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RAMESHWAR SINGH

v.

STATE OF JAMMU & KASHMIR

September 7, 1971

[J. M. SHELAT, I. D. DUA AND S. C. ROY, JJ.]

B

Criminal Trial—Accused not known to witnesses—No identification parade or description of accused in F.I.R.—Weight of Identification in Court.

Code of Criminal Procedure (Act 5 of 1898), ss. 161 and 162—Statements to police during investigation—Use of.

C The appellant was convicted of the offence of murder by shooting and the High Court confirmed the conviction and the sentence of death.

In appeal to this Court,

HELD : The conviction and the sentence should be set aside.

(1) The substantive evidence of a witness is his evidence in the trial court. But then the accused person is not previously known to a witness

D when the identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines, in addition to furnishing corroboration of his own evidence in court. [631 A-C]

In the present case, the evidence of the witness who gave the F.I.R. showed that he did not give any description of the person who was alleged

E to have fired the shots. Nor did he state in the F.I.R. that he knew the appellant previously. There was no evidence to show that the witness had identified the accused in the Committing Magistrate's Court. Therefore, his identification in the Sessions Court of the accused without any previous identification at a test parade, and without any description in the F.I.R. to corroborate it, is far too slender a piece of evidence to support the appellant's conviction. [631 F; 633 B-E; 635 D, F]

F (2) Some of the witnesses had stated in their evidence that they had heard the name of the accused being called but neither this fact nor the name of the accused was mentioned in the F.I.R. The High Court was in error in taking into consideration the contents of the statements recorded under s. 161, Cr.P.C., of the various witnesses, during the course of investigation, for the purpose of finding corroboration of their statements in court that the name of the accused was disclosed to the police. If the accused's name was really disclosed soon after the occurrence steps would

G have been taken by the investigating authorities to arrest him immediately, but no such action was in fact taken. [634 D; 636 C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 3 of 1971.

Appeal by special leave from the judgment and order dated

H October 30, 1970 of the Jammu and Kashmir High Court in Criminal Appeal No. 12 of 1969 and Criminal Reference No. 10 of 1969.

Ram Asray Misra, Risi Ram, O. P. Rana and *R. Bana,* for the appellant. A

D. Mukherjee and *R. N. Sachthey,* for the respondent.

The Judgment of the Court was delivered by

Dua, J. Only two points were argued at the bar in this appeal by special leave because if we agree with the appellant's learned counsel on these points then the appeal must succeed and the appellant must be acquitted without going into the other points relating to the appellant's guilt intended to be raised on his behalf by his counsel. The relevant facts of the case necessary for appreciating the two important points relating to the legality of the appellant's conviction may briefly be stated : B C

On the morning of October 7, 1967 a football match was being played at the Srinagar Stadium between the Kashmir University and the Punjab University teams. The Kashmir University team (hereafter called the home team) was the first to secure one goal against the Punjab University team (hereinafter called the visiting team). The players of the home team were naturally cheered by the spectators, when they scored the first goal. After a few minutes the visiting team equalised the score and a little later secured another goal against the home team. This in turn brought cheers and applause for the visiting team from the spectators. It appears that some of the more enthusiastic spectators rushed to the football ground and are said to have made some provocative gestures towards the players of the home team. This apparently annoyed not only the players of the home team but also their sympathisers amongst the spectators and a clash between the rival sets of sympathisers of the two teams amongst the spectators followed. As usually happens on such occasions stones were thrown at each other by the two rival groups. These rival groups are stated to be those of Kashmiris on the one side and Punjabis on the other. The headquarters of the P.A.C. (Police Armed Constabulary) are also stated to be located in the Stadium and some members of that force were present at the match. The young men of the P.A.C. came to the spot and with their *dandas* put the people to flight. Up to this stage there seems to be no controversy. According to the prosecution case as stated by P. W. Abdul Gani Sheikh, on April 24, 1969 when the people had left the Stadium the appellant, to use the words of the witness in his examination-in-chief : D E F G

> ". . . . . was seen descending the bund, in the direction of the stadium cycle-shed. The accused carried a gun in the hand. He had a helmet on the head. H

