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IN THE HIGH COURT OF JUDICATURE FOR
RAJASTHAN
BENCH AT JAI PUR

JUDGMENT

1) D. B. CRIMINAL APPEAL No. 709/2008.

Vi rendra @Mahaveer & Ors.
Vs.
State of Rajasthan

2) D. B. CRIMINAL APPEAL No. 634/2008.

Shyam @Shyam Kumar
Vs.
State of Rajasthan

3) D. B. CRIMINAL APPEAL No. 800/2008.

Deepak Chaudhary
Vs.
State of Rajasthan

4) D. B. CRIMINAL APPEAL No. 448/2011.

Devendra @Mama
Vs.
State of Rajasthan

Date of Judgment : August 30, 2013.

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ

HON'BLE MR. JUSTICE J. K. RANKA

Shri Biri Singh, Senior Advocate with
Shri Laxmi Kant Shandilya for appellant
in D. B. Criminal Appeal No. 634/2008.

Shri Anil Upman for accused-appellants
in D. B. Criminal Appeal Nos. 709/2008,
800/2008 & 448/2011.

Shri Javed Choudhary, Public Prosecutor.

Reportable

BY THE COURT (Per Mohammad Rafiq J.):-

1) All these appeals arise out of the
common first information report being FIR

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No. 343/1996 registered with Police Station Jawahar Nagar, Jaipur for offence u/Ss. 307, 332, 353, 365, 395, 397, 324 IPC and Sections 3/25 and 4/25 of the Arms Act leading to conviction of the appellants in two separate trials. While first three of these appeals namely; D. B. Criminal Appeals No. 709/2008, 634/2008 & 800/2008 are directed against the common judgment dated 31/05/2008 passed by the learned Additional Sessions Judge (Fast Track) No. 2, Jaipur City, Jaipur in Sessions Case No. 112/2001, fourth D. B. Criminal Appeal No. 448/2011 is directed against the judgment dated 24/07/2008 passed by the learned Additional Sessions Judge (Fast Track) No. 2, Jaipur City, Jaipur in Sessions Case No. 48/2008 whereby, the accused-appellants were convicted and sentenced for the alleged offences, as under: -

(a) All the accused-appellants were convicted for offence u/S.395 IPC and were sentenced to life imprisonment alongwith fine of Rs.5,000/- and in default thereof, each one of them was sentenced to further undergo simple imprisonment for six months, convicted for offence u/S.332/149 IPC and were sentenced to simple imprisonment for three years alongwith fine of Rs.1,000/- and in default thereof, each one of them was sentenced to further undergo simple imprisonment for three months, convicted for offence u/S.353/149 IPC and were sentenced to simple imprisonment for two years

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alongwith fine of Rs.1,000/- and in default thereof, each one of them was sentenced to further undergo simple imprisonment for two months, convicted for offence u/S.365/149 IPC and were sentenced to simple imprisonment for seven years alongwith fine of Rs.2,000/- and in default thereof, each one of them was sentenced to further undergo simple imprisonment for six months.

(b) Accused-appellants Virendra @Mahaveer, Rahul @Ashish @Tulla and Ajay @Vijay were convicted for offence u/S.148 IPC and were sentenced to simple imprisonment for three years alongwith fine of Rs.1,000/- and in default thereof, each one of them was sentenced to further undergo simple imprisonment for three months.

(c) Accused-appellants Sandeep @Bittu, Deepak Chaudhary & Shyam @Shyam Kumar were convicted for offence u/S.147 IPC and were sentenced to simple imprisonment for two years alongwith fine of Rs.1,000/- and in default thereof, each one of them was sentenced to further undergo simple imprisonment for two months.

(d) Accused-appellants Rahul @Ashish @Tulla and Ajay @Vijay were convicted for offence u/S.4/25 of the Arms Act and were sentenced to simple imprisonment for one year alongwith fine of Rs.500/- and in default thereof, each one of them was sentenced to further undergo simple imprisonment for fifteen days.

(e) Accused-appellant Virendra @Mahaveer was convicted for offence u/S.3/25 of the Arms Act and was sentenced to simple imprisonment for two years alongwith fine of Rs.500/- and in default thereof, he was sentenced to further undergo simple imprisonment for

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fifteen days.

(f) **Accused-appellant Devendra @Mama** was acquitted from the charge of offence u/S.397 IPC.

(g) All the sentences were ordered to run concurrently.

