW-47 (JMFC-IV, Thiruvananthapuram) to conduct a TIP. Accordingly, PW-47 decided to conduct the TIP on 31.07.2000 for the identification of Accused Nos. 1-16.

7. To protect the sanctity of the TIP, the Judicial Magistrate (PW-47) is said to have instructed the IO (PW-84) to ensure that the witnesses (who were later examined as PWs 1, 3, 4, 5, 6 and

7) earmarked for the TIP do not get any opportunity to see the Accused before the TIP. For conducting the TIP, the Judicial Magistrate (PW-47) directed the IO (PW-84) to arrange forty civilians as non-suspects. The IO (PW-84) could, however, arrange only for thirty non-suspects being twenty police officers and ten civilians. In addition to these thirty non-suspects, the Judicial Magistrate (PW-47) is said to have shortlisted twenty-one undertrials to participate in the TIP. However, PW-47 decided to go ahead with only twenty-one undertrials and ten civilians. It is his version that he made an effort to fetch more undertrials for the TIP, but to no avail. Ultimately, he conducted the TIP by mixing the sixteen accused with the thirty-one non-suspects.

8. The TIP began with the Judicial Magistrate (PW-47) taking note of the name, address, and other details of the non-suspects. After that, the suspects and non-suspects were mixed, and witnesses were asked to identify the Accused.

9. After the conclusion of the identification process for Accused Nos. 1-16, the non-suspects were asked to leave, and when the suspects were alone, they were asked if they had any complaints about how the TIP was conducted. It is alleged that all of them replied in the negative. However, when questioned if they had anything else to say, Accused No. 2, on behalf of all the accused, stated that, when the suspects were in police custody from 20.07.2000 to 22.07.2000, they were all photographed and video-graphed and were also shown to all the six witnesses from the cabin of the IO (PW-84). All this is evident from the "Report of the Identification Parade of the 16 Accused Persons dated 31.07.2000".

10.1 2nd Test Identification Parade: In the previous TIP, six witnesses identified accused 1-16. But as mentioned earlier, Accused Nos. 17-19 were arrested after the completion of the 1 st TIP. In that view of the matter, permission to conduct the 2 nd TIP was sought from the CJM by the IO (PW-84) to facilitate the identification of the Accused in three phases – (i) In the 1 st Phase to identify Accused Nos. 17-19 by those very witnesses who identified Accused Nos. 1-16 in the 1st TIP (PWs 1, 3, 4, 5, 6 and

7); (ii) In the 2nd Phase to identify Accused Nos. 1-16 by PW's 10, 11, 12 and 15; and (iii) In the 3 rd Phase to identify Accused Nos. 1-19 by PW's 8, 9 and 33. After receiving the request from the IO (PW-84), the CJM granted permission and directed the Judicial Magistrate (PW-47) to conduct the 2nd TIP. Accordingly, PW-47 decided to conduct the 2nd TIP on 26.08.2000. The conduct of the TIP in each of the phases is as under.

10.2 In the 1st Phase of this TIP, Accused Nos. 17-19, who were to be identified, were mixed with sixteen under-trial non-suspects. After the identification process culminated, Accused No.19, for himself and the other two accused, stated that while they were in police custody, they were shown to the six witnesses, PWs 1, 3, 4, 5, 6 and 7. Further, he also stated that they were all photographed and video-graphed and that they were allowed to be seen by all the witnesses when they were taken to court for extending their remand.

10.3 In the 2nd Phase of the TIP, Accused Nos. 1-16 who were to be identified were mixed with 45 non-suspects, with thirty-one of them being under-trials and the remaining being civilians.

Thereafter, PWs 10, 11, 12 and 15 proceeded with the identification.

10.4 In the 3rd Phase of the TIP, Accused Nos. 1-19 were to be identified by PWs 8, 9 and 33. For identification, the Accused were mixed with the pre-existing 45 non-suspects. After the end of the identification process, Accused No. 2, on behalf of others, stated that when Accused Nos. 1-19 were taken to court for remand, and the presence of all the witnesses was arranged in the court by the police. He reiterated that while they were in police custody, they were photographed and video-graphed and were also made to be seen by all the witnesses from the chamber/cabin of the IO (PW-84). All the Accused collectively stated that they were wearing the very same dress, straight from their arrest, till the date of the TIP. All this is evident from the "Report of the Identification Parade of the 19 Accused Persons dated 26.08.2000".

