

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL NO. 2553 of 2009****With****CRIMINAL APPEAL NO. 1047 of 2010****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE G.R.UDHWANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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RAJUBHAI VIKRAMBHAI PATIL....Appellant(s)

Versus

STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:

MR MP SHAH, ADVOCATE for the Appellant(s) No. 1

MS. KRUTI M SHAH, ADVOCATE for the Appellant(s) No. 1

MR LB DABHI, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 30/09/2013

COMMON ORAL JUDGMENT

1. Having been charged with, tried, convicted and sentenced, *inter-alia* to 7 years rigorous imprisonment (original accused no.2) and 10 years rigorous imprisonment (original accused no.1) by the impugned judgment and order dated 11.12.2009 passed by the learned Additional Sessions Judge, Fast Track Court No.1, Bhavnagar, the aggrieved appellants are before this Court in two different appeals. Since both the appeals arise out of common judgment and order, they are heard and decided together for convenience.

2. The prosecution had come out with a case that while complainant-Ghanshyambhai Babubhai Sudani was riding a Hero Honda Motorcycle with a cash of Rs.40,000/- (Rupees Forty Thousand) on 06.02.2004 and was heading to his house, he was intercepted between Village Jaliya and Mandvi by the appellants. The appellants are also alleged to have been riding on their Hero Honda Motorcycle. After interception, one of the appellants fired and caused injuries to the complainant, who fell down, and thereafter, from his garments, the amount was allegedly drawn by the appellants and they fled with the booty.

3. It is also the case of the prosecution that immediately before the said incident, both the appellants approached the complainant inquiring about then School Leaving Certificate. Since, at that point of time, the complainant did not have staff at his disposal, he requested them to defer the request until

the staff was available. It is stated that subsequently, when the complainant was carrying a sum of Rs.40,000/- from his salary account, two culprits intercepted him with a plea of expediting the grant of certificate and after the complainant expressed his inability, he was attacked as above.

4. The culprits could not be apprehended immediately. It is the prosecution case that one of them Rasik alias Vishal Popatbhai Ghamalia was named in some other case and was lodged at jail in Baroda where he revealed his involvement in the present case along with appellant-Raju Vikrambhai Patil in the year 2005. It is stated that therefore, in the Year-2008, custody of appellant-Rasik Ghamalia was obtained from Baroda on the basis of transfer warrant. It is also stated that thereafter, during remand, appellant-Raju Patil on the basis of information supplied by appellant-Rasik Ghamalia was also named and both of them were arrested and the Test Identification Parade ("T.I. Parade" for short) was arranged. The complainant is said to have successfully identified both of them twice, during such parade and also during the trial.

5. In support of its case, the prosecution examined various witnesses amongst whom the crucial witnesses were PW:1 Ghanshyambhai Babubhai Sudani Exh:11 (complainant) and PW:2 Bhikhabhai Merabhai Ahir Exh:19 with whom the appellants are said to have inquired about the school teacher i.e. the

complainant; PW:7 Dhirubhai Somabhai panch-witness, PW:8 Patel Vinodkumar Jivabhai Exh:37, respectively, the panch-witnesses of T.I. Parade dated 21.08.2008 and 23.08.2008, PW:9 Dr.Vijay Chatrabhujbhai Ramdevputram Exh:41, who examined the complainant on receiving bullet injuries, PW:13 P.S.I. Vikter Johan Farnandis Exh:56 and eye-witness to the incident, PW:15 Bhikhubhai Laxmanbhai Der, P.S.O., in the concerned Police Station at the relevant point of time, PW:16 P.I. Natvarbhai Vanabhai Gamit Exh:71 testifying in relation to discovery of arms, etc. by accused-Rasik Ghamalia. The other witnesses are either hostile or police witnesses which will be referred to, if necessary.

6. The prosecution also produced following documentary evidence:-

| Sr.Nos. | Documentary evidence | Exhibits |
|---------|-----------------------------------|----------|
| 1. | Complaint | 12 |
| 2. | Body panchnama of the complainant | 13 |
| 3. | Report of FSL Officer | 14 |
| 4. | Yadi of muddamal sent to FSL | 15 |
| 5. | Letter of FSL Ahmedabad | 16 |
| 6. | Muddamal Report of FSL Ahmedabad | 17 |
| 7. | Letter of FSL Ahmedabad | 18 |
| 8. | Scene of offence panchnama | 24 |

| | | |
|-----|---|----------|
| 9. | Receipt of muddamal | 25 to 28 |
| 10. | Identification Parade Panchnama | 31, 38 |
| 11. | Police Yadi | 39, 40 |
| 12. | Medical Certificate of the complainant | 42 |
| 13. | Refer Memo | 44 |
| 14. | X-ray Report | 45, 46 |
| 15. | Papers of Indoor Treatment | 47 |
| 16. | Muddamal Discovery Panchnama | 48 |
| 17. | Scene of offence panchnama | 53 |
| 18. | Station Diary | 55 |
| 19. | Yadi of investigation | 57 |
| 20. | Yadi of Report sent to FSL Ahmedabad | 58 |
| 21. | Receipt of FSL Muddamal | 59 |
| 22. | FSL Biology Report | 60 |
| 23. | Serological Report | 61 |
| 24. | Zerox copy of F.I.R. | 62 |
| 25. | Zerox copy of F.I.R. | 63 |

