# Mukesh Singh vs The State (Nct Of Delhi) on 24 August, 2023

## Author: M.M. Sundresh

## Bench: M.M. Sundresh

2023INSC765 REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1554 OF 2015

MUKESH SINGH …APPELLANT

VERSUS

THE STATE (NCT OF DELHI) …RESPONDENT

JUDGMENT

J.B. PARDIWALA, J. :

1. This appeal, by special leave, is at the instance of a convict accused and is directed against the judgment and order dated 28.02.2014 passed by the High Court of Delhi in Criminal Appeal No. 1246 of 2011 by which the High Court dismissed the appeal and thereby affirmed the judgment and order of conviction dated 08.04.2011 and the order on sentence of life imprisonment dated 27.04.2011 Date: 2023.08.24 16:13:31 IST Reason:

resply passed by the Additional Sessions Judge-II (North West), Rohini, Delhi in the Sessions Case No. 998 of 2009 holding the appellant convict herein guilty for the offences punishable under Sections 302, 392, 394 and 397 resply read with Section 34 of the Indian Penal Code (for short, 'IPC').

CASE OF THE PROSECUTION

2. The appellant convict along with three other co- accused was put to trial in the Court of the Additional Sessions Judge-II (North West), Rohini, Delhi for the offences punishable under Sections 392, 394, 397, 307, 302, 411 read with Section 34 of the IPC. On 16.08.2008 at about 3.30 in the early morning the PW-1, namely, Sushil Kumar (original first informant and injured eye witness)

along with his friend Pappu (deceased) and his brother Pradeep Kumar, PW-4 were at the Azadpur Subzimandi. They were at the Azadpur Subzimandi for the purpose of purchasing vegetables. After purchasing vegetables from the D Block corner of the Azadpur Subzimandi, they proceeded towards the main gate. When the PW 1 and his friend Pappu reached near the STD PCO at the D Block corner, they were cornered by the four accused persons who were put to trial. These four accused persons, according to the case of the prosecution, included the appellant herein also. Two of the accused persons snatched away Rs. 14,800/- from the pocket of the PW 1. The two accused persons who snatched away the money from the pocket of the PW 1 were Sharwan Kumar and Pawan Kumar respectively. When the PW 1 resisted, the other two accused persons armed with ice picks attacked him and his friend Pappu. The appellant convict and co-accused Vijay alias Kalia are alleged to have caused injuries with their respective ice picks on the body of the PW 1 as well as his friend Pappu (deceased). After robbing and in the process of causing injuries, all the four accused ran away from the place of occurrence. When the traffic of trucks at the market got eased, the PW-1 saw Pappu (deceased) lying in an injured condition. Both received help from the PCR officials and were taken to the BJRM hospital. Pappu ultimately succumbed to the injuries he suffered and died at the hospital. The PW 1 was also admitted in the hospital.

3. The PW 1 lodged the First Information Report (FIR) No. 186 of 2008 on 16.08.2008 in connection with the incident as narrated above. The FIR No. 186 of 2008 dated 16.08.2008 reads thus:-

> "F.I.R. No.186/2008, DATED 16.08.08 Statement of Sushil Kumar S/o Shri Ram Das R/o H. No.190, Mukesh Nagar, Shahadara Gali No.3, near Badi Ramleela Ground, Delhi aged 42 years. Stated that I reside at the above mentioned address with family and I am a retail vegetable seller at nearby place of Metro Station. Today, on 16/8/08, I arrived for purchasing vrgetables at Azadpur Sabzimandi along with my friend Pappu S/o Shri Shokaran Singh R/o H.No.199, Bholanath Nagar, Near Railway Line, Sabzimandi Shahdara, Delhi. We purchased some vegetables from D Block and we both were going towards main gate from D Block Azadpur Mandi. Then, at around 3-30 a.m., when, we both reached at D Block Corner main road Azadpur Mandi, then, four boys, surrounded us and out of them, two boys, took out amount of Rs.14,800/- placed in my pocket. I and my friend Pappu opposed it. The four boys began to fight with us and out of them, two boys, by taking out some sharp weapon, attacked on the chest of Pappu and on my left hand and on my chest and on our screaming, the four boys, snatched the amount from us and ran away from the spot. The police personnel of PCR Van admitted us in BJRM Hospital. The four boys, having common intention, have looted the amount from me and on raising objection by us, with intention to kill us, while attacking by sharp object, have injured us. I will identify if four boys may come in front of me. You have recorded my statement as per my saying. Read over and affirmed to be correct. Hence, it is requested that legal action may kindly be taken against them." [Emphasis supplied]

4. Upon the FIR being registered as referred to above, the investigation started. On 17.08.2008 pursuant to the secret information, the three co-accused, namely, Vijay

alias Kalia, Pawan Kumar and Sharwan Kumar were arrested from the DDA park, South Azadpur, Delhi. The appellant convict herein came to be arrested on 20.08.2008.

5. In the course of the investigation, the investigating officer decided to hold the Test Identification Parade (TIP) of the accused persons. However, it is the case of the prosecution that the appellant convict herein declined to participate in the TIP on the ground that he was already shown to the witnesses in the police station.

6. It is also the case of the prosecution that after the arrest of the appellant convict, he made a statement that he would be in a position to show the weapon of offence i.e. the ice pick which he had placed in one corner of his house.

The investigating officer is said to have discovered the weapon of offence i.e. the ice pick at the instance of the appellant convict herein.

7. Upon conclusion of the investigation, the charge sheet was filed for the offences enumerated above. The case was committed to the Court of Sessions as the offences were exclusively triable by the Court of Sessions. The appellant convict herein and the co-accused pleaded not guilty to the charge framed by the trial court and claimed to be tried.

8. In the course of trial, the prosecution led the following oral evidence:-

Sr. Name of the witness Details of deposition No. PUBLIC WITNESSES/EYE WITNESSES

1. Sushil Kumar He is the eye witness to the (PW1) incident and had also received injuries during the incident. He has deposed on the following aspects:

1. That on 16.08.2008 he along with his friend namely Pappu came to Azadpur Subzi Mandi to purchase vegetables.

2. That they had purchased some vegetable from the D Block of Azadpur Subzi Mandi and were going towards the IN Gate/ Main gate and at about 3.30 AM when they were near the STD PCO on the D Block corner, they were encircled by four persons.

3. That two of the accused persons snatched Rs.14,800/- from his pocket. He has identified the accused Sharwan Kumar and Pawan to be the persons who had snatched money from him.

4. That when he resisted, two of the other accused persons who were armed with Ice pricks started attacking him and Pappu. He has identified the accused Vijay @ Kalia to be the person, who stabbed him and has also identified accused Mukesh as the person who was armed with ice prick.

5. That the accused persons Vijay and Mukesh caused injuries with the aid of ice picks on the person of Pappu and also to him on the left side of chest and abdomen in three places and also on his right hand.

6. That after snatching money the accused persons ran away.

7. That he had been gheroed by the accused persons, when he entrapped in the traffic of trucks and when he moved out of the traffic he saw that his companion Pappu was also lying in an injured condition on the road on which he called up PCR from his mobile phone bearing number 9210415252 and requested the public to take them to hospital.

8. That they were taken to a private nursing home but the guard at the Nursing Home did not let them enter the same on the pretext of police case and in the meantime, PCR officials reached there and took them to BJRM Hospital.

9. He has proved having given his statement to the police in BJRM Hospital which is Ex.PW1/A.

10.That the denomination of currency note was Ten currency notes of Rs.1000/-, Nine currency notes of Rs.500/- and Three currency notes of Rs.100/- each.

11.That he had identified the accused persons on 15.09.2008 in the Rohini court Complex when the accused persons had produced in the some court.

12.That his blood stained clothes were seized at the hospital which he identified in the court i.e. a white shirt with cuts on the left chest side which is Ex.P1 and a vest bearing a cut corresponding to the cut in the shirt which is Ex.P2.

13.That within a month of the occurrence he was again called at the hospital when his blood sample was taken by the doctor.

2. Pradeep Kumar He is the brother of deceased (PW4) Pappu and also the alleged eye witness to the incident. He has deposed on the following lines:

1. That on 16.08.2008 he along with his brother Pappu and one Sushil came to Azadpur Subzi Mandi for purchasing vegetable at around 3.00 a.m. and Pappu and Sushil went towards D Block for purchasing vegetables whereas he went towards onion shed.

2. That at around 3.30 AM he saw that four boys had surrounded his brother Pappu and friend Sushil and one of them had taken out the purse of his brother from his pocket and when his brother objected then the accused Mukesh and Vijay (whom the witness has correctly identified in the court by pointing out towards them but not by

name), gave ice prick blow on various parts of his body and the other two accused who had surrounded his brother and Sushil had taken out the money.

