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HARNATH SINGH

v.

STATE OF MADHYA PRADESH

September 27, 1968

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[J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE
AND A. N. GROVER, JJ.]

Code of Criminal Procedure, s. 164—Test identification parade held by Magistrate of the Third Class—Record of such identification whether inadmissible in evidence as contravening s. 164 of the Code.

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The appellant who was suspected of having taken part in a dacoity was put up for identification by the witnesses in a test identification parade which was conducted by a Magistrate of the Third Class. The Magistrate noted in Col. 5 of the prescribed form the fact of identification by a witness, in Col. 7 he recorded further statements made by the witness after he had purported to identify the accused. Later the appellant was tried for the offence under s. 395 of the Indian Penal Code, and convicted. His appeal to the High Court failed. In this Court it was urged on behalf of the appellant that the record of the test identification parade was inadmissible in evidence as the statements therein were recorded by a Magistrate of the Third Class who was not empowered under s. 164 of the Code of Criminal Procedure to record such statements.

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HELD : A Magistrate when called upon to conduct verification proceedings should confine his attention only to the steps to be taken to ensure that the witnesses were able to identify certain persons alleged to have been concerned in the commission of the crime or to identify certain things which were said to be the subject matter thereof. The Code of Criminal Procedure does not sanction his transgression of this limit and recording of other statements which may have a bearing in establishing the guilt of the accused except in accordance with s. 164 of the Code. [296 C-D]

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In the present case the Magistrate was called upon only to conduct the identification proceedings. He was not required to record any confession or to interrogate witnesses to elicit any other facts or call upon them to make any statement beyond mere identification. The statements in Col. 7 would therefore be inadmissible in evidence. This would however not be applicable to the record under Col. 5 [296 G]

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As the High Court had not taken into consideration the statements in Col. 7 its judgment could not be said to suffer from the infirmity of having relied on inadmissible evidence. [296 H]

Deep Chand v. State of Rajasthan, [1962] 1 S.C.R. 662, applied.

Nazir Ahmad v. King Emperor, A.I.R. 1936 P.C. 253 and *Ramkrishan Mithanlal Sharma v. State of Bombay*, [1955] 1 S.C.R. 903, referred to.

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 130 of 1966.

Appeal by special leave from the judgment and order dated April 24, 1965 of the Madhya Pradesh High Court, Gwalior Bench in Criminal Appeal No. 55 of 1964.

R. L. Kohli, for the appellant.

I. N. Shroff, for the respondent.

The Judgment of the Court was delivered by

Mitter, J. This is an appeal by Special Leave from the judgment and order of the Madhya Pradesh High Court, Gwalior Bench on April 24, 1965 in Criminal Appeal No. 55 of 1964. The said appeal was heard and disposed of along with two other appeals Nos. 44 and 45 of 1964. The appellant before us, Harnath Singh, was the appellant in Appeal No. 55 of 1964 while Narayan Singh and Chhotelal were the appellants in the other two appeals. Narayan Singh and Harnath Singh were convicted by the Additional Sessions Judge, Morena, under s. 395 of the Indian Penal Code while Chhotelal was convicted in the same trial under s. 395 read with s. 75 of the Indian Penal Code.

The prosecution case was as follows. There was a dacoity at the house of one Dhudilal in village Chhota Kheda on the night of December 10, 1962 in which the inmates of the house were beaten and property, to wit, Rs. 350 in currency notes, some silver ornaments etc., belonging to one Raghunath were taken away by the dacoits from the said house. Ramkumar (P.W. 1) raised an alarm which brought the neighbours on the scene and one of the dacoits, Chhotelal, was caught on the spot and handed over to the police. The first information report was lodged by Dhudilal at about 9 a.m. on the following morning. During investigation Rs. 335 in currency notes besides some silver articles and small change were found on the person of Chhotelal. Some articles were also produced by Narayan Singh on December 12, 1962. On the same day, on a personal search of the appellant Harnath Singh, four George V silver rupee coins, one Victoria silver rupee coin, one silver half-rupee coin and one old square coin with vermillion on them were found and seized. On December 25, 1962 there were test identification parades of the accused and all the appellants were identified by some of the eye witnesses. The appellant, Harnath Singh, was identified by Ramkumar (P.W. 1), Panabai (P.W. 13) and Hari Shankar (P.W. 15). The articles seized from the accused were also identified. Chhotelal admitted his presence in the village on the night of the incident and the seizure of Rs. 335 from his person but claimed them as his own. He denied the seizure of the other articles from his possession. Narayan Singh denied the recovery of any articles from his house while the appellant Harnath Singh, admitted the seizure of the five rupee coins and the square coin from his person but claimed them as his own.

