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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1651 of 2017

Judgment Reserved on 15.04.2024
Judgment Delivered on 25.04.2024

1. Lalit, S/o Shri Ramayan Kenwat, Aged About 30 Years,
2. Kishan Turkane, S/o Shri Dukalu Ram Turkane, Aged About 19 Years,
3. Vinnu (Binnu) Kenwat, S/o Desram Kenwat, Aged About 19 Years,
4. Ramkumar, S/o Shri Lodhi Ram Kenwat, Aged About 25 Years,

All are R/o Village Dewarghata, Police Station Shivrinarayan, District Janjgir - Champa Chhattisgarh.

---- Appellants

Versus

State of Chhattisgarh Through Station House Officer, Police Station Sheorinarayan, District Janjgir - Champa Chhattisgarh.

---- Respondent

For Appellants : Mr. Ajeet Kumar Yadav, Advocate

For Respondent/State : Mr. H.A.P.S. Bhatia, P.L.

Division Bench

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Sanjay Kumar Jaiswal

CAV Judgment

Sanjay Kumar Jaiswal, J.

1. This criminal appeal filed by the appellants under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") is directed against the impugned judgment of conviction and order of sentence dated 24.08.2017 passed by the Additional Sessions Judge, F.T.C. Janjgir, District Janjgir-

Champa, Chhattisgarh in Sessions Trial No.181 of 2015, whereby the appellants have been convicted under Section 376D of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentenced to undergo rigorous imprisonment for 20 years with fine of Rs.20,000/- to each of the appellants, in default of payment of fine, additional rigorous imprisonment for 6 months to each of the appellants.

2. Under the impugned judgment in question, appellants were acquitted by the trial Court for the offence punishable under Section 67A of the Information Technology Act, 2000 (hereinafter referred to as "I.T. Act").

3. The allegations against the present appellants are that, on 10.07.2015, at about 2:15 PM in Village Devarghata within the ambit of Police Station Shivrinarayan, District Janjgir-Champa, they have committed gang-rape with the prosecutrix without her wish and consent and also published/distributed obscene pictures of the said incident through electronic devices.

4. The case of the prosecution, in a nutshell, is that the prosecutrix (PW-12), aged about 12 years, who worked in NGO, had gone to village Devarghata with her former acquaintance friend Tinkeshwar Tandon (PW-5) and after visiting the temple, they went to the river side. While they were sitting on the sand,

appellants came along with a delinquent child, abused Tinkeshwar Tandon (PW-5), beat him up, drove him away and after pushing the prosecutrix (PW-12) on the ground, they removed her clothes and forcibly committed gang-rape with her. The video of one of the incidents was also prepared from a mobile phone. Later, Tinkeshwar Tandon (PW-5) came there, as marriage of prosecutrix was fixed. They were scared as the appellants had threatened to make the obscene video viral and due to the said fear, they neither reported to the police nor narrated the incident to their home. After few days, prosecutrix (PW-12) got information from her friends about the obscene video going viral, then she informed her family about the incident. Thereafter, a named written report was lodged on 25.07.2015 at Police Station Shivrinarayan vide Ex.P/10 against the appellants, upon which, First Information Report was registered vide Ex.P/17 and medical examination of prosecutrix (PW-12) was conducted. Dr. Anvita Dhruv (PW-11) conducted the medical examination of prosecutrix and in her report (Ex.P/8), no definite opinion was given regarding forceful intercourse/rape. Statements of witnesses were recorded and spot map was prepared vide Ex.P/3. Undergarments of both the parties were seized and sent for its chemical examination to the FSL. In the FSL report (Ex.P/39), semen stains and human sperm were found on the underwear of appellants Kishan

Turkane and Lalit respectively. No semen stains and human sperm were found on the underwear of prosecutrix. On 31.07.2015, Dinesh Kumar Chincholkar, Tehsildar (PW-15) has conducted test identification parade of the accused along with other persons, which was done by the prosecutrix (PW-12) in District Jail, Janjgir, for which, identification memo was prepared vide Ex.P/15. Thereafter, appellants were arrested vide Ex.P/20 to Ex.P/22 & Ex.P/36. After completion of the investigation, charge-sheet was filed against the appellants.

