

State Of Andhra Pradesh vs K. Venkata Reddy & Others on 26 March, 1976

Equivalent citations: 1976 AIR 2207, 1976 SCR (3) 929, AIR 1976 SUPREME COURT 2207, 1976 SCC(CRI) 448

Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, P.N. Shingal

PETITIONER:
STATE OF ANDHRA PRADESH

Vs.

RESPONDENT:
K. VENKATA REDDY & OTHERS

DATE OF JUDGMENT 26/03/1976

BENCH:
SARKARIA, RANJIT SINGH
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SARKARIA, RANJIT SINGH
SHINGAL, P.N.

CITATION:
1976 AIR 2207 1976 SCR (3) 929
1976 SCC (3) 454

ACT:

Evidence Act (1 of 1872), s. 9-Identification of accused at test identification parade-Use of.

Indian Penal Code (Act 45 of 1860), ss. 34 and 302-Conviction under, when named co-accused are acquitted-When permissible.

HEADNOTE:

When the bus in which the deceased and P.Ws. 1 to 3 were travelling, along with other passengers, halted at a bus stop, a number of persons surrounded the bus, forced all the passengers out of the bus except the deceased, and inflicted multiple stabs on the deceased causing his death. Thirteen persons were charged with offences under s. 302, 34 and 149 I.P.C. The trial court convicted some and acquitted the others. In appeals against the conviction and acquittal,

the High Court acquitted all the accused. In appeal to this Court against the acquittal of seven accused, including A-7,
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HELD: Confirming the acquittal of others, A-7 is guilty of an offence under s. 302, read with s. 34, I.P.C.

(1) The evidence of the interested eye-witnesses PWs 2 and 3 was sufficiently corroborated as against A-7 by the testimony of PWs 9 and 11 the conductor and driver of the bus. They had identified A-7 at an identification parade. It is true that while picking out this accused at the parade these witnesses did not say anything with regard to the specific part played by him in the commission of the crime. That, however, does not render the evidence of such identification inadmissible. From the fact that PW 9 while testifying as to the fact of identification was referring to this accused as A-7 implies that he had identified him in court. He had in that connection elucidated why he had picked out A-7 at the identification parade. The evidence given by the witness in court was substantive testimony, while the identification made by him at the parades was confirmatory of that fact. As regards PW 11 his evidence was more clear. The Magistrate who held the parade had mixed up 12 other persons at this parade with the four accused, including A-7. It could not therefore be said that the number of other persons mixed with the accused was inadequate. [936H; 937F; 938B-F, G-H; 939C]

(2) The result is that excepting A-7, the participation of the other 12 named accused in the commission of the crime has not been established. There is also no evidence to show as to which of the assailants dealt the fatal blow on the deceased. The medical evidence, however, shows that there were not less than 44 incised injuries including penetrating wounds upon the body of the deceased. The extremely large number of injuries on the body of the deceased lends assurance to the testimony of PWs 2 and 3 that the number of assailants was more than 13 including some unnamed and unidentified persons. Therefore, apart from the accused named in the charge, there were at least one or more unidentified person who participated in the fatal assault on the deceased conjointly with A-7. A-7 can, therefore, be convicted under s. 302 read with s. 34, I.P.C. [940B, G-941B]

Maina Singh v. State of Rajasthan [1976] 3 SCR 651, followed.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 155 of 1971.

Appeal by Special Leave from the Judgment and Order dated 31-7-70 of the Andhra Pradesh High Court in Criminal Appeal No. 45/69 and Criminal Revision Case No. 391/69.

P. Ram Reddy and P.P. Rao for the Appellants. Govind Das, Mrs. Sunanda Bhandare, A.K. Mathur, A.K. Sharma and M.S. Narasimhan for the Respondents.

The Judgment of the Court was delivered by SARKARIA, J.-This appeal by special leave is directed against a judgment of acquittal rendered by the High Court of Andhra Pradesh.

The facts may now be stated.