A Getting down the bund, the accused got near the cycle shed. There he did something for a minute or a half. Forthwith he opened the door of the cycle-shed and came out. The accused was facing the Militia wall. As he turned his face that side, he fired a shot. The shot hit the Militia wall. I was at a distance of nearly 50 B yards from the accused. After firing the shot, the accused came on the main road which leads to the aerodrome. A zamindar was going on it. At the sight of the accused he stopped. The accused fired a shot at him. He fell along the drain adjoining the Militia wall. Thereafter the accused turned to the right side. C There, on the other side of the road, in the direction of Hazuri Bagh Maidan, a young man in suit and boots was going there. At the sight of the accused he too stopped. There was exchange of some talk between him and the accused. I did not hear what he spoke. However, I saw that man facing the accused, with D folded hands. Then the accused fired a shot at him. He fell down immediately on receiving the shot. Then the accused again turned towards that Zamindar, at whom he had fired the first shot. He fired another shot at him. Thereafter, the accused turned towards a boy, aged 15 or 16 years, who was going towards Mira Kadal. He fired a shot at him. The boy did not fall E down, may he took to his heels. He ran in the direction of the tonga-stand on the side of Mira Kadal. Thereafter he fired again at the youngman in suit and boots, at whom he had already fired a shot. Thereafter he fired another shot at the Zamindar. The accused fired more shots as well after that. In the F meantime, three more men appeared there. They were the accused's men. Besides, a sardar of the K. A. P. also appeared at the spot. They got hold of the accused and took him inside. They were trying to snatch the rifle from the accused. Another person held the rifle and the accused was taken inside the G stadium. I made a report of this occurrence at police station Sher Ghari, which may be at a distance of 150 yards from the place of occurrence. I made an oral report. I have heard the contents of the first information report. The same are correct. The police recorded what I stated. I affixed my signatures to it. It is correct. (Note : It is marked Ext. P/1)" H

The learned Sessions Judge, Srinagar, Qazi Mirajudin, in whose court the appellant was tried for offences under ss. 302 and 307, I.P.C. convicted him for both the offences imposing

the sentence of death under s. 302 and rigorous imprisonment for five years under s. 307, I.P.C. Charges under s. 302 related to the death of Ghulam Mohd. Fuchey who died in the hospital on the day of the occurrence and also to the death of Aziz Teli who died two days later on October 9, 1967 at 5-50 p.m. The charge under s. 307, I.P.C. related to the injuries caused to P. W. Abdul Ghani Sheikh.

On appeal, the High Court which had before it also the murder reference for confirmation of the death sentence, considered it necessary to examine the ballistic expert for elucidating certain points. That Court permitted the appellant also to examine another ballistic expert Siyaram Gupta by name and also Shri Ratan Sahgal and C. L. Wasan, Commandant (U.P. P.A.C.). C. L. Wasan was allowed to be examined even though he had already been examined earlier as a prosecution witness. It may also be stated here that the appellant wanted to produce some more witnesses in defence, but permission to do so was declined by the High Court and the appellant's Counsel before us raised a grievance on this score as well. The High Court, after considering the evidence, dismissed the appeal and confirmed the sentence of death. An oral prayer for certificate to appeal to this Court was declined.

On behalf of the appellant it is not disputed before us that somebody did resort to firing during the disturbance in the course of the football match on October 7, 1967 and two persons were actually killed as a result thereof. The first question raised before us in this connection is that there is no legal evidence that it was the appellant who fired the fatal and other shots in question on this occasion. This indeed is the principal point urged. And the second point which arises out of discussion on this point relates to the scope and effect of ss. 161 and 162, Cr. P.C. and the admissibility at the trial of the statements made by some of the witnesses to the police during investigation under s. 161, Cr. P.C. The High Court appears to have relied on such statements in their entirety for seeking corroboration of the statement made by the prosecution witnesses in court and ultimately for the purpose of sustaining the appellant's conviction. Incidentally, the manner in which the investigating agency conducted the investigation of this case also came up for serious criticism at the hands of the appellant's counsel, it being urged that the investigation was not objective and impartial but smacked of prejudice against the appellant and was, therefore, unfair. The investigation was however, sought to be justified by the counsel for the State. The evidence of identification of the appellant on which the courts below placed reliance for convicting the appellant has to be scrutinised with great care in order to see if such evidence is

A legally admissible and on the facts and circumstances of this case this scrutiny must, in our opinion, include within its purview the manner in which the investigation of the alleged offences was conducted by the authorities concerned.