7. The learned counsel for both the appellants, after taking this Court through the evidence on record, would contend that despite alleged confession in the Year-2005 by original accused no.1, no steps were taken until 2008 and sole basis for involvement of accused no.2 was the statement made by accused no.1. It was argued that except a bald claim, no

documentary evidence evidencing arrest of any of the appellants was brought on record in the Trial Court. It was also argued that the incident was of 06.02.2004, T.I. Parade was held after 4 years and 6 months. No attempt was made to avoid the possibility of mistaken identity by securing dummy accused with attributes similar to those of accused like baldness, black complexion and earrings. It was contended that the prosecution case was mainly based upon T.I. Parade, and therefore, in absence of ensuring the safety by associating one or two persons resembling to appellants, it cannot be said that T.I. Parade was properly conducted. Reliance was placed upon ***State of Gujarat Vs. Ramsevak Geyadin Pandit (1993(2) G.L.H. (U.J.) 13)***, ***State of A.P. Vs. Dr.M.V. Ramana Reddy and others (AIR 1991 SC 1938)***, ***Ravi alias Ravichandran Vs. State represented by Inspector of Police (2007 (15) SCC 372)***, and ***Rajesh Govind Jagesha Vs. State of Maharashtra and allied matters (1999 (8) SCC 428)***.

8. It was also argued that in the complaint, the physical description of the culprits was absent and therefore, after about four and half years, it was impossible to identify the culprits.

9. It was also argued that there was material contradiction-omission in the contents of the F.I.R. and the complaint inasmuch as, the version in the complaint that before loot, there was a scuffle or

quarrel was absent in the testimony of the complainant.

10. It is also argued that neither there was recovery of the weapon used in the offence nor the doctor rendered any evidence correlating the injuries of the complainant to the bullet.

11. Countering the above submissions, the learned Additional Public Prosecutor argued that it was possible even after a period of four and half years to identify the culprits since on the very day, the complainant had two occasions to see the accused and being a Principal, it was possible for him to recall the physical features of the culprits when they appeared before him during T.I. Parade. It was argued that different persons may possess different memory and therefore, it cannot be argued with precision that under no circumstances, the complainant could have identified the appellants.

12. It is next argued by the learned APP that the delay of investigation between Year-2005 and Year-2008 was not fatal to the accused and T.I. Parade was held at the earliest immediately after arrest of the appellants in the Year-2008. It was argued that to ensure the identification of the appellants, the complainant was asked to identify them twice so as to avoid case of mistaken identity.

13. Referring to the omission in the testimony of the

complainant as above, it was argued that such an omission was not fatal to the prosecution inasmuch as it was not aimed to help the prosecution case.

14. It was next contended that the probable defence in relation to the purpose or the source of money with the complainant having not been taken in the Trial Court, was not available to the appellants before this Court. It was, however, argued that the consistent evidence evidencing the fact that the complainant was carrying with him the salary amount, was rendered.

15. It was next contended that from the scene of offence, incriminating material like bullets, blood, although unidentified; were recovered. It is argued that in view of the above stated evidence, the mere inability of the doctor to correlate the injury to bullet is of no assistance to the defence. It was argued that pistol was recovered during other case as referred to hereinabove, in a working condition and thus, adequate evidence was rendered in the Court below.

16. Relying upon ***Mullu and another Vs. State of U.P. (2010 (2) G.L.H. 471)***, the learned Additional Public Prosecutor contended that the identification of the appellants in the Court itself was sufficient.

17. Relying upon ***Mankubhai Bhayabhai and another Vs. State of Gujarat (2006 (3) G.L.H. 202)***, it was argued that even in absence of panchas, the evidence of

police witness was reliable.

18. Relying upon ***Munna Kumar Upadhyaya alias Munna Upadhyaya Vs. State of Andhra Pradesh (2012(6) SCC 174)***, it was contended that the delay *per se* in holding T.I. Parade was not fatal to the prosecution.

19. Relying upon ***Munaf Sha alias Ghayal Jaman Sha Fakir Vs. State of Gujarat (Criminal Appeal Nos.513/1999 with 544/1999 with 663/1999 dated 24.01.2007 & 25.01.2007)***, it was argued that the Court in Paragraphs-27 and 32 considered the T.I. Parade evidence, though delayed, along with the medical evidence and F.S.L. Report as the good justification for convicting the accused persons.

