

Babu Singh Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Dec-14-1989

Reported in : 1989(2)WLN362

Judge : S.S. Byas and; N.C. Kochar, JJ.

Appeal No. : D.B. Cr. (Jail) Appeal No. 342 of 1988

Appellant : Babu Singh

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

S.S. Byas, J.

1. Accused Babu Singh was convicted under Sections 302 & 324 IPC and sentenced to imprisonment for life with a fine of Rs 500/- and rigorous imprisonment for two year's with a fine of Rs. 500/- on the respective counts by the learned Additional Sessions Judge (1), Ajmer by his judgment dated June 18, 1988. The accused has come-up in appeal and challenges his conviction.

2. At about 7-50 p.m. on 22-12-1984, PW 4 Radhey Shyam appeared at G.R.P. Station, Ajmer with a bleeding wound on his neck, he was employed as a 'Rakshak' (constable) in the Railway Protection Force and his duty hours on that

day were from 6.00 p.m. to 12 p.m. He stated before the S.H.O. Modsingh PW 14 that while taking rounds at the railway station, he leached the R.P.F. post near which bicycles are kept at about 7.30 p.m. He found a healthy-man around 55-60 years in age with white hair beard and moustache. As bicycles are generally stolen from that place he asked that man as to why he was standing there. That man told him that he had come therein search of his friend 'Vermaji' That man then left the place and went towards the plat-form No. 1. He (Rakshak) also followed him and after some distance asked him his name. That man told his name as Joshi and that he had come from Ratlam in railway train No. 112 While these talks were going on PW 7 Ishwarlal who is his relative also came there. The Rakshak and that man proceeded further and came at the junction of plat-forms No. 2 and 3. They and Ishwarlal smoked a bidi there Ishwarlal then left the place to go to his house. He (Rakshak) suspected that man as a cycle thief and caught him to take to the railway police station. That man offered a big bribe of Rs. 500/- to him but he refused to accept it. While they were on the way that man took out a dagger from his bag and struck a blow with it on his (Rakshak's) neck. That man then took to heels. He raised cries and ran after that man. Hearing his cries Mahendra Singh, the deceased, tried to catch that person. That person plunged his dagger in the chest of Mahendra Singh. Mahendra Singh fell down. PW 2 Rambal who was also employed as a Rakshak in the R.P.F ran after that person. That person entered in a compartment of the train Rambal PW 2 followed him and that person struck blow on his abdomen by the dagger. Rambal fell down That person made good his escape throwing his bag and the cover of dagger there. PW-14 Modsingh, S.H.O. recorded this statement of Radhey Shyam in Ex. P 7 and prepared the First Information Report Ex. P 8. A case under Sections 307, 302, 353 and 333 IPC was registered Mahendra Singh was taken to the Government Hospital where he passed away at about 8-15 p.m. on the same day. The Station House Officer inspected the site and prepared the site plan Ex. P 9 and the inquest report of the victims dead-body. He also seized the bag and the dagger cover thrown by the culprit near the place of incident. The post mortem examination of the dead-body of Mahendra Singh was conducted next day by the medical jurist J.L. Nehru Hospital, Ajmer The injuries of Radhey Shyam PW 5 and Rambal PW 2 were also examined As per medical opinion the cause of death of Mahendra Singh was