3. He has identified the accused Pawan and Sarwan correctly by pointing out towards them in the court.

4. That accused gave ice prick blow to Sushil and Pappu on which he raised alarm and thereafter all the four accused ran away towards D Block on which somebody informed the police on No.100 and police came there and took his brother and Sushil to BJRM Hospital.

5. That he went to his house to inform about the incident and later on he came back at the spot when he came to know that his brother has already expired.

6. That deceased Pappu was having black colour purse and used to keep one small diary and some telephone diary, voter I card etc.

7. That after postmortem examination dead body of his brother was received vide receipt which is Ex.PW4/A.

8. That later on he identified the accused Pawan and Vijay in the judicial test Identification Parade in Rohini jail. He has proved his statement recorded during the Test identification Parade of accused Pawan and Vijay which are Ex.PW4/B and Ex.PW4/C respectively.

9. That subsequently he was again called in Tihar jail for the test Identification Parade of other two accused but they refused to participate in the same and thereafter he had not identified them anywhere before the police.

10. Some leading questions were put to the witness Pradeep by the Ld. Addl. PP for the State wherein he has admitted that on 15.09.2008 he had come to court complex Rohini and outside the court of Ld. MM Shri Prashant Kumar he had identified accused Sharvan and Mukesh also besides accused Pawan and Vijay to the investigating officer being the said four persons who were involved in the incident.

11.That in the incident accused Sharvan had blocked the way of his brother and Sushil and Mukesh had attacked them with ice prick.

MEDICAL EVIDENCE/WITNESSES

3. Dr. Gopal (PW3) This witness has proved that on 16.08.2008 one patient Sushil S/o Ramdass aged 42 years, male was brought to the BJRM hospital with the alleged history of physical assault and was examined by Dr. Nadeem Sr. Resident under his supervision. He has proved the MLC of injured Sushil which is Ex.PW3/A. He has

also proved that on the same day one patient Pappu S/o Sobran Singh, aged 45 years male was also brought to hospital with the alleged history of physical assault and was also examined by Dr. Nadeem under his supervision vide MLC which is Ex.PW3/C.

4. Dr. R.P. Singh This witness has proved having (PW12) conducted the postmortem examination on the dead body of deceased Pappu on 16.8.2008 which report is Ex.PW12/A. He has also proved that the cause of death in this case was shock due to cardiac temponade as a result of injuries to great vessels produced by pointed stabbing object and the Injury no.2 is ante-mortem and sufficient to cause death in ordinary course of nature and time since death is about eight hours.

He has also proved that on 22.10.2008 on an application moved before him by Inspector Ram Chander, he gave his opinion that the injuries mentioned in the dated 16.8.2008 on the body of Pappu S/o Shobha Ram are possible by the weapons produced before him or by similar such type of weapons, which opinion is Ex.PW12/B. He has proved that the sketch prepared by him which are Ex.PW12/C & PW12/D. He has correctly identified the ice pricks examined by him which are Ex.P-4 and Ex.P-5.

5. Dr. Rohit Kumar This witness has proved the death (PW15) certificate of Pappu issued by BJRM hospital which is Ex.PW15/A and Death Summary which is Ex.PW15/B POLICE/OFFICIAL WITNESSES (Proving Investigations)

6. HC Raghubir Singh He is a formal witness being the (PW2) Duty Officer who has proved having received the rukka on the intervening night of 15/16.08.2008 at around 6 AM which was brought by ASI Surender and sent by SI Arvind Pratap Singh, on the basis of which rukka he got an FIR no.186/08, under Section 394/ 397/307/34 IPC registered by dictating it to the computer operator, print out of which FIR is Ex.PW2/A. He has also proved having made an endorsement on the rukka which is Ex.PW2/B and having recorded the DD No.31A copy of which is Ex.PW2/C.

7. HC Mahender He is also a formal witness being (PW5) the photographer who has proved having taken seven photographs of the place of incident on the direction of the investigating officer the negatives of which are Ex.PW5/A (1 to 7) and the corresponding positive photographs are Ex.PW5/B (1 to 7).

8. SI Satpal Singh This witness is the Crime Team (PW6) Incharge who has proved having inspected the spot of incident on 16.08.2008 and having prepared his report which is Ex.PW16/A which he handed over to the Investigating Officer.

9. HC Prahlad Singh He is the formal witness being the (PW7) MHCM who has proved having received the various case properties from the Investigating Officer and later on sent same to FSL. He has placed on record the photocopies of the various entries in Register No. 19 and the RC which are Ex.PW7/A to Ex.PW7/J. He has proved that the sealed pullanda remained intact during his custody and he did not interfere with the same nor allowed anyone to interfere with it.

10. SI Manohar Lal He is the Draftsman who has (PW8) proved having prepared the scaled site plan of the spot of incident which site plan is Ex.PW8/A.

11. Ct. Rakesh (PW9) He is a formal witness who has proved that on 27.10.2008 he took six sealed pullandas and four sample seals along with FSL Form for depositing in FSL Rohini vide RC No.83/21/08. He has proved that the sealed pullanda remained intact during his custody and he did not interfere with the same nor allowed anyone to interfere with it.

12. SI Arvind Pratap He is the initial investigating officer Singh (PW10) who has proved the following documents:

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| Ex.PW10/A | DD No. 29A |
| Ex.PW10/B | Rukka prepared by him |
| Ex.PW10/C | Seizure of pullanda containing the clothes of injured Sushil. |
| Ex.PW10/D | Arrest memo of accused Vijay @ Kalia |
| Ex.PW10/E | Arrest memo of accused Pawan |
| Ex.PW10/F | Arrest memo of accused Sharwan |
| Ex.PW10/G | Personal search memo of accused Vijay |
| Ex.PW10/H | Personal search memo of accused Pawan |
| Ex.PW10/J | Personal search memo of accused Sharwan |
| Ex.PW10/K | Disclosure statement of accused Vijay |
| Ex.PW10/L | Disclosure statement of accused Pawan |
| Ex.PW10/M | Disclosure statement of accused Sharwan |
| Ex.PW10/N | Pointing out memo |
| Ex.PW10/O | Seizure of Purse along with its belonging got |

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| | recovered by the accused Vijay @ Kalia |
| Ex.PW10/P | Sketch of the ice prick got recovered by the accused Vijay @ Kalia |
| Ex.PW10/Q | Seizure of the ice prick |
| Ex.PW10/R | Arrest memo of accused Mukesh |
| Ex.PW10/S | Personal search memo of accused Mukesh |
| Ex.PW10/T | Disclosure statement of accused Mukesh |
| Ex.PW10/U | Pointing out memo |
| Ex.PW10/V | Seizure of currency notes recovered by the accused Mukesh |
| Ex.PW10/W | Sketch of the ice prick got recovered by the accused Mukesh |
| Ex.PW10/X | Seizure of ice prick got recovered by the accused Mukesh |

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| 13. | SI Kishan Lal (PW11) | This witness has proved having got conducted the Test Identification Parade of the accused persons during which they have refused to participate. He has also proved having got the witness Sushil Kumar medically examined in BJRM Hospital and the seizure of blood samples of the accused vide memo Ex.PW11/A. |

14. Inspector R.C. He is the subsequent investigating Sangwan (PW13) officer who has proved the various investigation proceedings conducted by him. Apart from the document proved by SI Arvind Pratap he has proved the following documents:

> Ex.PW13/A-1 Photographs of to A-7 the spot Ex.PW13/B Site plan Ex.PW13/C Brief Facts Ex.PW13/D Form 25.35 Ex.PW13/E & Dead body Ex.PW13/F identification statement of Pradeep and Bhagwati Ex.PW13/G Request for postmortem Ex.PW13/H Seizure of pullanda containing clothes of the deceased Ex.PW13/J Application for

seeking subsequent opinion Ex.PX FSL result (not disputed by the Ld. counsels for the accused persons)

15. HC Kanwarpal He was the PCR van Incharge and (PW14) has deposed that:

1. In the intervening night of 15/16.8.2008 at about 3:50 am they received the information that two persons have been stabbed at gate no.2 Azadpur Mandi.

2. Thereafter he along with staff reached gate no.2 Azadpur Mandi from where he came to know that the incident had taken place at D-

Block Corner near STD booth and thereafter, they reached there and found two persons namely Sushil Kumar and Pappu in injured conditions.