2) The facts giving rise to these appeals are that a 'parcha bayan' of Home Guard-Ummmed Singh was recorded on 21/09/1996 that he along with Police Constable-Laxminarayan was on surveillance duty in the night of 20-21/09/1996 in Ram Gali Nos. 6 & 7 of Raja Park Colony of Jaipur. When they reached in front of 'Appu Ghar' at 3.30 a.m., they found a person standing in suspicious circumstances. Then they noticed two persons breaking shutter of 'Look Fine Garments Store'. They challenged them. However, one of them took out a pistol and pointed at him (informant). Four-five persons suddenly came there and started beating him. One of them caught hold of him, whereas another put a pistol on his chest. They compelled him to sit in a blue Maruti Car. Other accused started beating Laxminarayan. One of the culprits, who was having a knife in his hand, assaulted Laxminarayan. Laxminarayan started crying for help and he entered the nearby house. Accused ran behind him and entered the shop. He then entered the adjoining room and

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bolted the room from inside. Soon the accused came out. They broke the glass of shop-Look Fine Garments Store and took out some bundles of garments therefrom and put the same in a white Maruti Van and ran away. Ummmed Singh was also in the Van. One of the accused called another by the name of Mahaveer, asking him what to do with him (Ummmed Singh). Second person, who was being referred as Mama suggested that chilli powder be put in his eyes and he should be thrown out. Suddenly, one of them threw chilli powder in his eyes and pushed him down from the Van. He went to nearby house for help. He washed his eyes with water and then made telephonic call to the police for help.

3) On the basis of the aforesaid 'parcha bayan', a first information report was lodged against all the accused vide No. 343/1996 with Police Station Jawahar Nagar, Jaipur for offence u/Ss. 307, 332, 353, 365, 395, 397, 324 IPC and Sections 3/25 and 4/25 of the Arms Act. A wireless message was flashed and police intercepted both the vehicles on Delhi route and arrested the accused within few hours. After investigation, the police filed challan against eight accused for the aforesaid offences in the court. On committal of the case, the Learned Additional Sessions

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Judge (Fast Track) No. 2, Jai pur Ci ty, Jai pur framed the charges against the accused for offence u/Ss. 147, 395, 397, 332, 353 and 365 IPC and Sections 3/25 and 4/25 of the Arms Act. The accused pleaded innocence, denied the charges and claimed to be tried. The prosecution examined as many as 33 wi tnesses and produced 48 documents to prove their case. One of the accused namely; Birju @Vijendra died during trial. Remaining seven were convicted, who have preferred the present four appeals.

4) We have heard Shri Biri Singh, Learned Senior Advocate & Shri Anil Upman, Learned counsel for the accused-appellants and Shri Javed Choudhary, Learned Public Prosecutor.

5) Shri Biri Singh, Learned senior counsel for accused-appellant Shyam @Shyam Kumar has argued that the Learned trial court has not correctly appreciated the evidence of Laxminarayan (PW13), who did not identify Shyam @Shyam Kumar. He identified only four accused namely; Vi rendra @Mahaveer, Shyam Kumar, Birju @Vijendra and Rahul @Ashish vide Exh. P. 21. Conviction of Shyam @Shyam Kumar is therefore bad in law. Laxminarayan (PW13) stated that there was dark night and four-five persons gave beating to him but he did

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not remember as to who stabbed knife in his buttocks. This witness has admitted that the accused were shown to him in the police station on the same day in the morning. Therefore, identification parade became meaningless and cannot be relied upon for conviction of appellant-Shyam @Shyam Kumar. Ummed Singh (PW19) stated that Sandeep @Bittu, Mahaveer @Virendra, Shyam Pareek, Ajay @Vijay, Deepak and Devendra were culprits but he has also admitted that there was dark night and that the accused were shown to him in the police station prior to the test identification parade at about 10.30 a.m. Most of the accused-appellants were arrested on the same day but accused-appellant Shyam @Shyam Kumar was not arrested with them. He has been falsely implicated. Shyam @Shyam Kumar was arrested in Delhi in connection with some other crime and he was produced in the Police Station Jawahar Nagar, Jaipur by the Delhi Police. This accused has wrongly been mixed up with the other accused. His arrest therefore has wrongly been made. Ramjilal (PW2) and Anil Jain (PW3) are not the eye-witnesses of the alleged offence. They have also stated that they could not due to the darkness of the night identify the accused. Dayaram (PW12), Chandgiram (PW14)