5. During the course of trial, in order to bring home the offence, prosecution has examined as many as 17 witnesses and exhibited 41 documents. Statements of the appellants were recorded under Section 313 of Cr.P.C., in which, they denied the circumstances appearing against them in the evidence brought on record by the prosecution, pleaded innocence and false implication. However, in defence, appellants have not examined any witness, but exhibited two documents.

6. After conclusion of the trial, the learned trial Court, by impugned judgment dated 24.08.2017, on appreciation of the oral and documentary evidence available on record, has convicted and sentenced the appellants as mentioned herein-above, against which, this appeal has been preferred by the appellants calling in question the legality, validity and correctness of the impugned

judgment.

7. Mr. Ajeet Kumar Yadav, learned counsel for the appellants submits that incident was happened on 10.07.2015, but its report was lodged after 15 days i.e., on 25.07.2015, for which no satisfactory explanation was given, therefore, entire case of prosecution has been doubtful. He further submits that Tinkeshwar Tandon (PW-5) was a friend of prosecutrix (PW-12) whom the villagers had seen in an objectionable position as also protested against commission of such acts near the temple and at the tourist spot of Devarghata, due to which, she got irritated and subsequently lodged a report with inordinate delay. In the written report, she has named the appellants, but no explanation has been given as to how prosecutrix would know the name of appellants. If the prosecutrix (PW-12) already knew the accused, then there was no need for the Police to conduct identification parade. It is contended that identification parade (Ex.P/15) which has been conducted is not in accordance with the law as according to the guidelines given by Hon'ble Supreme Court, at least 6 people should have been identified along with one person, which has not been followed as well as their order has also not been changed. It is further contended that prosecutrix had already seen the appellants in the Police Station and got them identified. The independent witnesses of identification

proceedings have not been examined. It is argued that statement of prosecutrix is not supported by medical and FSL report. Thus, the conviction of the appellants is not based on proper, reliable and valid evidence. Therefore, he should be acquitted by setting aside the conviction and sentence. Therefore, conviction and sentence of the appellants were not based on reliable and clear evidence, as such, it should be set aside and appellants be acquitted of the charges levelled against them.

8. Per contra, Mr. H.A.P.S. Bhatia, learned State counsel supported the impugned judgment of conviction and order of sentence and submits that the prosecution has proved the offence beyond reasonable doubt by leading evidence of clinching nature. The learned trial Court has rightly convicted the appellants for the offence punishable under Section 376D of the IPC, thus, the present appeal deserves to be dismissed.

9. We have heard learned counsel for the parties, considered their rival submissions made herein-above and gone through the records with utmost circumspection.

10. It is clear from entire prosecution case that incident had happened on 10.07.2015, but a named written report was lodged after 15 days i.e., on 25.07.2011 against the appellants and

prosecutrix has not given any explanation as to how she knew the name of appellants. It has been further stated that on 31.07.2015, i.e., after about 21 days of the incident, identification parade was conduced and identification memo was prepared vide Ex.P/15. The independent witnesses of Ex.P/15 have not been examined by the prosecution.

11. The conviction of the appellants is basically based on the statement of prosecutrix (PW-12) and her friend Tinkeshwar (PW-5). It is clear from the statements of Kiran Tandon (PW-7), Sushila Joshi (PW-8) and Gange Dinkar (PW-9) that after the video went viral on the mobile phone, prosecutrix (PW-12) narrated the incident to her family members and after consultation with her family and with the help of her colleagues of the N.G.O., where she worked, she went to the Police Station and lodged a written report. The said video, which had gone viral has been seized and produced, but on the basis of not having a certificate under Section 65 of the Evidence Act and CD not being marked as an article, the trial Court has found that prosecution has not been able to prove the case under Section 67A of the I.T. Act, and accordingly acquitted the appellants for the offence punishable under Section 67A of the I.T. Act. Thus, the fact has not come on record as to who was in the so-called video, which had gone viral and what was the sequence of

events.

