

**State of Bihar Vs. Surendra Manjhi and Saryug Manjhi**

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**Court :** Patna

**Decided On :** Jul-21-2009

**Reported in :** 2010CriLJ292

**Judge :** Navin Sinha and; Dharnidhar Jha, JJ.

**Acts :** Explosive Substances Act - Sections 4 and 5; ;Criminal Law Amendment Act - Section 17; ;Arms Act; ;Police Act - Sections 7 and 12; ;Indian Penal Code (IPC) - Sections 120B, 147, 148, 149, 302, 307, 332, 333, 341, 342, 353, 380, 436 and 458; ;Code of Criminal Procedure (CrPC) - Section 235; ;[Constitution of India](#) - Article 309

**Appeal No. :** Death Referanc No. 9 of 2008 and Cr. APP (DB) No. 860 of 2008

**Appellant :** State of Bihar;surendra Manjhi and Saryug Manjhi

**Respondent :** Surendra Manjhi and Saryug Manjhi;state of Bihar

**Advocate for Pet/Ap. :** Shakeel Ahmad Khan, Sr. Adv. in Cr. App. 860/08; Lala Kailash Bihari, Sr. Adv. in D.R. 9 of 2008 and;

**Disposition :** Application allowed

**Judgement :**

**Navin Sinha and Dharnidhar Jha, JJ.**

1. The two appellants, namely, Surendra Manjhi and Saryug Manjhi were tried by the Additional Sessions Judge-cum-Presiding Officer, Fast Track Court No. II, Nalanda at Biharsharif, with eight other accused persons for different charges, in Sessions Trial No. 818 of 2005/210 of 2007. The trial ended in judgment dated 6th of June, 2008. While the two appellants were found having committed offences under Sections 147, 148, 458, 120B, 302, 307, 380, 332, 333, 353, 341, 436, 342 read with Section 149 of the Indian Penal Code, besides, Sections 4 and 5 of the Explosive Substances Act and Section 17 of the Criminal Law Amendment Act, the other accused persons facing trial with the two appellants were not found having committed any offence under the Penal Code as also the Arms Act, and accordingly, they were acquitted. The order of sentence was passed by the learned trial court on 9.6.2008 and after hearing both the sides under Section 235 of the Code of Criminal Procedure, the learned trial Judge found that it was a rarest of rare cases and directed the two appellants to be hanged by their neck till they were dead. Thus, Death Reference No. 9 of 2008 and Cr. Appeal No. 860 of 2008 are before this Bench.

2. The case relates to an incident taking place in the night intervening 11/12th of August, 2005 at about 11.45 P.M. The allegation emanating from the written report (Ext.3) of P.W. 10 Sarvanand Mishra, an Assistant Sub-Inspector of Police posted on the relevant date in Chhabilapur Police Station, is that a mob of about 350-400 persons variously armed with deadly weapons, such as gun, stengun, bomb, petrol bomb, etc. swooped at the police station. On that particular day an accused of another case, namely, Kishori Ravidas had been arrested and he was under police custody and was lying in the premises of the Police Station. The police Station did not have any lock up. It is stated that the mob was towards eastern, western and southern sides of the Police Station. The constables on duty, picking up the presence of the mob being there, alerted their other colleagues by pointing out to them about the arrival of the M.C.C. men and commanded the mob to stay away from the premises. The mob of M.C.C. persons started firing at the Police Station and according to the written report there was firing in retaliation by the police also, but the criminals surrounded the Police Station from all sides, entered into its premises and captured the Police Station so much so that they took the police personnel in their custody, tied down their hands and feet and looted away

all the arms and ammunition of the police station and other properties. The officer-in-charge of the Police Station, incidentally, was in his house. The armed criminals hurled bombs including petrol bombs at the Police Station as a result of which the whole of the Police Station was set ablaze. The arms and ammunitions seized by the police in connection with different crimes reported to the Police Station were also taken away. They also took away the arms and ammunitions of the police station which had been kept in the safe custody of the police Station.

3. During firing, Chaukidar Rambriksha Manjhi died at the spot and Havildar Ramsakal Ram received injuries who also subsequently succumbed to his injuries. In addition to the above, three persons, namely, constable Ramakishore Choudhary, Kishori Ravidas, an accused of another case, and Sarwan Thakur were also injured.