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and Jai narayan (PW16) are those police officials, who intercepted the vehicles to vehicles on Delhi road and were the witnesses of the arrest of the accused along with cars and articles. Rameshwari al (PW18) is the motbir witness but he could not clarify as to for what reason arrests were made. The investigation officer Poonam Chandra Vishnoi (PW21) SHO Police Station Manoharpur stated that he did not arrest Shyam and Sandeep. Laxminarayan (PW22) Head Constable Police Line, Jaipur and Laxman Singh, Sub Inspector of Police, Police Station Jawahar Nagar, Jaipur have not uttered a single word about the involvement of the accused in the alleged crime. It is, therefore, prayed that the appeal be allowed.

6) Shri Anil Upman, learned counsel for accused-appellants Virendra, Rahul @Ashish, Ajay @Vijay, Sandeep @Bittu, Devendra and Deepak Chaudhary has argued that the entire prosecution case hinges on the testimony of Ummad Singh (PW19), who was kidnapped and was pushed down from the Van on the road by putting chilli powder in his eyes and who sustained injuries in the incident and identified the accused-appellants and Laxminarayan (PW13). The trial court has relied on the recognition of the accused-

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appellants by these witnesses during test identification parade in the jail but in doing so, the trial court has completely overlooked that part of cross-examination, where these witnesses admitted that the accused were shown to them in the police station much prior to the test identification parade. The third witness-Satyanarain (PW5), owner of the house in which Laxminarayan took shelter, turned hostile and did not support the prosecution case. Ummed Singh (PW19) identified all the accused-appellants except appellant-Rahul @Ashish @Tulla but in cross-examination, even this witness stated that all the accused were shown to him in the police station at 10.30 a.m. on that day and that thereafter he identified them in jail. In the examination-in-chief, he has stated that a fat man, who looked like a Nepali, hit him with fist and pointed the pistol at him but in cross-examination, this witness has stated that the accused, who pointed pistol at him, was not present in the court. Laxminarayan (PW13) has stated that when he and Ummed Singh challenged the accused, they started beating them. One accused called another by the name of Ajay Singh and asked him to put both Laxminarayan and Ummed Singh in the car. Yet another person took out the

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revolver and caught hold of Ummed Singh and pointed revolver at him and they put him in the car. Other two-three accused started beating this witness. One of the accused took out the knife and tried to inflict a blow on his chest, which he saved with the hands resulstantly, a cut wound was received by him in his finger. Then, accused stabbed knife in his buttocks. He somehow got rid-of them and ran towards temple while crying for help. Suddenly, one shop owner opened the shop and he entered the adjoining room and bolted the room from inside. Accused threatened the shop owner. This witness has identified Sandeep in the court stating that he was also one of amongst the accused. In cross-examination however, he pointed at accused Ajay, Ashish, Mahaveer and Deepak as those accused, who subjected him to beating and inflicted knife blows. In further cross-examination however, this witness has stated that he could not see the face of the accused, who attacked him thereafter, the one, who stabbed the knife in his buttock. He further admitted that all the accused were shown to him in the police station and their names were also told by the police to him on that day.

7) Shri Anil Upman, learned counsel has referred to the statement of Satyanarain

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(PW5), the house owner and submitted that this witness though identified only Ashish in the test identification parade but in the court he refused to identify him and was declared hostile. Learned counsel referred to the statement of Shri Shahbuddin (PW15) the Judicial Magistrate, who conducted the test identification parade and has proved the test identification parade proceedings stating that while Ummed Singh (PW19) identified all other accused but he wrongly identified Suresh vide memo Exh. P. 19, Laxminarayan (PW13) identified four accused namely; Virendra @Mahaveer, Shyam Kumar, Birju @Vijendra and Rahul @Ashish vide memo Exh. P. 21, whereas Satyanarain (PW5) identified only Rahul @Ashish vide memo Exh. P. 3. The test identification of the accused by these witnesses was vitiated because accused were though arrested on the same day of incident but their faces were not covered (baparda). Learned counsel referred to the arrest memos of the accused Exh. P. 24 to Exh. P. 29 and Exh. 45 and argued that in none of them, was there any mention made that they were kept with covered faces (baparda). It was argued that even though accused were arrested by the police on the same day but no recovery of looted articles whatsoever was