20. What follows from the above discussion is that incident in question occurred on 06.02.2004 and the complaint was immediately lodged without, however, any description as to physical features of the assailants. One of the assailants is said to have been arrested on transfer warrant having been named in another case lodged in the Year-2005 at Vadodara. It is he who revealed appellant-Raju Patil as the accompanying culprit at the relevant point of time. Admittedly, both the appellants bear unique features. So far as appellant-Raju Patil is concerned, he has dark skin complexion and earrings. So far as other appellant is concerned, he was bald. The prosecution case was mainly based upon the memory of the witnesses as corroborated by the T.I. Parade. The complainant was

asked to identify the appellants after a period of four and half years. Assuming that being a Principal, he had a sharp memory, the question that needs to be addressed is whether the doubt as to mistaken identity was attempted to be ruled out during the T.I. Parade. It is settled law that dummy persons with similar features must be arranged to avoid a mistaken identity. The ability of an identifier can be tested only if he successfully identifies the culprits from amongst the persons possessing similar personalities and age. Admittedly, in the instant case, neither a person with dark complexion and with earrings nor the persons with the bald head were included as the dummy accused. Therefore, even if rest of the procedure like allowing accused to change their clothes or change their sequence was followed, the doubt as to mistaken identity remained and the unique physical features of the appellants as above allowed the complainant to easily identify them. The argument is that identity of the appellants was obtained two times to avoid mistaken identity but as stated above, the person having unique personality and physical features was possible to be identified without any confusion as many number of times as the complainant wishes. Therefore, no substance is found in such an argument.

21. Prosecution has not explained the delay in initiating the investigation, though admittedly revelation was made by appellant-Rasik Ghamalia in the Year-2005. The argument that the delay did not cause

any prejudice to the appellants requires rejection for the simple reason that with the passage of time, the memory of the witnesses would gradually fade giving more and more scope to mistaken identity. Therefore, it is always desirable to hold the T.I. Parade as early as possible. Moreover, one of the appellants was behind the bar in another case, and therefore, chances of exposes of his identity even before the T.I. Parade cannot be ruled out. In **Soni Vs. State of Uttar Pradesh (1983 (3) G.L.H. 33)**, the Hon'ble Supreme Court considered the delay of 42 days in T.I. Parade as fatal in case of dacoity. In **Rajesh Govind Jagesha (supra)**, it was held that apart from the fact that the prosecution was duty bound to satisfactorily explain the delay in holding T.I. Parade, such parade having not been properly held, benefit must go to the accused and in that case, various infirmities in relation to physical features of the accused person were noticed by the Hon'ble Supreme Court.

22. In **Ravi alias Ravichandran (supra)**, while approving the fact that T.I. Parade was not a substantive piece of evidence and the judgment of conviction can be rested even in absence of T.I. Parade, it was held that when the F.I.R. is lodged against the unknown persons, T.I. Parade must be held for the purpose of testing the veracity of the witnesses with regard to his capability of identifying persons who were unknown to him. In **State of A.P. Vs. Dr.M.V. Ramana Reddy and others (supra)**, the Hon'ble Supreme Court disapproved the delayed identification

of the accused in absence of satisfactory explanation.

23. Thus, what emerges from the above authorities is that the T.I. Parade is not a substantive piece of evidence but when held, the doubt as to mistaken identity must be avoided by arranging for the dimities with personalities similar to the accused and delayed T.I. Parade would give a room to a doubt of identity being known to the witnesses during the period of delay. It is settled law that the prosecution must prove its case beyond reasonable doubt but, in the present case, custody of one of the accused was obtained on the basis of transfer warrant and even after revelation by him, about four and half years were taken from the date of incident for identification without any convincing explanation.

24. In **Munna Kumar Upadhyaya alias Munna Upadhyaya (supra)** relied upon by the learned APP which is sought to be distinguished by the learned counsel for the appellants, the Hon'ble Supreme Court observed in Paragraph-66 as under;

"There was some delay in holding the identification parade. But the delay per se cannot be fatal to the validity of holding an identification parade, in all cases, without exception. The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature. No other infirmity has been pointed out by the learned counsel appearing for the appellant, in the holding of the identification parade. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a

number of persons who had joined the identification parade."

(emphasis supplied)

While it is true that the delay *per se* in holding T.I. Parade cannot be fatal to the prosecution, in the instant case, the delay is not the only ground on which the T.I. Parade is sought to be impeached. T.I. Parade is successfully challenged as discussed hereinabove in a greater detail.

