CASE NO.:
Appeal (crl.) 1299-1300 of 2002

PETITIONER:
Malkhansingh & Ors.

RESPONDENT:
Vs.
State of Madhya Pradesh

DATE OF JUDGMENT: 08/07/2003

BENCH:
N. SANTOSH HEGDE, ASHOK BHAN & B.P. SINGH

JUDGMENT:

J U D G M E N T

B.P. Singh, J.

The three appellants herein were tried by the Second Additional Sessions Judge, Vidisha, M.P. in Sessions Trial No. 76 of 1992 charged of offences under section 3(1)(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989; section 376 (2)(G) and section 506 of the Indian Penal Code on the allegation that they had, on March 4, 1992, committed gang rape and criminally intimidated Kumari Lusia a tribal woman, who was posted as Assistant Teacher in the Primary Government School at Village Bagod. The trial court acquitted them of the charge under the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 but found them guilty of the offence under section 376(2)(G) of the Indian Penal Code and sentenced them to ten years rigorous imprisonment and a fine of Rs.2,000/- each under that section. It further found them guilty of the offence under section 506 Part II of the Indian Penal Code for which they were sentenced to one year rigorous imprisonment. Aggrieved by the judgment and order of the trial court, the appellant Malkhansingh preferred Criminal Appeal No. 49 of 1997 while the other two appellants filed Criminal Appeal No. 76 of 1997 before the High Court of Madhya Pradesh at Jabalpur. The High Court by its impugned judgment and order of March 11, 2002 dismissed the appeals. The appellants have preferred these two appeals by special leave.

The case of the prosecution is that the prosecutrix Kumari Lusiya was working as Assistant Teacher in the Government Primary School at village Bagod. She was aged about 28 years and was unmarried. On March 4, 1992 at about 11.30 a.m. she boarded a bus to go to Bagod and alighted from the bus at about 1.00 p.m. at a place known as Zero Chain Puliya from where her school was located at a distance of about 1 kilometer. After alighting from the bus she proceeded on foot to the school in village Bagod. When she was near the tapara of Baldar Khan she noticed that she was being followed by three persons. When she proceeded some distance she suspected that some of them had come very close to her. She moved to the edge of the path-way giving way to the persons behind her to go ahead. However, one of them, later identified at appellant Maharajsingh, caught hold of her hands from behind. The prosecutrix objected and raised an alarm calling out for Baldar Khan but no one came to her rescue. On the other hand appellant Malkhansingh took out a knife and

threatened her. Appellant Musab Khan also took out a knife and threatened her into silence. Two of them then dragged her towards the canal where she was further threatened and made to lie on the ground. When again she persisted in raising alarm, appellant Maharajsingh placed a knife on her neck and tried to press her neck. Thereafter the appellants Musab Khan and Malkhansingh removed her clothes and Musab Khan was the first person to sexually assault her followed by Maharajsingh and Malkhansingh. Thereafter they left her giving threats of dire consequences if she reported the matter to the police and reminded her that she would meet the same fate, which Madam Rekha had met, if she reported the matter to the police.

After the occurrence the prosecutrix left for her home at Bagod and went to school at about 3.00 p.m. On the next day she attended the school but thereafter went to Vidisha accompanied by another teacher Mangalsingh. At Vidisha she met the Deputy Director of Education, one Mr. Dutta, on March 6, 1992 to whom she narrated the incident and told him that the three boys were after her life and it was not safe for her to go back to Bagod. She requested that she may be transferred to some other school. According to the prsocutrix, Mr. Dutta attached her to a school at Khamkheda with effect from March 10, 1992. She narrated the incident to her colleague Shri Mangalsingh on March 12, 1992, who inturn reported the matter to Kaluram, PW.3, who was the President of District Teachers Association. On March 14, 1992 Shri Kaluram, PW.3, took her to the residence of Superintendent of Police, Vidisha where the prosecutrix handed over a typed complaint to the Superintendent of Police. The said complaint was forwarded to the Kotwali, Vidisha, where a crime was registered. The prosecutrix was thereafter medically examined by Dr. Manju Singhai, PW.1, on the same day at about 6.45 p.m. Her clothes were seized and handed over to the police. The Vidisha police sent the relevant papers to Police Station Satpada, since village Bagod fell within the jurisdiction of that police station. The case was investigated and ultimately Musab Khan was arrested on March 29, 1992 while the others were arrested on March 26, 1992. The appellants were put up for trial before the Additional Sessions Judge, Vidisha, where the prosecutrix identified them as the three persons who had subjected her to sexual assault and criminal intimidation.

A few facts which may be noticed at the threshold are that the investigating officer did not consider it necessary to hold the test identification parade. Surprisingly, the prosecution did not examine its witnesses Shri Mangal Singh and Shri Dutta, Deputy Director of Education, to whom she had narrated the incident on March 6, 1992. Before the trial court as well as before the High Court it was urged on behalf of the defence that there was considerable delay in lodging the first information report and therefore not much reliance could be placed upon the testimony of the prosecutrix. It was also urged that the medical evidence on record did not support the case of the prosecution. Lastly it was submitted that in the absence of a test identification parade, the identification of the appellants by the prosecutrix before the trial court had no value whatsoever and, therefore, the conviction of the appellants was not justified in law.