shock and haemorrhage as a result of ante-mortem injury on vital organ (liver). Radhey Shayam and Rampal were admitted for treatment in the hospital where they remained as indoor patients for a pretty long time. When the bag thrown by the culprit was opened and searched, some clothes, keys, tooth-brush and like such articles along with a torn written chit Ex. P. 26 were found. In Ex. P.26, 'Naharpura' was found written along with two names namely Rampal and Laluramji Sharma. The blood stained clothes of the deceased and the injured Rakshaks were seized and sealed. The police made strenuous efforts to trace-out the culprit and various police parties were sent for that purpose. The Dy. Supdt. of Police went to Ratlam and arrested the accused Babu Singh in Naharpura locality in the mid-night of 26-12-1984 and prepared the arrest memo Ex. P 22. The accused was brought to Ajmer and remand of his police custody was obtained from a Judicial Magistrate In consequence of the information furnished by him. a dagger was recovered lying buried deep near the place of incident. The accused was lodged in Central Jail, Ajmer on 31-12-1984. The test identification parade was conducted on 2-1-1985 by the Addl. Chief Judicial Magistrate Shri Verma PW 16. The accused was correctly identified by PW 5 Ishwarlal Ramesh and Ramchandra PWs Amar Singh and Bachcha Ram did not identify him correctly and identified some others as the person who had stabbed the Rakshaks and deceased Mahendra Singh.

3. Again on 22-2-1985 a test identification was conducted in the Central Jail. Ajmer by the Judicial Magistrate Shri T.P. Gupta PW 15 in which PW 2 Rambal and PW 5 Radheyshyam correctly identified the accused as the person who had stabbed them. The test identification memos are Ex. P 1 and Ex. P 2 After when the investigation was over, the police submitted a challan against the accused in the court of the Judicial Magistrate (Railways) Ajmer who in his turn committed the case for trial to the Court of Sessions. The case came for trial before the Additional Sessions Judge (1), Ajmer, who framed charges under Sections 302 and 307 IPC against the accused to which he pleaded not guilty and faced the trial. In support of its case the prosecution examined 16 witnesses and filed some documents. In defence the accused examined one witness. On the conclusion of the trial, the learned Addl. Sessions Judge held the charges proved against the accused. He was consequently convicted and sentenced as mentioned at the very out-set.

Aggrieved against his conviction, the accused has taken this appeal.

4. We have heard Mr. Ashok Verma learned Counsel for the appellate and the learned Public Prosecutor Shri Rizwan Alvi. We have also gone through the case file carefully.

5. It may be mentioned at the very out-set that Mr. Verma did not challenge the cause of death of Mahendra Singh and the number and nature of injuries found on PW 2 Rambal and PW 5 Radheyshyam. The post-mortem examination report is Ex. P 17 and the injury reports are Ex. P18 and Ex. P 19. All these there documents were admitted by the accused during trial and as such, the doctors who conducted the autopsy and examined the injuries were not produced in evidence. Since these are admitted document, we need not deal with them in detail. Suffice it to say that the death of Mahendra Singh was homicidal and the injuries caused to PW 2 Rambal and PW 5 Radhey Shyam were simple inflicted by a sharp weapon.

6. Mr. Verma also did not challenge the incident not was in a position to do so in view of the direct evidence of PW 1 Ram Chandra, PW 2 Rambal, PW 5 Radheyshyam, PW 6 Bachcharam. PW 7 Ishwarlal PW 8 Ramesh and PW 2 Amar Singh. We have gone through the evidence of these witnesses and it can be said without any hesitation that PW2 Rambal and PW 5 Radhey Shyam were inflicted injuries with some sharp weapon and Mahendra Singh was stabbed to death by same person in the yard of railway station, Ajmer around 7.40 p.m. on 22-12-1984.

7. In assailing the conviction of the appellant, Mr. Verma vehemently contended that it is a case of wrong identity. It was argued that the entire prosecution case rests on the identification of the accused made by the prosecution witnesses firstly on 2-1-1985, and subsequently on 22-2-1985, He has taken several grounds to show that the test identification parades conducted do not inspire confidence. It was further argued that the Dy. Superintendent of Police who arrested the accused in Naharpura locality, Ratlam on 26-12-1984 has not been produced in evidence by the prosecution. The prosecution has act explained as to on what grounds and reasons the accused was arrested at Ratlam. The best witness to state so was the Dy. S.P. and he has been with held. We shall take up his

contention assailing the identifications at serial.