11. Thus, it can be seen that from the very beginning, the Accused had objected to how the TIP was conducted and the events preceding it, which inter-alia included – (i) the Accused being shown to the witnesses from the cabin of the IO (PW-84);

(ii) the Accused being photographed and video-graphed while they were in police custody; (iii) securing the presence of the witnesses in court while the accused were produced for extension of their remand; and (iv) the Accused wearing the same dress straight from their arrest till the date of the TIP.

12. Upon completion of the investigation, including the TIP as indicated above, charge sheet was filed on 23.09.2000, and the case was committed to the Court of Additional District and Sessions Judge (Fast-Track Court – I), Thiruvananthapuram, on 27.10.2000.

13. Sessions Court and High Court: On 26.05.2005, the Sessions Court framed charges under Sections 120B, 143, 147, 148, 324, 427, 506, 302, 109 and 111 r/w 149 of the IPC and Sections 3(2)

(e) of the PDPP Act against Accused Nos. 1-33. The prosecution examined 85 witnesses and marked 134 documents as exhibits. Thereafter, the defence examined 3 witnesses and marked 24 documents as exhibits. After hearing the matter in detail, the Sessions Court framed 12 points for consideration, which can be broadly classified into three issues (i) conspiracy hatched by Accused Nos. 1-2 and 25-33; (ii) the murder of Rajesh; and (iii) the destruction of KSRTC buses and other public properties.

14. Re: Conspiracy hatched by Accused No. 1-2 and 25-33: To establish a conspiracy case against Accused Nos. 1-2 and 25-33, the prosecution examined PW-68 and PW-85. PW-68, who deposed before the court that he had overheard the conversation between the Accused hatching the conspiracy. PW-85, on the other hand, turned hostile. Therefore, based on the deposition of PW-68, the Sessions Court convicted Accused Nos. 1-2 and 25-33 under Sections 120B of the IPC r/w Section 3(2)(e) of the PDPP Act, Sections 109 and 111 of the IPC, and sentenced them to four years of imprisonment. In appeal, the High Court disbelieved PW-68 and consequently set aside the conviction of Accused Nos. 1-2 and 25-33 under the abovementioned provisions. The decision of the High Court on the issue of conspiracy against Accused Nos. 1-2 and 25-33 has attained finality as the State has not preferred an appeal.

15. Re: Charge of the murder of Rajesh against Accused 17 and 19: In so far as the issue relating to the charge of murder of Rajesh against Accused Nos. 17 and 19 is concerned; the prosecution relied upon the evidence of PWs 5, 6 and 8. These witnesses deposed that while Accused No. 17 beat Rajesh with an iron pipe, Accused No. 19 beat him with a wooden reaper. Based on the deposition of PWs 5, 6 and 8, the Sessions Court convicted Accused Nos. 17 and 19 under Sections 302 r/w 34 of the IPC for life. The High Court, in appeal, set aside this conviction and instead found them guilty under Section 326 r/w 34 of the IPC and sentenced them to 7 years of rigorous imprisonment. The finding of the High Court on this issue has also attained finality as the State has not appealed before this Court against the altered conviction and the reduced sentence. In fact, even Accused Nos. 17 and 19 have not appealed since they had already served a sentence of seven years.

16. Given the findings of the Trial and the High Court on the issue of conspiracy and murder attaining finality, the only question that falls for consideration is the issue relating to the destruction of public property. In fact, this is the only question that was raised and argued before us. We will now proceed to examine this aspect in detail.

17. Re: Charge of the destruction of public property against Accused Nos. 1–7, 9–12, 14, 16 and 18 under Sections 143, 147, 148 of the IPC and Sections 3(2)(e) of the PDPP Act r/w Section 149 of the IPC: To establish the charge of destruction of public property, the prosecution relied upon the evidence of PWs 5, 6, 8, 31 and 33, as eye-witnesses to the crime. To prove the presence of these witnesses, the prosecution had to necessarily rely on the TIP proceedings. The defence questioned the TIP on various grounds, among other things, the presence of IO (PW-84) at the time of conducting the TIP, the accused being photographed and video-graphed while they were in police custody, among others.