The trial court as well as the High Court have carefully considered the evidence on record and have come to the conclusion that the delay, if any, in lodging the first information report was fully explained by the prosecutrix and was strongly supported by the circumstantial evidence on record. The courts below have noticed the fact that the prosecutrix was living all alone and was an unmarried person, about 28 years of age. She did not have any

family member to whom she could have narrated her story immediately after the occurrence. Moreover the sense of shame coupled with the fear on account of threats given out by the appellants must have deterred her from immediately reporting about the occurrence to others. Even so, according to her, she narrated the incident to Shri Dutta, Deputy Director of Education on March 6, 1992. Later she narrated the incident to one of her colleagues whom she found to be sympathetic towards her and thereafter when her cause was taken up by the teachers association, she could muster courage to lodge a report with the Superintendent of Police. The courts below have, therefore, rightly held that in the facts and circumstances of the case, the mere delay in lodging of the first information report does not discredit the prosecution case. The courts below have also examined the medical evidence on record and have observed that the medical evidence, to some extent, supported the case of the prosecution that the prosecutrix may have been subjected to forcible sexual intercourse within a week or two of her medical examination. The medical evidence also indicated that the prosecutrix was not habituated to sexual intercourse. We find no reason to dis-agree with the findings recorded by the courts below on these aspects of the matter.

The principal submission urged before the courts below as also before us is whether the conviction of the appellants can be sustained on the basis of the identification of the appellants by the prosecutrix in court without holding a test identification parade in the course of investigation. While the appellants contend that the identification in court not preceded by a test identification parade is of no evidentiary value, the prosecution contends that the substantive evidence is the evidence of identification in court and, therefore, the value to be attached to such identification must depend on facts and circumstances of each case. No general rule could be laid that such identification in the court is of no value.

It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is 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 proceedings. This rule of prudence, however, is subject to exceptions, 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 stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad vs. Delhi Administration : AIR 1958 SC 350; Vaikuntam Chandrappa and others vs. State of Andhra Pradesh: AIR 1960 SC 1340 ; Budhsen and another

vs. State of U.P. : AIR 1970 SC 1321 and Rameshwar Singh vs. State of Jammu and Kashmir : (1971) 2 SCC 715 ).

In Jadunath Singh and another vs. The State of Uttar Pradesh : (1970) 3 SCC 518 the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive considerations of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in Parkash Chand Sogani vs. The State of Rajasthan : (Criminal Appeal No.92 of 1956 decided on January 15, 1957) wherein it was observed :-

"It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person, who is well-known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances."

The Court concluded :

"It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani V. The State of Rajasthan (supra), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case".

In Harbajan Singh vs. State of Jammu and Kashmir : (1975) 4 SCC 480, though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in court corroborated by other circumstantial evidence. In that case it was found that that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16th December, 1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the

bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held :-

"In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh vs. State of U.P., absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant."

It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

In Ram Nath Mahto vs. State of Bihar : (1996) 8 SCC 630 this Court upheld the conviction of the appellant even when the witness while deposing in Court did not identify the accused out of fear, though he had identified him in the test identification parade. This Court noticed the observations of the trial judge who had recorded his remarks about the demeanour that the witness perhaps was afraid of the accused as he was trembling at the stare of Ram Nath, accused. This Court also relied upon the evidence of the Magistrate, PW.7 who had conducted the test identification parade in which the witness had identified the appellant. This Court found, that in the circumstances if the Courts below had convicted the appellant, there was no reason to interfere.

In Suresh Chandra Bahri vs. State of Bihar : 1995 Supp (1) SCC 80 this Court held that it is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. Thereafter this Court observed :-

"But the position may be different when the accused or a culprit who stands trial had been

seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TI parade."

In State of Uttar Pradesh vs. Boota Singh and others : (1979) 1 SCC 31 this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad day light, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

In Ramanbhai Naranbhai Patel and others vs. State of Gujarat : (2000) 1 SCC 358 after considering the earlier decisions this Court observed :-

"It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of State (Delhi Admn.) vs. V.C. Shukla wherein also Fazal Ali, J. speaking for a three-Jude Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eyewitnesses. It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless ; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned counsel for the appellants that the later decisions of this Court in the case of Rajesh Govind Jagesha vs. State of Maharashtra and State of H.P. vs. Lekh Raj had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned counsel for the appellants that the evidence of these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains

that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them."

In the light of the principle laid down by this Court we may now examine the facts of this case.

It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In the instant case the courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in court as she was found to be implicitly reliable. We find no error in the reasoning of the courts below. From the facts of the case it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely implicate them by naming them at any stage. The crime was perpetrated in broad daylight. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity. The occurrence took place on March 4, 1992 and she deposed in Court on August 27, 1992. The prosecutrix appears to be a witness on whom implicit reliance can be placed and there is no reason why she should falsely identify the appellants as the perpetrators of the crime if they had not actually committed the offence. In these circumstances if the courts below have concurrently held that the identification of the appellants by the prosecutrix in court does not require further corroboration, we find no reason to interfere with the finding recorded by the courts below after an appreciation of the evidence on record.

We, therefore, find no merit in these appeals and the same are accordingly dismissed.