A HEM SINGH @ HEMU

v.

STATE OF HARYANA

Criminal Appeal No. 495 of 2008

MAY 6, 2009

B

[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal code, 1860 – ss. 302, 307, 353/34 – Prosecution under – Gun battle alleged between Police party and accused party – Resulting in death of one accused, one constable and C *injury to one police official – Admission of Police witnesses that they did not know the accused from before – TI Parade not conducted – Identification of the accused for the first time in the Court – Death of the constable found to be caused by service revolver of police – No recovery of such weapon alleged* D *to be causing injury – Conviction by courts below – On appeal, held: Identification of the accused, injuries from the alleged arms, existence of common object not proved – Murder of the constable also not proved to be from the weapon of the accused – Accused liable to be acquitted – Arms Act, 1959 – s. 25.*

E **Appellants were prosecuted u/ss. 302, 307, 353 r/w s. 34 IPC. Proseuction case was that PW 10 (police Inspector) got information that one 'S',, appellant-accused and one accused 'L' would be coming to a particular village. He deputed ASI (PW 3), constable (PW2) and a** F **constable 'L' to the said village in civil clothes. The accused recognized the policemen and opened fire and a gun battle ensued between them. Accused 'S' and constable 'L' died on the spot. PW 2 also received a gunshot injury. Accused 'L' absconded. Appellants-**G **accused were arrested. Accused 'H' was arrested in some other case wherein he, in police custody, admitted his involvement in the present case and that he and the absconded accused had fired at the constable (deceased). In that case, proceedings under Arms Act was**

H

initiated against him, wherein he was acquitted. In the instant case, charges u/ss. 353, 302, 307 r/w s. 34 IPC were framed against the accused persons. Additional charge u/s. 25 of Arms Act was framed against accused 'V'. Trial court convicted all the accused u/ss. 302, 307, 353 r/w s. 34 IPC. Accused 'V' was acquitted of the charge u/s. 25 of Arms Act. High Court confirmed the conviction. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1 Courts, ordinarily, do not give much credence to identification made in the court for the first time and that too after a long time. In the present case, P.Ws.1, 2 and 3 in their depositions admitted that they had not been knowing the accused from before and despite so, no Test Identification Parade was held. The accused persons having been identified for the first time in the court, it is difficult for any court to rely upon the same and that too after such a long time. Appellants were not known to the police officers, they were not involved in any other case. In fact, so far as appellant-accused 'H' is concerned, no case at the relevant time was pending against him. Only because the deceased accused allegedly called them by their names, which appears to be wholly unlikely, they could not have been identified particularly in view of the fact that the incident had taken place in an isolated area and that too on a dark night. [Paras 10 and 11] [898-G-H; 899-A-C]

Mahabir v. The State of Delhi 2008 (6) SCALE 52; *Amitsingh Bhikamsing Thakur vs. State of Maharashtra* (2007) 2 SCC 310; *Bollavaram Pedda Narsi Reddy and Others v. State of Andhra Pradesh* (1991) 3 SCC 434 – relied on.

Nathuni Yadav vs. State of Bihar (1998) 9 SCC 238; *Bharosi vs. State of M.P.* (2002) 7 SCC 239; *S. Sudershan Reddy vs. State of A.P.* (2006) 10 SCC 163; *State of U.P. vs. Sheo Lal and Ors* 2009 (2) SCALE 582 – distinguished.

A 2. It stands admitted that as on the date of commission of offence appellant-accused 'H' was not involved in any other criminal case. Trial Judge did not frame any charge as against accused 'H' or accused 'S' for commission of offence under the Arms Act. It is also B undisputed that appellant-accused 'V' has been acquitted in the case of possessing a firearm. Three bullets were recovered by the investigating officer; two of them which had hit the deceased accused and the constable were fired from .38 bore revolver. .38 bore revolvers indisputably were used by the police officers. P.W.2 however, received C a gunshot injury fired from .315 weapon. No such weapon was recovered from any one of the accused. [Paras 7 and 8] [895-G-H; 896-A-B]

3. Existence of any common object amongst the accused had also not been proved. The deceased D accused furthermore could not have been instrumental in murdering the police constable. The constable died of a firearm injury shot from a service revolver, i.e., at the hands of the police party only. Such a revolver, thus, was not and could not have been used by any of the accused E persons. [Para 12 & 13] [901-C-D]

Yunis @ Kariya vs. State of M.P. (2003) 1 SCC 425 – referred to.