3. They took the injured to BJRM Hospital and got them admitted there for treatment.

16. Sh. Rajesh This witness has proved having Kumar Goel, conducted the Test, Ld. ACMM Ld. ACMM Identification Parade proceedings of accused persons namely Sharwan Kumar, Vijay @ Kalia and Pawan Kumar and Mukesh. He has proved the following documents:

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| Ex.PW8/A | Test Identification Parade of accused Mukesh |
| Ex.PW8/B | Test Identification Parade of accused Vijay @ Kalia |
| Ex.PW8/C | Test Identification Parade of accused Pawan |
| Ex.PW16/A | Application of the investigating officer for obtaining copies of the proceedings |
| Ex.PW8/E | Test Identification parade of accused Sharwan |
| Ex.PW16/B | Application of |

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| | the investigating officer for obtaining the copies of the proceedings |
| Ex.PW16/C & Ex.PW16/D | Envelopes containing the Test Identification Parade proceedings |
| Ex.PW16/E & PW16/F | Application moved by the investigating officer for conducting Test Identification Parade |

9. Upon conclusion of the recording of evidence, the further statement of the appellant convict under Section 313 of the Code of Criminal Procedure, 1973 (CrPC) was recorded in which the appellant convict stated that he had refused for the TIP as he was already shown to the witnesses by the police. He further stated that he was innocent and had been falsely implicated in the case. He was picked up from the house of his in-laws and was detained in the police station for three days. He stated that he had no idea about the case.

10. Upon appreciation of the oral as well as documentary evidence on record, the Trial Court came to the conclusion that the appellant convict herein and the co-accused, namely, Vijay alias Kalia were guilty of the offences punishable under Sections 302, 392, 394 and 397 resply read with Section 34 of the IPC, whereas the other two co-accused, namely, Pawan Kumar and Sharwan Kumar were held guilty of the offence punishable under Section 392 read with Section 34 of the IPC.

11. The order of sentence as awarded to the appellant convict herein by the Trial Court is reproduced as under:-

> "The convict Mukesh Singh is sentenced to Rigorous Imprisonment for life and fine for a sum of Rs.25,000/- for the offence under Section 397 read with 302 Indian Penal Code. In default of payment of fine the convict shall further undergo Simple Imprisonment for a period of three months. The total fine of Rs.25,000/-, if recovered, shall be given to the family of the deceased Pappu as compensation under Section 357 Cr.P.C. Further the convict is sentenced to Rigorous Imprisonment for a period of Five years and fine of Rs. 2,000/- for the offence under Section 392 read with Section 394 Indian Penal Code. In default of payment of fine the convict shall

further undergo Simple Imprisonment for a period of one week."

12. The appellant convict being aggrieved by the judgment of conviction and order on sentence passed by the Trial Court went in appeal before the High Court of Delhi. The High Court upon re-appreciation of the entire evidence on record, dismissed the appeal and thereby affirmed the judgment of conviction and order on sentence passed by the Trial Court.

13. In such circumstances referred to above, the appellant is here before this Court with the present appeal. SUBMISSIONS ON BEHALF OF THE APPELLANT

14. Mr. Jayesh Gaurav, the learned counsel appearing for the appellant convict vehemently submitted that the Courts below committed a serious error in holding that the prosecution was successful in establishing its case against the appellant convict beyond reasonable doubt. He submitted that the conviction of the appellant convict is essentially based on the evidence of the PW 1 – Sushil Kumar. According to the learned counsel, there is no other evidence on record to connect the appellant convict with the alleged crime.

15. The learned counsel laid much stress on the fact that the case of the prosecution is one of robbery and murder. The time of the alleged incident is early in the morning at 3.30. He argued that although the incident occurred at a vegetable market, yet there were no sufficient lights in that area to enable the assailants to easily identify or to put it in other words, the PW 1 as an injured eye witness must not have had the occasion to even have a bare glimpse of the appellant.

16. It was argued that the investigating officer had arranged a TIP but the appellant convict had declined to participate in the same as he had already been shown to the witnesses in the police station. He further submitted that the PW 4, namely, Pradeep Kumar also claims to be an eye witness to the incident. However, both the Trial Court and the High Court disbelieved his oral evidence as his presence at the place of occurrence was found to be doubtful. Therefore, according to the learned counsel, the entire case hinges on the evidence of a solitary eye witness i.e. PW 1 Sushil Kumar. He argued that PW 1 Sushil Kumar identified the appellant convict herein and other three co-accused for the first time before the Trial Court. This identification for the first time before the Trial Court could not have been relied upon being a weak piece of evidence to hold the appellant convict guilty of the offences charged with.

17. The learned counsel vehemently submitted that the Courts below ought not to have drawn any adverse inference against the appellant convict for not having participated in the TIP. According to the learned counsel, the TIP is a part of the police investigation and the accused cannot be compelled to submit himself to the TIP, more particularly if the case of the accused is that he was already shown to the witness before the TIP could be undertaken. In other words, the submission of the learned counsel is that if the identification of the appellant convict for the first time before the Trial Court is eschewed from consideration, then there is no other evidence to connect him with the alleged act. The learned counsel submitted that the prosecution seeks to rely upon the discovery of the weapon of offence i.e. the ice pick and an amount of Rs. 7,000/- of the denomination of one thousand from the house of the appellant convict, but it is not a discovery in the eye of law as the

same is not in conformity with Section 27 of the Evidence Act, 1872 (for short, 'the Evidence Act').

18. In such circumstances referred to above, the learned counsel prayed that there being merit in his appeal, the same may be allowed and the appellant convict be acquitted of all the charges.

SUBMISSIONS ON BEHALF OF THE STATE (NCT OF DELHI)

19. On the other hand, this appeal was vehemently opposed by Mr. K.M. Nataraj, the learned Additional Solicitor General appearing for the State (NCT of Delhi). He submitted that no error, not to speak of any error of law, could be said to have been committed by the Courts below in holding the appellant convict guilty of the offences he was charged with. The learned ASG submitted that the Courts below were justified in drawing adverse inference against the appellant convict for having declined to participate in the TIP. It was argued that once having declined to participate in the TIP, the accused thereafter cannot object or say anything against as regards the evidentiary value of the identification by the eye witnesses of the accused persons before the Trial Court. He further argued that the identification of the accused by the eye witnesses before the Trial Court constitutes substantive evidence and, if TIP is carried out in the course of the investigation, then the proceedings of such TIP would corroborate the substantive evidence of identification before the Court. The learned ASG submitted that the Courts below have believed and found the identification of the accused appellant for the first time before the Trial Court, absolutely reliable and trustworthy. This being a question of fact, the same may not be disturbed by this Court in exercise of its jurisdiction under Article 136 of the Constitution.

20. The learned ASG further submitted that over and above the evidence of identification, there is evidence of discovery of the currency notes of Rs. 7,000/- of the denomination of one thousand as well as the weapon of offence i.e. the ice pick from the house of the appellant convict. This, according to the learned Additional Solicitor General, is one additional incriminating circumstance against the appellant convict pointing towards his guilt.

21. In such circumstances referred to above, the learned ASG prayed that there being no merit in this appeal, the same may be dismissed.

ANALYSIS

22. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:-

> (i) Whether the High Court committed any error in dismissing the appeal filed by the appellant convict and thereby affirming the judgment and order of conviction and sentence passed by the Trial Court for the alleged offences?
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> (ii) Whether an accused can decline to participate in the TIP on the ground that he was already shown to the eye witnesses prior to the conduct of the TIP and in such circumstances, the TIP would be nothing short of creating evidence against him?

(iii) Can an accused decline to participate in the TIP that the investigating officer may propose to hold in the course of investigation on the ground that no person accused of any offence shall be compelled to be a witness against himself? To put it in other words, can an accused decline to subject himself to the TIP on the ground that the same violates his fundamental right under Article 20(3) of the Constitution?

(iv) To what extent the Court can draw an adverse inference against the accused for having refused to participate in the TIP? Whether by virtue of drawing such adverse inference, is it open for the Court to accept the substantive evidence of identification before the Trial Court without any corroboration to such identification?

(v) What is the true purport of Section 54A of the CrPC?

(vi) Whether the Courts below were justified in placing reliance on the discovery of weapon of offence and the currency notes from the residence of the appellant convict as one of the incriminating circumstances against the appellant convict?

Whether TIP violates the fundamental right of an accused under Article 20(3) of the Constitution

23. Article 20(3) of the Constitution reads thus:-

"Article 20(3):□No person accused of any offence shall be compelled to be a witness against himself."