The Sessions Judge found all the accused guilty and sentenced them as stated.

A So far as the appellant Harnath Singh is concerned, the High Court held that he had been "identified as one of the dacoits by Ramkumar (P.W. 1), Panabai (P.W. 13) and Hari Shankar (P.W. 15)" and they had also "identified him earlier in a test identification parade." Discussing the question as to whether the evidence with regard to the test identification parade was admissible in view of the fact that it was conducted by a Magistrate of the Third Class who was not empowered to record statements under s. 164 of the Criminal Procedure Code, the High Court was of the view that

B "the test identification parade.... cannot be disregarded as of no value under the circumstances of the case."

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The High Court then went on to consider the evidence against the appellant as to his being concerned in the dacoity. It relied on the testimony of Ramkumar, P.W. 1, that the appellant was standing near his sister, Tulsabai and had a Gajkundi and was firing crackers. Ramkumar had also given a description of the appellant to the police and stated in his evidence that he was able to identify him from his facial features. Panabai, another of the identifying witnesses, had stated that the appellant was wearing a black coat and was flashing a torch. The third identifying witness, Hari Shankar, could give no special reason for identifying the appellant but stated that he was standing near his aunt, Tulsabai. All these witnesses stated that they had identified the appellant in the identification parade. Tulsabai did not identify the appellant but had stated that the person standing near her had a black coat on. The High Court held on the evidence that there was no sufficient reason to discard the testimony of these persons on the point of their identifying the appellant as one of the dacoits although there were some minor discrepancies in their statements. The High Court also found that the evidence of the witnesses was amply corroborated from other evidence on record.

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One of the circumstances which corroborated the testimony of the witnesses, according to the High Court, was the unexplained possession of the appellant of some of the articles taken away by the dacoits from the scene after the incident. In the first information report there had been specific mention of the loss of four George V rupee coins, one Victoria rupee coin and a gilt half rupee piece. These correspond with the recovery from the appellant along with one square coin probably of brass all bearing marks of vermillion. This mark was explained by Raghunath, the claimant of the coins as having been used in the Diwali pooja. The High Court did not accept the appellants version of his having carried them on his person because they used to be worshipped by his father and grand-father. The High Court held that the

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presence of the square piece in his possession showed his complicity in the offence. According to Raghunath this coin was kept separately from the other coins but all bore vermillion mark because of their use in the pooja.

The second circumstance incriminating the appellant as found by the High Court was his unexplained absence from duty in the Chambal Canal Project from December 9, 1962. While the appellant admitted his absence from duty he tried to account for it by saying that he was ill but offered no independent witness to establish his statement. Accordingly, the High Court found itself unable to disturb the conviction of the appellant under s. 395 and dismissed the appeal.

Before us learned counsel for the appellant contended that the conviction of the appellant could not stand in view of the reliance of the High Court on the record of the test identification parade. In our opinion, the learned Judges of the High Court did not affirm the conviction relying merely or mainly on the said report. The elaborate discussion on this point appears to have been prompted by the two judgments in Appeal No. 218/1963 and Appeal No. 35/1964 of the same High Court on which reliance was placed by counsel for the accused. As noted already, the view of the High Court was that the test identification parade could not be discarded as of no value in the circumstances of the case. It was only after recording the said view that the High Court proceeded to consider the evidence of the witnesses and the circumstances which corroborated their testimony. These were only two as discussed above. It appears therefore that although the High Court did not reject the testimony of the Naib Tehsildar, Dinkar Rao who presided at the parade, it really upheld the conviction of the appellant on other evidence on the record.