12. The prosecutrix (PW-12) in her Court statement has admitted the sequence of events as per prosecution case and her statement has been corroborated by her friend Tinkeshwar Tandon (PW-5), but there are some contradictions in her Court statement and Police statement. In fact, there is a doubt as to whether the appellants had committed aforesaid incident with the prosecutrix (PW-12) or not and as per defence of appellants, it was only her friend Tinkeshwar Tandon (PW-5) who was found in an objectionable position with prosecutrix. The situation has been existing. The main reason for doubt is delay in lodging the report by 15 days. The second major reason is that statements of prosecutrix herself (PW-12) and her friend Tinkeshwar (PW-5) as well as mother Tulsi Mishra (PW-1) and father Narmada Prasad (PW-4) of prosecutrix are important. It has been established that prosecutrix (PW-12) was in friendship with Tinkeshwar Tandon (PW-5) even though they neither worked together nor studied together and on the day of incident, prosecutrix (PW-12) had informed at her home that she had gone to visit Devarghata tourist place with Tinkeshwar Tandon (PW-5). On the basis of the situation which is being reflected in the case, it would not be appropriate to believe the statement of prosecutrix (PW-12) and her friend Tinkeshwar Tandon (PW-5) beyond reasonable doubt

because prosecutrix (PW-12) neither lodged report of the incident promptly nor her statement is corroborated with medical evidence and FSL report.

13. The basic question is that how did the prosecutrix (PW-12) lodged a named written report (Ex.P/10) against the appellants after 15 days of incident, when she did not even know them before the date of incident. Thereafter, identification parade (Ex.P/15) was also conducted by the prosecutrix (PW-12). If the prosecutrix (PW-12) already knew the appellants, then there was no need to conduct the identification parade. In such a situation, a named report become doubtful and there is a need for interference in identification parade (Ex.P/15). Identification proceeding was conducted by Dinesh Kumar Chincholkar, Tehsildar (PW-15) in the District Jail, Janjgir, who has prepared identification memo vide Ex.P/15, for which witnesses namely, Satanand and Badri Vishal Patel were not examined by the prosecution. According to identification memo, a total of 12 persons, 4 appellants were included in the TIP. 8 persons were made to stand with 4 appellants and out of them, 4 appellants were identified by the prosecutrix (PW-12) by touching them. The appellants were placed at Sl. Nos.2, 5, 8 and 10.

14. It is well settled law that 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 TIP 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. (See: ***Heera & Anr. v. State of Rajasthan***[1]).

15. The identification test is not substantive evidence, such tests are meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. (See : ***Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh***[2]).

16. Recently, the Supreme Court in the matter of ***Rajesh Alias Sarkari @ Anr. v. State of Haryana***[3] considering the object of conducting TIP, laid down the principles to be followed for proper conduct of TIP and in para 43 & 44 held as under :

> "**43.** The prosecution has submitted that an adverse inference should be drawn against the appellants for refusing to submit themselves to a TIP. Before we deal with the circumstances in which the appellants declined a TIP, it becomes essential to scrutinize the precedent from this Court bearing on the subject. A line of precedent of this Court has dwelt on the purpose of conducting a TIP, the source of the authority of the investigator to do so, the manner in which

1 AIR 2007 SC 2425
2 (2010) 2 SCC 748
3 (2021) 1 SCC 118

these proceedings should be conducted, the weight to be ascribed to identification in the course of a TIP and the circumstances in which an adverse inference can be drawn against the accused who refuses to undergo the process. The principles which have emerged from the precedents of this Court can be summarized as follows:

43.1. The purpose of conducting a TIP is that persons who claim to have seen the offender at the time of the occurrence identify them from amongst the other individuals without tutoring or aid from any source. An identification parade, in other words, tests the memory of the witnesses, in order for the prosecution to determine whether any or all of them can be cited as eye- witness to the crime;

43.2. There is no specific provision either in the CrPC or the Indian Evidence Act, 1872, which lends statutory authority to an identification parade. Identification parades belong to the stage of the investigation of crime and there is no provision which compels the investigating agency to hold or confers a right on the accused to claim a TIP.

43.3. Identification parades are governed in that context by the provision of Section 162 of CrPC.

43.4. A TIP should ordinarily be conducted soon after the arrest of the accused, so as to preclude a possibility of the accused being shown to the witnesses before it is held.

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

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

43.7. A TIP may lend corroboration to the identification of the witness in court, if so required.

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

43.9. Since a TIP does not constitute substantive evidence, the failure to hold it does not ipso facto make the evidence of identification inadmissible.

43.10. The weight that is attached to such identification is a matter to be determined by the court in the circumstances of that particular case.