24. The true purport of clause (3) of Article 20 of the Constitution referred to above was laid down by this Court in the case of M.P. Sharma v. Satish Chandra, AIR 1954 SC 300. Jagannadhadas J., delivering the judgment of the Court, observed:-

"Indeed, every positive volitional act, which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part."

25. We are conscious of the fact that M.P. Sharma (supra) referred to above came to be overruled in K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, to the extent that it had observed that privacy is not a right guaranteed by the Indian Constitution. It was held in M.P. Sharma (supra) that in absence of a provision like the Fourth Amendment to the U.S. Constitution, a right to privacy could not be read into the Indian Constitution. In the case on hand, we are not concerned with the right of privacy of an accused when it comes to putting him to TIP. What has been ruled in K.S. Puttaswamy (supra) in context of Article 21, is that an invasion of privacy must be fulfilled on the basis of a law which stipulates a procedure which is fair, just and reasonable.

26. What is prohibited by Article 20(3) of the Constitution is procuring by compulsion of the positive volitional evidentiary acts of an accused. It is true that an accused may be said to be

compelled to attend a test identification parade, but this compulsion does not involve any positive volitional evidentiary act. His mere attendance or the exhibition of his body at a test identification parade even though compelled, does not result in any evidentiary act until he is identified by some other agency. The identification of him by a witness is not his act, even though his body is exhibited for the purpose. His compelled attendance at a test identification parade is comparatively remote to the final evidence and cannot be said by itself to furnish any positive volitional evidentiary act. [See : Peare Lal Show v. The State, AIR 1961 Cal 531]

27. In Peare Lal Show (supra), Mitter, J. of the Calcutta High Court in his separate judgment observed thus:-

> "5. True, we are to construe Article 20(3), but the language of Article 20(3) is as to the material part tolidem verbis the 5th Amendment of the American Constitution. Dealing with the point, Holmes, J. in Holt v. United States, (1910) 218 US 245, observed:
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> "A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent".
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> 6. In the same strain are to be found comments in Wigmore on Evidence, Volume VIII (3rd Edition), Section 2263 at page 363. The emphasis is upon the testimonial status of the accused and not upon any compulsion which might be a step in obtaining the final evidence against the man. Dealing with, this topic, Wigmore observed:
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> "Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence: for if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status, -- if, in other words, it created inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles, a clear "reductio ad absurdum"."

> 7. The foregoing principles were embodied in the judgement of the Supreme Court in M.P. Sharma v.

Satish Chandra, AIR 1954 SC 300, and the statement of the law set out earlier in this judgment furnishes, to my mind, the real test for determining whether any particular accused is compelled to be a witness against himself. As I have pointed out, the identification of an accused at a test identification parade by someone is not the accused's own act. His mere attendance or the exhibition of his body cannot be regarded as furnishing any positive volitional evidentiary act. That being the position, the impugned order cannot be regarded as violative of Article 20(3) of the Constitution." [Emphasis supplied]

28. Bhattacharya, J. by his separate but concurring judgment observed thus:-

> "10. In M.P. Sharma v. Satish Chandra, AIR 1954 SC 300, it is pointed out that the guarantee under Article 20(3) of the Constitution is available to the person against whom a first information report has been recorded. As was observed in Collector of Customs v. Calcutta Motor and Cycle Co., AIR 1958 Cal 682, no formal complaint is necessary and even if a person has been named as one who committed an offence, particularly by officers who are competent to launch a prosecution against him, he has been accused of an offence within the meaning of Article 20(3) and he can claim protection under that provision of law and, therefore, the extortion of any evidentiary material even at the stage of investigation, as in the present case, which may aid in the making out of a case against him may be within the meaning of condemnation of the Article. After the decision of the Supreme Court in Sharma's case, referred to above, it cannot be said that the guarantee in Article 20(3) is confined to the oral evidence of the accused. Their Lordships pointedly observed:
>
> "We can see no reason to confine the contents of the constitutional guarantee to this barely literal import. So to limit it would be to rob guarantee of its substantial purpose and to miss the substance for the sum as stated in certain decisions. A person can be a witness not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness or the like. To be a witness is nothing more than to furnish evidence and such evidence can be furnished through the lips or by production of a thing or of a document or any other means".
>
> 11. The Magistrate has directed the production of the petitioner in a test identification parade. The petitioner has objected to this procedure.

Consequently, there is an element of coercion and therefore no question of acquiescence arises. This kind of objection may be raised, in my opinion, by an accused person not only at the time of passing of such an order by a Magistrate orally or in writing, personally or through his lawyer, but also at the time of actual collection of his evidence which, according to the accused, may be self-incriminatory in character. The objection of the petitioner is in time. There is, therefore, no technical bar.

14. Apart from the question of coercion as opposed to acquiescence the fundamental idea stressed is 'positive volitional evidentiary act'. This is distinct from 'negative attitude of silence or submission'. It is clear that the Supreme Court did not lay down only the negative principle of silence or acquiescence. What stands out prominently in the judgment is 'a positive volitional evidentiary act'. If coercion is sought to be imposed in getting from an accused evidence which cannot be procured save through positive volitional act on his part, the Constitutional guarantee will step in to protect him. This was the view of this Court in the case of Farid Ahmed v. The State, AIR 1960 Cal 32, in connection with a case in which the Magistrate allowed an investigating officer to take specimen writing and signatures of the accused. But if that evidence can be procured without any positive volitional evidentiary act on the part of the accused, Article 20(3) of the Constitution will have no application. In so far as the above ratio decidendi laid down by the Supreme Court was not kept in view fully in Bhaluka Behara v. The State, AIR 1957 Orissa 172; Brij Bhusan v. The State, AIR 1957 Madh Pra 106; Nazir Singh v. The State, AIR 1959 Madh Pra 411, or Sailendra Nath v. The State, AIR 1955 Cal 247, or Ram Swarup v. The State, AIR 1958 Cal 119, we would with due deference dissent from the views in these decisions. In Bhaluka Behara v. The State, the Orissa High Court seems to have been of the opinion that any direction asking the accused to give his thumb impression would amount to asking him to furnish evidence which is prohibited under Article 20(3). In this case, however, there was no element of coercion or compulsion and no objection had been raised by the accused persons at the time of taking the thumb impression. In Brij Bhusan v. The State, the Madhya Pradesh High Court held that Section 5 of the Madhya Bharat Identification of Prisoners Act, in so far as it conferred powers on the Magistrate to direct an accused person to give his thumb impression, specimen writing and signature for comparison to be used against him in a trial, was repugnant to Article 20(3) of the Constitution and was, therefore, void. In Sailendra Nath v. The State and Ram Swarup v. The State it was pointed out that taking specimen writing did not offend Article 20(3) of the Constitution, -- a view that was dissented from in Farid Ahmed v. The State.

18. It will appear from People v. Swallow, 165 New York Supp. 915, that the rule against self-incrimination is not violated when the accused is compelled to exhibit himself or part of his body to the court or to allow a record of his finger prints to be taken. In State v. Ah Chuey, (1879) 33 Am Re 530, the Court held that an order directing the accused to exhibit certain tattoo marks On his person would not amount to an infringement of the rule against self- incrimination.

19. Negativing the contention that taking of finger prints is a violation of the privilege against self-incrimination, Willis in Constitutional Law of the United States (1936 Edition, page 522) observed inter alia:

> "The accused does not exercise a volition or give oral testimony. He is passive. He is not giving testimony about his body, but is giving his body". Speaking of inspection of bodily features by the Tribunal or by witnesses, Wigmore in Evidence, Vol. VIII, page 375, Section 2265 comments that what is obtained from the accused by such action is not testimony about his body but his body itself. This aspect, I cannot help repeating, was also stressed by Holmes, J. in the case of (1910) 218 US 245 by observing:

> "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material".

20. If, as we find, taking of thumb impression is not violative of Article 20(3), with greater force the reasons set out above mutatis mutandis will be applicable to a case directing the production of the accused in a test identification parade, apart from such consideration as interposition of a magisterial order. It is not the accused who is called upon to testify against himself but somebody else on seeing him and others now in the parade may have something to say later on. The accused does not produce any evidence or perform any evidentiary act. It may be a positive act and even a volitional act, but only to a limited extent, when he walks to the place where the test identification parade is to be held, as has been urged by Mr. Dutt, but certainly it is not his evidentiary act. The view that we take in the instant case is in full accord with the test of positive volitional evidentiary act laid down by the Supreme Court in the case of M.P. Sharma v. Satish Chandra, AIR 1954 SC 300." [Emphasis supplied] SECTION 54A OF THE CODE OF CRIMINAL PROCEDURE, 1973

29. In the aforesaid context, we shall now look into Section 54A of the CrPC. Section 54A reads thus:-

> "Section 54A. Identification of person arrested.□Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction may, on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit.
>
> Provided that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with:
>
> Provided further that if the person identifying the person arrested is mentally or physically disabled, the identification process shall be videographed."