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made at their instance. Besides, arrest of the accused-appellants Shyam @Shyam Kumar vide memo Exh. P. 26 and Deepak vide memo Exh. P. 27 was shown at 11.30 a.m. on 21/09/1996. Learned counsel in this connection referred to the statement of Laxman Singh (PW23) S. H. O. Police Station Jawahar Nagar, Jaipur and has submitted that these two accused were arrested by Surnedra Singh, S. H. O. Police Station Malviya Nagar, Jaipur, who has not been proved to explain as to in which case they were arrested by him. This witness has not stated that the accused were kept with covered faces when they were arrested. Lastly and alternatively, learned counsel argued that even if the guilt of the accused is taken to have been proved, though denied, it hardly justifies in the facts of the case like this, when identification is tainted and no recovery has been made, sentence of life imprisonment, which is the maximum sentence awardable for offence u/S. 395 IPC. Most of the appellants are behind the bars for last seven years and sentence has been suspended only in the case of accused-appellant Shyam @Shyam Kumar on the ground of his illness.

8) Shri Anil Upman, learned counsel has in support of his arguments, placed reliance

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upon the judgments of Supreme Court in **Ravi @Ravi chandran Vs. State Rep. By Inspector of Police** : 2007 Cr. L. R. (SC) 769, **Labha Vs. State of Uttaranchal** : 2007 Cr. L. R. (SC) 774, **State of Uttar Pradesh Vs. Punni and others** : (2008) 11 SCC 153, **M. Noohukan Vs. Bank of Travancore and another** : (2008) 11 SCC 161, **Musheer Khan @Badshah Khan & Anr. Vs. State of Madhya Pradesh** : 2010 Cr. L. R. (SC) 167, **P. Vijayan Vs. State of Kerala & Anr.** : 2010 Cr. L. R. (SC) 177, **Abdul Gafur and others Vs. State of Assam** : (2007) 12 SCC 627 & **Sitaram Sao alias Mungeri Vs. State of Jharkhand** : (2007) 12 SCC 630. It is therefore prayed that the appeals be allowed.

9) Shri Javed Choudhary, Learned Public Prosecutor opposed the appeals and submitted that immediately after 'parcha bayan' of Ummed Singh was recorded, wireless message was flashed and the police barricaded the Delhi Highway. Both vehicles broke the barrier of the police near Chandwaji Police Station but the police followed them. Both the vehicles were stopped at Manoharpur and the accused sitting in the Van ran in two directions but were arrested in an hour by the S. H. O. Police Station Malviya Nagar. While the five accused are from Delhi out of

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the State, two accused Deepak Chaudhary and Shyam @Shyam Kumar are from Jai pur. It is argued that their arrest actually was made by the S. H. O. Police Station Malviya Nagar, Jai pur. Handing over of their custody to Police Station Jawahar Nagar, Jai pur in the present case cannot be taken a lacuna in the investigation of the police. Learned Public Prosecutor referred to the statement of Shri Shahbuddin (PW15) the Judicial Magistrate, who has proved the proceedings of test identification parade vide memo Exh. P. 19. He has proved that Ummed Singh has identified all the accused except Suresh Nayak. Satyanarain (PW5) identified only one accused namely; Rahul @Ashish. Though, Satyanarain (PW5) turned hostile and did not identify the accused in court but Laxminarayan (PW13) identified Virendra @Mahaveer, Shyam Kumar, Birju @Vijendra and Rahul @Ashish @Tulla. Ummed Singh (PW19) identified all the accused but wrongly identified Suresh. It is contended that once the accused were identified by the witnesses in the court, test identification parade, which is only a corroborative piece of evidence, lost its significance.

10) Shri Javed Choudhary, Learned Public Prosecutor argued that mere absence of

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recovery of the looted articles from the accused-appellants, does not in any manner make the case of the prosecution weak. Besides, accused-appellants have also been convicted for offences u/Ss. 332, 353 and 365 IPC and appellant-Virendra @Mahaveer was convicted for offence u/S. 3/25 & appellants Rahul @Ashish @Tulla and Ajay @Vijay were convicted for offence u/S. 4/25 of the Arms Act, which is fully borne out from the record. It is therefore prayed that the appeals be dismissed.

11) We have given our anxious consideration to the rival submissions, perused the material available on record, carefully examined the judgments and considered the evidence on record.