8. Before we deal with the contention of Mr. Verma some prominent features arising in the case may be noticed. The first is that the incident took place in the yard of the railway station. All the witnesses who identified the accused as the culprit who committed the offence, are either police or railway employees or employees in the Railway Protection Force. G.R.P station is situated on platform No. 1 of the railway station. The accused was arrested at Ratlam in the night of 26-12-1984 and was brought to Ajmer. Remand of his police custody was obtained from a Magistrate and he remained in police custody till he was lodged in Central Jail, Ajmer on 31-12-1984. First identification parade was conducted on 21-1-1985. The accused was taken back in police custody and was thereafter lodged in Central Jail, Ajmer on 8-1-1985. The second test identification parade took place on 22-2-1985. In the second test identification, PW 2 Rambal and PW 5 Radheshyam who are the injured victims in the case participated. In the First Information Report Ex. P. 7 (statement of Radheshyam), the description of the culprit is that he has white hair on head, white beard and moustache and was of 55-60 years in age.

9. In challenging the identification, the contention raised by Mr. Verma is that the accused was arrested on 26-12-1984 at Ratlam. He was brought to Ajmer and remand of his police custody was taken. He remained in police custody and was lodged in Central Jail, Ajmer on 31-12-1984. When the first test identification was conducted on 2-1-85, the accused stated before the Magistrate conducting the identification that he was already shown to the witness by police and that fact has been mentioned in the identification memo Ex. P. 1. The mode and method adopted by the Investigating Agencies is highly objectionable and is in violation of Rule 7.31 of the Rajasthan Police Rules, 1965 (hereinafter to be referred to as 'the Rules'). It was argued that the Investigating Officer deliberately took the police remand of the accused with a purpose to show him to the witnesses. The contention raised is quite effective and has considerable merit.

10 Rule 7.31 deals with the identification of suspect. It would be useful to reproduce the following provision from it:

7.31. (b) Identification proceedings should be held soon after the arrest of suspects.

11. The rule requires that the identification parade should be held soon after the arrest of the suspect. The general practice followed should be that as the suspect is arrested, he should be sent to judicial custody to get his test identification conducted. There should be no departure from this salutatory provision because its breach may afford an opportunity to the suspect to contend that he was not sent to judicial custody soon after his arrest in order to show him to the witnesses participating in the test identification parade. Otherwise too, if the remand of police custody is first taken and the suspect is kept in police custody, the possibility to show him to the witnesses cannot be altogether eliminated. Here in the instant case, the facts are very startling. The accused was kept in police custody from 16-12-1984 to 31-12-1984. PW 1 Ram Chandra is a Rakshak in R.P.F., Ajmer. Harchcha Ram PW 6 is a porter at the railway station, PW 7 Ishwarlal is an employee in the railways and PW 8 Ramesh is again a porter at the railway station. They are all thus connected with the railway station, Ajmer working there in one of the other capacity. Railway Police Station is situated on platform No. 1. The accused remained in the police custody at Ajmer nearly for four or five days. Therefore, the possibility of his being shown to the aforesaid witnesses cannot be altogether eliminated. The possibility of his being shown to the witnesses is constantly there. The breach of Rule 7.31 may not be fatal to the prosecution but the breach gives rise to many suspicions including that of the bonafides and honesty of the Investigating Officer.

12. Another glaring informity in the test identification is that of delay. The first test identification as pointed out earlier was conducted on 2-1-1985. After the first test identification was over, the appellant was taken back in police custody and was lodged back in Central Jail, Ajmer on 8-1-1985. The second test identification vide Ex. P. 2 took place on 22-2-85 and the witnesses participating there in are the two injured persons, PW 2 Rambal and PW 5 Radheshyam. The accused was arrested on 26-12-1984 and the second test identification thus took place nearly after two months on 22-2-1985. The explanation for delay furnished by the prosecution is that both these witnesses remained in-door patients on account of the injuries

sustained by them. As such second test identification could not be conducted before 22-2-1985. We are unable to accept such an explanation for which there is no record except bald statement of these witnesses that they remained in-door patients and were discharged only a few days before 22-2-1985. The Prosecution was required to examine the doctors under whose treatment these two witnesses remained right from 26-12-1984 to 22-2-1985 or earlier. No effort was made to procure that evidence.