18. The Sessions Court rejected all the objections to the legality and credibility of the TIP by holding that (i) the IO (PW-84) was just present and did not influence the TIP in any manner; (ii) the imbalance in the ratio between suspects and non-suspects in the TIP is not the Judicial Magistrate's (PW-47) or the IO's (PW-84) fault, because they tried their best to fetch more non-suspects;

(iii) the IO (PW-84) took steps to prevent disclosure of identity of accused to witnesses before the TIP by covering the side of the vehicle in which they were brought to the court for extension of remand, though, he also stated that he did not put a mask on them; (iv) there is no material to show that photographs or video-graphs of the Accused were taken and shown to the witnesses prior to the TIP; and (v) even though PW-3 and PW-4 admitted in cross-examination before the Court that some of the accused were shown to them before the TIP, during re-examination, both of them frankly admitted that after the incident, they had seen the miscreants for the first time during the TIP. In view of its conclusions on the TIP, the Trial Court proceeded to convict Accused Nos. 1–7, 9–12, 14, 16–19 under Sections 143, 147, 148 IPC and 3(2)(e) of PDPP Act r/w 149 of the IPC and sentenced them to four years of imprisonment.

19. The High Court has, while exercising criminal appellate jurisdiction, failed to consider any of the submissions made by the Appellants on the legality or the integrity of the TIP. The following passage is the only discussion on this argument:

> "43. ..... The Court below has made its finding regarding the offence punishable under Ss.143, 147 and 148 IPC and S.3(2)(e) of the PDPP Act, based on the identification of the various witnesses in court. The matter has been dealt with elaborately by the Court below. It is idle for the appellants to say that there was no proper identification and so, it was not possible to say, who had caused obstruction to the KSRTC buses. Moreover, when a group of persons cause damage to public properties, each one of that illegal group will be held liable for the acts of the other members in the group also." In view of the above, the High Court upheld the conviction of Accused Nos. 1–7, 9–12, 14, 16–19 under Sections 143, 147, 148 IPC and 3(2)(e) of PDPP Act r/w 149 of the IPC and also the sentence of four years imprisonment imposed upon them by the Sessions Court. Therefore, the learned counsel for the Appellants were justified in contending that the High Court has not considered the submissions of the Appellants on law and on fact.
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> The High Court, while exercising criminal appellate jurisdiction under Section 386 of the Code of Criminal Procedure, 1973, has to necessarily assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the Trial Court is not vitiated by any illegality and is not palpably erroneous. The dismissal of appeal without considering an appellant's contention is a serious infirmity, which will result in no legal judgment in the eye of law7.
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> 7 Sohan and Anr. v. State of Haryana and Anr. (2001) 3 SCC 620; State of Rajasthan v.

Hanuman (2001) 1 SCC 337; Badri and Ors. v. State of Rajasthan (2000) 10 SCC 246.

20. Submissions of the Parties: Ms. Sonia Mathur, learned Senior Advocate appearing for Accused Nos. 1–7, 9, 14, 16 and 18, at the very outset, contended that the High Court has not rendered any independent finding on the issue of destruction of public property and has merely reiterated what the Sessions Court had held.

21. Be that as it may, the central thrust of Ms. Mathur's submission was on the manner in which the TIP was conducted. According to her, the TIP was of utmost importance, considering that this was a case where criminal liability was fastened only against a few protestors. She raised questions over the integrity of the TIP by contending that (i) the ideal ratio of suspects to non-suspects as laid down by the Kerala High Court in Pradeepan v. State of Kerala8, has not been followed; (ii) the presence of IO (PW-84) in the premises of central jail during both the TIPs vitiates the TIP in its entirety; (iii) the IO (PW-47) in both the TIPs did not record physical features, age etc. of the non-suspects. The learned senior counsel gave an example by stating that Accused No. 7 had a long beard, but there were no non-suspects having a long beard; (iv) the IO (PW-84) has admitted that 8 (2005) 3 KLT 1075.