12) The examination of the findings recorded by the learned trial court indicates that it has merely relied on the depositions of Laxminarayan (PW13) and Ummed Singh (PW19) in sustaining the conviction of the accused-appellants and has held that what they have stated finds corroboration from the attending circumstances. When one of the accused stabbed the knife in the buttock of Laxminarayan (PW13), he rushed for help and entered the shop of Satyanarain (PW5) and then went inside the adjoining room and

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bolted the room from inside and that accused still threatened him from outside the room. Accused thereafter fled in two vehicles and also forcibly took Ummed Singh with them. When Laxminarayan (PW13) came out, he neither found accused nor vehicles there. Trial court thus held that all this evidence proves that the accused inflicted the stab wound in the buttock of injured-Laxminarayan and that they fled from the place of occurrence in two vehicles and that this is further corroborated from the treatment given to Laxminarayan. All these facts are proved from the statements of Ramjilal (PW2), Satyanarain (PW5), Bhagwati Prasad (PW6) and Anil Jain (PW3). These witnesses have proved that after Laxminarayan sustained injuries, he entered the house of Ramjilal. He was bleeding profusely. Learned trial court then went on to hold that chain of circumstances against accused was fully proved, there being no missing links. Trial court has also relied on the identification of the accused made by Laxminarayan (PW13) and Ummed Singh (PW19), reference to which has already been made in earlier part of the judgment. Trial court then held that the statements of Laxminarayan (PW13) and Ummed Singh (PW19) corroborate each other. The fact that the accused threw

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chilli powder in the eyes of Ummed Singh (PW19) is corroborated from the statement of M. L. Shah (PW10), whose door was knocked by Ummed Singh in the night about 4.00 a.m. of the date of incident. M. L. Shah (PW10) stated that when Ummed Singh came to his house and knocked the door asking for help, he opened the door. Ummed Singh narrated the entire incident to him. Khuman Singh (PW11) also proved the fact that Ummed Singh went to the house of M. L. Shah and asked for water. Earlier to that, Ummed Singh came to him (Khuman Singh) and he gave water to Ummed Singh, who then washed his eyes and then left.

13) What has to be therefore examined is whether kind of investigation as has been made and the quality of evidence, which has been produced before the trial court, proves guilt of the accused-appellants beyond reasonable doubt. Learned trial court may be justified in holding that incident took place in the manner disclosed by the witnesses, but what is crucial to decide is whether involvement of the accused-appellants in the incident has been proved beyond reasonable doubt. In order to therefore test the correctness of the findings recorded by the trial court, we have to critically analyze

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the evidence recorded during trial.

14) Laxmi narayan (PW13) has stated that when he along with Home Guard Ummed Singh was on night surveillance duty, they noticed one person standing in suspicious circumstances and two persons breaking shutter of a shop opposite 'Appu Ghar'. When they challenged them, two other persons came from different direction and started beating them. One person called another by the name of Ajay, asking him to put him (this witness) in the vehicle. Another accused took out the revolver and pointed the same at Ummed Singh. They forced Ummed Singh to sit in the Maruti car and one accused also sat in the car by his side. Two-three persons started beating him (Laxmi narayan). One of them took out a knife and inflicted knife blow, which he received in hands and in that process, received a cut in finger of one of his hands and this person then inflicted stab wound in his buttock. He rushed crying for help and entered the shop of Satyanarain and then the adjoining room and bolted the same from inside. But what is crucial to notice is that this witness in the examination-in-chief stated that he identified the accused in jail during test identification parade on 9/10/1996 and while pointing at accused

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Sandeep, he stated that this accused was also along with other accused in the incident. But in cross-examination, this witness stated that accused Ajay, Ashish, Mahaveer and Deepak were those, who gave him beating. And when by force of beating he turned around, one of the accused stabbed knife in his buttock and another injury he received on his finger of the hand. He received six stitches in buttock and five-six stitches in the finger. Those two accused, who first started beating him in front of 'Appu Ghar' are not present in court. Third accused, who pointed pistol at him is also not present in court. He could not give the description of the accused, who inflicted knife injury to him because due to darkness, he could not see him. He also could not see face of those, who subjected him to beating. Laxminarayan (PW13) has further stated in cross-examination that about ten-fifteen days prior to the test identification parade conducted in jail, accused were shown to him in the police station and he was also told their names. Then he stated that he carefully saw the accused in the police station and that he identified only those accused whom he saw in the police station. Similar was the statement of Ummed Singh (PW19), who though while

