Mahabir vs The State Of Delhi on 11 April, 2008

Equivalent citations: AIR 2008 SUPREME COURT 2343, 2008 AIR SCW 3869, 2008 (3) AIR JHAR R 413, 2008 (6) SCALE 52, 2008 (4) CRI RJ 371, 2008 ALL MR(CRI) 1397, (2008) 2 JCC 1244 (SC), 2008 (16) SCC 481, 2008 (5) SRJ 412, (2008) 2 CURCRIR 295, (2008) 3 RECCRIR 5, (2008) 2 GUJ LH 536, (2008) 2 MAD LJ(CRI) 1449, (2008) 1 ANDHLD 960, (2008) 2 ALLCRIR 2162, (2008) 2 DLT(CRL) 578, (2008) 3 ALLCRILR 234, (2008) 149 DLT 439, (2008) 40 OCR 441, (2008) 6 SCALE 52, (2008) 63 ALLCRIC 58, (2008) 3 CHANDCRIC 100, 2008 (1) ALD(CRL) 960

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Bench: Arijit Pasayat, P. Sathasivam

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           CASE NO.:
Appeal (crl.)  932 of 2007

PETITIONER:
Mahabir

RESPONDENT:
The State of Delhi

DATE OF JUDGMENT: 11/04/2008

BENCH:
DR. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
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JUDGMENT REPORTABLE CRIMINAL APPEAL NO.932 OF 2007 With (Criminal Appeal no. 1475 of 2007) Dr. ARIJIT PASAYAT, J.

1. These two appeals are directed against the common judgment of the Delhi High Court in Criminal Appeal nos.430 of 2002 and 328 of 2005. It needs to be noted that by the said common judgment three appeals i.e. Criminal Appeal nos 430/2002, 545/2003 and 328/ 2005 were disposed of.

2. Appellant-Mahabir (appellant in Criminal Appeal no.932 of 2007) was appellant in Criminal Appeal no.430 of 2002 and appellant Jalvir (appellant in Criminal Appeal no.1475 of 2007 was appellant in Criminal Appeal no.328 of 2005). Each of them was convicted for offence punishable under Section 394 read with Section 34, and section 302 read with section 34 of the Indian Penal Code, 1860 (in short 'IPC'), and was sentenced to imprisonment for 10 years with fine and imprisonment for life with fine respectively, with default stipulation in each case for the aforesaid

offences.

3. Background facts in a nutshell are as follows:

Smt. Seema Sharma gave statement to the police alleging that on 24.2.1997 at about 4.15 p.m. she was present in her house bearing No.28-B, pocket-B Sidharth Extension, New Delhi when she heard her door bell ringing and her maid servant Kamla @ Kharpai went to open the door. Accused Jalveer who is related to the complainant along with his three associates entered the house. Complainant was standing in the balcony where all the four reached. All the three associates of Jalveer took out knives, Jalveer also took out knife from his pocket. Two of the associates of accused Jalveer caught hold of the complainant and dragged her to her bed room where she was beaten and accused made enquiries about gold kept in her house and when she did not give any information, they kicked her on her stomach. They removed a gold chain along with locket and jumkas with chain from her ear. When Kamla, the maid servant of the complainant, tried to intervene, two of the associates of the accused Jalveer tied a blouse around the neck of the complainant as a result of which she became unconscious for sometime. After sometime she heard the screams of Kamla @ Kharpai, her maid servant, and when she saw, a nylon string was tied around her neck and she was lying on the floor, Jalveer along with his associate thereafter fled away from the spot. Complainant was admitted in the hospital. Police party reached at the spot, dead body of Kamla was removed to AIIMS where postmortem was conducted on her dead body. Subsequently, accused Mahabir and Mahesh were arrested by the police of police station Hazarat Nizamuddin. A VCR, ear rings of this case belonging to complainant were recovered from their possession. They made disclosure statements regarding this case therefore, they were arrested in the present case. Police applied for holding TIP of accused Mahesh and Mahabir but they refused to join the proposed TIP. The TIP of jewelery articles and VCR recovered from the accused Mahabir and Mahesh was done by the Metropolitan Magistrate. The complainant correctly identified the articles as well as the jewelery recovered from the possession of these accused persons. Subsequently, accused Jalveer was arrested in this case and Roopa was also formally arrested in this case after production warrants were issued. Photographs of the place of incident were taken, site plan was got prepared, finger prints were lifted from the place of incident. Statement of witnesses were recorded by the police and after investigation of the case they came to the conclusion that the accused persons committed the murder of maid servant Kamla and they also committed robbery in the house of the complainant. Accordingly, challan was filed.

After complying with the provision of Section 207 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') learned Metropolitan Magistrate committed the case to the court of Sessions which in turn assigned the same to learned Additional Sessions Judge for trial in accordance with law.

4. In order to establish its accusations the prosecution examined 19 witnesses out of which Smt. Seema Sharma (PW-

4) was the eye-witness to the incident. Placing reliance on her evidence and the test identification parade of the accused persons and the articles, the Trial Court convicted both and sentenced as aforesaid.

5. Before the High Court the primary stand was that PW4 had accepted to have seen the accused Mahabir at the time of his arrest and, therefore, the test identification parade was of no consequence and rightly accused-appellant Mahabir had refused to take part in it. So far as accused Jalvir is concerned, it was stated that the complainant did not know his father's name and address and, therefore, could not have made accusations so far as he is concerned. It was also pointed out that in the first information report name of Jalvir was mentioned though PW4 herself accepted that she was unconscious for four days.