Before dealing with the evidence relating to identification of
B the appellant it may be remembered that the substantive evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right
C 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 and that all the necessary precautions and safeguards are
D effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is thus and
E thus alone that justice and fairplay can be assured both to the accused and to the prosecution. The identification during police investigation, it may be recalled, is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court. The identification proceedings, therefore, must be so conducted that
F evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in court of the identifying witness.

We may now turn to the evidence on the record. Abdul Ghani Sheikh who claims to be the eye witness to the occurrence
G lodged the first information report (Ex. P-1) at 11-30 a.m. at the police station only about 200 feet away from the stadium. In order to appreciate the value of this report and the value of the testimony of this witness in court in regard to the description of the alleged culprit we consider it proper to reproduce the whole of this report. It says :—

H

> "At the Stadium a football match was being played. From there the P.A.C. men chased and turned out the people. All the people came out from the gates on

the East and North. They were going back through the Hazuri Bagh Road. I was standing near the cycle-shop which is situated close to the Stadium chowk. A P.A.C. jawan came out of the main gate. He carried a rifle. He fired a shot towards the road. It went in the direction of the Militia wall. Thereafter the P.A.C. Jawan came on the road and fired shots. He went towards the Militia gate and inflicted bullet injuries on three of the persons going on the Road. Then a P.A.C. Sardar and a B.S.F. Jawan with three P.A.C. men who carried Dandas in the hands, got held of the said Jawan. They took him inside the stadium. The said Jawan fired nine or ten shots recklessly, though the way-farers were going on the road in a peaceful manner. There was no crowd, nor was there any breach. * * * *

Complainant."

. . . . .

In the trial court in his examination-in-chief he deposed that he had seen the accused coming down the bund with a gun in his hand and helmet on his head and that he fired the fatal and other shots. The relevant portion has already been reproduced earlier in this judgment. In cross-examination he stated that apart from the first information report he did not make any statement to the police excepting that he signed the seizure memos. He also could not remember if he had stated to the police that the accused was known to him. He was further unable to remember if the police had asked him this question. After the occurrence he saw the accused only in court and he was never required to identify the accused earlier. The accused, according to him, was not putting on a helmet and had also grown a beard when seen in court though at the time of the occurrence the accused had a helmet on his head. At this stage we may appropriately point out that according to P. W. Chaudhuri Ghulam Nabi Mir, S.R.O., Maharajganj, who, on hearing reports of gun shots while he was in the police station, had come out on the road, the statement of Abdul Ghani Sheikh was actually recorded by him. This, according to the S.H.O. was recorded near the Stadium gate at the 'T-chowk' which means the police-beat where three roads meet. On this report witness endorsed a note to the *thana* for drawing up F.I.R. Chaudhri Ghulam Nabi Mir has also stated in cross-examination that he recorded the statements of the prosecution witnesses during investigation under s. 161, Cr. P.C. Curiously all those statements were admitted in evidence and marked as exhibits by the trial court. According to the concluding part of Ghulam Nabi Mir's cross-examination in court, Abdul Ghani Sheikh had at first met him near the verandah of the

police station and since he was leaving in the direction of the place of occurrence Abdul Ghani Sheikh followed him. From the statements made to the police which were exhibited in evidence we find that Abdul Ghani Sheikh also made a statement on October 7, 1967 marked as Ex. D-2. It is important to point out that, according to Abdul Ghani Sheikh, he had not made any statement to the police besides the report Ex. P-1. From the testimony of P. W. Abdul Ghani Sheikh it is obvious that he did not give any description of the person alleged to have fired the shots in question in Ex. P-1 which was the first information given by him to the police and on which the investigation started; nor did he state in Ex. P-1 that he knew the appellant previously. He was never made to identify the accused. He has obviously told lies on a vital point when he says in the witness box that excepting Ex. P-1 he had made no other statement to the police. Though the contents of those statements cannot be used for any purpose other than that laid down in s. 162, Cr. P.C. the fact of that statement having been made can certainly be relied upon for the purpose of showing how untruthful Abdul Ghani Sheikh is or at least, taking a charitable view of this contradiction on his part, how undependable his memory is. No attempt was made on behalf of the State before us to show if this witness had identified the accused in the committing magistrate's court. We have referred to the statement of this witness under s. 161, Cr. P.C. because the High Court seems to have taken into consideration not only the statement of this witness under s. 161, Cr. P.C. for seeking corroboration of his testimony in court but the statements of a large number of other witnesses during investigation have also been used for this purpose. This is what the High Court has said in its judgment:

