2019 INSC 1346

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 740 OF 2018

RAJA …Appellant

VERSUS

STATE BY THE INSPECTOR OF POLICE …Respondent

WITH

CRIMINAL APPEAL NOS.1608-1609 OF 2018

GOVINDARAJ AND ORS. …Appellants

VERSUS

STATE BY THE INSPECTOR OF POLICE,
SINGARAPATTAI POLICE STATION,
KRISHNAGIRI DISTRICT …Respondent

J U D G M E N T

Uday Umesh Lalit, J.

1. Criminal Appeal No. 740 of 2018 (preferred by original Accused No. 1) and Criminal Appeal Nos. 1608-1609 of 2018 (preferred by original

Accused Nos. 2, 3, 5 and 6) challenge the common judgment and order dated 27.04.2016 passed by the High Court of Judicature at Madras dismissing Criminal Appeal Nos. 604 of 2012 and 92 of 2013 preferred by said accused as well as original Accused No. 4 (who is stated to have expired since then).

2. The case of the prosecution as set out in paragraphs 2.1 to 2.3 of the judgment under appeal is as under:-

> "… …Mr. Sengoda Goundar was the father of P.Ws. 1 and 3 and husband of P.W.2. P.W.4 is the wife of P.W.3 and the daughter-in-law of the deceased. P.W.5 is the grandson of the deceased and P.W.2. P.Ws. 3 and 4 had a child also and all of them were living together under one roof in Nallavumpatti village.
>
> 2.2 On 27.05.1999, P.Ws. 1 to 5, after having their dinner, had fallen asleep. The house of P.W.1 and others is facing towards west. P.W.1 was sleeping in the room situated on the northern portion of the house. P.Ws. 3 and 4 along with the child were sleeping in the room situated on the southern portion of the house. P.W.5 was sleeping on the pial situated on the veranda in front of the said house. Just opposite to the said house, on the western side, the tractor shed belonging to them is situated. The deceased Sengoda Goundar and his wife (P.W.2) were sleeping in the said tractor shed.
>
> 2.3 Around 09.30 p.m., they went to the respective place to sleep. When they were fast asleep, around 01.00 a.m. on 28.05.1999, these appellants (accused 1 to 6) came to the house of the deceased in order to commit dacoity. They first went into the tractor shed and started mounting attack with deadly weapons on the deceased. The deceased cried for help which awakened P.W.2. These accused indiscriminately attacked P.W.2 also. She raised alarm and cried for

help. On hearing the cry of the deceased and P.W.2, P.W.1 who was sleeping in the room situated on the western portion of the house, opened the main door from inside and came out. On seeing him, some of the accused attacked him with deadly weapons like knife and wooden log. Since the attack was so violent, unable to bear the same and in order to avoid further blows being made, P.W.1 crying for help, tried to rush inside the house. By the time, on hearing the alarm raised, P.W.3 came out of the house. Some of the accused, attacked him with weapons. He sustained bleeding injuries. With a view to save himself from further attack, he rushed into the house and went into the room where his wife was sleeping. The assailants did not stop. They gave a chase, entered into the said room and indiscriminately attacked P.W.3 and his wife (P.W.4) with weapons. Both sustained a number of bleeding injuries. P.W.5 who was sleeping at the Pial, awakened by the cry, rushed out. He was also attacked. Raising alarm, he rushed towards the house of one Thaluka Goundar. These assailants, barged into the house, looted the properties. Number of jewels worn by the witnesses were snatched away by the accused. They broke open the steel bureau in the house and committed theft of the jewels. All happened with a short time. Even before the villagers could gather at the place of occurrence, the accused fled away from the scene of occurrence with decamped valuable jewels and other articles. P.Ws. 1 to 5 and the deceased were struggling for life due to the bleeding injuries. The villagers immediately rushed all of them to the Government hospital at Uthangarai."

3. All the victims were taken to the hospital, where Sengoda Goundar was declared dead. The following injuries were found on the person of the deceased.