4. After receipt of the written report of Sarvanand Mishra the case was registered and investigation was taken up by two police officers, firstly, by P.W. 12 and thereafter, by P.W 15. As may appear from the evidences which are available to us, the police forwarded the accused persons on different dates to be remanded to judicial custody. As regards the two appellants, it appears that Surendra Manjhi was arrested and remanded to judicial custody, but subsequently the police obtained his remand for the purpose of investigating the case further and kept the said Surendra Manjhi in the custody of the Police Station and sent him back to judicial custody after some days. As regards accused Saryug Manjhi, he was arrested on 6.9.2005 along with appellant Surendra Manjhi and others and they were forwarded together for being remanded on 7.9.2005, as may appear from paragraphs 163 and 164 of the case diary, and the police testified that the remand order was passed by the C.J.M., Nalanda on that particular date.

5. It is not disputed that the deaths of the injured Rambriksha Manjhi and Ramsakal Ram were caused by firearm injuries. This could be available to us from the evidence of two witnesses, P.Ws 11 and 12 who held the post mortem examination on the dead bodies of the above named deceased persons and prepared the reports Exts 5 and 5/1. After having gone through the evidence of the above witnesses, like P.Ws. 1, 2, 3, 4, 8, 9 and 16 we are also not in doubt that

the two deceased persons were killed in an attack which was set up by the extremists on Chhabilapur Police Station in the fateful night. Indeed, the attack was pre planned and it was telltale. Not only the police force was attacked, there was concerted planned actions from the extremists to eliminate those who could resist their acts. This could be the reason that two police personnel died and three persons who were present at the Police Station, like, constable Raj Kishore Chaudhary, accused Kishori Ravidas and the cook Shrawan Thakur received serious injuries. But, the fact remains that in the written report (Ext 3) P.W. 10 has not named any one. He had claimed that he could not identify any one in spite of seeing them. Most of the accused persons appear indulging in acts of capturing Police men of Chhabilapur Police Station so as to tying down their hands and feet and thereafter plundering the Police Station by breaking open the locks of the box so as to taking away the seized arms and ammunitions and other properties. We are confirmed in holding that indeed the incident had occurred in the manner as alleged. However, we, for the reason to be recorded hereinafter could not uphold the impugned judgment if in the Test Identification Parade the police did not establish the identity of a culprit.

6. The whole plethora of evidence is of good number of witnesses out of whom P.Ws. 5 and 6 were the witnesses to seizure and P.W. 16 a formal witness proving the writings on Exts. 6 ad 6/1, the two injury reports. There is no evidence indicating that any one had identified any of the culprits except P.W. 1. The importance of evidence of P.W. 1 is that he participated in the Test Identification Parade which was overseen by P.W. 13, Shri Alok Raj, Judicial Magistrate, 1st Class posted on 4. 10.2005 at Nalanda and who after observing the Rules prescribed in that behalf submitted his report (Ext. 7) which indicates that as many as four persons were identified by P.W. 1. The four identified persons include the two appellants before us. The participating witness was P.W. 1 Ram Pravesh Singh, a constable posted on the relevant date in Chhabilapur Police Station. His evidence is necessary to be discussed in some detail.

7. P.W. 1 Ram Pravesh Singh has generally supported the story of the prosecution as regards the occurrence as detailed in the written report and as supported by the other witnesses, like, P.Ws. 1 to 4, 8, 9 and 10. Thereafter he went to state in his