Relying principally on the judgment of the Judicial Committee of the Privy Council in *Nazir Ahmad v. King Emperor*⁽¹⁾ and to certain observations of this Court in *Ramkrishan Mithanlal Sharma v. The State of Bombay*⁽²⁾ counsel for the appellant attacked the identification proceedings as being without jurisdiction and as such inadmissible in evidence. It was further argued that if the High Court had rejected the said evidence, it would not have maintained the conviction of the appellant. In order to appreciate the foundation for this argument, it is necessary to take a brief note of the reason for holding identification proceedings and the scope thereof. During the investigation of a crime the police has to hold identification parades for the purpose of enabling witnesses to identify the properties which are the subject matter of the offence or to identify the persons who are concerned therein. They have thus a two-fold object : first, to satisfy the investigating

(1) A.I.R. 1936 P.C. 253.

(2) [1955] 1 S.C.R. 903.

A authorities that a certain person not previously known to the witnesses was involved in the commission of the crime or a particular property was the subject of the crime. It is also designed to furnish evidence to corroborate the testimony which the witness concerned tenders before the court. The process of identification proceedings and the legal basis of evidence adduced thereat were
B considered by this Court in *Ramkrishan Mithanlal Sharma v. The State of Bombay*⁽¹⁾. It was there said (at p. 920) :

“.... it is clear that the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person.....
C The distinction between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification.”
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F On the above logic the Court pointed out that identifications by a police officer would be hit by s. 162 of the Code of Criminal Procedure.

G It being hardly practicable to have identification proceedings conducted by private citizens they are as a rule held by Magistrates at the request of the investigating police authorities. Usually the record of the proceedings is made on certain forms and one such, Ex. P-1, was used in this case. This form contains 9 columns, the first being for the serial number, the second for the names of the witnesses who identified the accused, the third for names of the accused who are to be identified, the fourth for the number of persons who were mixed in the identification parade, the fifth being headed “correctly identified”; the sixth reading
H “wrongly identified”, the seventh for “statement of the witnesses

about identification", the eighth for the signature of the identifying witnesses and the ninth and last being for remarks. The note at the end of the form shows how the parade was conducted, where it was held, how many persons were mixed up with the accused in the case, what precautions were taken so that the witnesses could not see the steps being taken for mixing the accused persons etc. The last sentence of the form reads :

"From their gestures it appeared that the witnesses had correctly identified the accused persons."

In *Nazir Ahmad's* case⁽¹⁾, the appellant was convicted mainly, if not entirely, on the strength of a confession said to have been made by the appellant to a Magistrate who was examined at the trial. The Magistrate however did not record the confession under s. 164 of the Criminal Procedure Code which provides that a Magistrate of the class therein mentioned may record any statement or confession made to him in the course of an investigation in the manner prescribed and after complying with the formalities therein laid down. The Judicial Committee found that though the Magistrate was manifestly acting under Part V of the Criminal Procedure Code, he neither purported to follow nor in fact followed the procedure of ss. 164 and 364 of the Code. To quote the words of the judgment to show absence of non-compliance with secs. 164 and 364 of the Criminal Procedure Code :

"...there was no record in existence at the material time (at the time the alleged confession was made), there was nothing to be shown or to be read to the accused, and nothing he could sign or refuse to sign."

The Magistrate gave no explanation as to why he adopted this procedure. It was argued on behalf of the appellant that by necessary implication in the Code of Criminal Procedure the Magistrate must either proceed under s. 164 of the Code or not at all. Considering the position of the accused persons and the position of the magistracy, the Judicial Committee observed that it was most undesirable that Magistrates and Judges should be in the position of witness insofar as it could be avoided. According to the Judicial Committee :

"...it would be particularly unfortunate if Magistrate were asked at all generally to act rather as police officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police officers under s. 162 of the Code; and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records under s. 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be

(1) A.I.R. 1936 P.C. 253.

- A required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever."

B In the result it was held that the Code of Criminal Procedure did not sanction any departure from the mode in which the confessions were to be dealt with by the Magistrates when made during an investigation.