There are three villages, Konda Kala Vatala, Konda Papaya Palli and Govinda Palli situated at a short distance from each other. There were warring factions in these villages. One was led by Vellugoti Pedda Eswara Reddy deceased and Mumagala Narayana Reddy, the Sarpanch of Konda Kala-Vatala. The rival faction was headed by Akkammareddigari Venkata Kondareddy, Accused No. 1 (for short, A-1). There was bad blood between the two factions. Both the factions were proceeded against under ss. 107/151, Cr.P.C., also. The deceased was a resident of Konda Papayapalli village. On May 16, 1968, the deceased accompanied by PW 1, K. Venkatareddy, went to Jammalamadugu and stayed for the night there in the hotel of PW 12 (Dastagiri). On the following morning at about 8-30 a.m., they boarded bus No. APD 2083 for proceeding to their village. L. Venkata Ramanna (PW 14) was checking tickets on that bus. When the bus stopped at Sanjamalavari House, Accused 2, 3, 5 to 8 (for short, A-2, A-3, A-5 to A-8) boarded it. On seeing the accused, who belonged to his opposite faction, the deceased got apprehensive of his safety. He therefore alighted from the bus, and, accompanied by PW 1, returned to the hotel of Dastagiri. After remaining at the hotel for some time they returned to the bus stand, and boarded bus No. APD 2276, at about 9-30 a.m. for going to their village. P.W. 11 (E. Solomon) was the driver and P.W. 9 (V. Bala Subbanna), the conductor of that bus. There were about 30 passengers, including PW 2, PW 3 and PW 4, in the bus. At about 10-30 a.m., the bus halted at Nossam near the hotel of Rangappa, PW 10. This bus-stop is at a distance of about 60 or 65 yards from the Police Outpost and is located in a populated quarter of the town which has a population of 3,000 souls. The conductor, the driver and some of those passengers got down to take refreshments in the nearby hotel. Some passengers including the deceased and P.Ws. 1, 2 and 4, however, remained inside the vehicle. A-4 then came there. He peeped into the bus through the door and went away towards the house of one Yerikala Reddy, situated at a distance of 200 feet from the bus towards the north. Soon thereafter, A-1 and A-2, armed with revolvers, and A-3 to A-13, all armed with daggers, came there from Yerikala Reddy's house, encircled the bus, and at the point of daggers forced the passengers including PWs 1 and 4, to get out of the bus. The deceased also tried to get away but the accused prevented him from doing so. A-1 and A-2 took positions in the doors of the vehicle. They fired revolvers in the air while their companions immediately entered the bus and there, stabbed the deceased to death causing no less than 44 injuries. The assailants were yelling: "Stab ! kill !" P.Ws. 1 to 4 witnessed the occurrence. P.W. 1 while raising an alarm proceeded towards the Police Outpost, but the accused obstructed and chased him over a short distance. P.W. 1 took to his heels, went away from the village and concealed himself somewhere. After about two hours he came out of his hiding and returned to the spot at about 12-30 p.m. After murdering the deceased, the miscreants went away towards the north taking their

weapons with them. Thereafter, P.Ws. 2, 3 and 4 entered the bus and found the deceased lying dead in a pool of blood. P.W. 2 then went to Papayapalli, five miles away, and informed the wife and the relations of the deceased about the occurrence. He returned to the scene of the crime in the company of those relations at about 4 p.m. In the meantime, the village Munsiff (P.W. 15) on learning about this incident, also came there. At the dictation of P.W.1, the Munsiff recorded the complaint, Ex. P-3, and then prepared an injury statement of the deceased. At about 3 p.m., he sent the complaint together with other documents prepared by him, through the Talyari to the Police Station, Vuyyalawada. A copy of the complaint was sent to the Judicial Magistrate Koilkuntla.

Prior to the making of this complaint, Head Constable Abdul Khadar, PW 16, of the Police Out-Post had sent an oral information to the Police Inspector about this murder. The Head Constable had heard the reports of revolver-fire at about 10-30 a.m. Thereupon, he alongwith a Constable went out to the bus stand. At the spot, he heard from the by-standers that the deceased had been killed inside the bus. But, despite inquiries, no one told him about the identity or particulars of the culprits. He looked for the complainant, if any. No one came forward to make a complaint. The driver and the conductor of the bus were also found absent. He therefore sent an oral information to the Inspector through the Talari, Pollana.