30. The newly inserted Section 54A provides for the identification of the arrested person where it is considered necessary for the purpose of investigation by the officer-in- charge of a police station. The said Section empowers the court, on the request of the officer-in-charge of a police station, to direct for placing the accused at test identification parade for identification by any person or persons in such manner as the court may deem fit. It is provided in the "objects and reasons":-

> "This clause seeks to insert a new section 54A to empower the Court to direct specifically the holding of the identification of the arrested person at the request of the prosecution."

31. First Proviso : Identifier mentally or physically disabled.□When the person identifying the suspect is mentally or physically disabled, the process of identification must be under the supervision of a Judicial Magistrate. This mandatory requirement of law has been incorporated in the statute by the amending Act 13 of 2013 w.e.f. 03.02.2013. It is the duty of the Magistrate supervising TIP to take appropriate steps to ensure that such identifier identifies the suspect using methods to which he was comfortable with. The Magistrate cannot discharge his duty lightly or in a slip-shod manner.

32. Second Proviso : Identification when suspect is mentally or physically disabled. □The second proviso to Section 54A has been inserted in the statute by the amending Act 13 of 2013 w.e.f. 03.02.2013. It relates to identification of a suspect who is mentally or physically disabled. It appears that the requirements specified in the first proviso are not attracted for the second proviso. But it is obligatory that the process of identification of the person arrested shall have to be videographed. Unless this requirement is complied with, the identification shall fall to the ground and no reliance can be placed on it at any stage of the trial.

33. This Section is restricted to identification of persons only. So this Section has no application where the question of identification of articles arises. TIP is part of investigation and the investigation of a case is to be conducted by the investigating agency and it is their statutory prerogatives. There was no statutory provision authorizing the accused to pray for placing him in the test parade. Some High Courts approved this right, while some other High Courts took a contrary view. In State of Uttar Pradesh v. Rajju, AIR 1971 SC 708, this Court observed, “If the accused felt that the witnesses would not be able to identify them□they should have requested for an identification parade.” This observation indirectly approves the right to ask for test parade by the accused. In another case, the accused voluntarily accepted the risk of being identified in a parade but he was denied that opportunity. This Court observed that this was an important point in his favour □Shri Ram v. State of U.P., (1975) 3 SCC 495.

34. This provision for giving directions by the Court as to the manner in which test parade is to be conducted may be viewed as treating the Court as part of the investigating agency. Without having any provision like Section 54A there has been so long no difficulty in holding test identification parades. There are plenty of judicial pronouncements to show the safeguards to be followed while holding identification parade.

35. Thus we are of the view that after the introduction of Section 54A in the CrPC referred to above, an accused is under an obligation to stand for identification parade. An accused cannot resist subjecting himself to the TIP on the ground that he cannot be forced or coerced for the same. If the coercion is sought to be imposed in getting from an accused evidence which cannot be procured save through positive volitional act on his part, the constitutional guarantee as enshrined under Article 20(3) of the Constitution will step in to protect him. However, if that evidence can be procured without any positive volitional evidentiary act on the part of the accused, Article 20(3) of the Constitution will have no application. The accused while subjecting himself to the TIP does not produce any evidence or perform any evidentiary act. As explained very succinctly by the learned Judges of the Calcutta High Court as above, it may be a positive act and even a volitional act, but

only to a limited extent, when the accused is brought to the place where the TIP is to be held. It is certainly not his evidentiary act. The accused concerned may have a legitimate ground to resist facing the TIP saying that the witnesses had a chance to see him either at the police station or in the Court, as the case may be, however, on such ground alone he cannot refuse to face the TIP. It is always open for the accused to raise any legal ground available to him relating to the legitimacy of the TIP or the evidentiary value of the same in the course of the trial. However, the accused cannot decline or refuse to join the TIP.

36. Thus, our aforesaid discussion answers two of the six questions framed by us i.e. (i) whether an accused can decline to submit himself to the TIP on the ground that the same is violative of Article 20(3) of the Constitution and (ii) the true purport of any order that the Magistrate may pass in exercise of powers under Section 54A of the CrPC directing any person to subject himself or herself to the TIP. IMPORTANCE AND EVIDENTIARY VALUE OF TIP

37. Facts which establish the identity of any person or thing whose identity is relevant are, by virtue of Section 9 of the Evidence Act, always relevant. The term 'identification' means proving that a person, subject or article before the Court is the very same that he or it is alleged, charged or reputed to be. Identification is almost always a matter of opinion or belief.

38. The identification has by itself no independent value. As stated by Viscount Haldane L. C. in Rex v. Christie, (1914) A. C. 545 (551) (E):-

> "its relevancy is to show that the witness "was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake."

39. Lord Moulton (with whom Viscount Haldane L. J. agreed) said at page 558 :

> "Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained."

40. During the investigation of a crime committed by persons unknown to the witnesses, the persons arrested on suspicion of their complicity in the crime have got to be confronted by the investigating authority with the witnesses so that they can find out whether they are the persons who committed the crime or not. Before the investigating authorities send up a case to Court, they must be satisfied that the persons arrested by them are the persons accused of having committed the crime.

41. If they were known to the witnesses, the witnesses would have given their names and that would have established their identity, but when they were not known, their identity could be established only if the witnesses on seeing them say that they are the offenders. Since it would be very easy for a witness who has little regard for truth, to say that the person arrested on suspicion was the offender, he is confronted with the suspect mixed with innocent men. If he picks him out, that would add to the credibility of his statement that he was the offender. This is the primary object of identification

proceeding.

42. Phipson writes in his Law of Evidence, Edn. 8, p. 392:-

> "In criminal cases it is improper to identify the accused only when in the dock; the police should place him, beforehand, with others, and ask the witness to pick him out."

43. A three-Judge Bench of this Court in the case of Rajesh v. State of Haryana, (2021) 1 SCC 118, had the occasion to consider (i) the purpose of conducting a TIP, (ii) the source of the authority of the investigator to do so, (iii) the manner in which these proceedings should be conducted, (iv) the weight to be ascribed to identification in the course of a TIP, and (v) the circumstances in which an adverse inference can be drawn against the accused who refuses to undergo the process. After due consideration of the aforesaid, this Court summarised the principles as follows:-

> "43.1 The purpose of conducting a TIP is that persons who claim to have seen the offender at the time of the occurrence identify them from amongst the other individuals without tutoring or aid from any source. An identification parade, in other words, tests the memory of the witnesses, in order for the prosecution to determine whether any or all of them can be cited as eyewitness to the crime.
>
> 43.2 There is no specific provision either in CrPC or the Evidence Act, 1872 ("the Evidence Act") which lends statutory authority to an identification parade.

Identification parades belong to the stage of the investigation of crime and there is no provision which compels the investigating agency to hold or confers a right on the accused to claim a TIP.

43.3 Identification parades are governed in that context by the provision of Section 162 CrPC. 43.4 A TIP should ordinarily be conducted soon after the arrest of the accused, so as to preclude a possibility of the accused being shown to the witnesses before it is held.

43.5 The identification of the accused in court constitutes substantive evidence.

43.6 Facts which establish the identity of the accused person are treated to be relevant under Section 9 of the Evidence Act.

43.7 A TIP may lend corroboration to the identification of the witness in court, if so required. 43.8 As a rule of prudence, the court would, generally speaking, look for corroboration of the witness' identification of the accused in court, in the form of earlier identification proceedings. The rule of prudence is subject to the exception when the court considers it safe to rely upon the evidence of a particular witness without such, or other corroboration.

43.9 Since a TIP does not constitute substantive evidence, the failure to hold it does not ipso facto make the evidence of identification inadmissible. 43.10 The weight that is attached to such

identification is a matter to be determined by the court in the circumstances of that particular case. 43.11 Identification of the accused in a TIP or in court is not essential in every case where guilt is established on the basis of circumstances which lend assurance to the nature and the quality of the evidence.

43.12 The court of fact may, in the context and circumstances of each case, determine whether an adverse inference should be drawn against the accused for refusing to participate in a TIP. However, the court would look for corroborating material of a substantial nature before it enters a finding in regard to the guilt of the accused."