25. In ***Mullu and another (supra)***, the facts of the case as revealed by the witnesses in Paragraphs-9, 10, 12, 15, 16, 17 and 19 would suggest that the serious incident had taken place in altogether different circumstances than the case on hand. The offence was committed in November-1995, culprits there were eight in number, who committed dacoity after confining the villagers. They killed five persons, caused injuries to various persons and some of the houses were also set ablaze. The incident lasted for hours. There was a lot of uproar because of this happening and the active role of the culprits was adequate enough to identify the culprits in the Court.

26. Whereas, as discussed above and hereunder, about four and half years preceding the arrest of the appellants, the complainant claims to have had a short conversation with the appellants, so is the case with few witnesses discussed hereunder. The facts of the present case suggest that proceeding the incident, the conversation or acts of the appellants were not such

as would leave a long lasting memory with the witnesses as distinguished from the case before the Hon'ble Supreme Court in ***Mullu and another (supra)***.

27. The only conversation by the appellants, as claimed by PW:2 Bhikhabhai, related to an inquiry about the teacher of the school and he guided them to a boy who was sitting near the bus-stand for the said purpose. Such a conversation could not have lasted more than 30 or 40 seconds. On the very same day, he claims having a glimpse of the appellants, and thereafter, on proceeding ahead, he found the complainant lying on the road. Thus, any glimpse of the appellants preceding about five years of the date of his testimony could not have lasted more than 5 or 10 seconds and yet the witness, without any corroboration from the identification parade, claims to have identified the appellants in the Court.

28. In the cross-examination, he clarifies that amongst the two, one culprit was wearing black garments with jacket while the other, who was riding, was wearing earrings. He also admits that this was the only occasion when the complainant offered him the lift. The witness was never called for T.I. Parade and yet claims to have remembered minute details as above even after a period of about five years and the fact that he was never offered a lift earlier, though residing in the same village as the complainant, creates a reasonable doubt as to why he was offered a lift, without asking. Thus, the witness does not

appear to be genuine, and his being offered lift does not appear to be natural.

29. Similarly, PW:3 testifies two persons having inquired with him for the Principal of the school. The witness deposes to have sought clarification about the school of which the Principal they were looking for, from the persons enquiring. Those persons, however, did not reply to that question and he i.e. the witness claims to have shown the way to the secondary school to them. This conversation by witness with two persons could not have lasted more than a minute. He was also not required to identify the culprits in the T.I. Parade and yet, he claims to be able to recall after one and half years that the rider of the vehicle was wearing earrings and goggles and pillion rider a jacket. The omission as regards the witness asking as to whether they wanted to meet the Principal of high school, in his statement under Section 161 of the Code of Criminal Procedure, 1973 has been admitted by him in the cross-examination.

30. PWs:5 and 6, being the panchas of the scene of offence, PWs:10 and 11 being the discovery panchas, PW:12, being the discovery panch for the scene of offence, have all turned hostile and nothing is revealed favouring the prosecution in their cross-examination.

31. What emerges from the above discussion is that apart from the eye-witnesses, the only substantive

part of the evidence available to the prosecution was in the nature of the T.I. Parade. The ocular version in a case where the witnesses depose to the glimpse of culprits only for short duration like five or ten seconds or few minutes needed corroboration from proper T.I. Parade. It is also settled law that T.I. Parade must be held at the earliest to protect the disclosure of identity of culprits before such parade as also to ensure that the parade is not rendered a futile exercise for want of the witnesses ability to recall the personality of the culprits due to long lapse of time which is about five years in the instant case. Undisputedly, within about one year of the incident, appellant-Rasik Ghamalia made disclosure in relation to the case in question. He also named appellant-Raju Patil as the person accompanying him in the Year-2005 itself. No satisfactorily explanation is coming forth from the prosecution or investigation justifying their wait for about three years after such disclosure. Normally, memory of a witness would fade by passage of time particularly when his confrontation with the culprits lasts for few seconds or few minutes. Unfortunately, all the norms required for a genuine and proper T.I. Parade were thrown to the wind even as no attempt was made to include the dummy persons with personalities similar as those of the appellants. Thus, assuming that features of the appellants being unique could have been recalled by the eye-witnesses, the appellants were not given an opportunity for being identified from amongst the persons possessing similar unique features or look.

Undisputedly, few persons, who had come to visit the office of the Executive Magistrate, were detained for the purpose without verifying whether they had personalities similar as those of the appellants. It appears that thus, T.I. Parade was a mere eye-wash and it was not aimed at real identification of the culprits. The evidence as to identification of the appellants does not inspire confidence of this Court, and therefore, benefit of doubt must go to the appellants. Accordingly, the impugned judgment and order is quashed and set aside. The appellants are ordered to be acquitted of the charges levelled against them, on benefit of doubt. They shall be set at liberty forthwith if not required in any other case. Fine, if paid, shall be refunded to the appellants. The appeals are, accordingly, **allowed**. No costs.

(G.R.UDHWANI, J.)

rakesh/