

Mahabir Singh Vs. State of U.P.

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Court : Allahabad

Decided On : May-03-1996

Reported in : 1997CriLJ1703

Judge : G. Malaviya and ;J.C. Mishra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 207, 208, 302, 303 and 394

Appeal No. : Criminal Appeal No. 492 of 1980

Appellant : Mahabir Singh

Respondent : State of U.P.

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : G.S. Hajela, Adv.

Judgement :

J.C. Mishra, J.

1. The appellant Mahabir Singh was convicted under Section 302/34 IPC and 394 IPC and sentenced to undergo life imprisonment under Section 302/34 and seven years rigorous imprisonment under Section 394 IPC Both the sentences were to run concurrently.

2. The prosecution case is that in the night intervening 23 April 1979, 3 or 4 miscreants, variously armed with Parsa, Lathi and Ballam entered in the house of the informant Ram Narain, by scaling the adjoining house of Hazari Lal, with the help of a ladder and then climbed up the second storey roof of the informant's, with the help of some ladder and then reached the first floor of the informant house by climbing down the staircase. The informant, along with his wife Smt. Parwati Devi and children, was sleeping on the roof, in front of the verandah, where a burning lantern was defusing light. They were awakened by the sound of the footsteps of the robbers, who approached him and demanded keys from him, by putting a pharsaon his neck. The informant handed over the keys of the rooms to them, whereupon they opened the rooms and looted property from the boxes. They then went to the ground floor, where the deceased Smt. Asharfi Devi, mother of the informant was sleeping. She raised an alarm and tried to obstruct the robbers, whereupon they assaulted her. It is alleged that on the alarm raised by the informant and other family members, several persons from the vicinity, including Babu Lal (P.W. 5) and Madan Mohan (P.W. 6) arrived at the spot, took their position at vantage points and saw progress of the robbery. The robbers after assaulting the mother of the informant came out from the main door and walked away towards the east. As the robbers were total strangers, they could not be named by the witnesses. It was, however, asserted that in the light of torches, Hashed by them, they had marked their features.

3. After the departure of the robbers the informant discovered the articles, taken away by the robbers, dictated report Ex. Ka. 1. which was scribed by his nephew Madan Mohan and then proceeded along with his injured mother to P.S. Baldeo, where he lodged the report at 7.15 A.M. The injured Smt. Asharfi was sent to Baldeo Dispensary. Her general condition was poor. She was referred to district Hospital, Mathura but before she could reach there she succumbed to her injuries and was declared dead, when she was produced before the doctor in the district Hospital at 9.00 A.M.

4. The investigation of the case was taken over by S.I. Inam Singh (P.W. 8), who interrogated the witnesses, proceeded to the place of occurrence of offence, where inspecting the site, he prepared its plan. He also inspected the lantern,

which was burning in the house of the informant, at the time of the incident and torches of the witnesses and finding them servicable prepared their memos Ex.Ka.9, Ka.14 and Ka. 16. S.I. Dhyan Pal Singh held inquest on the dead body, prepared the inquest report and other papers and sent the dead body, for post mortem examination, which was done by Dr. Arvind Kumar (P.W. 3). He found that she had received three incised wounds, accompanied with fractures of left side frontal bone and right maxilla.

5. Then the prosecution case is that S.I. Inam Singh found the appellant Mahabir in suspicious circumstances, while he was returning from the investigation of another case. On seeing the police party the accused turned back and started moving backwards. The police succeeded in arresting him after chasing him for about 25 steps, on the road towards Baldeo. From his personal search a country-made pistol and two cartridges were recovered. On interrogation he admitted his participation in this robbery. Therefore, he was made Baparda with the help of his Safi, brought to the police station at 10.15 P.M. and was sent, to jail on the next day.

6. The test identification was conducted by the Special Executive Magistrate, Shri J. S. Keral (P.W. 7) on 25-6-79. The appellant was correctly identified by Ram Narain (P.W. 1), Babu (P.W. 5) and Madan Mohan (P.W. 6). The investigating Officer submitted the charge sheet against the accused. After complying with the requirement of Section 207 and Section 208, the case was committed to sessions.

7. To prove its case the prosecution examined identifying witnesses Ram Narain (P.W.1), Babu Lal (P.W. 5) and Madan Mohan (P.W. 6), who had identified the appellant in the jail and also picked up correctly in the dock. They stated that they had seen the appellant committing robbery at the house of the informant in the night of the incident and they did not know him since before the incident.