Case Law Reference

F 2008 (6) SCALE 52	Referred to	Para 10
(2007) 2 SCC 310	Referred to	Para 10
(1991) 3 SCC 434	Relied on.	Para 11
(1998) 9 SCC 238	Distinguished	Para 11
G (2002) 7 SCC 239	Distinguished	Para 11
(2006) 10 SCC 163	Distinguished	Para 11
2009 (2) SCALE 582	Distinguished	Para 11
H (2003) 1 SCC 425	Referred to.	Para 12

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 495 of 2008

From the Judgement and Order dated 01.08.2006 of the High Court for the States of Punjab and Haryana at Chandigarh in Criminal Appeal No. 392-DB of 2005.

WITH

Criminal Appeal No. 496 of 2008

Sushil Kumar Atul Kumar, S.K. Verma, Manish Mohan, Anita Mohan, Nirmal K. Ambastha (for Ugra Shankar Prasad), for the Appellant.

Rajeev Gaur 'Naseem', Satish Kumar Hooda (for T.V. George), for the Respondent.

The Judgement of the Court was delivered by

S.B. SINHA, J.

1. These two appeals arising out of a common judgment and order dated 1.8.2006 passed by a Division Bench of the Punjab & Haryana High Court at Chandigarh in Criminal Appeal Nos. 311-DB of 2005 and 392-DB of 2005 were taken up for hearing together and are being disposed of by this common judgment.

2. Appellants were prosecuted for commission of offences punishable under Section 302, 307, 353 and 34 of the Indian Penal Code (for short, "IPC"). They were, it is of some significance, not charged for commission of offence punishable under Section 25 of the Arms Act.

3. The prosecution case is as under.

During the night intervening 24/25.12.1999, Inspector Kuldeep Singh (P.W.10) received a secret information that the accused Sattey (since deceased), Sunil, Vinod, Hemu (appellants herein) and one Pappu @ Lilu (absconding) of U.P. (said to be dacoits), would be coming to Lakarpur. On the basis

A of the said information, Inspector Kuldeep Singh deputed ASI Randhir Singh (P.W.3), Constable Ramesh Kumar (P.W.2) and Constable Lasker Singh (deceased) to the said village in civil cloths. Allegedly, on recognizing the policemen, accused persons opened fire and a gun battle ensued between them. B Accused Sattey alias Satender received a gun shot injury. He died on the spot. Other accused persons were said to have fled away. Constables Ramesh Kumar (P.W.2) and Lasker Singh chased them. While the exchange of fire was going on, Lasker Singh received a gunshot injury. He also died on the spot. P.W. C 2 also received a gunshot injury.

A First Information Report ("FIR" for short) was lodged by P.W.10 in respect of the aforesaid incident at about 1.30 a.m. registered as FIR No. 775 dated 25.12.1999 under Sections 302, 307, 353 IPC and Sections 25, 45 and 59 of the Arms Act D at P.S. NIT Faridabad.

On the same day, i.e. on 25.12.1999, P.W. 10 prepared a site plan in which the name of the appellant - Hemu was not mentioned.

E On or about 5.1.2000, P.W.10 arrested Vinod from Village Dagarpur, Police Station Khekhra (UP). He was interrogated on 6.1.2000 and 11.1.2000 and on the basis of his purported disclosure, a pistol was recovered. On or about 19.1.2000, the Investigating Officer arrested Sunil from Delhi after obtaining F warrants of his arrest and recorded his confessional statement on 23.1.2000. He also took in possession the pistol and the car said to have been used by the accused on 25.12.1999.

Indisputably, Hemu was arrested on 6.1.2000 by Inspector Palvinder Singh (P.W. 17) while he was riding on a red Yamha G Motorcycle. Allegedly, a pistol was recovered from him. A case under Section 302, 185, 353 IPC and 27 Arms Act had been registered against him being FIR No. 4 of 2000 at P.S Sarita Vihar, New Delhi. A disclosure statement of Hemu was recorded on or about 6.1.2000. It is alleged that Hemu was forced to admit H his involvement in the present case and the said disclosure

statement was obtained by undue influence and coercion at the hands of police.

Indisputably, another disclosure statement of Hemu while he was in police custody on 2.2.2000 was recorded wherein it was mentioned that the Hemu and Lilu had fired at Constable Lasker Singh who had died. A case under Arms Act was initiated against him. He was acquitted in the aforesaid case by the learned Additional Sessions Judge, New Delhi in Appeal No. 101 of 2001 holding that the alleged firearm was not in a working order and the same could not have been used.

The postmortem was conducted on the bodies of Constable Lasker Singh and accused Sattey. The Postmortem reports were submitted and the recovered articles were taken in custody and a memo therefor was prepared.

Accused Pappu could not be arrested, therefore, he was declared a 'proclaimed offender'.

After completion of the investigation, charge sheet was filed against Hemu, Vinod, Sunil (appellants herein) and Pappu @ Lilu. Charges under Section 353, 302, 307 IPC read with Section 34 IPC were framed against the accused persons while additional charge under Section 25 of the Arms Act was framed only against Vinod.