13. It has been repeatedly held that a test identification of the suspect should be held within a reasonable short period from the date of his arrest. We are quite conscious of the position that at times there can be justification or explanation for the delay. But the justification and the grounds of delay must be forth-coming and acceptable. If there is unexplained or unreasonable delay in putting up the suspect for a test identification, the delay by itself, detracts from the credibility of the test. Test identification parade held long after the arrest of the suspect of little value. We are fortified by the observations made in *Harinath and Ors. v. State of Uttar Pradesh* AIR 1 SCC 14, *Shiv Singh v. State of M.P.* : 1975 CriLJ26 and a lot others. In *Hasib v. State of Bihar* : 1972 CriLJ233 it was pointed out that it is always desirable to hold the test identification parade at the earliest opportunity. Their Lordships took the delay of 17 days as unreasonably long and the test identification was held a nullity on that ground.

14. The other striking feature in the two test identification parades is the lack of precautions taken by the Magistrate who conducted them. The test identification memo Ex. P. 2 shows that the appellate has a scar mark 3-1/2' in diameter on his fore-head. He took the precaution to counsel it by pasting a chit of paper on it. Unfortunately, in the earlier test identification parade conducted on 2-1-1985 (vide Ex. P. 1), the learned Magistrate did not mention this prominent scar-mark in Ex. P. 1. If a suspect has a prominent scar mark 1-1/2' in diameter and no precautions have been taken to conceal or hide it, it is very easy to identify him in the test identification parade. If the distinctive or prominent mark noticeable from a distance on the face of the suspect is not concealed or no precautions had been taken by the Magistrate conducting it, such a test identification loses weight.

15. There is yet another glaring informity in the second test identification parade conducted on 22-2-1985. The arrest memo of the accused (Ex. P 22) as well as the first test identification memo (Ex. P. 1) show that the appellant wearing a white beard. The learned Magistrate who conducted the first test identification on 2-1-1985 took precaution to mix the persons wearing beards with the appellant. Of course, he failed to take the precaution in respect of the scar mark on the forehead of the appellant. In the second test identification parade conducted on 22-2-1985 vide Ex. P. 2, the learned Magistrate has not mentioned whether the appellant at that time was wearing the beard or not. The learned Magistrate Mr. Gupta (PW 15), who conducted the second test identification was pointedly cross-examined on this vital point and his reply is extremely vague and evasive. In his cross-examination he stated that he was unable to recollect whether the appellant was wearing a beard at that time and whether he was clean-shaved. He gave a very evasive reply that in case the appellant was wearing a beard, he must have mixed the persons wearing beards with him and in case he was not wearing any beard, the persons wearing no beard would have been mixed with him. We are not at all satisfied with this statement of the learned Magistrate. The act of conducting the test identification of the aspect is solemn and is responsible in nature. It should, therefore, be discharged in a fair and honest manner and not in a casual and cavalier way. The appellant was wearing a beard at the time of his arrest and when the first test identification was conducted on 2-1-1985. There is no material on record that he got it shaved subsequent to 2-1-1985 when he was in police or judicial custody. If the appellant was wearing a beard at the time of second test identification and persons wearing the beard were not mixed with him, at that time, the whole second test identification parade loses its evidentiary value.