8. The prosecution also examined the investigating officer S.I. Inam Singh, who stated that he had arrested the appellant on 31-5-79 at about 8.30 p.m. made him bapurda, brought him to the police station and lodged him in the lock up at 10.15 P.M. An entry of arrival was noted in the general diary report no. 34. On the following morning he was sent to jail through constable Jagdish Prasad, who filed

his affidavit stating that he had brought the appellant from the police station on 1 - 6-79 in veiled condition to the Court of Magistrate, where after his production, a warrant was prepared and then he had brought the appellant in veiled condition to Mathura Jail, where he had lodged him on the same after noon.

9. Thus link evidence was given to prove that right from his arrest till his confinement in jail the accused was kept Bapurda and no opportunity was given to the witnesses to see and identify him.

10. Learned Session Judge believed the prosecution evidence and convicted and sentenced the accused as aforesaid. Felt aggrieved the accused Mahavir preferred this appeal. We have heard Sri G. S. Hajela learned counsel for the appellant and Sri R. C. Deepak learned Additional Government Advocate.

11. The learned counsel for the appellant contended that the witnesses had no sufficient light and opportunity to identify the robbers during the commission of the robbery and therefore, the conviction could not be recorded. The learned Additional Government Advocate contended that the informant Ram Narain (P.W. 1) had opportunity to mark features of the robbers in the Verandah in the light of lantern, whereas identifying the witnesses Babu Lal and Madan Mohan had seen robbers in the light of torches flashed by them while the robbers were coming out from the house and also while they were chasing the robbers.

12. Rain Narain (P.W.I) had undoubtedly sufficient opportunity to watch the robbers and to mark their features. He has stated that he was awakened by the foot steps, when the robbers came in the Verandah. Then they asked for keys. He has further stated that they had kept Pharsa on his neck and threatened him to keep silence. Ram Narain handed over the keys. The miscreants opened the room where they opened the boxes and looted the goods. Thus there was sufficient opportunity for Ram Narain to identify the robbers.

13. Regarding Babu Lal and Madan Mohan, learned counsel for the appellant, contended that they were not present at the door of the informant during the commission of the robbery and they had arrived on the spot after the departure of the robbers. In support of his contention learned counsel referred to the statement

of Ram Narain (on page 4). He has stated that after assaulting his mother the robbers opened the main door and escaped. He further stated that he raised alarm while the miscreants were going towards the ground floor. From this statement, the learned counsel concluded that the villagers were attracted to the spot, after the informant had raised alarm and as the alarm was made while the miscreants were escaping, witnesses could not have arrived in time to watch the culprits.

14. Learned Additional Government Advocate pointed out that according to Ram Narain he had raised alarm while he was awakened by the foot steps of the robbers and they were looting goods. He stated that his mother was also awakened on the out cry, raised by him and then several persons assembled outside.

15. After having gone through the statement of Ram Narain we find that he had raised alarm in the beginning as also while the robbers were descending through the staircase. Learned counsel for the accused, while cross-examining Ram Narain inquired about the alarm raised by at the later part of the occurrence and omitted to ask any question regarding the alarm raised in the beginning. Both the witnesses namely Babu Lal and Madan Mohan have stated that they had reached the spot and watched the progress of robbery. Moreover it is a matter of common knowledge that during robbery and dacoity the dacoits and robbers themselves terrorise the inmates by threatening and raising out cries and the large number of villagers assemble and take their position at vantage points after taking precautions for their protection. We find nothing in the statement of witnesses to disbelieve their evidence that they were present at the door while the robbers were coming out of the house of Babu Lal also stated that while they were escaping, the miscreants were turning their faces, obviously to see whether there was any apprehension of their being apprehended by the villagers.

16. Thus the witnesses who had identified the appellant in the court and earlier in the jail had sufficient opportunity to identify the robbers in the light of lantern and torches to mark the features of the robbers.

17. The learned counsel for the appellant vehemently argued that none of the identifying witnesses had disclosed the features of the robbers and this creates

serious doubt about the authenticity of their evidence. A perusal of the identification memo would disclose that the appellant had no special distinctive feature which could be marked from a distance during the commission of the robbery. The Magistrate saw very light small-Pox marks on his face. Babu Lal and Ram Narain have stated that they could not see small pox marks during the commission of robbery. They could not disclose the presence of the marks to the investigating officer. Madan Mohan had seen such marks but he had not disclosed this fact to the investigating officer obviously for the reason that the marks were not distinctive. Madan Mohan further stated that the appellant had no special distinctive features and he had identified him as he had seen him during the commission of the robbery. His evidence appears to be natural and probable.