"1. Abrasion 4 cm x 4 cm left shoulder.

2. Contusion 10 cm x 10 cm left wrist.

3. Contusion 10 cm x 10 cm right wrist.

4. Lacerated wound 1 cm x bone deep horizontal middle head.

5. Lacerated wound 10 cm x 1 cm bone deep oblique left side head."

4. The other injured persons were also examined the same day before 6.00 a.m.

A) PW1- Sundararajan had following injuries: -

"1. An abrasion of 4 x 4 cm on the left shoulder

2. A lacerated wound of 10 x 10 cm on the left elbow.

3. A lacerated wound of 10 x 10 cm on the right elbow.

4. A lacerated wound of 10 x 1 cm to bone deep in the centre of the head.

5. A lacerated wound of 10 x 1 cm to bone deep in the left side of the head."

B) PW2-Irusayi was found to be having following injuries:-

"1. Lacerated wound 2 cm x 1 cm x 1 cm at right thumb hand.

2. Lacerated wound 6 cm x 1 cm x bone deep on the left side of forehead.

3. Contusion 10 cm x 6 cm left wrist.

4. Contusion 10 cm x 10 cm back below right shoulder."

C) PW3-Kumar was found to have suffered injuries as under:-

> "1. A lacerated wound 10 cm x 6 cm x bone deep oblique left upper arm.
>
> 2. A lacerated wound 8 cm x 4 cm x 4 cm left upper arm below 4 cm wound horizontal.
>
> 3. A lacerated wound 6 cm x 2 cm x bone deep lower aspect left upper arm horizontal.
>
> 4. A lacerated wound 10 cm x 1 cm x bone deep extending from left ear lobe horizontally backwards.
>
> 5. Lacerated wound above right upper lip extending upto left side nose 8 cm x 1 cm x bone deep.
>
> 6. Lacerated wound 4 cm x 1 cm x 1 cm left eyebrow.
>
> 7. Lacerated wound 16 cm x 2 cm x bone deep over right shoulder upper aspect oblique."

D) PW4-Thangammal had following injury:-

> "A lacerated wound 10 cm x 1 cm x bone deep extending from forehad vertically to middle head."

E) Following injuries were found on the person of PW5-Sengodan.

> "1. Contusion 10 cm x 10 cm left knee.
>
> 2. Abrasion 6 cm x ¼ cm right thigh middle front."

5. At about 6.00 a.m. on 28.05.2009, complaint (Exhibit-P1) was made by PW1-Sundararajan, pursuant to which FIR No.238/1999 was registered with Singarapettai Police Station, as under:-

"On 27-05-1999 night at about 9.30 p.m. we all took bed after food. My father and mother were sleeping in the tractor shed in front of the house. My brother's son Sengodan was sleeping in the veranda of the house. My younger brother Kumar and his wife Thangam with her child Manju were sleeping in the southern side room of the house. I was sleeping in the northern side room of the house. At about 1.00 clock in the midnight I heard noise of my father, woke up and came out of the room. At that time a person wearing red colour shirt came there with a stick in a hand and found sitting. A group of 6 persons were attacking and beating my father with stick and koduval. One among them cut the gold chain of about 5 sovereigns and removed I cried and raised noise. Those persons attacked me with stick and koduval on my head and all over the body. On hearing my noise my younger brother Kumar came out running from the room and his hands were tied from behind by them and he was beaten with sticks. His wife Thangam came out to avert the beating but she was also attacked by koduval. They removed the gold chain of 10 sovereigns worn by her, a pair of silver leg chain worn by her also snatched by them. Then they entered into the house and broke open the bureau and removed the silver waist chord and silver leg chain worn by child. At that time my brother's son Sengodan raised noise and he was also attacked. All the people ran away. They were 7 members of aged group from 20 to 25. On hearing our noise the villagers consisting of Ramasundaram and Srinivasan etc. came and took us to the Government Hospital, Uthangarai at about 4.00 am in the early morning. I came to know that my father Sengodan died. Others were admitted in the Hospital treated by the Doctor. The value of stolen articles will be Rs.45000/- (Forty five thousand). I can identify the jewels stolen if recovered. I can also identify the persons who came and stole the jewels and killed my father and attacked us, if they are found."