Accused Nos. 1–16 were in his custody when he questioned the eyewitnesses in his office; (v) PW-3 and PW-4 have admitted that they had seen the Accused while they were at the Police Station;

(vi) PW-1, PW 8-12 and PW-33 have admitted that they had identified the Accused in the TIP based on the pictures they saw in the newspaper; (vii) the Accused had complained that while they were in police custody, they were photographed and shown to the witnesses from the cabin of PW-84; (viii) Remand Report dated 14.07.2000 clearly stated that Accused Nos. 1-16 were shown to the eye-witnesses; (ix) there has been a delay in holding in the TIP which is fatal, in light of the decision in Acharaparambath Pradeepan and Anr. v. State of Kerala9, Lal Singh and Ors. v. State of UP10 and Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra11; and (x) no importance can be given to the identification made in the TIP when the same witness fails to identify the same accused before the court. For this purpose, reliance was placed on the judgement of this Court in Lalli alias Jagdeep Singh v. State of Rajasthan12. Independent of her submissions on the aspect of TIP, the learned senior advocate 9 (2006) 13 SCC 643 10 (2003) 12 SCC 554 11 (1998) 5 SCC 103 12 (2003) 12 SCC 666 also relied upon the decision of the Delhi High Court in Capitol Art House (P) Ltd v. Neha Datta13, where it was held that re-examination of witnesses should not be allowed, especially to facilitate them to rectify their mistakes. This submission was made in the context of PW-3 and PW-4s contradictory statements made in the chief examination and the re-examination.

22. Shri Vinay Navare, learned Senior Advocate appearing for Accused Nos. 10-12 contended that the statements given by PW-5, PW-6 and PW-8 could not form the basis of conviction because

(i) PW-5 had stated in his deposition that he was not present at the time of the incident and that he reached the place of occurrence only after the incident; (ii) PW-6 could only identify Accused Nos. 17 and 19 and could generally identify the other accused as the agitators; (iii) PW-8 had stated in his deposition that he identified the Accused on the basis of the images he saw in a newspaper.

23. Shri Navare also raised questions over how the TIP was conducted by submitting that (i) the purpose of conducting a TIP fails when pictures of the accused are published in newspapers. He relied upon the decision of this Court in Ravi alias 13 (2022) SCC OnLine Del 1746 Ravichandran v. State represented by Inspector of Police 14, where this Court had held that no importance could be attached to a TIP where the photos of the alleged suspects were making rounds in newspapers and also when the witnesses had a chance to look at the accused while the accused were in police custody. Additionally, he also placed reliance on the judgement of this Court in Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra (supra) to bolster his submission on the same point;

(ii) the ratio of suspects to non-suspects was improper in the 1 st TIP; (iii) the IO (PW-84) was present in the hall where both the TIPs took place; (iv) there was a delay of over one month between the date of the incident and the dates of the TIP, which facilitated the investigation officer to acclimatise the witnesses to the way the Accused's look. He relied upon the decision of this Court in Suresh Chandra Bahri v. State of Bihar 15 where it has been held that a TIP has to be conducted at the earliest possible opportunity; and (v) the identification made by PW-5, PW-6 and PW-8 are of no consequence as they are not an independent witness.

14 (2007) 15 SCC 372 15 (1995) Supp 1 SCC 80

24. Shri Harshad V. Hameed, learned counsel appearing for the State, countered the submissions made regarding the conduct of the TIP by contending that – (i) the decision in Pradeepan v. State of Kerala16, is not binding. The same were mere guidelines which could be adjusted based on the facts and circumstances of a case. Reliance was also placed on the decision of the Kerala High Court in Mohanan Nair v. State of Kerala 17, to support the same point; (ii) a TIP can be accepted as a piece of evidence based on the subjective satisfaction of a court, which has occurred in this case; (iii) if there were concerns about the manner in which the TIP was conducted, then the TIP itself should have been challenged. In that view of the matter, it was submitted that when it has not been challenged, then under Section 80 of the Indian Evidence Act, 1872, a presumption arises that the TIP Report is a valid proof of evidence; (iv) the JFMC (PW-47) took every measure within his reach to ensure smooth conduct of the TIP; (v) the IO (PW-84) took all possible measures to ensure that the TIP is conducted at the earliest possible opportunity; (vi) reliance was placed on the decision of this Court in the case of 17 (1989) Cr.L.J. 2106 (Ker) Munna Kumar Upadhyay v. State of Andhra Pradesh18, where it was held that if pictures of the suspects were circulated in newspapers months before the TIP is conducted, then the circulation would have lost its effect on the minds of the witnesses; (vii) the Sessions Court has only convicted those accused, who were identified both before the Court as well as in the TIP. The testimony of these eyewitnesses never suffered from any infirmities; and (viii) the evidence of PW-5, PW-6 and PW-8, which was relied upon by the Trial Court, was not biased.