On receiving the information, Inspector Santhoji Rao (P.W. 25) reached the place of the murder at 6 p.m. He examined P.Ws. 1, 15, 16 and 19 and recorded their statements under s. 161, Cr.P.C. Thereafter, he held an inquest over the dead-body from 2-30 a.m. to 6 a.m. on May 18, 1968. During the inquest he examined P.Ws. 2, 9 and 11. The Inspector searched for the accused but could not find them. A-4 to A-8 surrendered on May 22, 1968 and were taken into custody. A-2, A-3, A-9, A-10, A-11 and A-13 were arrested by the police on June 24, 1968. Thereafter, on some date before August 10, 1968, A-1, A-6 and A-12 were arrested.

All the accused persons were not previously known to the eyewitnesses. They were put up for test identification at three parades held by Mr. Johnson, Magistrate 1st Class (P.W. 20) on June 7, 1968, July 18, 1968 and August 10, 1968.

After completing the investigation the police sent 13 accused persons under a charge-sheet before the Magistrate for preliminary enquiry. The Magistrate committed all the 13 accused for trial to the court of Session. The Sessions Judge acquitted A-5, A-6, A-8, A-9 and A-11, but convicted the remaining seven under s. 302, Penal Code and sentenced each of them to imprisonment for life.

Against that judgment, two appeals were preferred to the High Court, one by the State against the acquittal of A- 5, A-6 and A-8, and the other by the convicted accused against their conviction. The High Court dismissed the appeal preferred by the State but accepted the other filed by the accused and acquitted all of them.

Aggrieved, the State made a petition in this Court under Article 136 of the Constitution seeking leave to appeal against the acquittal of A-1 to A-9 and A-12. This Court however granted special leave to appeal against the acquittal of A-1 to A-4, A-7, A-9 and A-12 only and refused it against A-5, A-6 and A-8.

Mr. Ram Reddy appearing for the appellant-State contends that the judgment of the High Court acquitting all the accused persons is perverse in law and has occasioned gross failure of justice. It is maintained that the reasons given by the High Court for wholesale rejection of the evidence of P.Ws. 1, 2, 3, 9 and 11 are manifestly erroneous and contrary to the fundamental canons of appraising evidence.

As against this, Mr. Govind Das maintains that the reasons given by the High Court for rejecting the evidence of these witnesses are quite sound and cannot, by any stretch of imagination, be branded as 'perverse'. According to the Counsel since the view taken by the High Court is also reasonably possible, this Court should not, in deference to the well-established ruler of practice, interfere with the order of acquittal.

To appreciate the rival contentions, it is necessary to examine the reasons given by the High Court for not accepting the evidence of these five witnesses.

P.W. 1 is the prime-mover of the gear. The case was registered on his complaint (Ex. P-3) lodged with the village Munsiff (P.W. 15) at 12-30 p.m. At the trial, he narrated more or less the same story which has been set out at the commencement of this judgment. The High Court found his evidence unworthy of credit for these reasons:

(i) P.W. 1 is a confirmed partisan of the deceased.

(ii) He was unable to give a consistent and satisfactory account of the purpose of his going to Jammalamagdu on May 16, 1968.

(iii) In the First Information Ex. P-3, he did not state many material facts. For instance, he did not mention there that, in the first instance, he and the deceased had boarded the Nandyal-Koilkuntla bus at 8-30 a.m. and thereafter alighted from it on seeing the accused getting into the bus.

(iv) If P.W.1 was really in the ill-fated bus, at the time of the occurrence, he could not have been left unharmed;

(v) The conduct of P.W. 1 was so unnatural that it improbabilises his presence at the time and place of the incident:

(a) If he had really seen A-4 peeping into the bus and going back to the house of Erikala Reddy, 60 or 70 yards away, to inform the other accused, it was unlikely that P.W. 1 and the deceased would have remained sitting in the bus. P.W. 1 knew that A-4 was a partisan of the other accused:

(b) The conduct of P.W. 1 after the occurrence, was also artificial, unnatural and strange. He did not go to the Police Outpost which was at a stone's throw. His explanation that he was prevented by the accused from going there and had to

remain in hiding at some unspecified place towards the West for two hours till he returned to the bus-stand at 12-30 p.m., was incredible.