6. The investigation was commenced by PW17-M.Chinnathambi, Deputy Superintendent of Police. Accused No.1-Raja, Accused No.2-Govindraj, Accused No.3-Palani, Accused No.4-Vandikaran @ Murugan, Accused No.5-Elumalai and Accused No.7- Arumugam were arrested on 21.06.1999 while Accused No.6-Chinnapaiyan surrendered himself before the Magistrate on 22.06.1999, who remanded him to judicial custody on the same day. On 27.06.1999 requisition was made by the Investigating Officer for conducting Test Identification Parade (TIP for short) insofar as all the arrested accused were concerned. On 28.6.1999 an application was made by the Investigating Officer seeking permission to take Accused No.6 – Chinnapaiyan in police custody. The permission was granted by the concerned Magistrate on 29.06.1999 to hold the TIP on 01.07.1999. The police custody of Accused No.6 was also given for 3 days from 01.07.1999. Thereafter, the TIP was held on 01.07.1999, in which PWs 1 to 5 identified the concerned accused. The TIP was conducted in the presence and under the supervision of PW11-Boopalan, who was then working as Sub-Judge, Rani Pettai.

7. During the course of investigation, following recoveries were made from the concerned accused.

i) MO 18 wrist watch was recovered from Accused No.1

ii) MO 12 gold chain, MOs 21, 23 & 24 gold articles, MOs 46 and 47 clothes having blood stains were recovered from Accused No.2

iii) MOs 48 and 49 namely clothes including a red shirt were recovered from Accused No.3.

iv) MOs 13, 14, 15 and 19 being gold articles were recovered from Accused No. 4.

v) MOs 6 and 16 being gold articles were recovered from Accused No. 5.

vi) MO 17 a wrist watch and MOs 43 and 56 being gold articles were recovered from Accused No. 6.

8. After completion of investigation, the aforementioned seven accused persons were charged of having committed various offences including those punishable under Sections 109, 120B, 394, 395, 396, 449 of the Indian Penal Code, 1860 ('IPC', for short). The prosecution, in support of its case, principally relied upon the testimonies of PWs 1 to 5 who identified Accused Nos. 1 to 6 to be the assailants. All the witnesses, however, stated that Accused No. 7 was not present as a member of the assembly. In their cross examination, it was suggested to all the witnesses that the accused were shown to the witnesses while they were in custody and that their photographs were also published in newspapers before the TIP was undertaken. The responses of these witnesses were as under:-

a) PW1-Sundararajan stated:-

> "Police showed the jewels and the accused and asked us to identify them as to whether they are the persons who are caught. We did not see in the police station. We saw in the papers. I do not know whether it was published in the paper 25 days after the occurrence. It is not correct to say that I identified them in the Central Jail because I saw them already in the papers. It is not correct to say that I identified them in the Jail because I saw them in the police station and in the papers already."

b) PW2-Erusayee stated:-

> "At the time of occurrence totally 6 persons came. I saw them for the first time only then. I have not seen them before. Police said that they were caught I saw in the police station then saw them in the Central Jail, Salem."

c) PW3-Kumar stated:-

> "In the enquiry by the police I have stated that, 6 unidentifiable persons came and attacked. I did not say that identifiable persons attacked us. I have stated I can identify them if seen. I identified in the police station. … …I identified in the Singarapettai Police Station one month after the occurrence."

d) PW4-Thangammal stated:-

> "It is not correct to say that I am deposing falsely that gold chain of 4 sovereigns was stolen. Singarapettai Police also came and wrote. Police asked in the Salem Jail thereafter. I identified in Salem. We identified in Morappur police station."

e) PW5-Sengodan stated:-

> "I did not say the identity of the accused when police examined me. It is not correct to say that, I am deposing falsely because of enmity between our family and Arumugam's family or that I identified Arumugam

> in the jail. It is not correct to say that because police showed me the photos of the accused which were published in the paper and I was already shown the accused in Morappur police station, I was called for identification and so I identified the accused. The daily newspaper "Dhina Thanthi" was not coming to our village at that time."