25. Analysis: Heard the learned counsel for the parties and perused the case records. 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 18 (2012) 6 SCC 174 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 and Anr. v. State of U.P.19).

26. 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 alias Girish Chandra v. State of U.P.20; Mulla and Anr. v. State of U.P.21 and C. Muniappan and Ors. v. State of Tamil Nadu22). The evidence of a TIP is admissible under Section 9 of the Indian 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 and Anr.23; and C. Muniappan and Ors v. State of T.N.24).

19 (2010) 3 SCC 508 (Paras 44, 45 and 55) 20 (1971) 2 SCC 75 (Para 17) 22 (2010) 9 SCC 567 (Para 42) 23 (2000) 1 SCC 247 (Para 3)

27. 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 and Anr. v. State of U.P.25 and Suresh Chandra Bahri v. State of Bihar26).

28. In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept "baparda" to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form, i.e., physically, through photographs or via media (newspapers, television etc...), the evidence of the TIP is not admissible as a valid piece of evidence (Lal Singh and Ors v. State of U.P.27 and Suryamoorthi and Anr. v. Govindaswamy and Ors.28).

29. If identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless (Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra 29). Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 (Chunthuram v. State of Chhattisgarh30 and Ramkishan Mithanlal Sharma v. State of Bombay31).

30. It is significant to maintain a healthy ratio between suspects and non-suspects during a TIP. If rules to that effect are provided in Prison Manuals or if an appropriate authority has issued guidelines regarding the ratio to be maintained, then such rules/guidelines shall be followed. The officer conducting the TIP 28 (1989) 3 SCC 24 30 (2020) 10 SCC 733 31 (1955) 1 SCR 903 is under a compelling obligation to mandatorily maintain the prescribed ratio. While conducting a TIP, it is a sine-qua-non that the non-suspects should be of the same age-group and should also have similar physical features (size, weight, color, beard, scars, marks, bodily injuries etc.) to that of the suspects. The concerned officer overseeing the TIP should also record such physical features before commencing the TIP proceeding. This gives credibility to the TIP and ensures that the TIP is not just an empty formality (Rajesh Govind Jagesha v. State of Maharashtra32 and Ravi v. State33).

31. It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP. Thus, the burden is not on the defence. Instead, it is on the prosecution (Rajesh Govind Jagesha v. State of Maharashtra34).

32. We will now consider the three major contentions raised by the Appellants before us, being (i) the credibility of the eye-witnesses who participated in the TIP to identify the accused; (ii) delay in conducting the TIP; and (iii) legality of the TIP and the 32 (1999) 8 SCC 428 presence of the IO

during the conduct of the TIP. We will now consider each of these submissions.

33. Re: Credibility of the eyewitnesses who participated in the TIP to identify the accused:

34. PW-3, in his deposition before the Sessions Court, stated that:

> "Prior to the date of identification parade, I had been to the Crime Branch office on different days. (Q). Were there 10-18 accused at time of first parade. (A). So many people were there.
>
> (Q). Were some of the accused shown to you from the crime branch office (A). They were shown (Q). Were some more of the accused were shown to you before going to the 2nd parade (A). Yes"

35. PW-4, in his deposition before the Sessions Court, has stated that:

> "I went to Crime Branch office for giving statement. That was 8-10 days prior to the first parade. (Q). When you went there to give your next statement did they show you some of the accused (A). They were there (Q). After the first parade I have given statement to the Crime Branch. That was before 2nd parade. Did they show you the accused at that time (A). They were there. Thus, those persons I saw or shown to me were identified at the time of parade."

36. Both these witnesses, during their re-examination, have, however, contradicted themselves by stating that they saw the Accused for the first time during the TIP.

37. In so far as PW-5 is concerned, his presence at the scene of the offence and seeing the Accused committing the offence is in serious doubt. During his cross-examination, he stated that "(Q). Did you go and see the place of incident.

(A) I went there at the place of occurrence after the incident. Then I saw three employees. Altogether, there were 10-20 persons including who stood outside the office and at the place of occurrence.

(Q). Did you ask them about the incident.

(A) No. (Q). Did you reach there only after accused left the place.