Although he had ample opportunity and time to go to his village and inform the co-villagers about the incident, he did nothing of the kind.

(vi) No bus-ticket was found with P.W. 1.

(vii) The evidence of the witnesses produced to corroborate the version of P.W. 1 was also unsatisfactory.

P.W. 14, Ticket-Checker of bus No. APD 2083 which the deceased and P.W. 1 are said to have boarded earlier at Jamalamadugu, admittedly did not know P.W. 1 prior to that date. P.W. 14 was not asked to identify P.W. 1 at any test identification or even in court. Moreover, P.W. 14 was examined by the investigating Police Officer about a week after the occurrence.

The evidence of Dastgiri, P.W. 12, owner of the hotel at Jamalamadugu was no better. He had no record to show that P.W. 1 and the deceased had spent the night between the 16th and 17th May at his hotel. His testimony was at variance with his statement recorded under s. 164, Cr.P.C. In that statement, he did not say that the sons (i.e. A-2, A-3 and A-6) of Kalavatala Reddy were also reported by the deceased to be in the bus. He had simply stated there, that Kalavatala (Reddy) and his men were in the bus. At the trial, he stated that the deceased had informed him about the presence of A-2, A-3 and A-6, also, in the bus. P.W. 12 was not a disinterested witness. Admittedly, the deceased had helped him in getting assignment of land for raising a building, before the revenue authorities. His statement was also recorded by the police several days after the occurrence.

(viii) There was unexplained delay in registration of the case. The Police Station Vuyyalawada is 12 miles from Nossam. The complaint, Ex. P-3, was received there at 8 p.m. Copy of the complaint reached the Magistrate Koilakuntla, 16 miles away, at 6 p.m. There was a bus leaving Nossam at 4-30 p.m. for Koilakuntla. It was more likely that the copy of the complaint was sent to the Magistrate by that bus at 4-39 p.m., and not at 3 p.m. as the Munsiff P-W. 15, wanted to have it believed. This inordinate delay in registering the F.I.R. shows that the First Information was lodged after confabulation with other persons who had come from the village of the deceased. In these circumstances, the F.I.R. had little value as a corroborative piece of evidence.

These reasons given by the High Court for not relying on the evidence of P.W. 1, cannot, by any standard be said to be unsound or puerile. There is a good deal of force in them.

We will now take up P.W. 2. Mr. P. Ram Reddy contends that the High Court was in error in dubbing this witness as an interested witness. It is maintained that his relationship or affinity with the deceased or his party had not been established. It is argued that his evidence was almost impeccable.

The High Court has found that P.W. 2 is closely related to the deceased. This is an inference drawn from the conduct of the witness in not denying a suggestion of such relationship put to him in cross-examination by the defence. The pointed suggestion was, whether the son of his junior paternal uncle was married to the daughter of the deceased. The witness replied that he did not know. The relationship suggested was so near that the witness could not be unaware of it. If the suggestion was wrong, he ought to have registered a categorical denial. The High Court was therefore justified in presuming that the witness was the first cousin of the son-in-law of the deceased.

The next infirmity in his evidence noted by the High Court, is that his conduct in not trying to go to the Police Outpost or in not reporting the matter to the village Munsiff, was not the natural conduct of an eye-witness of the murder. The third weakness in his evidence noted by the High Court, is, that he was not examined by the investigator on the 17th May, although he claimed to be present at the spot at that time. Another reason given by the High Court for doubting his veracity was, that there was no necessity for him to go to Proddutur to ascertain the price of castor-oil cake because the same inquiry could be conveniently made telephonically. The Court further found that he could not give a satisfactory account as to why he adopted the circuitous route via Nossam when buses starting at 6-30 and 7-30 a.m. from Jammalamadugu and plying directly to Allagaddi were available. We need only add that this witness also was unable to produce any bus ticket.