18. The identifying witnesses have made contradictions regarding the number of the persons who were mixed with the suspect during the test identification parade and had small pox marks. But this contradiction is not very material. Learned Session Judge dealt with this discrepancy and the conclusion drawn by him appears to be correct. He rightly remarked that there was no reason to disbelieve the evidence of Magistrate who stated that all the undertrials who were mixed with the accused had small pox marks on their faces.

19. The learned counsel for the appellant then contended that one of the identifying witnesses namely Gopal Prasad had admitted that he knew the appellant Mahavir Singh since before the incident. This contention is no doubt correct. However, this statement will not effect the creditability of other identifying witnesses whose evidences have been found to be reliable. It may be mentioned that Gopal Prasad did not identify the appellant in jail, despite of fact that he claimed that the appellant was known to him. It shows that Gopal was wonover by the appellant. Furthermore Gopal was not examined by the prosecution.

20. Learned counsel then contended that the defence version that the appellant was shown to the witnesses at the police station is probable. We do not find any force in the contention. There is no material on record to substantiate this empty allegation. All the identifying witnesses stated that they had not seen the appellant at the police station. The prosecution has adduced evidence to prove that the face

of the appellant was covered after his arrest and till his confinement in jail he was kept bapurdah and no opportunity was offered to the witnesses to mark his features. In view of this factor we find that the defence plea was rightly rejected by the learned Session Judge.

21. Learned counsel for the appellant contended that there was inordinate delay in holding test identification parade and therefore no reliance can be placed on the result of the test identification. It cannot be denied that the identification should be held at the earliest, without loss of time but there is no hard and fast rule about the period of time, after which the test identification parade should be held after arrest, but if there is some delay it must be explained by the prosecution. It cannot be laid down as proposition of law that after the lapse of a long period, witnesses in no case will be able to identify the dacoit, they had seen in the course of dacoity, committed during the night. It would be hazardous to fix the universal measure of time after, which the evidence of identification would be necessarily disbelieved. The question whether or not a certain set of witnesses, who say that they have identified a particular accused or a group of accused persons should be believed is a question depending on the facts and the circumstances of the case. If the accused cannot be put for identification for some time after the occurrence, the prosecution obviously suffers in as much as it becomes more and more difficult for the witnesses to identify persons, who were not known to them at all and who were seen by them for the first time at the time of occurrence. But if in spite of fading memory and effect of seeing the accused in different appearance and long gap between the occurrence and holding of identification proceedings, the witnesses had identified the accused, there should be no justification whatsoever for discarding their evidence. The prosecution suffers the disadvantage of the losing the testimony of these witnesses, who are unable to identify the accused on account of their fading memory. There is no reason why the evidence of these witnesses, who do in spite of this handicap identify the accused, should be disbelieved.

22. In the case before us the appellant was put up for test identification after a lapse of 2 months and 21 days, after the commission of robbery. A similar question arose for consideration before the Supreme Court (in Brij Mohan v. State

of Rajasthan, AIR 1994 SC 739 whether the test identification, which was virtually held after three months of the occurrence can be relied on in recording conviction. It was observed 'It is true that with lapse of time, the memory of the witnesses-, who have seen the culprits at the time of the commission of the dacoity gets dimmer and dimmer, and the earlier the test identification is held, it inspires more faith about the fairness of the test identification. But no time limit can be fixed or holding a test identification, after which the investigating officer will be debarred from putting the suspects for test identification.' The Supreme Court further observed 'With the present case, the identification made by the witnesses cannot be rejected merely on the ground that it was not possible for them to identify after lapse of a period of three months. This was not an ordinary case of dacoity, for commission thereof, four persons were killed, one of them being a lady. The gruesome and callous manner, in which the dacoity was committed by the culprits must have left a deep impression on the minds of the witnesses, who had occasion to see such culprits in the electric light during the course of commission of assault, firing and removal of the articles from the house in question. This deep impression will also include the facial impression of the culprits, which in normal course must not have been erased only within a period of three months.

23. The learned counsel for the appellant referred to some pronouncements in support of the contention that the test identification result cannot be relied on, as it was held after a period of about three months from the date of occurrence. In *Shatrughan alias Shatradhan Parida v. State of Orissa*, 1994 SCC (Cri) 1424, the identification parade was held 1 1/2 months after the occurrence in question and more than 15 days after the arrest of Rabin Candy and almost a month after the arrest of other two accused. The Supreme Court held that the prosecution has not advanced any reason for not holding the identification parade promptly.