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giving initial version about the incident has stated that three-four accused abducted him and one of the accused pointed gun at him and another khukhri, on his neck and forced him to sit in a car. They tied his hands and threatened him with dire consequence if he spoke. When they ran away in two vehicles, they forcibly took this witness with them. They threw chilli powder in his eyes and pushed him out of the car on the road near water tank. He asked for help from the nearby house owner, washed his eyes, and then called the control room. This witness has identified Sandeep, Mahaveer, Shyam Pareek, Ajay @Vijay, Deepak and Devendra in the test identification parade conducted vide Exh. P. 19. He further stated that there were four persons in the car, who abducted him and one of them was looking like a Nepali, who was driving the car. Remaining three are in the court today. In cross-examination, this witness has stated that the accused were shown to him by the police in police station. Then, strangely this witness has further stated that he was forcibly put in the car, yet he did not see the faces of the accused. Then, he next stated that he did not see the faces of the accused standing opposite the shop. He then, stated that they were three-

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four persons, who looked like Nepalis. He identified the accused in the test identification parade seven-ten days after they were shown to him in the police station. The fat Nepali man had pointed pistol at him. He identified six-seven accused in the jail. These accused had looted two big cartons of garments. One of the fat accused had pointed khukhri on his neck. All the accused were shown to him in jail prior to the identification parade. There was complete dark at the place where Laxminarayan was subjected to beating, therefore, he could not identify the accused, who gave him beating. He could not state with certainty as to which of the three-four accused were breaking upon the shutter. He also could not give the names of those, who subjected him to beating. He also could not see as to which of the accused had forcibly put him in the car. He identified those accused during test identification parade in jail, who were shown to him in the police station. In cross-examination, he then stated that the accused, who had pointed gun at him, was not amongst those present in court. Third witness, who was also called for identification of the accused, is Satyanarain (PW5). He has narrated the manner in which the incident had

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taken place and fact that he rushed to the nearby shop, entered the adjoining room and bolted the same from inside and that accused followed him and commanded him to come out and then accused fled. But in the cross-examination, this witness has stated that he could not identify the accused because one and a half year has gone by since the date of incident. He has also denied having identified Ashish during test identification parade. In view of the statement made by him, this witness was declared hostile.

15) Shri Shahbuddin (PW15) the Judicial Magistrate, who conducted the test identification parade, has proved the proceedings thereof vide Exh. P. 19 and the other related documents Exh. P. 21 and Exh. P. 3. He has stated that while Ummed Singh (PW19) identified all the seven accused but wrongly identified Suresh vide Exh. P. 19, Laxminarayan (PW13) identified four accused namely; Virendra @Mahaveer, Shyam Kumar, Birju @Vijendra and Rahul @Ashish but did not identify rest accused vide Exh. P. 21. Satyanarain (PW5) identified Rahul @Ashish correctly but wrongly identified Damodar vide Exh. P. 3.

16) The Supreme Court in Ravi @Ravichandran supra was dealing with a case

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in which the first information report was lodged against unknown persons and there was delay in conducting test identification parade. The photos of the accused-appellants were already published in newspaper. The accused were shown to the witnesses in advance and witnesses admitted that they were well aware of the publication of the photographs. In those facts, the Supreme Court held in paras 9 & 10 of the report, as under: -

"9. We may at the outset notice the evidence of the first informant (PW-1). According to him, the appellant and the said Udayakumar had been running towards John Basha (deceased) and Usman Ali (PW-3) from about a distance of 15 feet from them. According to him, nobody shouted when the first injury was inflicted. Apart from those two, he stated, nobody else was touched. He stated that he been knowing the accused persons from before as also their names, but then stated that he did not know the same at that time. According to him, he had mentioned in the First Information Report about the scar which he had noticed on the right hand of the appellant, but the First Information Report does not show it. He accepted that the photographs of the appellant and the said Udayakumar had appeared in the newspaper that they had committed the murder of John Basha.

10. PW-2 even could not remember as to whether he had identified the appellant on the basis of scar mark. PW-3 allegedly had disclosed the mark of identification. His statement must have been taken after the inquest report was made. PW-4 even could not say whether he had seen the appellant and the said Udayakumar prior to the date of occurrence. But still then according to him their faces were known. He could

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not even recollect as to whether he had stated about the said identification mark to anybody else."