We agree with the High Court that in view of the infirmities enumerated above, the evidence of P.W. 2 could not be safely acted upon without corroboration from independent sources.

This takes us to the evidence of P.W. 3.

The High Court found that P.W. 3, also, was not an independent witness. He stood surety for five partisans of the deceased in security proceedings under s. 107, Cr.P.C. This fact was borne out by the documentary evidence furnished by the copies of the surety bonds, Exh. D-10 to D-14, although the witness had the temerity to deny it. Mr. Ram Reddy laid great stress on the fact that the evidence of this witness with regard to his being among the passengers in the ill-fated bus at the time of occurrence, stands corroborated from the testimony of an independent witness, the bus conductor (P.W.9). It is further maintained that this witness (P.W. 3) was examined during the inquest held on the night between the 17th and 18th May. Reference on this point has been made to the inquest report Ex. P.6. These twin circumstances-proceeds the argument-were sufficient to lend assurance to the interested testimony of this witness so as to make it acceptable against A-1 and A-2, if not against the other accused respondents. These circumstances were noticed by the High Court. In its opinion, they did not furnish adequate confirmation of the testimony of P.W. 3. In this connection, the High Court observed:

"We do not think much assurance can be taken from the evidence of P.W. 9 about the presence of P.W. 3 on that day in that bus. It is true that the name of P.W. 3 was mentioned as an eye-witness in the inquest report. Even though the inquest according to P.W. 25 was held in the early hours of the morning of 18-5-1968 and the inquest report was said to be ready on that morning, the inquest report was received in Court at 6 P.M. on 19-5-1968. As provided under sec. 174(2) Cr.P.C. the inquest

report shall be forth with forwarded to the Court. P.W. 3 was examined on 19-5-68 only. With regard to the inquest report no other independent panchayatdar was examined apart from P.W. 15, the village Munsiff. Having regard to these circumstances we do not think much can be taken from the fact that the name of P.W. 3 finds a place in the inquest report."

Another infirmity in the testimony of PW 3, according to the High Court, was that documentary evidence of the sales allegedly made by the witness at the Shandy (periodical market) and the receipts of the fees/cess paid on such sales to the Panchayat, was not forthcoming and that the explanation given by the witness for non-production of such documentary evidence was unsatisfactory.

It will be seen from the synopsis of the reasoning of the High Court, given above, that whereas the evidence of P.W.1 was considered to be wholly unreliable, the possibility of P.Ws. 2 and 3 being witnesses of the occurrence was not positively ruled out. The conclusion reached in respect of these two witnesses was that their evidence suffered from several infirmities and, as such in the absence of corroboration from independent sources, it could not be accepted as a safe basis for convicting the accused. We are also of the opinion that as a matter of prudence, it was not safe to convict any of the accused respondents merely on the basis of the testimony of P.Ws. 2 and 3. We, however, do not agree with the High Court that the evidence of P.Ws.9 and 11 did not furnish reliable corroboration of the testimony of the interested witnesses (P.Ws. 2 and 3) against any of the accused-respondents whatever.

The sum and substance of the testimony rendered by P.W.9, the Conductor of the bus, was that when the bus halted at Nossam at about 10-30 a.m., the witness accompanied by the Driver (P.W. 11), got down and both of them went to the nearby hospital for getting an injury on his leg (P.W 9's) dressed up. They however, did not find the Doctor there. Consequently, both of them returned to the hotel of Rangappa which is hardly 18 ft. from the scene of occurrence. While the witness was standing in the verandah of the hotel, the driver took his meals inside and then came out and went to the adjacent hotel of Pullayya to take coffee. The witness asked Rangappa's wife to give him some water. He was waiting in the doorway when he saw some persons coming from the northern side and going to the bus and encircling it. Some of them were armed with daggers. The witness heard the sound "dama dama" of the firing of a revolver. The witness heard cries from the bus-"kill ! stab !". After the disturbance had subsided, the witness went out and saw the deceased lying dead inside the bus in a pool of blood. Due to fear, the witness and the driver (P.W.11) went into the nearby Vaisya's house and remained there till 7-30 or 8 p.m. when they came out on learning that the Police Inspector had come to the spot.