44. In the very same judgment referred to above, this Court observed as under:-

> "46. ... In this backdrop, the contention of the appellants that the refusal to undergo a TIP is borne out by the fact that Sandeep and Rajesh were known to each other prior to the occurrence and that PW 4, who is a prime eyewitness, had seen Rajesh when he would attend the court during the course of the hearings, cannot be brushed aside. Consequently, in a case, such as the present, the Court would be circumspect about drawing an adverse inference from the facts, as they have emerged. In any event, as we have noticed, the identification in the course of a TIP is intended to lend assurance to the identity of the accused. The finding of guilt cannot be based purely on the refusal of the accused to undergo an identification parade. In the present case, we have already indicated that the presence of the alleged eyewitnesses PW 4 and PW 5 at the scene of the occurrence is seriously in doubt. The ballistics evidence connecting the empty cartridges and the bullets recovered from the body of the deceased with an alleged weapon of offence is contradictory and suffers from serious infirmities. Hence, in this backdrop, a refusal to undergo a TIP assumes secondary importance, if at all, and cannot survive independently in the absence of it being a substantive piece of evidence." [Emphasis supplied]

45. In Munshi Singh Gautam (D) & Ors. v. State of M.P., reported in (2005) 9 SCC 631, this Court observed as under:-

> "16. ... 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 Evidence Act. It is desirable that a test identification parade should be conducted as soon as 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 an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.
>
> 17. 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 a 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. ..."

46. In Ramanbhai Naranbhai Patel v. State of Gujarat, (2000) 1 SCC 358, after considering the earlier decisions this, Court observed:- (SCC p. 369, para 20) "20. 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 State (Delhi Admn.) v. V.C. Shukla [(1980) 2 SCC 665 : 1980 SCC (Cri) 561 : 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 eyewitnesses. It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. 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 [(1999) 8 SCC 428 : 1999 SCC (Cri) 1452 : AIR 2000 SC 160] and State of H.P. v. Lekh Raj [(2000) 1 SCC 247 : 2000 SCC (Cri) 147 : 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 eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them." [Emphasis supplied]

47. In Malkhansingh v. State of M.P., (2003) 5 SCC 746, a three-Judge Bench of this Court considered the evidentiary value of the identification of the appellant in that case by the prosecutrix in the Court without holding a TIP in the course of the investigation. It was argued before the Court that the identification in Court not preceded by a TIP is of no evidentiary value. On the other hand, it was argued on behalf of the prosecution that the substantive evidence is the evidence of identification in Court and, therefore, the value to be attached to such identification depends on facts and circumstances of each case. The Court ultimately answered as under:-

> "7. 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 a 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 of Criminal Procedure 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 of Criminal Procedure. 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." [Emphasis supplied]

48. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if

required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine.

49. In Prem Singh v. State of Haryana, (2011) 9 SCC 689, a two-Judge Bench of this Court expressed conflicting opinion, H.S. Bedi, J. observed in para 19 as under:-

> "19. ... It must be borne in mind that it is impossible for an accused to prove by positive evidence that he had been shown to a witness prior to the identification parade but if suspicion can be raised by the defence that this could have happened, no adverse inference can be drawn against the accused in such a case."

50. Gyan Sudha Misra, J. while disagreeing with H.S. Bedi, J. took the view that it is not open to accused to refuse to participate in the TIP. The learned Judge observed in para 27 as under:-

> "27. In my considered view, it was not open to the accused to refuse to participate in the TI parade nor was it a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the appellant-accused had reason to do so, specially on the plea that he had been shown to the eyewitnesses in advance, the value and admissibility of the evidence of TI parade could have been assailed by the defence at the stage of trial in order to demolish the value of the test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case." [Emphasis supplied]

51. Ultimately, the matter was heard by a three-Judge Bench in the case titled Prem Singh v. State of Haryana, (2013) 14 SCC 88, and the appeal filed by the convict was allowed. However, we do not find any discussion in the said judgment as regards the issue whether the accused can refuse to participate in the TIP. This Court on its own looked into the entire evidence and ultimately acquitted the appellant accused.

52. In Munna v. State (NCT of Delhi), (2003) 10 SCC 599, this Court took the view that if an accused himself refused to participate in the TIP, then it is not open to him to contend that the statement of the witnesses made for the first time should not be relied upon. The Court held as under:-

> "10. In a case where an accused himself refuses to participate in a test identification parade, it is not open to him to contend that the statement of the eyewitnesses made for the first time in court, wherein they specifically point towards him as a person who had taken part in the commission of the crime, should not be relied upon. This plea is available provided the prosecution is itself responsible for not holding a test identification parade. However, in a case where the accused himself declines to participate in a test identification parade, the prosecution has no option but to proceed in a normal manner like all other cases and rely upon the testimony of the witnesses, which is recorded in court during the course of the trial of the case."

[Emphasis supplied] It is relevant to note that in the aforesaid decision, the accused in his statement under Section 313 CrPC had not stated that he had been shown to the witnesses at the police station. In the case on hand, it is the case of the appellant convict that he along with other co-accused was shown to the witnesses not only prior to the conduct of the TIP but even before the identification in the Court.

53. In Ravindra Laxman Mahadik v. State of Maharashtra, 1997 CriLJ 3833, in a case involving Section 395 of the CrPC, it was opined:-

"10. I find merit in Mr. Mooman's submission that it would not be safe to accept the identification evidence of Manda Sahani. Manda Sahani in her examination- in-chief stated that on the place of the incident, there was no light. In her cross-examination (para 6) she stated that it was dark at the place of the incident but, slight light was emanating from the building situate on the shore. The distance between the building and the place where Manda Sahani and her husband were looted has not been unfolded in the evidence. The learned trial Judge has observed that the evidence of Vinod Sahani is that the incident took place at a distance of about 100 ft from the Gandhi statue, where the meeting was held. What he wanted to convey was that hence there must have been light at the place of incident. In my view, on the face of the definite statement of Manda that it was dark as there was only slight light, and bearing in mind that the incident took place at 9.30 p.m. in the month of February, 1992, it would not be safe to conclude that there was sufficient light on the place of the incident enabling Manda Sahani to identify the appellant."

54. In Kanan & Ors. v. State of Kerala, AIR 1979 SC 1127, this Court held:-

"...It is well settled that where a witness Identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The Idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. ..." [Emphasis supplied]

55. In Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1, this Court noticed the importance of TIP and logic behind it. It is the practice not borne out of procedure but out of prudence. In this case, this Court has exhaustively examined the entire case law on the subject. It was observed:-

"254. Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by Section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of Section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in court. The logic behind

> TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation."
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> 56. This Court has further referred to its earlier decisions which state:-
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> "256. The law as it stands today is set out in the following decisions of this Court which are reproduced as hereinunder:
>
> Munshi Singh Gautam v. State of M.P. [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269] : (SCC pp. 642-45, paras 16-17 & 19) "16. As was observed by this Court in Matru v. State of U.P. [(1971) 2 SCC 75 : 1971 SCC (Cri) 391] 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 : 1973 SCC (Cri) 828]) 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 Evidence Act. It is desirable that a test identification parade should be conducted as soon as 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 an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

17. 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 a 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 Admn. [AIR 1958 SC 350:1958 Cri LJ 698], Vaikuntam Chandrappa v. State of A.P. [AIR 1960 SC 1340:1960 Cri LJ 1681], Budhsen v. State of U.P. [(1970) 2 SCC 128:1970 SCC (Cri) 343] and Rameshwar Singh v. State of J&K [(1971) 2 SCC 715 : 1971 Cri LJ 638] ) x x x x

19. In Harbajan Singh v. State of J&K [(1975) 4 SCC 480 : 1975 SCC (Cri) 545] , 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 16-12-1971 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 : (SCC p. 481, para

4) ‘4. 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. [(1970) 3 SCC 518 : 1971 SCC (Cri) 124] absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers 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.’ ”

57. Applying the aforesaid principles of law as discernable from the various decisions referred to above, we may now proceed to look into the evidence on record so as to consider whether the conviction of the appellant convict for the alleged offence is sustainable or not. EVALUATION OF EVIDENCE OF IDENTITY OF THE APPELLANT CONVICT

58. On 18.08.2008, an application was moved for conducting test-identification parade of the co-accused persons, Vijay alias Kalia, Pawan Kumar, and Sharwan Kumar, to be identified by PW 4, before the MM, Shri Prashant Kumar who adjourned it for 20.08.08 and marked the same to MM,

Shri Rajesh Kumar Goel i.e., PW 16 herein.

59. On 20.08.2008, the PW 16 conducted the TIP in respect of co-accused Vijay and Pawan Kumar, who were identified by PW 4.