17) The Supreme Court in **Suryamoorthi and Anr. Vs. Govindaswamy and Others** : (1989) 3 SCC 24, held as under: -

"10. Two identification parades were held in the course of investigation. At the first identification parade PW 1 identified all the seven accused persons whereas PW 2 identified three of them, namely, accused 2, 6 and 7 alone. It is, however, in evidence that before the identification parades were held the photographs of the accused persons had appeared in the local daily newspapers. Besides, the accused persons were in the lock-up for a few days before the identification parades were held and therefore the possibility of their having been shown to the witnesses cannot be ruled out altogether. We do not, therefore, attach much importance to the identification made at the identification parades."

18) Holding of a test identification parade after a long time particularly when their photographs were published has also been commented upon by the Supreme Court in **Acharaparambath Pradeepan and Anr. Vs. State of Kerala** : (2006) 13 Scale 600, stating thus: -

"Descriptions of a few persons were given in the statements of the child witnesses. Except A1, however, they were not arrested. The reason for their being not arrested had not been disclosed. They were arrested, as noticed hereinbefore, on 6.03.2000 only after their names were

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disclosed by PWs 7 and 8. Test Identification Parade of the accused persons, other than A1, was held on 4.04.2000. Why the Investigating Officer took such a long time for arranging a test identification parade has not been disclosed. Furthermore, A3 was not identified. A6 was present when the first Test Identification Parade was taken but he had not been identified by any of the witnesses.

We are not impressed with the purported explanation in regard to the holding of test identification parade. Identification of the said accused by the child witnesses, having regard to the facts and circumstances of the case lead us to a definite conclusion that they were the only persons who participated in the commission of the offence.

They are entitled to benefit of doubt. There had been great delay in conducting the Test Identification Parade. Undue delay has also occurred in recording the statements of PWs 7 and 8."

19) The Supreme Court in **Musheer Khan @Badshah Khan** supra held that identification test parade is not substantive evidence but it can only be used in corroboration of the statements in Court. Since one of the prosecution witnesses has admitted that heads of none of the persons were covered. He has stated that body of the accused was covered with a blanket upto the neck. No reference of blanket was made in the exhibits produced in the court. There was material contradiction in the evidence of the investigating officer. There was delay of one month in conducting the test identification parade. Evidence was

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held to be unreliable.

20) If the law on the question of test identification parade as discussed above is applied to the facts of the present case, it would be evident from the fact that Satyanarain (PW5) has turned hostile and has not supported the prosecution case and Laxminarayan (PW13) and Ummed Singh (PW19) have admitted unambiguously that each of the accused was shown to them in the police station much prior to the test identification parade conducted in jail. They have gone to the extent of stating that they identified only those accused, who were shown to them in jail. In fact, Laxminarayan (PW13) was very explicit in stating that he had carefully seen the accused in the police station and that he identified only those accused whom he had seen in the police station and further that he could identify them in jail (during test identification parade) only because he had seen them in police station. Ummed Singh (PW19) has also similarly stated that he had identified such accused in jail, who were shown to him in the police station.

21) Accused-appellants, as per own case of the prosecution, were arrested on 21/09/1996. There is no explanation why their test identification parade was conducted much

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belatedly thereafter on 14/10/1996. In a given case, identification for the first time in court, not proceeded by a test identification parade, may be accepted as valid evidence. But in the facts of the present case when prosecution has set up a case that it conducted the test identification parade thirteen days after the incident/arrest and witnesses, who claimed to have identified the accused in jail, admitted that they could identify them in test identification parade only because they were shown to them in the police station and they carefully saw them, makes identification of such accused by those witnesses in court also highly doubtful.

22) No doubt, in the facts of the case like the present one, identification parade is a tool of investigation and is primarily used to strengthen case of prosecution and to make sure that persons named as accused in case are the actual culprits. Identification parade primarily belongs to stage of investigation by police. Fact that a particular witness has been able to identify accused at an identification parade is only a circumstance corroborative of identification in court. But departure made by the witnesses in the court, being substantive evidence, is

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equally important.