At the test identification parades, the witness had identified Accused 2 and 7. He stated that P.W. 3 was one of the passengers who travelled in the ill-fated bus.

The driver (P.W.11) substantially corroborated P.W.9. He stated that he had seen five or six persons carrying white stick like daggers in their hands going behind the bus. The witness was then taking coffee at the hotel of Pullayya. He then heard the "dum dum" sound from the bus. At the test

identification parades held before the Magistrate, the witness had identified A-7 and A-11.

The High Court while conceding that P.Ws. 9 and 11 were the "proper persons to have spoken about the occurrence", brushed aside their evidence even against the accused identified by them at the test identifications, mainly on the ground that they were "unwilling witnesses" and were not prepared to speak the whole truth. The High Court noticed that there was a discrepancy with regard to the receipt of injury by P.W. 9 between his statement before the police and the subsequent statement recorded under s. 164, Cr.P.C. Before the police, P.W.9 had stated that he had received an injury. But in his statement recorded under s. 164, Cr.P.C. he said that he had a boil on his leg. It appears to us that this discrepancy was of no consequence. P.Ws.9 and 11 were the conductor and the driver of the bus. It is undisputed that the bus was parked close to the hotels of Rangappa (P.W.10) and Pullayya. Their presence near the bus at the hotels was a highly probable fact. Even if the reason for their going to the nearby hospital was disbelieved, it could not affect their being eyewitnesses of the incident. Might be that they did not disclose all that they had seen and had not identified all the culprits whom they could identify; but that is no ground to hold that their evidence could not furnish valuable corroboration of the testimony of the interested witnesses (P.Ws. 2 and 3) even against the accused whom they identified at the test identifications and later in court.

The statements of P.Ws. 2, 9 and 11 were recorded by the Investigating Officer during the night between the 17th and 18th May 1968 from 2-30 a.m. to 6 a.m. There was thus no good reason for wholesale rejection of the evidence of P.Ws. 9 and 11. It therefore remains to be seen to what extent the independent testimony of P.Ws. 9 and 11 lends corroboration to the statements of the interested witnesses (P.Ws. 2 and 3).

At the test identification parade held on June 7, 1968, A-4, A-5, A-7 and A-8 were paraded along with 12 other prisoners. P.Ws. 2, 3, 9 and 11 were called upon to identify the accused at this parade. P.W. 2 while identifying A-7 at the parade, said: "I saw him while killing the deceased in the bus" P.W. 3 also identified A-7 as Konda Kalavatalavadu. He also identified A-4 and A-8 by touching their hands. P.W.9 identified A-7 saying: "I suspect this man". He could not identify others. P.W.11 also at this parade picked out A-7 who was then standing at No. 15 in the parade and said that he had seen him.

The second batch of the accused persons consisting of A-2, A-3, A-9, A-10, A-11 and A-13 was arrested on June 24, 1968. These six accused persons were paraded at the test identification on July 18, 1968. P.Ws. 1, 2, 3 and 9 were called upon to identify them at the parade. P.W. 3 picked out A-2, A-3, A-9 and A-10 at the parade. P.W. 9 similarly identified A-2 by touching his hand. A-2 objected that in 1962 or 1963 P.W. 9 had served him as driver of his bus for 10 days.

The third test identification parade was held on August 10, 1968. At this parade, nine accused persons A-1 to A-3, A-6, A-9 to A-13 were paraded. P.Ws. 1, 2, 3 and 11 were called upon to identify. P.W. 2 identified A-8, while P.W.11 identified A-11 only. He could not identify A-2 or the other accused who were in this parade.

Thus the net result is that at the test identifications, P.Ws. 9 and 11 had correctly identified A- 7, P.W 9 had identified A-2, also. But P.W. 11 could not identify him.

The question is, whether the evidence of P.Ws.9 and 11 can be safely relied upon as against A-7 and A-2. In our opinion, so far as A-7 is concerned, chances of mistake in identification by these witnesses were extremely remote.