60. On 30.08.2008, upon instructions of the IO, the PW 11 SI Kishan Lal, moved an application before the MM, Shri Prashant Kumar for fixing the TIP of the appellant convict along with co-accused Vijay, Pawan Kumar and Sharwan Kumar. The same was adjourned to 01.09.2008 and marked to PW 16.

61. On 01.09.2008, the TIP of the appellant convict along with co-accused Vijay and Pawan Kumar was fixed for 02.09.2008, whereas TIP of Sharwan Kumar was fixed for 03.09.2008.

62. On 02.09.2008 the MM/PW-16 conducted the TIP proceedings where co-accused Vijay and Pawan Kumar were to be identified by PW 1 and the appellant convict was to be identified by PW 4. In the said TIP, all the accused persons refused to participate.

63. On 03.09.2008, PW 16 conducted TIP of co-accused Sharwan Kumar, to be identified by PW 1 and PW 4 resply wherein, the co-accused Sharwan Kumar refused to participate.

CHART OF THE TIPs CONDUCTED

| S. No. | Date | TIP Conducted for | To be Identified by | Particulars |
|---|---|---|---|---|
| 1. | 20.08.08 | (i) Vijay @ Kalia (ii) Pawan Kumar | PW4 | TIP conducted and PW4 identified the accused. (Ex.PW4/B) & (Ex.PW4/C) |
| 2. | 02.09.08 | (i) Vijay @ Kalia (ii) Pawan Kumar | PW1 | Both Refused TIP. (Ex.PW8/B – Vijay @ Kalia) (Ex.PW8/C – Pawan) |
| 3. | 02.09.08 | (iii) Mukesh Singh (Appellant) | PW4 | Refused TIP (Ex.PW8/A – Mukesh) (Appellant) |
| d. | 03.09.08 | (iv) Sharwan Kumar | PW1 & PW4 | Refused TIP (Ex.PW8/E – Sharwan) |

64. Remarkably, while the co-accused; Vijay and Pawan Kumar initially participated in the TIP on 20.08.2008, but thereafter all the accused persons including the appellant convict herein refused to participate in the TIP. In their further statements recorded under Section 313 of the CrPC, all of them gave the explanation that they refused to participate as they had already been shown to the witnesses in the police station. Moreover, it is the specific case of the appellant convict herein, that he refused the TIP as he was to be identified by PW4 who was a got up witness.

65. Later, on 15.09.2008, the PW 1 and PW 4 who had gone to meet the police officials at the Rohini Court complex, identified all the accused persons, who were produced before the Metropolitan Magistrate in connection with the present case.

66. The PW 1 Sushil Kumar in his examination in chief has stated thus:-

> "I had identified the accused persons on 15.9.2008 in the Rohini Court Complex, when the accused persons were produced in the same Court."

67. The PW 11 SI Kishan Lal who at the relevant time was posted as Sub-Inspector in the Adarsh Nagar Police Station in his examination in chief as stated thus:-

> "On 15.9.2008 I alongwith SHO Ram Chander came to the court and there we met PWs Sushil and Pradeep and they had identified all the four accused who were produced in the court for taking the judicial custody. PWs pointed out towards the accused Pawan and Sharwan that they had surrounded Sushil and Pappu and they pointed out towards accused Mukesh and Vijay and told that Mukesh had taken out the money from the pocket of Sushil and Vijay had taken out money from Pappu and they had attacked on them with ice picks on 16.8.2008. IO recorded their statements."

68. Thus, from the oral evidence of the PW 1 and the PW 11, it is evident that the PW 1 (injured eye witness) had the opportunity to see the accused persons when they were present at the Rohini Court Complex. When the PW 11 says that the witnesses were able to identify all the four accused at the time when they were produced in the court for taking them into judicial custody, the same should be understood as conveying that as an investigating officer, he took a chance to get the accused persons identified through the witnesses. Indisputably, it was not a regular identification in accordance with law.

69. The appellant convict argues that the only substantive evidence against him is in the form of his identification by the PW 1 before the Trial Court. He says that there is no question of drawing any adverse inference against him for refusing to participate in the TIP because from day one, he had been saying that the witnesses had seen the accused persons. He further says that the PW 1 was in a position to identify him for the first time before the Trial Court only because he had the opportunity to see him on 15.09.2008. In such circumstances, it is argued on behalf of the appellant convict that there is no evidence worth the name to hold him guilty for the alleged crime. On the other hand, the State says that although the witnesses had a chance to see the accused persons on 15.09.2008 when

they were present at the Rohini Court Complex, but that, by itself, is not a sufficient or a good ground to discard the substantive evidence of identification before the Trial Court. The State wants us to draw adverse inference against the appellant convict as he had refused to participate in the TIP and at the same time also wants us to accept the identification of the appellant by the PW 1 before the Trial Court. The State further says that the PW 1 being an injured eye witness had an opportunity of having more than a fair glimpse of the four accused persons including the appellant convict and, therefore, irrespective of the fact that the PW 1 had an opportunity to see the appellant convict on 15.09.2008 at the Rohini Court Complex, the identification before the Trial Court should be accepted.

70. The evidence of PW 1 Sushil Kumar regarding the occurrence that took place on 16.08.2008 early in the morning at 3.30 is fully supported by the medical evidence on record. The PW 1 along with the deceased was immediately taken for medical attention. The deceased was found to have suffered multiple injuries in the form of punctured wounds caused by a sharp pointed weapon. The PW 1 was also found to have suffered two injuries and one of those was in the form of a punctured wound in the chest caused by a sharp pointed weapon. Considering the nature of injuries suffered by the PW 1 and the deceased and the fact that the PW 1 and the deceased were cornered by the accused persons and further that they were robbed of their money, the entire incident could certainly have afforded sufficient time and opportunity to the PW 1 to recall and identify the assailants including the appellant convict herein. It is a long settled law that if a witness is trustworthy and reliable, the mere fact that no identification parade could be conducted and the appellant convict was identified for the first time before the Trial Court, would not be a reason to discard the evidence of the witness. As held by this Court in the case of Munna (supra), that in a case where an accused himself refused to participate in the TIP, it is not open to him to contend that the statement of the eye witnesses made for the first time in Court, wherein they specifically point towards him as a person who had taken part in the commission of the crime, should not be relied upon. Such a plea is available provided the prosecution is itself responsible for not holding a TIP. However, in a case where the accused himself declines to participate in a TIP, the prosecution has no option but to proceed in a normal manner like all other cases and rely upon the testimony of the witnesses, which is recorded in Court during the course of the trial of the case. It will be too much for us to say that the PW 1 was able to identify the accused convict for the first time before the Trial Court only because the PW 1 had an opportunity to have a look at him on 15.09.2008 at the Rohini Court Complex. As observed above, the PW 1 could be said to have had more than a fair glimpse of the assailants at the time of the incident and on the strength of the same, the PW 1 identified the appellant convict as one of the assailants.

71. We deem it appropriate to refer to the factors which are to be considered for in-Court identification and were relied by the American Supreme Court in John R. MANSON, Commissioner of Correction of Connecticut v. Nowell A. BRATHWAITE reported in 432 U.S. 98 (1977), where while referring to its earlier decision in William S. NEIL, Warden v. Archie Nathaniel BIGGERS, reported in 409 U.S. 188 (1972), it held that reliability is the linchpin in determining the admissibility of identification testimony and the factors to be considered are: the opportunity of the witness to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of his prior description of the criminal; the level of certainty demonstrated at the confrontation, and

the time between the crime and the confrontation.

72. In the aforesaid context, we should also look at the line of reasoning assigned by the High Court. In para 37 of the impugned judgment, the High Court took into consideration the site plan Ex. PW-8/A. The site plan was looked into to ascertain whether there was sufficient light at the place of the occurrence or not. In this regard, the High Court held as under:-

> "37. One of the contentions raised by counsel for the appellant Vijay was that there were no sufficient lights at the place of incident and this is apparent from the fact that in the site plan proved on record as Ex. PW8/A, existence of any such lights have not been shown. Contention of learned counsel for the appellant was that in the absence of any light being there PW-1 could not have seen any of the assailants, and later recognised them as being the actual perpetrators of the crime. This contention raised by counsel for the appellant Vijay Kumar is devoid of any merit as PW-1 in his testimony categorically stated that there was sufficient street light with yellow colour lamps being lit around to see the faces of the assailants. PW-1 also deposed that the accused persons had not covered their faces at the time of occurrence. In his cross-examination he denied the suggestion that it was pitch dark at the spot of occurrence or that he could not have seen any of the assailants. With such clear stand taken by PW- 1 that there was sufficient street light to see the faces of the assailants, we find no merit in the said contention raised by counsel for the appellant Vijay.