Accused persons denied the charges and claimed to be tried.

4. A large number of witnesses were examined by the prosecution in support of its case.

After considering the materials on record, the learned trial judge, Faridabad held all the accused persons guilty for commission of the offences under Sections 302, 307 and 353 of IPC read with Section 34 of IPC. However, Vinod was acquitted in respect of the charge under Section 25 of the Arms Act.

5. Criminal Appeals preferred thereagainst were

A dismissed by the High Court by reason of the impugned judgment, inter alia, holding:

> "We do not find any merit in the arguments advanced by the learned counsel for the appellants that since no injury is attributed to Hem Singh alias Hemu accused, therefore, B he cannot be said to have shared common intention with all the accused because it has come in evidence that accused were five in numbers. Admittedly, accused Sattey and other accused were required in number of cases relating to dacoity and other heinous crimes. The police C party had secret information and was following them with an intention to nab them. Such accused persons who always remained equipped with the loaded arms to face resistance of any kind from any source, certainly had the common intention. It is something different that out of five D accused, one accused namely Sattey died and the other ran away, whereas three accused namely Hem Singh alias Hemu, Vinod and Sunil were arrested. The arms were recovered from them, therefore, Hem Singh though has not been attributed any injury, could not be said to have no E common object and did not participate in the crime along with the accused, therefore, complicity of accused Hem Singh alias Hemu cannot be ruled out since the three accused were arrested and, therefore, their conviction under Section 34 of IPC was justiciable.
>
> F No other point has been urged and no law has been cited to assail the impugned judgment.
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> The close scrutiny of the trial court judgment does not suggest any apparent illegality suggesting interference by G us."

6. It is not in dispute that none of the prosecution witness knew any of the accused – appellants. However, in Column No.2 of the FIR, not only their names but also their parentage and complete addresses were stated. It is, however, not clear as to H whether the name of the accused Hemu was recorded in the

said FIR or not, the translated version thereof has been placed before us. We may reproduce the same:

"At the Police Station

On receipt of original writing a case (FIR) under above said offence has been registered, Copies of FIR have been prepared as per procedure which are being sent to the concerned officers as a special report through special constable Ram Kishan No. 1825. Copy of police file together with original writing is being sent to the Inspector CIA for further investigation at the spot through in coming constable. I, the Inspector/SHO of the police station along with C. Shiv Parshad 1441. C. Suraj Mal 2106 on official Jeep driven by C. Sunder Singh 1824 proceed to the spot.

Sd/- Kuldeep Singh
Insp./SHO P.S. NIT
Faridabad
Dt. 25.12.99
(in Hindi)

Received at 4.40 A.M. at my residence
Sd/-
CJM, Faridabad
25.12.99"

7. Accused Hemu was arrested on 6.1.2000 at Delhi. He was found to have been in possession of a firearm. In that case, he is said to have been confessed his involvement in the present case. He was arrested in this case on 22.1.2000 on the basis of a production warrant issued from Delhi by P.W.10.

It, however, now stands admitted that as on the date of commission of offence Hemu was not involved in any other criminal case. It is also undisputed that accused Vinod has been acquitted in the case of possessing a firearm.

We may furthermore place on record that three bullets were

A recovered by the investigating officer; two of them which had hit Accused Sattey and Constable Lasker Singh were fired from .38 bore revolver. .38 bore revolvers indisputably were used by the police officers.

P.W.2 Ramesh, however, received a gunshot injury fired
B from .315 weapon. No such weapon was recovered from accused Sunil, Vinod or Hemu.

So far as the recovery of weapon from Hemu and Sunil are concerned, as noticed hereinbefore, Hemu had been
C acquitted of the charge of possessing any weapon by a Delhi Court.

So far as the finding of the High Court that Sattey and the other accused persons were required in a number of cases for committing dacoity and other heinous crimes are concerned,
D we may notice that Kuldeep Singh (P.W. 10) categorically admitted that no case was pending against accused Hemu at the time of occurrence.

8. The learned trial judge did not frame any charge as against Hemu or Sunil for commission of offence under the Arms
E Act. Even Vinod was acquitted of that charge.

Appellants herein admittedly were not known to the police officers. Only Sattey was known to them. P.W.1 – Anoop Singh in his deposition categorically admitted that he did not know
F the assailants previously. After their arrest, no identification parade test was held. Although the first informant as also witnesses in their depositions proceeded on the basis that all the accused had been coming in a Maruti Car and they were heavily armed, no arm was recovered from any of them.