(A). Yes"

38. PW-6, whose evidence has been relied upon by the prosecution, has also stated that he had visited the crime branch office eleven days prior to the 1 st TIP, i.e., on 20.07.2000. This date coincided with the date when the Accused were also taken into police custody. On the other hand, PW-8, whose evidence has also been relied upon by the prosecution, has stated in his deposition

that he identified the Accused in the TIP based on the pictures published in a newspaper.

39. PW-31, an employee of KSRTC, has deposed only on the financial loss caused to KSRTC because of the destruction. His deposition is not helpful to fasten any liability on the Accused.

40. The last witness relied upon by the prosecution to prove the charge of destruction of public property was PW-33. However, this witness turned hostile. Therefore, his deposition takes us nowhere.

41. Proceeding to the deposition of the Judicial Magistrate (PW-

47), he was asked, if before commencing the parade, he had asked any of the witnesses whether they had any prior acquaintance with the suspects or non-suspects or whether the suspects or non-suspects were shown to them by the IO (PW-34). PW-47 stated that he did not ask any such question to the suspects before commencing the parade. However, he said that he asked the suspects at the end of the parade if they had any objection to the manner in which the TIP was conducted. It may be recounted that Accused No. 2 had objected that they were shown to the witnesses while they were in police custody.

42. This Court in Budhsen and Anr. v. State of UP35, had directed that sufficient precautions have to be taken to ensure that the witnesses who are to participate in the TIP do not have an opportunity to see the accused before the TIP is conducted. In Lal Singh v. State of U.P.36, this Court had held that a trial would be adversely affected when the witnesses have had ample opportunity to see the accused before the identification parade is held. It was held that the prosecution should take precautions and establish before the court that right from the day of his arrest, the accused was kept "baparda" to rule out the possibility of his face being seen while in police custody. Later, in Lalli v. State of Rajasthan37 and Maya Kaur Baldevsingh Sardar and Anr. v. State of Maharashtra38, this Court has categorically held that where the accused has been shown to the witness or even his photograph has been shown by the investigating officer prior to a TIP, holding an identification parade in such facts and circumstances remains inconsequential. Another crucial decision was rendered by this Court in Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra 39, where it was held:

> 35 (1970) 2 SCC 128 38 (2007) 12 SCC 654 "8. .... But, the question arises: what value could be attached to the evidence of identity of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made the basis for recording conviction against the accused. The reliance of evidence of identification of the accused in the Court by PW 2 and PW 11 by the Designated Court, was an erroneous way of dealing with the evidence of identification

of the accused in the Court by the two eyewitnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside."

43. In so far as evidence of PW-8 is concerned, who has stated that he identified the accused in the TIP based on pictures published in newspapers, the position of law is clear. This Court in Suryamoorthi v. Govindaswamy40, has held as follows:

"10. Two identification parades were held in the course of investigation. At the first identification parade PW 1 identified all the seven accused persons whereas PW 2 identified three of them, namely, Accused 2, 6 and 7 alone. It is, however, in evidence that before the identification parades were held the photographs of the accused persons had appeared in the local daily newspapers. Besides, the accused persons were in the lock-up for a few days before the identification parades were held and therefore the possibility of their having been shown to the witnesses cannot be ruled out altogether. We do not, therefore, attach much importance to the identification made at the identification parades." Reiterating the same principle, this Court in Ravi v. State41, has again reaffirmed the aforesaid position by holding as follows:

"17. Certain facts are not in dispute. The test identification parade was held after ten days. It is also not in dispute that the photographs of the accused were taken at the police station. The investigation officer allowed them to be published. Photographs of the appellant and the said Udayakumar were not only published, according to the prosecution witnesses, they were shown to be the accused in the aforementioned crime. Some of them admittedly were aware of the said publication. The purported test identification parade which was held ten days thereafter, in our opinion, looses all significance, in the aforementioned fact situation.

19. In a case of this nature, it was incumbent upon the prosecution to arrange a test identification parade.

Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

44. Having considered the evidence of crucial eye-witnesses and the material indicating the conduct of the TIP, we are of the opinion that the witnesses had the opportunity of seeing the accused before the conduct of the TIP. Not only have the witnesses deposed that they had seen the suspects before the TIP, even Accused No. 2, at the end of the 1 st TIP, had raised a grievance that the suspects were all photographed, video-graphed and were shown to the witnesses from the cabin of the IO (PW-

84). At the end of the 2 nd TIP, he had also stated that when Accused Nos. 1-19 were taken to court for the purpose of remand, and the presence of all the witnesses was arranged in the court by the

police. In fact, all the Accused collectively stated that they were wearing the very same dress, straight from their arrest, till the date of the TIP to indicate that the TIP did not serve its purpose. We find no reason to disbelieve the truthfulness of the statement of the Accused because they had raised this contention right from the beginning and have maintained it all along.