Even otherwise in the scaled site plan proved on record as Exhibit PW-8/A at point C, D and E the position of lights as were existing at the site have been duly shown." [Emphasis supplied]

73. In para 41 of the impugned judgment, the High Court has discussed about the identity of the accused persons. Para 41 reads thus:-

> "41. Learned counsel for the appellant laid much emphasis on the contention that the prosecution has utterly failed to prove the involvement of these appellants in the commission of the said crime through any cogent and clinching evidence. As per the counsel for appellant, PW-1 failed to give description of these assailants to the police in his first statement and he could recognise the assailants only at the time of his deposition in court after these assailants were shown to him by the police. Counsel also justified the refusal of the appellants to participate in the Test Identification Parade conducted on 02.09.08 because of they being already shown to PW-1 by the police. This contention raised by counsel for the appellant lacks any merit. There can be no dispute that one of the important task of the investigation is to apprehend the real and actual culprit of the crime. The Investigation which is carried out by the Investigating Officer and his team should be judicious, fair, independent, transparent, totally uninfluenced by any extraneous factors. There should not be undue and undesirable delay in the investigation of any crime as any slackness in the investigation can always prove fatal. The entire pursuit of any criminal trial is to see that no innocent man is punished and no guilty man goes scot free. PW-1, in his very

first statement categorically stated that he can recognise all the four assailants if brought before him. While giving his statement in court, he could easily identify all these four assailants who were present in the court. He specifically pointed out to the two accused persons who had snatched money from his pocket and the other two who were armed with ice pricks and started attacking him and the deceased Pappu. In his cross-examination, he also stated that the person who stabbed him was dark in complexion and had a cut mark on his face. It would be therefore seen that right from the first statement, the stand of PW-1 had been that he can identify the assailants and in fact he had identified them when they were also present at the time of his deposition in court. The refusal of these assailants to participate in the test identification parade proceedings thus goes against them. The trial court is correct in taking a view that the onus shifted on the accused persons to prove on record that their photographs were shown to PW-1 prior to the holding of the said test identification parade. PW-1 is quite candid in stating in his court deposition that he had seen these assailants on 15th September 2008 when they were produced in a court at Rohini Courts Complex. In this background, it is difficult to accept the argument of counsel for the appellant that the prosecution had failed to establish the identity of these assailants who committed the said crime." [Emphasis supplied]

74. In para 42, the High Court elaborated further the issue of identification. Para 42 reads thus:-

"42. Learned counsel for the appellant – Mukesh was quite emphatic in his contention that PW-1 in his cross examination admitted the fact that he had clearly seen the face of one assailant, who stabbed him and this deposition of PW-1 clearly meant that he was stabbed by the assailant to whom he described as person with dark complexion having a cut mark on his face and therefore, Mukesh had no role in the commission of the said crime. The court has to take an overall view of the entire testimony of a witness, which includes his examination in chief as well as his cross examination. PW-1 while giving his evidence in examination in chief, had clearly identified all the four accused persons being the assailants who were involved in the said incident and in cross examination he merely said that he had clearly seen the face of only one assailant who stabbed him. The said statement of PW-1 in his cross examination can lead to only one inference that so far as the face of one assailant was concerned, he could see him with more clarity, but that would not mean that he did not see the faces of the other assailants or he was not in a position to identify the other assailants, may be with the help of their other descriptions including their height, gait and manner of walking, etc. We also cannot subscribe to the said contention raised by counsel for these appellants as we find no reason for PW-1 to implicate these persons to save the actual culprits of the said crime. We thus find no force in the above contention raised by counsel for the appellant." [Emphasis supplied]

75. Although the appellant convict in his further statement recorded under Section 313 CrPC stated that he had refused to participate in the TIP as the eye witnesses had already seen him, yet except a

bald assertion, no other foundation has been laid for offering such an explanation. It is true that the explanation that the accused may offer when the Court confronts him with the incriminating materials in his further statement has to be tested on preponderance of probability and not on proof beyond reasonable doubt. However, even while testing the answer on preponderance of probability some foundation has to be laid for such explanation to be accepted. A mere bald assertion is not sufficient.

76. The matter does not rest over here. There is something more against the appellant convict. It appears that the appellant was arrested on 20.08.2008. At the time of his arrest, he is said to have made a disclosure statement recorded in Ex. PW10/A. The statement was one relating to the weapon of offence i.e. ice pick which was ultimately discovered from his house. The proceedings recorded in regard to the actual discovery of the ice pick is in the form of Ex. PW10/V. The statement is said to have been made by the appellant convict before the PW 10 SI Arvind Pratap Singh which led to the discovery of the fact i.e. the discovery of the ice pick. The PW 10 in his examination in chief has deposed as under:-

> "On 20-8-2008 in the evening I along with Inspt. Ram Chander and Ct. Baljit proceeded for investigation and when we reached at Out Gate, Azadpur Mandi then informer met us there and he told that the fourth accused wanted in this case is present behind the onion shed near Mall Godown, if raided he can be apprehended. On this information IO asked 4-5 public persons to join the investigation but none agreed and went away without telling their names and addresses. Thereafter, we along with secret informer reached behind the inion shed near Railway Track, Mall Godown and from there at the pointing out the secret informer we apprehended accused Mukesh Singh, whose name came to know after inquiry and who is present in the court today. He was interrogated and arrested vide memo Ex. PW10/R and his personal search was conducted vide Ex. PW10/S both bearing my signatures at point A and he made disclosure statement Ex. PW10/T bearing my signatures at point A. The accused was kept in muffled face. Thereafter accused took us at the spot i.e. D block corner Azadpur Mandi, Opposite STD PCO Shop and pointed out the place of occurrence vide pointing out memo Ex. PW10/U bearing my signatures at point A. Thereafter accused took us at his house i.e. H.No. 101, Ravi Dass Colony, Sarai Peepal Thala & he took us in a room at the ground floor and taken out Rs. 7,000/- from an iron box and one ice pick (SUA) and handed over to Inspt. Ram Chander and told that this sum of Rs. 7,000/- is remaining amount out of looted amount of Rs. 14,800/-. He also informed that the ice pick was the same with which he had inflicted injury to the victim. Rs. 7,000/- consists of seven currency notes of Rs.1000 denomination. The same were put into an envelope and sealed with the seal of RCS and seized vide memo Ex. PW10/V bearing my signatures at point A. IO prepared the sketch of the 'Sua' and measured the same. It was found to be having length of 22.5 cm, the length of the prick was 12 cm and the length of the handle was 10.5 cm. The sketch is Ex. PW10/W bearing my signatures at point A. The same was put into pullanda and sealed with the seal of RCS and seized vide memo Ex.PW10/X bearing my signatures at point A. Seal after use was handed over to Ct. Baljit and after

completing the investigation accused was brought to PS and accused were sent to lockup and case property was deposited in the malkhana." [Emphasis supplied]

77. Thus the aforesaid is one additional circumstance pointing towards the guilt of the appellant and at the same time lending credence to the substantive evidence of his identification by PW 1 before the Trial Court.

78. Even if we have to discard the evidence of discovery on the ground that no independent witnesses were present at the time of discovery, still the fact that the appellant herein led the police party to his house and handed over the ice pick used at the time of the assault, would be reflective of his conduct. By virtue of Section 8 of the Evidence Act, the conduct of an accused is relevant, if such conduct influences or influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where he had concealed the weapon of offence i.e. ice pick, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the appellant convict contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. Even if we hold that the discovery statement made by the appellant convict referred to above is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8 of the Evidence Act.

79. In the overall view of the matter, we have reached to the conclusion that it is difficult for us to say that the prosecution has not been able to establish its case against the appellant convict beyond a reasonable doubt. We are convinced with the line of reasoning adopted by the Trial Court as well as by the High Court in holding the appellant convict guilty of the alleged crime.

80. In the result, this appeal fails and is hereby dismissed.

81. In the course of the hearing of this appeal, it was brought to the notice of this Court that the appellant hails from a very poor family and is undergoing sentence past more than sixteen years. In other words, he has been in jail for the past sixteen years. We grant liberty to the appellant herein to file a representation addressed to the competent authority of the State (NCT of Delhi) for premature release. If any such representation is preferred by the appellant herein, then the competent authority shall at the earliest process the same and take an appropriate decision in accordance with law, more particularly in accordance with the policy prevailing at the time of commission of the offence as regards remission within a period of two months from the date of receipt of such representation and further communicate the same to the appellant in writing without fail.

.....J. ( M.M. SUNDRESH ) .....J. ( J.B. PARDIWALA ) NEW DELHI;

AUGUST 24, 2023