

(1996) 05 MAD CK 0006

In the Madras High Court

Case No : Criminal Revision Case Sr. No. 7501 of 1996 and Cri. R.P. Sr. No. 7502 of 1996

Nallam Krishnaraya Babu and others

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 16-05-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401

Citation : (1996) CriLJ 4484

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : M. Ravindran for V. Viswanathan, for the Appellant; I. Subramaniam, Addl. Govt. Pleader, for the Respondent

Judgement

1. This unnumbered revision petition has been filed against the endorsement of return made by learned Judicial Magistrate No. 1, Ulundurpet, on

10-5-1996, returning the petition filed by the petitioners herein against the proposed identification parade to be held on 10-5-1996.

2. As the Registry felt this revision is not maintainable, since the endorsement of return made by the learned Judicial Magistrate No. 1, Ulundurpet,

is not a Judicial order, which could be challenged in revision before this Court, with regard to the question of maintainability, the matter has been

posted before this Court.

3. When the matter came up on 15-5-1996, this Court directed the learned Additional Public Prosecutor, Mr. I. Subramaniam, to take notice for

considering the question of maintainability.

4. Mr. M. Ravindran, learned Senior Counsel appearing for the petitioners submits that the petitioners, police officers of Pondicherry are arrayed

as accused in a rape case and were summoned by the learned Judicial Magistrate No. 1, Ulundurpet, to appear before the said Court on 16-4-

1996 for identification parade, in connection with the said rape case, and that on 16-4-1996, the petitioners filed an application to adjourn the said

parade, for the reason that they were engaged in the election work and that the parade was adjourned to 10-5-1996, and that on 10-5-1996, the

petitioners filed another application before the said learned Magistrate, objecting to the conduct of identification parade itself, on the ground that

the victim Vijaya, in this case, had ample opportunity to see the accused during the enquiry conducted by the District Revenue Officer and in fact

the witnesses saw the accused in the Special Branch Police at Pondicherry, and that that this petition was not entertained by the learned Judicial

Magistrate, who returned the same on 10-5-1996, on the ground that the identification parade is ordered to be held by the Judicial Magistrate, in

pursuance of the order of Chief Judicial Magistrate, Villupuram and that the said endorsement of return without passing any order on the petition

was not in accordance with law, and that the said endorsement of return is liable to be set aside.

5. Per contra, Mr. I. Subramaniam, learned Additional Public Prosecutor, submits that u/s 397 and 401 Cr.P.C., this Court can call for and

examine the record of any proceeding before any inferior criminal Court for the purpose of satisfying itself as to the correctness, legality or

propriety of any order and that the endorsement refusing to entertain and return the petition cannot be said to be a judicial order, and as such, this

revision petition against the said endorsement is not maintainable.

6. The contentions raised by Mr. M. Ravindran, learned Senior counsel could be summarised as follows :-

(i) The alleged occurrence of rape had taken place on 29-7-1993. But the summons for the identification parade were issued by the learned

Judicial Magistrate, in April 1996 and there is a long delay. In support of the said submission, learned senior counsel referred to the decisions of

the Supreme Court in Muthuswami Vs. State of Madras, and Hindu Singh v. State of Uttar Pradesh, (1982) 3 SCC 368 , in which the Apex

Court has rejected the delayed identification parade, as it does not inspire confidence.

(ii) With regard to the same accusation, a joint petition was presented by the victim Vijaya and the mother of the victim on 3-8-1993 to the District

Collector, who in turn ordered enquiry by the DRO. Between 17-10-1993 and 7-2-1994, the District Revenue Officer has conducted the enquiry

and sent a report, stating that the petitioners have participated in the commission of said crime and as such the victim had an opportunity to see the

accused persons in the enquiry conducted by D.R.O. In Budhsen and Another Vs. State of U.P., , the Apex Court has held that the person

required to identify an accused should have had no opportunity of seeing him, after the commission of the crime and as per the principle laid down

in the above referred decision, identification parade is not at all warranted in this case.

(iii) The date of identification parade was fixed on 10-5-1996 and on that date, a petition was filed requesting the Court, not to conduct the

identification parade, as the victim and the witnesses had already seen the petitioners in the enquiry conducted by the District Revenue Officer.

Therefore, the learned Judicial Magistrate ought to have entertained the petition and recorded their objections before conducting the identification

parade, and as such, since the objection has not been recorded and returned, the learned Magistrate has not acted in accordance with law.