examination in chief that he had participated in the Test Identification Parade organized for identification of the accused and he had identified two persons. He had identified appellant Surendra Manjhi, and Saryug Manjhi in context of the acts done by them. P.W. 1 has stated that appellant Surendra Manjhi was found taking away rifle and gun whereas appellant Saryug Manjhi was found committing theft of the articles from the Police Station. This could be available at page 8 of the Paper Book and in its original form on the lower court record which are available to us at page 09 of the same. The Magistrate Shri Alok Raj (P.W.13) in his evidence has stated that the above noted P.W.1 had identified four persons in the Test Identification Parade, the other two being Bindeshwari Manjhi and Arjun Manjhi. He has merely stated that he followed the Rules framed on holding of the Test Identification Parade. Thus, the first defect in the evidence of P.W.1 is that he had identified four persons, i.e., Surendra Manjhi, Bindeshwari Manjhi, Saryug Manjhi and Arjun Manjhi in the Test Identification Parade. The witness did not identify Bindeshwari Manjhi and Arjun Manjhi in court though they were very much present in the court on that particular day, i.e., 1.4. 2006 when P.W. 1 was examined, cross examined and discharged by the trial court. Besides the above, when one considers the evidence in cross-examination of P.W. 1, specially at page 88 of the Paper Book one could find that the witness has stated that appellant Surendra Manjhi was brought to the Police Station after obtaining remand order to that effect. It is not controverted that all the aforesaid persons were put on the Test Identification Parade and that they were produced by the police before the Magistrate, but made a reference of a particular order of remand passed by the learned Magistrate on their production by him on 7.9.2005. There is a specific order passed by the Chief Judicial Magistrate, Nalanda on that particular date which indicates that as many as four persons, namely, Surendra Manjhi, Saryug Manjhji, Ramchandra Manjhi and Jagjiwan Manjhi were forwarded to the learned Magistrate through a forwarding report by the Officer-in-charge of Chhabilapur Police Station and they were remanded to jail Hajat. There is nothing recorded in order dated 7.9.2005 that they were brought to the Police Station after having taken precaution of concealing their identities from other persons. The order does not speak that the accused persons had themselves taken precaution to conceal their identities. The court, as such, could take as concluded that the accused

persons including the two appellants were forwarded to the court for remand purposes without taking any precaution for concealing their identities. This is a sine qua non as appearing from Rule 236 of the Bihar Police Manual.

8. On further reading of the evidence of P.W. 1 in his cross-examination the Court finds that the witness admitted that after being taken on remand by the police, appellant Surendra Manjhi was brought to Chhabilapur Police Station. This is apparent from the evidence on record as also from the written report that Chhabilapur Police Station did not have any jail Hajat. P.W. 1 has stated that there was a Chabutra in the open which was utilized for keeping the persons who could be arrested in connection with different crimes. Surendra Manjhi was taken on remand by the police and thereafter he was sent for remand again to the Magistrate on 4.9.2005 by the Officer-in-charge of Chhabilapur Police Station. This fact is admitted by P.W. 1 in his cross-examination which appears from his evidence available to us both on the lower court record as also on page 88 of the Paper Book. Not only that, P.W. 1 has admitted that it was this witness who along with Havildar Kapildeo Yadav had taken appellant Surendra Manjhi to the Magistrate for remand and from there to jail by P.W. 1. Thus, it could safely be concluded that P.W. 1 had all the occasion in the world, at every moment while the accused persons were at the Police station and while the appellant Surendra Manjhi was taken from the Police Station to the learned Magistrate, of seeing the appellant clearly.

9. The order dated 7.9.2005, referred to above, which is in respect of production of accused persons and their remand, as noted earlier, denotes that four accused persons were forwarded simultaneously in one batch to the court. We could safely say that more than one police persons could have been required to accompany the accused who were rounded up and sent to the Magistrate to be remanded in such a serious case. From that angle their accompaniment by Kapildeo Yadav is more probalised.

10. The accused persons were arrested and were kept at the Police Station. This is indicated by the case diary to which we have made a reference in the earlier part of the judgment. It is admitted by P.W. 1 also. The Officer-in-charge has noted

that they were brought to the Police Station again. The Officer-in-charge has not noted in the case diary nor he has stated in his evidence before the court that he had taken any precaution to camouflage or conceal the identities of the suspected accused. Rule 236 of the Bihar Police Manual lays down clear and elaborate guidelines regarding identification of suspects in connection with any offence. We are tempted to quote the said Rule in extenso:

236. Identification of suspects- (a) Whenever it is necessary that a person suspected of having been concerned in any offences should be identified by a witness, the following instructions shall be complied with word by word:

(1) These suspects shall be kept at a place where identifying witness cannot have access to him.

(2) At the time of taking the suspects to Court or Jail, precaution shall be taken that none is able to see them and hence they shall be taken in closed vehicles or if such vehicles are not available, their faces shall be covered in such a manner that they can not be recognized.