9. PW11-Boopalan, Sub-Judge in whose presence the TIP was conducted, stated that the Accused Nos.1 to 6 were made to stand for identification along with 19 other inmates from the Central Prison who were used as dummies and that PWs.1 to 5 identified Accused Nos.1 to 6. PW8-Thangaraj, Village Administrative Officer, in whose presence, the recoveries were said to have been effected, turned hostile. The prosecution did not examine the other Panch, Kasim. PW17, the Investigating Officer, in his cross examination by the Accused 1 to 5 and 7 stated :-

> "It is not correct to say that, the accused 1 to 5 and 7 were brought to Singarapettai Police station where they were shown to the witnesses and identified. I do not know if the photos of the accused 1 to 5 and 7 were already published in the newspaper before 21-06-1999."

10. The case of the prosecution was accepted by the Additional Sessions Judge, Krishnagiri, who by the judgment dated 24.07.2012 found Accused Nos.1 to 6 guilty of the offences punishable under Sections 394, 396, 449 IPC. Accused Nos. 1 to 3 were also convicted under Section 395 read with Section 397 IPC while Accused Nos. 2, 4, 5 and 6 were convicted under

Section 395 IPC and all were awarded the sentence of life imprisonment along with other sentences, including payment of fine and default sentences. Accused No.7 was, however, acquitted of all the charges.

11. Thereafter, Criminal Appeal No.604 of 2012 was preferred by Accused Nos. 1 to 5 while Criminal Appeal No.92 of 2013 was preferred by Accused No.6. By its common judgment and order dated 27.04.2016 the High Court affirmed the view taken by the Trial Court and dismissed both the appeals. Being aggrieved, Accused Nos.1, 2, 3, 5 and 6 have preferred these Criminal Appeals. We have heard Mr. Rahul Shyam Bhandari, learned Advocate for the Accused No.1 and Mr. Gopal Sankaranarayanan, learned Senior Advocate for the other accused and Mr. M. Yogesh Kanna, learned Advocate for the State.

12. The principal submissions advanced on behalf of the appellants are:

(a) The initial reporting shows that the identity of the assailants was not known to any of the witnesses. The admissions given by PWs. 1, 2, 3 and 4 in their cross-examination show that the accused were shown to the witnesses in the Police Station. It is accepted that the photographs of the accused were published in local newspapers.

(b) According to the initial version of the prosecution, Accused No.7, a neighbour living in the vicinity was responsible for the crime and the appellants were said to be his accomplices. However, every eye-witness stated that Accused No.7 was not involved in the crime. The acquittal of said Accused No.7 was accepted by the prosecution. There was thus no connection of the appellants with the crime.

(c) The recoveries were not supported by PW8-Thangaraj. The other Panch was also not examined.

13. Mr. Kanna, learned advocate for the State, however, submitted that as found by the Courts below, the eye-witness account through PWs.1 to 5 was clear, cogent and completely reliable. Every one of those prosecution witnesses had suffered injuries; their presence could never be doubted; and considering the nature of injuries the opportunity available to them to observe the features of each of the Accused was quite sufficient.

14. In the present case, the incident occurred after mid night. The prosecution witnesses 1 to 5 suffered injuries in the transaction but the initial reporting showed that the identity of the assailants was not known to the witnesses. It is true that no identification marks or attributes were stated but

it was asserted that the assailants were in the age group of 20 to 25 and one of the assailants had worn a red colour shirt. Further, if the nature and number of injuries suffered by each of the witnesses are considered, the assailants must have been quite close to the witnesses to afford to the witnesses sufficient time and opportunity to observe their features.