16. Assuming now that at the time of second test identification, the appellant was not wearing a beard as he got it shaved an interesting question arises as to whether PW 2 Rambal and PW 5 Radheshyam who had seen him wearing a beard at the time of the incident could correctly identify him when he was not wearing the beard and the beard was absent. In *Liason Singh v. Emperor* AIR 1925 Allahabad 405 a similar situation arose. The dacoit was wearing the beard at the time of his committing the dacoity. In the test identification his beard was absent. The question arose where the witness identifying him in the test identification could do

so. The learned Judges held that in such a situation, the identification/evidence should be ignored. We are lured to borrow the following excerpt from the aforesaid judgment:

How he was able to do it, is mysterious. One can only say that an identification made of a man who said to have been wearing a beard at the time, and whose beard is concealed or absent at the time of identification, is by go means convincing, and when it stands alone, must be regarded as an unstable piece of evidence.

Both the witnesses PW 2 Rambal and PW 5 Radheyshyam did not explain as to bow they identified the appellant if he was not wearing a beard in the test identification parade though he was admittedly wearing a beard at the time of commission of the offence.

17. The appellant was arrested on 26-12-1984 in Naharpura locality, Ratlam (MP) at about 12 30 p.m. vide arrest memo Ex. P 12. The arrest was made by the Dy. S.P., GRP, Ajmer. The Dy. S.P. who made the arrest of the appellant has not been examined in evidence by the prosecution. There is no material on record to show as to what suspicion and circumstances led the Dy. S.P. to arrest the appellant. When one is arrested and he turns out to be the real offender subsequently, it is incumbent on the prosecution to show and explain the circumstances which led the Investigating Agency to arrest him. It is all the more necessary when the prosecution case, rests squarely on the evidence of identification. In *Jaila and Anr. v. State of Rajasthan* AIR 1952 Pepsu 103 the learned Chief Justice observed as under:

When the name of the offender is not mentioned in the First Information Report and the prosecution contends that he was not known to the persons who witnessed the occurrence, it is necessary for the prosecution Co make out what led to the identity and the arrest of the offender. If a person is arrested on mere suspicion and later on he turns out to be the real culprit it is also necessary for the prosecution to prove the circumstances which created the suspicion.

We have pointed out earlier that the Dy. S.P. who arrested the appellant at Ratlam has not been examined by the prosecution to show and explain the circumstances which induced him to arrest the appellant. Likewise no material has been placed by the prosecution which led to the arrests of the appellant. It is very easy to arrest one and later to get him identified in the test identification parades. This infirmity in the prosecution camp is a serious one and cannot be lightly ignored or by passed.

18. It may be recalled that the entire prosecution case against the appellant rests on identification. The lapses and infirmities indicated above by us are not slight. They are serious and have telling effect on the test identification parades. If the test identification parades are taken as dubious and suspicious and if they have not been carried out faithfully and in a responsible manner, the evidence relating to them must be rejected. The appellant should therefore be acquitted.

19. Learned Counsel for the appellant also addressed us on the statement Ex. P 7 of PW 5 Radheyshyam on which formal FIR Ex. P 8 was prepared in the prescribed proforma. Statement Ex P 7 according to Mr. Verma is a fabricated and fictitious document because it has been written in different inks from place to place. It was also argued that the FIR Ex P 8 was received in the Court on 3-1-1985, The crime was committed in (be evening of 22-12-1984. The delay in despatching it to the Court of Magistrate renders the prosecution story highly suspicious. We need not examine these contentions as we are acquitting the accused on the ground of lapses in the test identification garades.

20. The knife recovered in consequence of the information furnished by the accused unlist in police custody and the recovery of the bag alleged to have been thrown by him while fleeing away have not been connected with the commission of the crime No evidence is there to show that blood, muchless the human blood and still less the human blood of the group of the deceased was found on the knife. The articles found in the bag have also not been connected with the appellant. For the reasons discussed above, we are unable to maintain the conviction of the accused-appellant under Sections 302 and 324, 1PC and the sentences awarded to him thereunder.

21. In the result, we allow the appeal of the accused-appellant Babu Singh. His conviction under Sections 332 and 324, IPC and the sentences awarded to him thereunder by the court below are set-aside. He is acquitted of the offences he was charged with. He is serving the sentences in jail and shall be forth-with released, if not wanted in any other case.

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