(3) As far as possible, the photographs of suspected persons shall not be published before identification.

(4) The investigator shall not keep suspected persons in Police custody before holding Test identification.

(5) The prosecutor shall request the Magistrate that these persons should not be released on bail before identification.

(6) If the physical characteristics of any suspected person are such that on account of these, he can be searched in a group, then as far as possible such persons shall be assembled for mixing up who have similar characteristics or the characteristics shall be covered. The investigator shall see before identification parade begins that the suspected person is available in it.

(7) For identification, one suspected person is to be mixed with 8-10 others persons and not that ten suspected persons shall be mixed in a small group.

- (8) Identification should be done without delay because identification done with delay is not fully acceptable to Courts.
- (9) Where the description of suspected persons in the first information report or in the statements of witnesses are so explicit that there is no suspicion left of any kind, it is not essential to hold identification parade.
- (10) The investigating officer though his presence may be essential outside shall not be present while the identification is in progress.
- (11) If a witness is unable to attend an identification parade and identification is considered necessary, this may be arranged with reference to photograph, details of which are incorporated in Appendix 22.
- (12) When suspected persons are brought for identification its chart shall be prepared in P.M. Form No. 42. An indication of the above facts should be given in case diary and identification chart.
- (b) Identification of suspected articles-In this connection, the following instructions shall be followed word by word:
- (1) For identification of one article three or four articles of similar nature shall be mixed up.
- (2) No mark shall be put on a suspected article. If it is essential to give a mark similar marks shall be placed on unsuspected articles.
- (3) Care shall be taken to see that witnesses have not seen the suspected articles before the identification. Hence the witnesses shall not go with that officer who carries the articles before magistrate.
- (4) Where any special mark has been given on articles from before and their descriptions have been noted in first information report and in the statement of witnesses, the investigator shall fully scrutinize it after the article has been recovered and if from descriptions given, those articles are established, it shall not be necessary to get identification done. Only at the time of trial, the witnesses concerned shall identify these articles before courts.

(5) For the sake of identification it will be proper if articles, similar to suspected articles are made available.

(c) The identification parade shall be conducted as far as possible before a Magistrate but if for any reason, a Magistrate can not be available then before any other responsible Officer, such as the services of Deputy Registrar shall also be admissible.

(d) The witnesses shall have to certify in the prescribed columns of the chart that the method in which the identification has been carried, was correct.

(e) Suspects who are to be subjected to an identification parade shall be informed about it at the time of their arrests to enable them to take necessary precautions by way of keeping their faces covered and a request should be made to the Magistrate to record a note in the remand papers regarding such precautions having been taken by him so as to eliminate any subsequent defence by the suspects that they had been shown to the witnesses before identification parade was held.

It may be found from the bare perusal of those Rules that the provision has to be observed word by word.

11. Shri Lala Kailash Bihari, Learned Counsel for the State submitted before us that the above provisions on test identification parade were only obligatory and if there was any departure or deviation in observance of those Rules it could not be vitiating or having decisive effect on the merit of a man. Learned Counsel for the State could not bring into our notice any decision of this Court or the superior Court in support of his contention that it was merely a manual. In other words, Shri Bihari was submitting that it could be only instructions devoid of any legal effect and if the police officer was deviating or departing in following the Rules, the Court could not frown at such departure. We have decision from this Court alone holding that the Bihar Police Manual is a subordinate legislation brought into existence under the Rules making powers of the State Government conferred by Sections 7 and 12 of the Police Act read with Article 309 of the [Constitution of India](#). Not only that, this Court in the case of Prem Chandra Jha and Ors. v. The State of Bihar

and Ors. reported in 2007 (2) P.L.J.R. 566 went on to observe, after noticing the earlier decision of the Court, that the Bihar Police Manual has the statutory character and a deviation could have the effect on administrative actions or any other action which is envisaged to be taken by the Manual. We have already quoted the relevant Rule and the Rule prescribes elaborate precautions so as not to allowing the accused to take a plea that he could have been shown earlier to any of the witness.