15. It has been accepted by this Court that what is substantive piece of evidence of identification of an accused, is the evidence given during the trial. However, by the time the witnesses normally step into the box to depose, there would be substantial time gap between the date of the incident and the actual examination of the witnesses. If the accused or the suspects were known to the witnesses from before and their identity was never in doubt, the lapse of time may not qualitatively affect the evidence about identification of such accused, but the difficulty may arise if the accused were unknown. In such cases, the question may arise about the correctness of the identification by the witnesses. The lapse of time between the stage when the witnesses had seen the accused during occurrence and the actual examination of the witnesses may be such that the identification by the witnesses for the first time in the box may be difficult for the court to place complete reliance on. In order to lend assurance that the witnesses had, in fact, identified the accused or suspects at the first available opportunity, the

TIP which is part of the investigation affords a platform to lend corroboration to the ultimate statements made by the witnesses before the Court. However, what weightage must be given to such TIP is a matter to be considered in the facts and circumstances of each case.

16. Again, there is no hard and fast rule about the period within which the TIP must be held from the arrest of the accused. In certain cases, this Court considered delay of 10 days to be fatal while in other cases even delay of 40 days or more was not considered to be fatal at all. For instance, in ***Pramod Mandal*** v. ***State of Bihar***[1] the accused was arrested on 17.01.1989 and was put up for Test Identification on 18.02.1989, that is to say there was a delay of a month for holding the TIP. Additionally, there was only one identifying witness against the said accused. After dealing with the decisions of this Court in ***Wakil Singh*** v. ***State of Bihar***[2], ***Subhash*** v. ***State of Uttar Pradesh***[3] and ***Soni v. State of Uttar Pradesh***[4] in which benefit was conferred upon the accused because of delay in holding the TIP, this Court considered the line of cases taking a contrary view as under:

> **"18.** Learned counsel for the State submitted that in the instant case there was no inordinate delay in holding the test identification parade so as to create a doubt on

[1] (2004) 13 SCC 150
[2] (1981) Suppl. SCC 28
[3] (1987) 3 SCC 231
[4] (1982) 3 SCC 368

the genuineness of the test identification parade. In any event he submitted that even if it is assumed that there was some delay in holding the test identification parade, it was the duty of the accused to question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the test identification parade. Reliance was placed on the judgment of this Court in ***Bharat Singh*** v. **State of U.P**.[5] In the aforesaid judgment this Court observed thus: (SCC p. 898, para 6)

> "*6*. In ***Sk. Hasib*** v. ***State of Bihar***[6] it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time. Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the police officer who conducted the investigation should have been cross-examined in that behalf."

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[5] (1973) 3 SCC 896
[6] (1972) 4 SCC 773

In the instant case we find that the defence has not imputed any motive to the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade. The evidence of the Magistrates conducting the test identification parade as well as the investigating officer has gone unchallenged. Learned counsel for the State is, therefore, justified in contending that in the facts and circumstances of this case the holding of the test identification parade, about one month after the occurrence, is not fatal to the case of the prosecution as there is nothing to suggest that there was any motive for the prosecution to delay the holding of the test identification parade or that any irregularity was committed in holding the test identification parade.

19. Learned counsel for the State has also relied upon the decision of this Court in ***Anil Kumar*** v. ***State of U.P.***[7] wherein the test identification parade was held 47 days after the arrest of the appellants. This Court after considering several decisions of this Court including the decisions in ***Brij Mohan*** v. ***State of Rajasthan***[8], ***Daya Singh*** v. ***State of Haryana***[9] and ***State of Maharashtra*** v. ***Suresh***[10] concluded that since the identifying witness was attacked by the assailants including the appellant and another, he had a clear look at the assailants. When his younger brother came to save him, he was killed by the assailants while the witness also received serious injuries. These were circumstances which would have imprinted in the memory of the witness the facial expressions of the assailants and this impression would not diminish or disappear within a period of 47 days. Similar was the case of the father and the mother of the identifying witness who had seen the assailants attacking their sons and one of their sons getting killed. In their memory also the facial expressions of the assailants will get

[7] (2003) 3 SCC 569
[8] (1994) 1 SCC 413
[9] (2001) 3 SCC 468
[10] (2000) 1 SCC 471

embossed. A mere lapse of 47 days would not erase the facial expressions from their memory.