Mr. Gobind Das, Counsel for the respondents, contends that the evidence of test identification is not substantive evidence. It can be the Magistrate holding the parade did not mix up with the accused adequate number of other prisoners and did not hold separate parades for individual accused; (b) at the time of picking out A-7 and A-2 at the parade, the identifying witnesses did not say as to in what connection they were identifying them. It is stressed that the evidence of test identification is not substantive evidence. It can be used only to corroborate or lend assurance to the identification made by the same witness in court. If at the time of picking out a particular accused at the parade, a witness does not say anything about the role of the person, thus identified, in the commission of the crime, such test identification little evidentiary value. Further, it is pointed out that P.W. 9 was not called upon to identify A-2 and A-7 in court at the time of his examination as a witness. Reference has made to a number of decisions including Kamal Gope v. State of Bihar,(1) Kanta Prasad v. Delhi Administration(2) and Sampat Tatyada Shinde v. State of Maharashtra(3).

In our opinion, so far as the identification of A-7 by P.Ws. 9 and 11 is concerned it can safely be relied upon as confirmatory of their evidence in court. A-7 was identified by P.Ws. 9 and 11 at the test identification parade held on June 7, 1968. It is true that while picking out this accused at the parade these witnesses did not say anything with regard to the specific part played by him in the commission of the crime. That however does not render the evidence of such identification inadmissible. The Magistrate (P.W. 20) who held the parade had mixed up 12 other persons at this parade with the four accused, including A-7. It could not therefore be said that the number of other persons mixed with the accused was inadequate. The very fact that both P.Ws. 9 and 11 commonly identified A-7, dispels any suspicion of such identification being a chance identification. In the witness-box, at the trial, however, P.W. 9 specifically stated: "I could identify only accused 2 and 7 among those persons who came to the bus from the northern side armed with daggers". Referring to the test identification parade, the witness added:

"I identified A-7 as one of the persons who came with dagger to the bus".

In cross-examination, the witness reaffirmed:

"It is not true.. that A-2 and A-7 were not among the persons who came to the bus.. It is not true that I have identified A-2 and A-7 at the parades not because they were seen near the bus but because Police showed them to me earlier to facilitate identification".

From the very fact that the witness while testifying as to the fact of identification was referring to this accused as A-7 implies that he had identified him in court, also, and had, in that connection,

elucidated why he had picked out A-7 at the identification parade. The evidence given by the witness in court was substantive testimony, while the identification made by him at the parade was confirmatory of that fact. This proposition is well established and it is not necessary to discuss the rulings cited at the bar on this point.

No capital can be made out of the fact that the trial judge recorded the evidence of the witness with regard to identification of A-7, in court, in an inartistic, laconic manner.

In the case of P.W. 11, however, the trial Judge recorded this fact more clearly. The witness stated:

"I can identify 2 persons among the 5 or 6 persons who were seen going behind the bus with white things like daggers. They are accused 7 and 11 (witness identified accused 7 and 11)."

With reference to the test identification, the witness stated:

"I identified A-7 in the 1st parade and A-11 in the second parade".

In cross-examination, he refuted a suggestion made by the defence that he had identified accused 7 at the parade because the police had shown him to the witness, earlier.

For these reasons we think that the High Court was clearly in error in discarding the evidence of these independent witnesses (P.Ws. 9 and 11) so far as the participation of A-7 in the commission of the crime was concerned.

The evidence of the interested witnesses (P.Ws. 2 and

3) was sufficiently corroborated as against A-7 by the credible testimony of P.Ws. 9 and 11. It could therefore be safely acted upon for convicting A-7 as one of the participants in the commission of the murder of P. Eswara Reddy, deceased.

As regards A-2, it is to be noted that neither PW 9 nor P.W. 11 stated that this accused was armed with a revolver. Neither of these witnesses has stated that any of the five or six persons who were seen by them going to the bus and encircling it, was armed with a revolver. They only say that those persons were carrying daggers. The prosecution case however is that A-2 was armed with a revolver only, which he fired in the air. Further when P.W. 9 picked out A-2 at the identification parade, the latter had objected that P.W. 9 was already known to him because he had served him as a driver for about 10 days. It is true that this suggestion was not repeated in the crossexamination of P.W. 9; but we have also to keep in mind in this connection that P.W. 11 had failed to identify A-2 at the test identification parade although both these witnesses had seen the culprits more or less from the same situation and distance. As a matter of abundant caution, while hearing this appeal, we do not consider the identification of A-2 at the test identification parade by P.W. 9, can lend sufficient assurance to the testimony of P.Ws. 2 and 3 so as to justify the conversion of his acquittal into conviction.