> "Lastly it was contended that although some of the eye witnesses have stated that the appellant Rameshwar Singh was called by name at the spot by his fellow constables and saying that he would get involved, yet the name of the appellant was not mentioned in the FIR, nor was the fact that the appellant was called by name and warned by his fellow constables stated therein. This circumstance in our opinion is not sufficient to demolish the prosecution case or cast any serious doubt thereon. To begin with, the first informant, Abdul Ghani Sheikh, has not stated in his evidence about the fact of the accused being called by name by his fellow constables. Furthermore, this was a matter of minute detail and since the FIR was lodged immediately after the occurrence, it may be that this particular detail was not mentioned in the FIR by the informant. What is more important is that all the eye

witnesses including the informant were examined by the police immediately after the occurrence was over and the defence has not cross-examined the investigating officer on the question that the fact mentioned above was not stated by the eye witness before the Investigating Officer at that time. Thus it should be taken for granted that this fact though not mentioned in the FIR was clearly stated by the eye witnesses in their statements before the police soon after the FIR was lodged. In fact the statements of the eye witnesses recorded by the police which have been marked by the court below as Exs. D-1 to 6 clearly show that the above mentioned fact was stated before the police when they were examined soon after the FIR was lodged. Thus the charge that said fact appears to be belated one appears to us to be groundless."

The High Court was clearly in error in taking into consideration the contents of the statement recorded under s. 161, Cr. P.C. during the course of investigation for the purpose of finding corroboration of the statements made in court. Section 162, Cr. P.C. lays down the limited use of such statements. It says :—

"Statements to police not to be signed; use of statements in evidence.

(1) No statement made by any person to a police in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made;

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 and when any part of such statement is so used, any part thereof may also be used

A in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, Clause (1) of the Indian Evi-
B dence Act, 1872, or to affect the provisions of Section 27 of that Act."

The language of this section is plain and explicit and it admits of no doubt as to its meaning. We do not consider it necessary to refer to a large catena of decisions reported in law reports
C and cited in text-books stating the legal position with regard to the restricted use of such statements as laid down in s. 162, Cr. P.C. prohibiting the court from using them as corroborative of the statements in court.

Once this part of the reasoning of the High Court is eliminated all that is left is the statement of Abdul Ghani Sheikh in
D court and his report Ex. P-1 made to the police. That report, it is not disputed, does not contain any description of the alleged culprit. Had the witness known the culprit earlier, one would have reasonably expected him to so state in the report. If, however, without knowing him earlier he had formed a distinct impression of the culprit's looks and bearing so as to be able to
E identify him later, then also one would have expected this witness to give in the report the description of the culprit as seen by him so as to provide the investigating authorities with something tengible as guideline to start with the investigation. His identification in court without any previous identification at a test parade and without any description in Ex. P-1 to corroborate it, is far
F too slender a piece of evidence to base the appellant's conviction thereon. So, Abdul Ghani Sheikh's evidence seems to us to be of no value in bringing home the offence to the appellant.

In the opinion of the High Court the evidence of Abdul Ghani Sheikh and of Noor Hussain is corroborated by P.Ws. Abdul Hamid and Noor Mohammed Sheikh. This is what the High
G Court says :

> "The evidence given by Abdul Ghani Sheikh the informant and also Noor Hussain, a resume of which has been given above is corroborated by Abdul Hamid and Noor Mohd. Sheikh PWs in all material particulars. All these witnesses, Noor Hussain, Abdul Hamid and
H Noor Mohd. have stated that they know the accused before the occurrence and they had occasion to see him before. They disclosed the name of the accused on the

very date of occurence when they said that they heard his three companions shouting at him "Ramesh what are you doing, don't be mad, you will be involved." Ghulam Nabi Mir, S.I. P.W. has clearly stated that it was on the very day of occurrence that the name of Rameshwar Singh, accused, was disclosed by Abdul Hamid and by some other witnesses."