24. The witnesses had not noticed any special features for identification. The learned counsel for the appellant contended that the Supreme Court found difficult to place implicit reliance on the identification made on the test identification parade and consequently the accused were given benefit of doubt and acquitted. It may however, be pointed out that the Supreme Court besides considering the delay found that there was nothing on the record to show that the prosecution had taken

care to ensure that their identity was not revealed, when they were taken to Court and produced as required by law. In other words the aforesaid inference was drawn, as link evidence was lacking and there was possibility of the accused having been seen while going to the Court.

25. In the case before us the prosecution has adduced link evidence to prove that right from their arrest till his confinement in jail precautions were taken to conceal the identity of the appellant. Furthermore there is sufficient explanation for the delay in holding test identification after the arrest of the appellant.

26. From the record it appears that after the arrest of the appellant a request was made to the Special Magistrate to fix a date for identification. A list of witnesses was also submitted. The Special Magistrate by order dated 7th June, 1979 fixed 16th June, 1979 for conducting the parade. The ordersheet dated 16-6-79 discloses that on that date all the witnesses required to participate in the identification parade were not available and therefore the Magistrate fixed 25-6-79 for conducting the identification parade. The investigating officer had reported that three witnesses had gone out of station and they were not available at their houses.

27. Thus sufficient explanation is available on the record to prove that due to circumstances beyond control of the investigating agency, the test identification could not be held, before 5th June, 1979. Moreover the plea of the accused in the case before us was that he was shown at the police station. He had not even alleged that he was shown or was seen by the witnesses in the Court.

28. In view of these facts we find that the aforesaid case relied on by the learned counsel for the appellant has no application.

29. Learned counsel also referred to the decisions noted below :-

In Chottey Lal v. State of U.P., 1994 SCC (Cri) 144, the test identification parade was held 2 months and 20 days after arrest of the appellant. No explanation was given for the delay in holding test identification. In Soni v. State of U.P., 1983 SCC (Cri) 49(1), the identification parade was held 42 days after the arrest. The

Supreme Court in both the cases held that the delay in holding test identification throws doubt on the genuineness of the test identification.

30. In *Subhash and Shiv Shankar v. State of U.P.*, 1987 All Cri C 507 : (AIR 1987 SC 1222) (SC) the identification parade was held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. The Supreme Court observed that therefore there was doubt as to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock up or in the jail premises or to make a note of his features. Over and above all these things, there was sufficiently long interval of time (4 months) that had elapsed between the date of occurrence when the date of witnesses had seen and the date of test identification parade.

31. It needs no repetition that in the case before us the identification parade was held two months 21 days after the occurrence and three weeks after the arrest and there was sufficient explanation for the delay in holding the test identification parade after the arrest of the appellant viz non-availability of the witnesses. The pronouncement of the Supreme Court in *Brij Mohan v. State of Rajasthan*, AIR 1994 SC 739 is directly applicable to the facts of the case before us. We find that the identification evidence cannot be discarded on account of the alleged delay.

32. In view of the aforesaid discussion we are of the opinion that the evidence of all the three identifying witnesses is trust-worthy and is fully corroborated by the test identification evidence, which was held after taking proper precautions by the Magistrate. We find that the appellant was rightly convicted under Section 394 IPC for committing robbery at the house of Ram Narain.

33. The prosecution has not adduced any evidence to show who had assaulted Smt. Asharfi Devi nor has given any evidence to prove that all the robbers had common intention to commit her murder. It appears that on account of resistance offered by Smt. Asharfi Devi one or two robber assaulted her. It cannot be said that the robbers who had assaulted Smt. Asharfi Devi had intention to commit her murder. It is probable that they would have intended to assault her, merely to prevent any obstruction from her side. In absence of any evidence it cannot be held that the appellant shared common intention with the assailants in commission

of her murder or even causing grievous or simple injuries. Therefore, the appellant could not be convicted for offence punishable under Section 303/34 IPC.

34. The appeal is partly allowed. The conviction of the appellant under Section 302/34 IPC and the sentence of life imprisonment are set aside. The conviction of the appellant under Section 394 IPC and sentence of seven years R.I. are maintained. The appellant is on bail. He shall be arrested to serve the sentence awarded.

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