Thus, the position that emerges is that the evidence of P.Ws. 2 and 3 has been adequately confirmed by the reliable and independent testimony of P.Ws. 9 and 11 as against A-7, while no such corroboration is forthcoming against any of the other accused-respondents. The High Court was therefore not justified in acquitting A-7.

The only question that remains to be considered is :

What offence has been made out against A-7 ? The charge- sheet by the police in this case was submitted against 13 named persons including A-7. The charge under s. 302 read with s. 34, Penal Code was also framed by the Sessions Judge against all the 13 named accused. In the charge, it was not mentioned that besides these named accused, there were some unidentified or un-named persons who acted conjointly with the charged accused, A-1 to A-13. But there was positive evidence on the record that besides the 13 named accused, there were four or more unidentified persons who participated in the commission of the crime.

Now the position which emerges is that excepting A-7, the participation of the other 12 named accused in the commission of the crime has not been established. The effect of their acquittal is that they would be deemed to have never participated in the criminal enterprise which resulted in the death of the deceased. There is nothing on the record to show as to who out of these persons dealt the fatal blows to the deceased. The question that falls to be determined is : Can A-7, in such circumstances, be held vicariously liable by invoking s. 149 or s. 34, Penal Code for the murder in question ? In *Maina Singh v. State of Rajasthan*(1) after reviewing earlier decisions viz., *Dalip Singh v. State of Punjab*(2); *Bharwad Mepa Dana and Anr. v. State of Bombay*(3), *Kartar Singh v. State of Punjab*(4); *Krishna Govind Patil v. State of Maharashtra*(5); *Mohan Singh v. State of Punjab*(6); *Yeshwant v. State of Maharashtra*(7); on this point this Court speaking through Shinghal J. reiterated the law, thus :

"It would thus appear that even if, in a given case, the charge discloses only the named persons as co-accused and the prosecution witnesses confine their testimony to them, even then it would be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there was other evidence to lead to the conclusion, but not otherwise."

(emphasis supplied) Let us now have another look at the case in hand, in the light of the above enunciation.

In the F.I.R., it was alleged by the informant that 8 named persons and 10 unnamed persons who were not known to the informant, had conjointly committed the crime. At the trial, P.W. 2 testified that the total number of culprits who had participated in the commission of the murder was 20. At the trial, he named A-2 to A-5 and identified A-7, A-10, and A-12 as 8 out of those 20 culprits who

had committed the crime. The evidence of P.W. 3 on this point was that the number of the culprits who committed the murder, while acting in concert, was 17. This means according to the evidence, there were acting conjointly with A-7 at least 4 or 7 more persons in addition to the 13 who were charged by the Committing Magistrate. The medical evidence shows that there were no less than 44 incised injuries, including penetrating wounds, apart from one lacerated wound, two contusions and one abrasion on the body of the deceased. Practically, he was made minced meat. The extremely large number of injuries on the body of the deceased lends assurance to the testimony of P.Ws. 2 and 3 that the number of assailants was more than 13 including some unnamed and unidentified persons. This evidence on the record is thus sufficient to base a firm finding that apart from the accused named in the charge, there were at least one or more unidentified persons who participated in the criminal action against the deceased con-jointly with A-7. While the precise number of those unidentified persons, other than the 13 named in the charge, cannot be ascertained with certitude, it can safely be said that apart from 13 named in the charge, there were some more confederates of A-7 and all of them participated in the fatal assault on the deceased in the manner alleged by the prosecution. A-7 can therefore be safely convicted under s. 302 read with s. 34, Penal Code. According, we allow this appeal against A-7, reverse his acquittal, convict him under s. 302 read with s. 34, Penal Code and sentence him to imprisonment for life.

V.P.S.

Appeal allowed.