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

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

44. These principles have evolved over a period of time and emanate from the following decisions:

1. *Matru v. State of U.P.* [(1971) 2 SCC 75 : 1971 SCC (Cri) 391]

2. *Santokh Singh v. Izhar Hussain* [(1973) 2 SCC 406 : 1973 SCC (Cri) 828]

3. *Malkhansingh v. State of M.P.* [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247]

4. *Visveswaran v. State* [(2003) 6 SCC 73 : 2003 SCC (Cri) 1270]

5. *Munshi Singh Gautam v. State of M.P.* [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269]

6. *Manu Sharma v. State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385]

7. *Ashwani Kumar v. State of Punjab* [(2015) 6 SCC 308 : (2015) 4 SCC (Cri) 171]

8. *Mukesh and Ors. v. State (NCT of Delhi)* [(2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673]"

As such, it is quite vivid that the facts which establish the identity of the accused person are treated to be relevant under Section 9 of the Evidence Act."

17. The best way to test the evidence of the witnesses regarding the identity of the accused is to mix the latter with other persons and to give the witnesses an opportunity of picking them out. Where this procedure is not adopted either by the Police or by the Magistrate who conducted the commitment proceedings and no explanation is forthcoming as to the omission, it is very serious

defect both in the investigation and the conduct of the case. (See: ***(1947) 48 Cri LJ 522 (529) (DB) (Lah)*** *{Amandchand v. The Crown}*.

18. The Allahabad High Court in the matter of ***Anwar & Another v. State***[4], it has been held that first rule relates to number of under-trials to be mixed with the suspect to eliminate reasonable possibilities of chance identification and to make results of the identification acceptable. It has been further held one of the rules laid down for testing the observation and memory of identifying witnesses relates to the number of under-trials to be mixed with a suspect in order to eliminate the reasonable possibilities of a chance identification and to make the results of identification acceptable. Further, it has been held that the second rule stresses that the performance of the witnesses in other parades is also relevant in assessing his power of observation. Each suspect should be put up separately for identification mixed with nine or more under-trials. The ratio of 7 : 1 in the case of one or two suspects ipso facto considerably diminishes the value of identification and unless the investigation is absolutely above board, it would not be prudent to place any reliance on such identification.

19. Further, it has been held in ***Dal Chand & Anr. v. State***[5] that as a

4 AIR 1961 All 50
5 AIR 1953 All 123

safe rule of prudence, a fair proportion of outsiders mixed with the suspects, considering the circumstances of the case should always be insisted upon by every Magistrate who is charged with the duty of conducting identification proceedings.

20. Similarly, in ***State v. Wahid Bux & Others***[6], in identification parades, it is always better to have as large a number of persons mixed up with the accused as possible. If five times the number of the accused persons are mixed with them, it cannot be said that there is any flaw in the identification proceedings.

21. In the matter of ***Budhsen & Anr. v. State of U.P.***[7] their Lordships of the Supreme Court laid down the principles of law where conviction based solely on identification of witnesses by test identification parade and laid down the principles for conducting the TIP and held that the number of persons mixed up with the accused should be reasonably large and their bearing and general appearance should not glaringly dissimilar and held in para 7 as under :

> "7. Now, facts which establish the identity of an accused person are relevant under Section 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for

6 AIR 1953 All 314
7 1970 (2) SCC 128

the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be 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 proceeding. There may, however, be exceptions to this general rule, 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 investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this : that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned

in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162, Cr. P.C. It is for this reason that the identification parades in this case seem to have been held under the supervision of a Magistrate. Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must, therefore, take intelligent interest in the proceedings, bearing in mind two considerations : (i) that the life and liberty of an accused may depend on their vigilance and caution and (ii) that justice should be done an the identification. Those proceedings should not make it impossible for the identifiers who, after all, have, as a rule, only fleeting glimpses of the person they are supposed to identify. Generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify, it may be kept in view, varies according to the power of observation and memory of the person identifying and each case depends on its own facts, but there are two factors which seems to be of basic importance in the evaluation of identification. The persons required to identify an accused should have bad no, opportunity of

> seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny by the Court. Shri Pratap Singh, Magistrate, who conducted the identification, has appeared at the trial as P.W. 20. The identification memo in respect of Naubat, appellant, is Ex. Ka 20, dated October 21, 1967 and in respect of Budhsen is Ex. Ka 21, dated October 28, 1967."