45. In view of the above, we are of the opinion that there existed no useful purpose behind conducting the TIP. The TIP was a mere formality, and no value could be attached to it. As the only evidence for convicting the appellants is the evidence of the eye□witnesses in the TIP, and when the TIP is vitiated, the conviction cannot be upheld. We will now examine the other lapses while conducting the TIPs.

46. Re: Delay in conducting the TIP: Undue delay in conducting a TIP has a serious bearing on the credibility of the identification process. Though there is no fixed timeline within which the TIP must be conducted and the consequence of the delay would depend upon the facts and circumstances of the case 42, it is imperative to hold the TIP at the earliest. The possibility of the TIP witnesses seeing the accused is sufficient to cast doubt about their credibility. The following decisions of this Court on the consequence of delay in conducting TIP have emphasised that the possibility of witnesses seeing the accused by itself can be a decisive factor for rejecting the TIP. In Suresh Chandra Bahri v. State of Bihar43, it was held that:

> "It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TIP."

47. In Budhsen & Anr. v. State of UP44, this Court set aside the conviction imposed on the appellant therein, on the ground that no conviction can be based by solely relying on the identification made in a TIP. While holding that a 14□day delay by itself in conducting the TIP may not cause prejudice to the accused, it observed that there is a high chance of accused being seen by the identifying witnesses outside the jail premises. In Subash and Shiv Shankar v. State of U.P.45, this Court acquitted an accused on the ground that the TIP was held three weeks after the arrest was made. This Court suspected that the delay in holding the TIP could have enabled the identifying witnesses to see the accused therein in the police lock□up or in the jail premises. In State of A.P. v. Dr M.V. Ramana Reddy and Ors.46, this Court acquitted respondent nos. 2 and 3 therein on the ground that there was a delay of 10 days in conducting the TIP, and in those 10 days, there was a high likelihood of their photographs being shown to the witnesses. In Rajesh Govind Jagesha v. State of Maharashtra47, a delay of about one month was viewed seriously by this Court since there was a possibility of the accused being shown to the witnesses.

48. Returning to the facts of the present case, we have already noted that Accused Nos. 1□16 were arrested on 13.07.2000. 45 (1987) 3 SCC 331 46 (1991) 4 SCC 536 Instead of filing an application for conducting a TIP at the earliest, the IO (PW□84) filed a remand application, pursuant to which the Accused were remanded to police custody. There is strong evidence that the Accused were shown to the witnesses during their police custody period. The fact that an application for conducting a TIP was filed on 23.07.2000, i.e., the very next day after the police custody period ended, leads to the inevitable conclusion that the Accused were taken into police custody to facilitate their easy identification during the TIP. Otherwise, we see no reason why an application for conducting a TIP was not filed immediately after the arrest of the Accused. In such circumstances, we firmly believe that the delay in holding the TIP coupled with other circumstances has cast a serious doubt on the credibility of the TIP witnesses.

49. Re: Legality of the TIP and the presence of the IO during the conduct of the TIP: A three□Judge bench of this Court in Chunthuram v. State of Chhattisgarh48, by relying on Ramkishan Mithanlal Sharma v. State of Bombay49, has held that any identification made by witnesses in a TIP in the presence of a police officer tantamount to statements made to the police officer under Section 162 Cr.P.C. The Court held:

> "The infirmities in the conduct of the test identification parade would next bear scrutiny. The major flaw in the exercise here was the presence of the police during the exercise. When the identifications are held in police presence, the resultant communications tantamount to statements made by the identifiers to a police officer in course of investigation and they fall within the ban of Section 162 of the Code."

50. The evidence of IO (PW□84) about the conduct of the Test Identification Parade may be noted: □ "(Q). Did you make any arrangement to prevent the witness and the accused from seeing each other inside the jail?

(A). I did not think it as something needed."

51. Further, when a question regarding the presence of the IO (PW□84) was put to JMFC (PW□47), he stated that:

> "...in the parade conducted on 31.07.2000, 31 non□suspects were selected. The civilian were produced by the IO. On that date also Dy. SP and CI were present in the premises of the jail....."