G The only statement which was relevant for this case had been made by P.W.2 – Ramesh Kumar in the following terms:

> "Accused Sattey, who has since died said to his companions pointing towards us, that police men in plain clothes have come and called upon Lilu, Hem Singh and
H

Vinod to open fire on us. Then those persons who were five in number started firing at us." A

9. How their names could be taken is beyond anybody's comprehension. Even two persons, namely, Lilu and Vinod were called by their first names. How the Officer In-charge even could ascertain their actual names has not been disclosed. He admitted that apart from Sattey, he had not seen any accused persons on previous occasion. Why despite the same, identification parade was not held has not been explained. Appellants were identified only in court. B C

10. Mr. Rajeev Gaur 'Naseem' learned counsel appearing on behalf of the State would contend that identification for the first time in court is permissible in law.

There cannot be any dispute so far as the aforementioned proposition of law is concerned. The said principle, however, should be applied having regard to the facts and circumstances of each case. Courts, as is well known, ordinarily, do not give much credence to identification made in the court for the first time and that too after a long time. D

In *Mahabir v. The State of Delhi* [2008 (6) SCALE 52], this Court held: E

"10. As was observed by this Court in *Matru v. State of U.P. (1971) 2 SCC 75* identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (*See Santokh Singh v. Izhar Hussain (1973) 2 SCC 406*). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to F G H

A identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first B impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, C 1872 (in short the 'Evidence Act'). It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification D parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution."

E 11. 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 F 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 G character."

{See also *Amitsingh Bhikamsing Thakur vs. State of Maharashtra* [(2007) 2 SCC 310]}

In the present case, P.W.1, 2 and 3 in their depositions admitted that they had not been knowing the accused from before H

and despite so, no test identification parade was held. The accused persons having been identified for the first time in the court, it is difficult for any court to rely upon the same and that too after such a long time.

11. As indicated hereinbefore, appellants were not known to the police officers; they were not involved in any other case. In fact, so far as the Hemu is concerned, no case at the relevant time was pending against him. Only because Sattey allegedly called them by their names, which appears to be wholly unlikely, they could not have been identified particularly in view of the fact that the incident had taken place in an isolated area and that too on a dark night.

In *Bollavaram Pedda Narsi Reddy and Others v. State of Andhra Pradesh,* [(1991) 3 SCC 434)], this Court held:

> "In the present case, the appellants are admittedly persons with whom the two witnesses had no previous acquaintance. The occurrence happened on a dark night. When the crime was committed during the hours of darkness and the assailants are utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance. The necessity to have the suspects identified by the witnesses soon after their arrest also arises..."

In *Nathuni Yadav vs. State of Bihar* [(1998) 9 SCC 238], whereupon reliance has been placed by the learned counsel for the State, this Court observed that the lack of moonlight or artificial light does not per se preclude identification of the assailants. It was noted as follows (particularly where the accused are known from before):

> "Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of

A stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the B assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that C there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, D though meagre, was enough for the assailants why should we think that the same light was not enough for the injured who would certainly have pointedly focussed their eyes on the faces of the intruders standing in front of them. What is sauce for the goose is sauce for the gander."

E The said principle was reiterated in *Bharosi vs. State of M.P.* [(2002) 7 SCC 239] and *S. Sudershan Reddy vs. State of A.P.* [(2006) 10 SCC 163].

{See also *State of U.P. vs. Sheo Lal & Ors.* [2009 (2) SCALE 582]}

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However, in our opinion, the said principle is not applicable in the present case as there was no specific targeting by the assailants here. What ensued between the parties was a pitched gun battles which lasted for only five to six minutes close to G midnight and that too at a considerable distance.

12. Mr. Naseem would also submit that as Sattey was involved in commission of a large number of offences, all others could be proceeded against for commission of offence under Section 302/49 of the IPC.

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Reliance in this behalf has been placed on *Yunis Alias Kariya vs. State of M.P.* [(2003) 1 SCC 425], wherein it was held:

> "9. The learned counsel appearing for appellant Liyaquat argued that no overt act is imputed to his client and he was being implicated only on the basis of Section 149 IPC. This argument, in our view, has no merit. Even if no overt act is imputed to a particular person, when the charge is under Section 149 IPC, the presence of the accused as part of an unlawful assembly is sufficient for conviction."

Although the proposition of law enunciated therein is not in question, herein no charge under Section 149 has been framed. Existence of any common object amongst the accused had also not been proved.

13. Sattey furthermore could not have been instrumental in murdering Lasker Singh. Laskar Singh died of a firearm injury shot from a service revolver, i.e., at the hands of the police party only. Such a revolver, thus, was not and could not have been used by any of the accused persons.

14. For the aforementioned reasons, the impugned judgment of the High Court cannot be upheld. The appeals are allowed. The appellants are directed to be set at liberty unless wanted in connection with any other case.

K.K.T. Appeals allowed.