22. Recently, in the matter of ***Gireesan Nair & Others v. State of Kerala***[8], Their Lordships of the Supreme Court held as under :-

> "33. It is significant to maintain a healthy ratio between suspects and non-suspects during a TIP. If rules to that effect are provided in Prison Manuals or if an appropriate authority has issued guidelines regarding the ratio to be maintained, then such rules/guidelines shall be followed. The officer conducting the TIP is under a compelling obligation to mandatorily maintain the prescribed ratio. While conducting a TIP, it is a *sine qua non* that the non-suspects should be of the same age-group and should also have similar physical features (size, weight, color, beard, scars, marks, bodily injuries etc.) to that of the suspects. The

8 (2023) 1 SCC 180

> officer concerned overseeing the TIP should also record such physical features before commencing the TIP proceeding. This gives credibility to the TIP and ensures that the TIP is not just an empty formality *(*Rajesh Govind Jagesha v. State of Maharashtra[9] *and* Ravi v. State[10]*).”*

23. If we consider the identification parade in light of the above-stated principles of law laid down by their Lordships of the Supreme Court, it is important to first see the statement of Dinesh Kumar Chincholkar, Tehsildar (PW-15) who has clearly stated in his cross-examination that the persons who were mixed with the appellants were the persons detained in jail. He has not mentioned in identification memo (Ex.P/15) that what was the appearance and height of the persons included.

24. The prosecutrix (PW-12) has proved the identification process in her statement and also identified the accused in the Court, but in her cross-examination, she has stated that after arresting the accused persons, police personnel used to call her to the Police Station for identification. First of all, they brought a boy to Police Station whom she recognized as the same boy who had made the video. Later, after arresting the appellants, they were identified by showing them at Police Station on different dates one by one. In this way, it is clear that even before the alleged

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9 (1999) 8 SCC 428
10 (2007) 15 SCC 372

identification parade (Ex.P/15) in District Jail, Janjgir, policemen called the prosecutrix to Police Station, where she identified the accused.

25. As an Investigator, Savita Das (PW-16), Inspector, has admitted that after arresting the accused persons, bringing them to Police Station and before the identification proceeding (Ex.P/15), no such document was produced in the case that appellants were kept in secrecy. She has expressed ignorance of the fact that after the arrest of appellants, their name was appeared in newspapers and TV channels. She has also expressed ignorance as to who had told the name of appellants to the prosecutrix (PW-12). She has admitted that she does not know the name of any person to whom Tinkeshwar (PW-5) was asked to call from the village and she has not taken the statement of any such person. Thus, the investigator has also failed to explain as to how the prosecutrix (PW-12) had named the appellants in written report (Ex.P/10) despite they being unknown to her.

26. In the light of above judicial precedents, the question of identity of the appellants is found to be completely doubtful because the prosecutrix (PW-1) had got the opportunity to see the appellants in Police Station even before the identification proceeding. Only the inmates of alleged jail were included in the identification parade. No details have been given about the clothes they were

wearing at the time of identification, their appearance and height. The identification parade has been conducted and it does not reflect that order of appellants has been changed to identify them. According to the guidelines for identification parade given by Hon'ble Supreme Court in above-mentioned case laws, sufficient proportion of persons have not been brought together for identification of four appellants.

27. Concludingly, it is held that the identification parade, which has been conducted by the prosecution vide Ex.P/15 is not in accordance with law and, as such, the identity of appellants for authors of the crime have not been proved by the prosecution beyond reasonable doubt and therefore, all the appellants are entitled for acquittal on the basis of benefit of doubt.

28. In view of the above, we are of the considered opinion that the appellants herein are entitled for acquittal on the ground of benefit of doubt. Accordingly, the impugned judgment of conviction and order of sentence dated 24.08.2017 is hereby set aside. The appellants are acquitted of the charges levelled against them under Section 376D of the IPC. All the appellants shall be forthwith set at liberty, unless they are required in connection with any other offence.

29. In the result, the appeal is **allowed**.

30. Let a certified copy of this judgment along-with the original record be transmitted to the trial Court and the concerned Superintendent of Jail be also supplied with a copy of this judgment for information and necessary action, if any, at the earliest.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Sanjay Kumar Jaiswal)
Judge

Yogesh