52. With respect to the 2nd TIP conducted on 26.08.2000, the JMFC (PW□47) stated that:

> "On 26.08.2000 Dy. SP S.P. Joshwa was also present in the central prison".

53. Having considered the statement of the JMFC (PW□47) and the evidence of the IO (PW□84) together, we are of the view that the presence of the Investigating Officer at the time of the TIP cannot be ruled out. The Investigating Officer has stated that he has not taken any steps to ensure

that the accused and the witnesses do not see each other. It is rather surprising to note that Investigating Officer thinks that such a measure is not necessary.

54. In this very context, we may also note the first TIP report dated 31.07.2000 made by the JMFC (PW□47). The Magistrate recorded that the Accused had raised concerns over the manner in which the TIP was conducted. The relevant portion of the TIP report is noted hereunder:

> "21. Thereafter when the suspects alone were left in the hall, they were asked, whether they have got any complaints, as to the manner of the conduct of the parade. All of them replied in the negative. When questioned, whether they have got anything else to say, they unanimously asked Mr. Padma Kumar (A2) to state something. He then said that when the suspects were in Police custody, they were all, photographed and videographed and were also shown to all the 6 witness, who are made to identify them in the parade, from the cabin of the Dy. SP. Mr. Joshwa."

55. Even the report of the second TIP dated 26.08.2000 as recorded by the JMFC (PW□47) notes as hereunder:

> "22. When the accused persons along were left in the hall, they were questioned, my whether they have got any complaint regarding the manner of the conduct of the parade. They all replied in the negative. When queried further, whether they have got anything else to say all of them wanted the second accused Padma Kumar to make some comments. Thereupon, the second accused stated that accused Nos. 1 to 16 were, before their production in court, in police custody for three days; that accused nos. 17 to 19 were similarly in police custody for 6 days; that when all the 19 were taken to the court on 24 and 25.8.2000 presence of all the witnesses in the court were arranged by the Police, so as to enable them to see all the accused persons; and that while in Police custody all of them were photographed and videographed and were also made to be seen by all the witnesses, from the chamber of Deputy Superintendent Of Police, the investigating officer. All the accused had also stated that they were wearing the very same dress, straight from their arrest till date."

56. In view of the evidence available on record, we are of the opinion that the conduct of the TIP, coupled with the hovering presence of the police during the conduct of the TIP vitiated the entire process. The Trial Court as well as the High Court have committed a serious error in relying on the evidence of the TIP witnesses for convicting and sentencing the Appellants. We are of the opinion that the conviction and sentencing are not sustainable. In view of these lapses on the part of the prosecution, it is not necessary for us to consider various other grounds raised by the Appellants.

57. Conclusion: Having considered the matter in detail and having noted the various discrepancies in the manner in which both the TIPs were conducted, we believe that the prosecution has not established its case beyond reasonable doubt. Apart from the TIPs, we find no other evidence put forth by the prosecution to prove the guilt of the Accused for offences under Sections 143, 147, 148 IPC and 3(2)(e) of PDPP Act r/w 149 of the IPC.

58. For the reasons stated above, and in conclusion, we: □i. Allow Criminal Appeal Nos. 1864□1865 of 2010 arising out of the judgment of the High Court of Kerala in Criminal Appeal Nos. 384 and 385 of 2006, and ii. Set aside the conviction and sentence of the Appellants under the judgment of the High Court of Kerala in Criminal Appeal Nos. 384 and 385 of 2006 dated 14.01.2010 and the judgment of the Court of Additional District and Sessions Judge (Fast□Track Court – I), Thiruvananthapuram in Sessions Case Nos. 302 of 2001, 1786 of 2001 and 1313 of 2002 dated 15.02.2006 under Sections 143, 147, 148 IPC and 3(2)(e) of Prevention of Damages to Public Property Act, 1984 r/w Section149 of the IPC.

iii. The Appellants are acquitted of all the charges, and their bail bonds, if any, stand discharged. Pending interlocutory applications, if any, stand disposed of in terms of the above order.

iv. Parties shall bear their own cost.

……J. [B.R. GAVAI] ……J. [PAMIDIGHANTAM SRI NARASIMHA] NEW DELHI;

NOVEMBER 11, 2022