20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification.

21. Lastly in ***Malkhansingh*** v. ***State of M.P.***[11] a three-Judge Bench of this Court of which one of us (B.P. Singh, J.) was a member, after considering various decisions of this Court observed thus: (SCC pp. 751-52, para 7)

> "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,

[11] (2003) 5 SCC 746

> 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 by us)

This Court thus found the evidence as regards identification to be trustworthy and dismissed the appeal preferred by the accused.

17. In ***Daya Singh*** v. ***State of Haryana***[9] the incident had occurred on 09.04.1988 and the accused was arrested on 28.05.1988 and was put up for test identification on 02.06.1988. However, the accused refused to take part in the TIP. Thereafter, the eye-witnesses, PWs 37 and 38, were examined in the trial after a lapse of seven and half years and eight years respectively from the date of occurrence. The ground regarding lapse of time between the occurrence and the actual identification in Court was dealt with by this Court as under:

> **"11.** At this stage we would first refer to the decisions upon which reliance is placed. In the case of ***Soni***[4] this Court observed that a delay of 42 days in holding the identification parade throws a doubt on genuineness thereof, apart from the fact that it is difficult that after a lapse of such a long time the witnesses would be remembering facial expression of the appellant. In the case of ***Mohd. Abdul Hafeez*** *v.* **State of A.P.**[12] the Court while dealing with a robbery case observed that as no identification parade was held, no reliance can be placed on the identification of the accused after a lapse of four months in the Court. In the case of ***Hari Nath***[13] the Court observed that evidence of test identification is admissible under Section 9 of the Evidence Act. But the value of test identification, apart from the other safeguards appropriate to a fair test of identification depends upon the promptitude in point of time with which the suspected persons are put up for test identification. If there is an unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test. The Court further referred to

[12] (1983) 1 SCC 143
[13] (1988) 1 SCC 14

(para 9) Prof. Borchard: *Convicting the Innocent* on the basis of error in identification of the accused. The learned author has observed:

> "The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally — the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused."

12. In AIR paras 10 and 11, the Court has observed as under: (SCC p. 21, paras 19-21)

> "*19*. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identity. In ***Sk. Hasib* v. *State of Bihar***[6] this Court observed: (SCC p. 777, para 5)
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> > '… the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding.'

20. In ***Rameshwar Singh*** v. ***State of J&K***[14] this Court observed: [SCC p. 718, SCC (Cri) p. 641, para 6]

[14] (1971) 2 SCC 715

> '… it may be remembered that the substantive evidence of a witness is his evidence in court, but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial.'

21. It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. It is also rightly said that:

> 'Courts ought not to increase the difficulties by magnifying the theoretical possibilities. It is their province to deal with matters actual and material to promote order and not surrender it by excessive theorising or by magnifying what in practice is really unimportant.' "

13. The question, therefore, is — whether the evidence of injured eyewitnesses PW 37 and PW 38 is sufficient to connect the appellant with the crime beyond reasonable doubt. For this purpose, it is to be borne in mind that the purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identity on the mind and

> memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion — what in present-day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution. The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra* v. *Suresh*[10] as under: (SCC p. 478, para 22)
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> > "We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."
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> (Emphasis supplied by us)

18. It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution. Applying the tests so laid down to the present case, in view of the fact that each of the eyewitnesses had suffered number of injuries in the transaction, it can safely be inferred that every one of them had sufficient

opportunity to observe the accused to have an enduring impression of the identity of the assailants. It is not as if the witnesses had seen the assailants, in a mob and from some distance. Going by the injuries, the contact with the accused must have been from a close distance.