7. Mr. I. Subramaniam, learned Addl. Public Prosecutor, countered the above submissions by stating that identification parade is ordered to be

conducted by the learned Judicial Magistrate, in pursuance of the order of the learned Chief Judicial Magistrate, Villupuram, during the

investigation process, in order to find out the truth, with regard to the identity of the persons involved in the crime. He also submitted, that the very

fact, the petition if filed, objecting to the conduct of identification parade, expressing their reluctance in participating the identification parade would

itself show that the petitioners wanted to drag on the proceedings in one day or other and as such, the revision is liable to be dismissed as not

maintainable. However, learned Addl. Public Prosecutor says that he has no objection for giving any direction to the learned Magistrate, to record

or receive objection, if any of the accused/petitioners at the end of the identification parade.

8. At the outset, I must say that the unnumbered revision petition is misconceived and unsustainable in law, inasmuch as the present revision is not

against any judicial order passed by the Court below. A mere return of the petition or refusal to entertain the petition will not entitle the petitioner to bring up the matter by way of revision to this Court. A conjoint reading of Sections 397 and 401, Cr. P.C. would make it clear, that this revision against the endorsement of return made by the learned Judicial Magistrate could not be entertained, because, it could not be considered to be a judicial order in the judicial proceedings. As such, I have no hesitation to hold that this revision is not maintainable. However, I feel that some directions could be issued to the learned Judicial Magistrate, with reference to the procedures to be followed while conducting the identification parade.

9. In Ramanathan Vs. The State of Tamil Nadu, , the Supreme Court has observed as follows (Para 18) :-

The holding of a test identification in such cases is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused. For while it enables the investigating officer to ascertain the correctness or otherwise of the claim of those witnesses who claim to have seen the perpetrator of the crime and their capacity to identify him and thereby fill the gap in the investigation regarding the identity of the culprit it saves the suspect or the accused from the sudden risk of being identified in the lock by the self-same witnesses during the course of the trial. The line up of the suspect in a test identification parade is therefore a workable way of testing the memory and veracity of witnesses in such cases and has worked well in actual practice.

As per the principles laid down in the above decisions of the Supreme Court, the identification parade is to be conducted taking into consideration the interest of both the investigating agency and the suspect or the accused.

10. Details of the procedure to be followed while conducting identification parades, by the Judicial Magistrate, have been given in the Manual of Instructions for the Guidance of Magistrate in the Madras State. In clause 10 of Paragraph 22 of the said Manual, it is specifically mentioned, that any objection by any suspect to any point in the proceedings should be recorded"". It is also stated that the Magistrate should make a report in writing of the entire proceedings and send a report to the higher authority.

11. The decisions on this point, rendered by various High Courts, would reveal

that it is the duty of the Magistrate to make a note of every objection which is made by an accused at the time of the identification proceedings so that the Court which has to judge the value of identification evidence may take into consideration the objections and in the light of those objections may appreciate the evidence of identification. So, the learned Judicial magistrate, while conducting the identification parade, has to take into consideration all these guidelines, before the identification proceedings are over.

12. It is also held in *Budhsen and Another Vs. State of U.P.*, that "generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the Court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence." As such, I am of the view, that the Magistrate is duty bound to record the objections raised by the accused/petitioners at the time of identification parade. But, in this case strangely, even before the commencement of the identification parade, petition has been filed by petitioners/accused before the learned Magistrate, that the "identification parade is unwarranted and the accused are reluctant to attend the parade." This would be preposterous, because the petitioners cannot ask the Court not to conduct the identification parade, or they cannot refuse to participate in the identification parade, for the reasons, stated in their petition. Probably, that was the reason, as to why, the said petition was not entertained by the learned Magistrate, and the same was returned. Suppose, during the identification parade, if the victim or the witnesses do not identify any of the petitioners, then the question of objection does not arise. Therefore, the recording of objection by the learned Judicial Magistrate, regarding the identification parade would only come in the event of identification of the accused by the witnesses concerned. As such, I am of the view, that presentation of the petitioner, objecting to conduct the identification parade, even before the commencement of the identification parade could not be said to be in accordance with law.

13. In that view of the matter, the contention raised by Mr. M. Ravindran, learned Senior counsel that there is delay in conducting the identification

parade and ample opportunity was given to the witnesses to see the accused/ petitioners during the enquiry conducted by the District Revenue

Officer, would not hold good. Accordingly, I see no reason to hold that the endorsement of return made by the learned Judicial Magistrate No. 1

Ulundurpet, returning the petition is bad in law. However, the learned Judicial Magistrate could hold the identification parade on 20-5-1996, as

fixed earlier and after the process of identification, he could question the petitioners with regard to objections, if any, and record the same in the

said proceedings and thereafter send a report of the proceedings to the concerned authority. With these directions, these Cri. R.C. Sr. Nos. 7501

and 7502 of 96 are dismissed as not maintainable.

14. Order accordingly.