23) Laxmi narayan (PW13) in cross-examination has given a waiving statement. He started with saying that he recognized the accused Ajay, Ashish, Mahaveer and Deepak, who gave him beating but in later part of the cross-examination, he stated that he could not see the face of those four-five accused, who had subjected him to beating. While in one part of cross-examination, he stated that two accused first started beating him in front of 'Appu Ghar' but then in the next three-four lines, he stated that those accused were not present in the court today. Then, he also stated that the accused, who pointed gun at him was also not present in the court. He also could not state as to which of the accused had inflicted knife blow at him. He stated that there were four-five persons in the Maruti car including him. He was abducted by one accused looked like a Nepali, who was driving the car. Then he was taken to the Van in which five-six accused were sitting. This witness pointed at the accused wearing T-shirt stating that he is the person, who looks like a Nepali. He further stated that a fat Nepali accused gave him beating by fist and blows and pointed the gun at him. This fact was told to the police

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in his statement u/S. 161 Cr. P. C. (Exh. D. 4) but why the police has not mentioned this fact therein, he cannot say. But in later part of cross-examination, he stated that he could not identify three-four accused, who broke the shutter open. He also could not identify the accused, who gave him beating. He also could not identify the accused, who made him forcibly sit in the car. Then he contradicted himself by stating contrary to earlier part of his statement that accused pointed gun at him was not present in the court today. Ummed Singh (PW19) was also shaken during cross-examination. If according to these witnesses, most of the accused, who were involved in the incident, were not present in the court, that would falsify the prosecution story, which has not claimed involvement of more than eight accused in the incident. There is another significant lacuna in the investigation. According to the prosecution, accused had looted the bundles of garments from the shop and, were arrested along with vehicles within few hours of the incident. Then, why such looted garments were not recovered. Yet another significant lacuna in the investigation, wherefor, no explanation has been given is that Laxman Singh (PW23), the investigation officer, who

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has proved all the exhibits of the prosecution, stated that Shyam Pareek and Deepak were arrested by Surendra Singh, S. H. O. Police Station Malviya Nagar on 21/09/1996 and were produced before him by the said S. H. O. Then, their arrest memos were prepared vide Exh. P. 26 and Exh. P. 27 at 11.30 a.m. There is no explanation why they were arrested by the S. H. O. Malviya Nagar and in connection with which case. Such evidence has been withheld from the court and the said S. H. O. Surendra Singh was not produced in Court to explain this fact.

24) Before parting with the case, we observe that investigating agency ought to investigate the crime like this adopting scientific methods and strictly in conformity with the law and should not leave such material lacunae, as are found in the present case, which go to the benefit of the accused. As we observed in past and reiterate that police should learn from its mistakes and should compile datas of the cases in which prosecution has failed with reference to reasons of such failure and train the investigation officers so as not to repeat such mistakes in future and also train them for using scientific methods of investigation to pin-pointedly prove the guilt of the

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culprits so that the culprits are brought to book and no innocent person gets punished.

25) The quality of evidence therefore does not prove the guilt of any of the accused beyond all reasonable doubt and possibility of their being innocent cannot be ruled out. It would be highly unsafe to approve the conviction of the accused on the kind of evidence that has been adduced by the prosecution in the present case.

26) In the result, all the four appeals succeed and are hereby allowed. The conviction and sentence of the accused-appellants vide judgments dated 31/05/2008 and 24/07/2008 passed by the Learned Additional Sessions Judge (Fast Track) No. 2, Jaipur City, Jaipur in Sessions Case Nos. 112/2001 and 48/2008, respectively are set-aside.

27) All the accused-appellants namely; Virendra @Mahaveer, Rahul @Ashish @Tulla, Ajay @Vijay, Sandeep @Bittu, Shyam @Shyam Kumar, Deepak Chaudhary & Devenendra @Mama (presently confined in Central Jail, Jaipur except accused-appellant Shyam @Shyam Kumar), are acquitted of all the charge for offences u/Ss. 395, 332/149, 353/149, 365/149, 147, 148 IPC and Sections 3/25 and 4/25 of the Arms Act. All the accused be released forthwith,

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if not required in any other criminal case, except accused-appellant Shyam @Shyam Kumar, who is already on bail thus, he need not to surrender. His bail bonds and surety bonds are accordingly discharged.

28) Keeping in view, however, the provisions of Section 437A of the Code of Criminal Procedure, 1973, each of the accused-appellants are directed to forthwith furnish a personal bond in the sum of Rs. 20,000/- each, and a surety bond in the like amount, before the Deputy Registrar (Judicial) of this Court, which shall be effective for a period of six months to the effect that in the event of filing of Special Leave Petition against this judgment or on grant of leave, the said appellants, on receipt of notice thereof, shall appear before the Supreme Court.

29) The records be sent back to the trial court forthwith.

(J. K. RANKA), J.

(MOHAMMAD RAFIQ), J.

Anil /6-9

All corrections made in the judgment/order have been incorporated in the judgment/order being e-mailed
Anil Kumar Goyal
Sr.P.A. Cum JW