Here again, the High Court has committed the same error in seeking corroboration from the statements said to have been made to the police by Abdul Hussain and others during investigation. We have also to consider further the circumstance that the High Court has not adverted to the omission on the part of the investigating authorities to take steps to arrest the appellant soon after the alleged disclosure of his name to them by the said witnesses, According to Ch. Ghulam Nabi Mr. S.H.O., the appellant's name was disclosed on the very day of the occurrence. There is no plausible reason discernible on the record as to why such steps were not taken if the appellant's identity as a result of the disclosure of his name became known to the authorities the same day. The High Court appears to us not only to have erroneously disregarded the forms of legal process but has also failed to advert to important and vital aspects, thereby causing serious prejudice to the appellant. In view of what has just been stated *prima facie* grave and substantial injustice cannot but be considered to have resulted from the infirmities in the impugned judgment.

Let us now see if the evidence of Noor Hussain, Abdul Hamid and Noor Mohd. Sheikh in any way advances the case of the prosecution. Abdul Hamid (P.W. 2) who has a cycle shop about 9 or 10 yards from the Stadium *chowk* claims to have gone to see the match in question. When the P.A.C. young men are said to have turned the people out of the Stadium during the course of the trouble this witness also went out. He claims to have watched the entire occurrence from the roof of his shop through the window panes because he was afraid of being seen in the open lest he may also be fired at. It is from there that he claims to have heard when the P.A.C. men addressed the appellant : "Have you turned mad ? Ramesh, have you turned mad ?" This seems to us to be wholly unacceptable and it appears to us that these words have been introduced in the evidence for the purpose of providing the missing link of identification of the appellant. Noor Mohd. Sheikh is the brother of Abdul Ghani Sheikh. He also did not know the appellant and he never saw him after the occurrence till he came to court, several months later. Though he claims to have given the description of the culprit to the police and to have also expressed his ability to identify him, he was for reasons not disclosed on the record, never

A made to identify the appellant at any test identification parade. He also claims to have gone to the police station with Abdul Ghani Sheikh though the latter claims to have gone there all alone. Now, if he had actually heard the name of the appellant being shouted by the P.A.C. men as claimed by him and had accompanied his brother to the police station then there is no B reason why the name of the culprit was not disclosed to the police and not included in the report, Ex. P-1. Noor Hussain has also stated that three youngmen of the appellant's unit came to the place of occurrence after the appellant had fired 8 or 9 shots and they shouted addressing the appellant: "Ramesh what are you doing, you will be implicated" and according to him they C continued shouting these words for some time, before they secured the appellant and took him inside. In his cross-examination he has admitted that on the day of the occurrence no police officer asked him whether he was an eye witness. When he was approached by the police later he is stated to have told them: "The whole of the occurrence has taken place outside the *thana* and you are not aware of it!" Beyond this remark there was, accord- D ing to him, no conversation between him and the police and indeed he asserts that no statement was taken from him on the day of the occurrence. In fact his position is that the statement in court was the only statement he had ever made relating to the occurrence. It is interesting to note that his statement before the police purporting to be under s. 161, Cr. P.C. is exhibited as E D-6 and is dated October 7, 1967. We are wholly unable to place any reliance on the testimony of anyone of these witnesses, who seem to us to be clearly untruthful.

Further, it appears from the evidence of C. L. Wasan (D.W. 2) who was again examined in the High Court that an informal F identification parade of all the constables belonging to U.P. (P.A.C.) contingent had been held on October 7, 1967 in which the appellant was also present. Some members of the public were also there who were asked to identify the culprit but none of them were able to do so. We need not dilate on this evidence as there was no formal record of any such test identification G parade.

The significant fact, however, which casts serious doubt on the truth of the story of disclosure of the appellant's name to the police on October 7, is the admitted omission by Ch. Ghulam Nabi Mir, S.H.O. to summon the appellant for interrogation soon after the alleged discovery of his name. No convincing or even H intelligible explanation is forthcoming for interrogating the other P.A.C. men on the 8th and 9th October. Such investigation can scarcely inspire confidence.

As a result of the foregoing discussion we do not consider it possible to uphold the conclusion of the High Court on the legal evidence existing on this record. In the absence of any test identification parade and excluding from consideration the statements made under s. 161, Cr. P.C. we find no reliable material on which the appellant's conviction can be sustained. The High Court was in error in affirming the appellant's conviction for the offence of murder and confirming the sentence of death. It was equally in error in upholding his conviction and sentence under s. 307, I.P.C. The appeal accordingly succeeds and allowing the same we acquit the appellant.

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V.P.S. *Appeal allowed.*