19. Furthermore, in the present case all the accused were arrested on 21.06.1999 except Accused No.6 who surrendered before the Magistrate on 22.06.1999 and was remanded to judicial custody. After securing permissions from the Magistrate, the police custody of Accused No.6 was obtained on 01.07.1999 and the TIP was held on 01.07.1999 itself. There was, thus, no delay on part of the investigating machinery in getting TIP held on 01.07.1999.

20. However, what is urged, is that at least three of the eyewitnesses had accepted that the accused were shown to them while the accused were in police custody. The responses of PWs 1, 2, and 3 as quoted hereinbefore do indicate that they had seen and identified the accused while they were in custody. The suggestion that the witness was able to identify the accused only because they were shown while the accused were in police custody or that their photographs had appeared in newspaper, was, however, denied by PW1. The response of PW4 was with regard to identification of gold chain

of four sovereign and that is why the identification was in Morappur police station whereas from the responses of PWs 1, 2 and 3 it is clear that the accused were in Singarapettai police station. The response of PW4 does not indicate that the witness had seen the accused while they were in custody. PW5 completely denied the suggestion that he could identify only because the accused were shown while they were in custody and that because the photographs of the accused were shown to the witnesses. He also denied that newspaper "Dhina Thanthi", which apparently had published the photographs of the accused, was available in their village at that time. No defence evidence has been placed on record either to establish the date of publication of such photographs in any newspaper and whether the newspaper "Dhina Thanthi" was normally available in the concerned village.

21. Thus, out of five prosecution witnesses who were all injured in the transaction, the testimonies of at least two of them, namely, PWs 4 and 5 stand on a different footing. Even with respect to PWs 1, 2 and 3, though there is some room to say that the accused were shown to the witnesses while they were in custody, that part by itself may not be sufficient in the light of

the discussion in ***Manu Sharma*** v. ***State (NCT of Delhi)***[15] which was to the following effect:

> **"252.** It is also contended by the defence that since the photographs were shown to the witnesses this circumstance renders the whole evidence of identification in court as inadmissible. For this, it was pointed out that photo identification or TIP before the Magistrate, are all aides in investigation and do not form substantive evidence. Substantive evidence is the evidence of the witness in the court on oath, which can never be rendered inadmissible on this count. It is further pointed out that photo identification is not hit by Section 162 CrPC as adverted to by the defence as the photographs have not been signed by the witnesses.
>
> **253.** In support of his argument the Senior Counsel for Manu Sharma relies on the judgment of ***Kartar Singh*** v. ***State of Punjab***[16] SCC at p. 711 wherein while dealing with Section 22 of TADA the Court observed that photo TIP is bad in law. It is useful to mention that the said judgment has been distinguished in ***Umar Abdul Sakoor Sorathia*** v. ***Narcotic Control Bureau***[17], where a photo identification has been held to be valid. The relevant extract of the said judgment is as follows: (SCC p. 143, paras 10-12)
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> > "*10*. The next circumstance highlighted by the learned counsel for the respondent is that a photo of the appellant was shown to Mr Albert Mkhatshwa later and he identified that figure in the photo as the person whom he saw driving the car at the time of interception of the truck.
> >
> > *11*. It was contended that identification by photo is inadmissible in evidence and, therefore, the

[15] (2010) 6 SCC 1
[16] (1994) 3 SCC 569
[17] (2000) 1 SCC 138

same cannot be used. No legal provision has been brought to our notice which inhibits the admissibility of such evidence. However, learned counsel invited our attention to the observations of the Constitution Bench in ***Kartar Singh*** v. ***State of Punjab***[16] which struck down Section 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By that provision the evidence of a witness regarding identification of a proclaimed offender in a terrorist case on the basis of the photograph was given the same value as the evidence of a test identification parade. This Court observed in that context: (SCC p. 711, para 361)

> '*361*. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are inclined to strike down this provision and accordingly we strike down Section 22 of the Act.'