C This decision of the Judicial Committee was considered by this Court in *Deep Chand v. The State of Rajasthan*⁽¹⁾ and the above observations were adopted. In this case, one Suraj Bhan had been abducted by certain persons and according to the prosecution case he was taken first to the house of Deep Chand and kept blind-folded and confined in a small room for 17 days. During this period after temporary removal of the bandage over his eyes he was made to write letters to his father asking for moneys to be paid for releasing him. He was thereafter removed to the house of one Lachman. As regards the identification of Deep Chand's house, the High Court accepted the evidence of Suraj Bhan that he had been able to note certain features of it through a chink in the wall of his room. Suraj Bhan's evidence was corroborated by the evidence of one Devi Singh, a Magistrate who had taken Suraj Bhan along with him to the house of Deep Chand. The Magistrate had inspected the house and got a plan prepared under his supervision and recorded a memorandum in which his observations and the statements made by Suraj Bhan were noted down. The Magistrate gave evidence at the trial describing the building of Deep Chand and proved the memorandum prepared by him. Objection was taken by the appellant to the verification proceedings conducted by the Magistrate on the strength of *Nazir Ahmad's case*⁽²⁾ and it was argued that the High Court had gone wrong in acting upon the memorandum prepared by the Magistrate. It was pointed out by this Court that the decision in *Nazir Ahmad's case*⁽²⁾ did not preclude a Magistrate from deposing to relevant facts if no statute precluded him from doing so either expressly or impliedly. It was also said that neither the evidence Act nor the code of Criminal Procedure prohibited a Magistrate from deposing to relevant facts within the meaning of s. 9 of the Evidence Act. Reference was made by this Court to the observation in *Amiruddin Ahmad v. Emperor*⁽³⁾ in relation to identification proceedings that "the main concern of the Court would seem to be to ensure that evidence not strictly admissible is not admitted." In that case, the High Court had further observed that the verifying Magistrate should not be permitted to speak to statements said to have been made to him in the course of the proceedings. The High Court observed that

(1) [1962] 1 S.C.R. 662.

(2) A.I.R. 1936 P.C. 253.

(3) I.L.R. 45 Calcutta 557.

"additional statements being statements made in the course of an investigation, when not recorded in the manner provided in section 164 of the Code of Criminal Procedure are inadmissible."

According to this Court, the above decision was "an authority for the position that the evidence given by a Magistrate on the basis of the verification proceedings conducted by him is relevant evidence, though he could not speak to statements made by the accused or a witness recorded by him in contravention of s. 164 of the Code of Criminal Procedure."

Deep Chand's case⁽¹⁾ goes to show that a Magistrate when called upon in a case like this to conduct verification proceedings should confine his attention only to the steps to be taken to ensure that the witnesses were able to identify certain persons alleged to have been concerned in the commission of the crime or to identify certain things which were said to be the subject matter thereof. The Code of Criminal Procedure does not sanction his transgression of this limit and recording of other statements which may have a bearing in establishing the guilt of the accused except in accordance with s. 164 of the Code.

In this case the Magistrate gave evidence to the effect that he was a Naib Tehsildar at Sivpur on 26th December 1962 on which date he had executed the proceedings of identification parade of the three accused including the appellant. He also stated that he had the power of a Third Class Magistrate. After stating how the parade was conducted he recorded statements in support of the identification of the three accused by different persons. He also purported to give evidence of what the witnesses had said after identifying a particular accused. Learned counsel for the appellant contended that as he had purported to record statements made in the course of investigation, the entire evidence of the Magistrate including the record of the identification proceedings became inadmissible because he was a Third Class Magistrate not empowered to proceed under s. 164 Cr.P.C. We find ourselves unable to accept this argument. The Magistrate was called upon only to conduct the identification proceedings. He was not required to record any confession or to interrogate witnesses to elicit any other facts or call upon them to make any statement beyond mere identification. The statements in column 7 would therefore be inadmissible in evidence. This would not however be applicable to the record under column 5. The High Court did not refer to the statements in column 7 at all. It would therefore be clear that the judgment does not suffer from the infirmity complained of and the appeal must fail. It is therefore dismissed.

G.C.

Appeal dismissed.

(1) [1962] 1 S.C.R. 662.