12. The scope and ambit of the above Rule 236 was considered by this Court on many occasions in many cases, one such case being 1990 P.L.J.R. 370 Kedar Yadav v. the State of Bihar. In that case the court found the Test Identification Parade not being held as per the guidelines contained under Rule 236 of the Bihar Police Manual. The Court held that the evidence of identification was doubtful as it was held in complete violation of the above Rule. The discussion on Rule 236 appears in paragraphs 6, 7, 8, 9 and 10 of the report and we, respectfully, find ourselves in complete agreement to those findings.

13. Shri Lala Kailash Bihari was placing before us a number of decisions, specially, those reported in (1995) S.C.C. (Cri.) 797 Radha Balalav and Ors. v. State of U.P.; (2009) 2 S.C.C.(Cri.) 489 Md. Kalam alias Abdul Kalam v. State of Rajasthan; (2009) 2 S.C.C.(Cri.) 476 M.A. Sattar and Ors. v. State of Andhra Pradesh, besides; (1996) 8 S.C.C.(Cri.) 630 Ramnath Mahto v. State of Bihar to submit that merely suspecting that the witnesses could have the occasion to see the accused and that they could have been shown the suspect, the evidence of identification of the witnesses must not be rejected.

14. We have gone through the decisions cited by learned Counsel for the State and we have no hesitation in recording with respectful agreement to the principle laid down by the Apex Court in those decisions. But, we must hasten to add that every case is special on its own facts. No two cases are similar on fact and a decision is precedent on its own special fact. Judicial pronouncements are not magic wands that when shown to a particular set of facts, they could elicit judgment. The facts noticed in the above decisions were very clear which could be the deciding factor in those reported decisions and which could be not a case in

hand. If one could consider the decisions cited, one could find that the argument was that here could be some possibility or suspicion that the suspect could have been shown to the witnesses. This is the distinguishing feature of those cases. No decisions which have been cited by learned Counsel for the State applies to the present case simply for the reason that P.W.1, the solitary identifying witness, has admitted that the accused persons were arrested, they were kept at the Police Station and from there were taken to the Magistrate accompanied either by P.W. 1 and some other police personnel. This admission we have already referred to which appears at page 88 of the Paper Book. So there could not be any case for suspecting the witness to have seen the accused. The witnesses had the occasion to see the accused persons. It is the admitted fact that the witness had ample opportunity to notice the accused persons who remained in the company of the police and they took them to the Magistrate and also to the court and further to jail. Admission further is that after one month of the remand of the appellants, P.W.1 was appearing at the Test Identification Parade and was identifying four persons. In the light of the above, the evidence on identification, we record, could not be acceptable to us.

15. The other reason for not accepting the identification evidence appears from the record itself. P.W. 13 Shri Alok Raj, J.M. Ist Class, Nalanda, has stated and it is also indicated by P.W.7 that P.W. 1 had identified four accused persons at the Test Identification Parade. During course of his evidence in court, the witness could identify only two, i.e., the two appellants. The remaining two accused Bindeshwari Manjhi and Arjun Manjhi were not identified in spite of being present in the dock. It is well known that the evidence of the witness on the Test Identification Parade is not a substantive evidence unless the evidence of identification of the suspect comes in court. As a matter of fact, Test Identification Parade is held so as to test the possibility that the witness actually could be supporting the evidence of identifying a suspect, as claimed by him. The law further speaks that the evidence of identification is a weak evidence and, as such, it requires corroboration from other evidence. Here, in the present case the weakness of the evidence comes from this fact that P.W. 1 having identified Bindeshwari Manjhi and Arjun Manajhi in the Test Identification Parade could not identify the same persons in court. We could, as such, very safely conclude that

the witness may be wavering on identification of the appellants.

16. The above are some of the reasons emerging from the records and on that account we find that the prosecution has not succeeded in establishing the charges and, as such, has failed in proving those against the two appellants.

17. While going through the judgment of the lower court we find the learned Judge recording the same fact in the evidence of P.W.1 in two conflicting manner- once at page 157 of the Paper Book recording that Surendra Manjhi was taken by P.W. 1 to the Police Station and while marshalling the above fact he appears falling in error in recording a fact contrary to the above. This appears to be the reason which could in itself be sufficient to vitiate the judgment.

18. In the light of the above discussions, we allow the appeal, reject the reference made by the learned trial Judge on confirmation of death sentence and acquit the appellants. The appellants who are in custody are hereby directed to be released forthwith, if not wanted in any other case.

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