12. In the present case prosecution does not say that they would rest with the identification made by Mr Mkhatshwa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the court. Then alone it would become substantive evidence. But that does not mean that at this stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time. It must be borne in mind that the appellant is not a proclaimed offender and we are not considering

> the eventuality in which he would be so proclaimed. So the observations made in *Kartar Singh*[16] in a different context is of no avail to the appellant."

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.

255. Mr Jethmalani has further argued on the proposition that mere dock identification is no identification in the eye of the law unless corroborated by previous TIP before the Magistrate. It has been further argued that in any case, even identification in court is not enough and that there should be something more to hold the accused liable. In support of his arguments, he placed heavy reliance on the decision of this Court in ***Hari Nath*** v. ***State of U.P.***[13] and ***Budhsen*** v. ***State of U.P.***[18] A close scrutiny of these judgments will reveal that they in fact support the case of the prosecution. These judgments make it abundantly clear that even where there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive.

256. The law as it stands today is set out in the following decisions of this Court which are reproduced as hereinunder:

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[18] (1970) 2 SCC 128

Munshi Singh Gautam v. ***State of M.P.***[19]: (SCC pp. 642-45, paras 16-17 & 19)

> "*16*. As was observed by this Court in *Matru* v. *State of U.P.*[20] 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***[21].) 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,

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19 (2005) 9 SCC 631
20 (1971) 2 SCC 75
21 (1973) 2 SCC 406

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*[22]., *Vaikuntam Chandrappa* v. *State of A.P.*[23], *Budhsen* v. *State of U.P.*[18] and *Rameshwar Singh* v. *State of J&K*[14].)

* * *

19. In ***Harbajan Singh*** v. ***State of J&K***[24], 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.***[25] absence of test identification is not necessarily fatal. The fact that

[22] AIR (1958) SC 350
[23] AIR (1960) SC 1340
[24] (1975) 4 SCC 480
[25] (1970) 3 SCC 518

> 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.' "

Malkhansingh v. ***State of M.P***[11]: (SCC pp. 751-52, para 7)

> "*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."
>
> **… … …**
>
> **259.** In ***Mullagiri Vajram*** v. ***State of A.P.***[26] it was held that though the accused was seen by the witness in custody, any infirmity in TIP will not affect the outcome of the case, since the depositions of the witnesses in court were reliable and could sustain a conviction. The photo identification and TIP are only aides in the investigation and does not form substantive evidence. The substantive evidence is the evidence in the court on oath."

22. The facts on record thus indicate with clarity that:

(a) There was no delay in holding the test identification parade and the delay, if any, was attributable to the fact that one of the accused was in judicial custody whose presence had to be secured only after appropriate permissions from the court;

[26] 1993 Supp. (2) SCC 198

(b) It is not the case of the accused that Accused No.6 was ever shown to any of the witnesses. The test identification parade of Accused No.6 has no infirmity on any count and all the witnesses consistently identified said Accused No.6;

(c) Out of five injured witnesses, two had completely denied that either the accused or their photographs were shown to the witnesses, while other three did accept the suggestion in that behalf; and

(d) All the witnesses were injured in the transaction with number of injuries. It can, therefore, safely be stated that every one of them had adequate and proper opportunity to observe the features of each of the accused.

23. As has been repeatedly laid down by this Court, what is important is the identification in Court and if such identification is otherwise found by the Court to be truthful and reliable, such substantive evidence can be relied upon by the Court. Considering the totality of circumstances on record, the presence and participation of the Accused Nos.1 to 6, in our view, stood proved through the eyewitness account. We do not find any infirmity in the evidence of identification by PWs 1 to 5.

24. Since we have accepted and relied upon the eye-witness account, the subsidiary issues like recoveries and whether they were proved in a manner known to law, need no further elaboration.

25. Consequently, we find that the Appellants were rightly found guilty of the offences with which they were charged. Affirming their conviction and sentence, we dismiss these appeals.

…….J.
[Uday Umesh Lalit]

…….J.
[Indu Malhotra]

New Delhi;
December 10, 2019.