7. The High Court did not find any substance in such plea. It noted that though accused was shown to her, that actually did not dilute the evidentiary value and also that was not relevant as the accused refused to take part in the test identification parade. It was also noted that accused Jalvir was known to the witness and, therefore, there was no difficulty in mentioning his name in the first information report. Accordingly, the conviction and sentence as recorded by the Trial Court came to be affirmed.

8. In support of the appeals, learned counsel for the appellant submitted that the identification after the accused was shown to the witness is really of no consequence. Further, so far as accused Jalvir is concerned, he is barely known to PW4. He was not a frequent visitor to the house of the accused and, therefore, it was not possible for her to identify the said accused.

9. Learned counsel for the respondent-State supported the impugned order of the High Court which affirmed the conviction and sentence as recorded by the Trial Court.

10. We shall deal with the appeal filed by the accused Mahabir. From the evidence of PW4 it is clear that after the incident accused Mahabir and Mahesh were shown to PW4 at the time of their arrest. In fact, police brought many persons for identification of culprits and identified Mahabir and Mahesh to PW4. She admitted that these two persons were brought to the hospital. Subsequently, she had identified them in Court. So far as recovery of the VCR is concerned, which was treated as a ground for holding Mahabir and Jalvir guilty, she accepted that it was not told to her about recovery of VCR. She was told by the police that VCR had been recovered after the police persons had brought Mahabir and Mahesh. Interestingly, she also accepted that Mahabir and Mahesh were brought to the hospital where she was asked to identify them.

11. As was observed by this Court in Matru v. State of U.P. (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain (1973 (2) SCC 406). The necessity for holding an

identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872 (in short the 'Evidence Act'). It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to 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 allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

12. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration (AIR 1958 SC 350), Vaikuntam Chandrappa and others v. State of Andhra Pradesh (AIR 1960 SC 1340), Budhsen and another v. State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v. State of Jammu and Kashmir (AIR 1972 SC 102).

13. In Jadunath Singh and another v. The State of Uttar Pradesh (1970) 3 SCC 518), the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive considerations of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been

frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in Parkash Chand Sogani v. The State of Rajasthan (Criminal Appeal No. 92 of 1956 decided on January 15, 1957), wherein it was observed:-

> "It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 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."

The Court concluded:

> "It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra) (AIR Cri LJ), 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 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."

14. In Harbhajan Singh v. State of Jammu and Kashmir (1975) 4 SCC 480), though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in Court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16th December, 1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held:-

> "In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh v. State of U.P. (AIR 1971 SC 363) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during

> the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant."

15. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.

16. In Ram Nath Mahto v. State of Bihar (1996) 8 SCC 630) this Court upheld the conviction of the appellant even when the witness while deposing in Court did not identify the accused out of fear, though he had identified him in the test identification parade. This Court noticed the observations of the trial Judge who had recorded his remarks about the demeanor that the witness perhaps was afraid of the accused as he was trembling at the stare of Ram Nath - accused. This Court also relied upon the evidence of the Magistrate, PW-7 who had conducted the test identification parade in which the witness had identified the appellant. This Court found, that in the circumstances if the Courts below had convicted the appellant, there was no reason to interfere.

17. In Suresh Chandra Bahri v. State of Bihar (1995 Supp (1) SCC 80), this Court held that it is well settled that substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. From this point of view 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. 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. Thereafter this Court observed:-

> "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 TI parade."

18. In State of Uttar Pradesh v. Boota Singh and others (1979 (1) SCC 31), this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

19. In Ramanbhai Naranbhai Patel and others v. State of Gujarat (2000 (1) SCC 358) after considering the earlier decisions this Court observed:-

> "It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of

the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of V.C. Shukla v. State (AIR 1980 SC 1382) wherein also Fazal Ali, J. speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye-witnesses. 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 eye-witness 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. It is, of course, true as submitted by learned Counsel for the appellants that the later decisions of this Court in the case of Rajesh Govind Jagesha v. State of Maharashtra (AIR 2000 SC 160) and State of H.P. v. Lekh Raj (AIR 1999 SC 3916), had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned Counsel for the appellants that the evidence of, these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eye-witnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well within imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them."

20. These aspects were highlighted in Malkhansingh and Others v. State of M.P. (2003 (5) SCC 746).

21. In view of the accepted position that the accused persons were brought to the hospital to be shown to PW4, grievance that the test identification parade was really of no consequence because they had already been shown to the witnesses has substance. That being only piece of material which was used for conviction of Mahabir, same cannot be sustained. The same is set aside. He be released forthwith unless required in any case. So far accused Jalvir is concerned, PW4 had categorically stated that she knew him six years prior to the incident. He had come to their house many times. Therefore, there was no difficulty in identifying accused Jalvir and naming him in the first information report. It is of significance that in the first information report name of Jalvir was specifically noted. The plea that Jalvir's name could not have been given at the first instance, because the witness was unconscious is without any substance. As a matter of fact, the witness has categorically stated that after the information was lodged, she became unconscious. Above being the position, the conclusions of the Trial Court in holding accused Jalvir guilty does not suffer from any

infirmity.

22. The High Court was right in dismissing the appeal of accused-appellant Jalvir. We find no infirmity in the conclusions of the High Court to warrant interference. Therefore, Criminal Appeal no.1475 of 2007 stands dismissed and as noted above, Criminal Appeal no.932 of 2007 is allowed.