
(1999) 02 MP CK 0007

In the Madhya Pradesh High Court

Case No : Criminal A. No. 198 of 1994 (G)

Tunde and Another

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 02-02-1999

Acts Referred:

Evidence Act, 1872 — Section 9

Penal Code, 1860 (IPC) — Section 302, 324, 34

Citation : (1999) 1 MPJR 428

Hon'ble Judges : Tej Shanker, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tej Shanker, J.

This appeal is directed against the order of conviction and sentence recorded by Sessions Judge, Datia on 24.9.94 whereby he convicted and sentenced the accused persons u/s 324 I.P.C. to a term of 2 years R.I. and a fine of Rs. 5000/- each.

Briefly narrated the facts are that on 9.4.89 at about 5 p.m., informant P.W.16 Ramkishore was at Khalihan along with his son Govind. Panchu, Hemraj, Brij Yadav and Viran Yadav were also there. In the meantime, Bhajju Yadav of Datia along with his two companions reached there. They called him and asked him to pay a sum of Rs. 1,500/- as he had saved him from Gundas. He said that he had no money whereupon all the three persons took out knives and threatened to kill him else he should pay the money. He tried to save himself whereupon a fair coloured long man who was wearing kurta and pajama and whose name he did not know, attacked with a knife in order to cause death which hit him on the left side of hip. His son Govind tried to save whereupon Bhajju Yadav attacked his son Govind with a knife in order to cause his death. Govind fell down. The persons who were standing there tried to save. All the three persons ran towards Vijanpura. He then took his son on a tractor in the injured condition to Bhandar

Hospital where doctor declared him dead. He then went to police station and lodged the report Ex.P-20 which was prepared by P.W. 11 D.R. Mishra, who was the then A.S.I., Bhandar. A case u/s 302/34 and 307 was registered. During investigation the accused were arrested and put up for test identification which was conducted by S.S. Rana who was the then Nayab Tehsildar on 28.4.89.

During the pendency of the case, accused Bhajju Yadav alias Ghanshyam Yadav was murdered on 17.3.92 and the case against him abated, vide order dated 8.8.92. Hence the two accused persons named Tunde and Kalli faced trial. They denied the charge and alleged that they are falsely implicated.

The prosecution examined as many as 16 witnesses and relied upon the documents Ex.P.4 to P-22 in support of its case. The accused did not enter upon their defence. After considering the entire evidence on record and hearing the parties, learned trial Court held the accused persons guilty of the offence punishable u/s 324/341.P.C. and convicted and sentenced them as aforesaid. However, they were acquitted of the charge u/s 302/34 I.P.C. Feeling aggrieved, they have preferred this appeal.

Learned counsel for the appellants contended that there is no evidence connecting the accused persons/appellants with the offence. The entire case against them is based upon the test identification and the identification was not in accordance with law.

Learned counsel for the State on the other hand contended that there has been a test identification parade and the accused persons were correctly identified by the complainant and the order of conviction and sentence is perfectly justified.

There is no denial of the fact and the accused appellants were not named in the F.I.R. A perusal of Ex.P-20 shows that the name of Bhajju Yadav has been mentioned specifically and according to the case of prosecution, he along with his two other companions went to the place of occurrence. Complainant P.W. 16 Ramkishore in his statement stated that Govind was his son. In the month of April, 1989, he was at Khalihan at village Kasoli along with his son Govind. Panchu, Hemraj, Brij Yadav and Viran Yadav were also there at Khalihan. Bhajju Yadav along with two other of Datia went there. They demanded a sum of Rs. 1,500/- from him. He further stated that when he refused, they attacked him with knife. There were two other boys with Bhajju Yadav who were present in Court. He pointed out towards accused Tunde in the Witness Box that he had attacked him with knife. When his son Govind went to save him, accused gave a knife blow to him which hit him on the chest. He fell down and became unconscious. Thereafter Bhajju Yadav and his two companions escaped. Thus according to his statement the attack on his son, now deceased, was made by Bhajju Yadav, who is admittedly dead. In this view of the matter, none can be held responsible for the attack on deceased Govind.

Now the main question remains for determination as to who caused the injury to Ramkishore. It is significant to mention that the person who attacked the

complainant has not been named by him. The F.I.R. is silent in this regard. Of course, the F.I.R. shows that he had mentioned that a fair coloured long person who was wearing Kurta and Pajama and whose name he did not know, attacked him with knife. In the witness box, the witness did state that the two boys, who were present at the time of occurrence, were present in Court and had identified in Court. Besides this statement, there is nothing to connect the accused persons with the attack on the complainant. It has been specifically stated by the complainant in his statement in para 12 that he did not know the accused persons from before. He also admitted that his house lay in Datia Bazar in Tigolia. He showed his ignorance about the fact that the accused persons resided near Tigolia. The most important fact that has come in his statement is that he admitted that it was correct that after the occurrence the accused persons were taken to the village by police. No doubt, he stated that the fact that Darogaji had not showed the witnesses to him. The prosecution has relied upon his statement and the identification evidence in order to connect the accused persons with the offence. This witness has categorically stated in para 16 of his statement that out of the two accused persons, present in Court, none of them was fair coloured. He also stated that out of the two accused persons, one boy was of fair colour as compared to the other who was somewhat black. The boy who is lesser black is Tunde alias Ravindar. This part of the statement, which has been given by him in para 16, is important and shall be considered hereinafter. At this stage I may mention that the prosecution has banked upon the statement of this witness as well as the identification evidence.

Now I proceed to deal with the evidence relating to the test identification. Section 9 of the Indian Evidence Act relates to the evidence of facts establishing identity of persons. Identification evidence is relevant under this Section. It is a weak type of evidence and unless it is shown that the identification proceedings were conducted fairly, without undue delay, without allowing witnesses to see the accused or get acquainted with his appearance with help of photographs or descriptions and by mixing accused with fairly large number of other persons of same race, culture, age, height and status, concealing distinguishing marks of the accused, it cannot be taken to be reliable. There are certain guidelines and principles of test identification parade and unless the result of identification parade inspires confidence and it is found that the guidelines and principles are fulfilled, no reliance can be placed upon the result of test identification parade. It is the duty of the prosecution to show that the test identification parade has been fairly conducted. It was conducted within a reasonable time. It has also to be established that the witnesses did not get any opportunity to identify the accused after their arrest and possibility of any extraneous aid must be ruled out. At this stage, we have to see as to how fairly the test identification was conducted within the present case. The test identification was conducted by P.W. 5 B.S. Rana, the then Naib Tehsildar on 28.4.89. We find that he has stated that he conducted the test identification parade on 28.4.89. I may mention here that there is nothing to show as to when the accused persons were arrested. He

stated that he conducted the test identification proceedings in Datia Jail of Tunde and Kalli. Identification was got made by witnesses Ramkishore, Ramgopal of village Kasoli. Ramkishore had correctly identified them. He had conducted the proceedings which is Ex.P-10. He had mentioned the precautions taken in the memo. He had mixed 10 undertrials whose names are mentioned in column No. 7. There is nothing to show in Ex.P-10 that the persons who were mixed with the accused persons were similar in height, race, constitution, etc with the accused persons. It also does not disclose as to what was the constitution, colour etc. of the said persons. Simply the name of the accused persons mixed have been mentioned in column No. 7 of the memo. It has been mentioned that at the time of identification proceedings, no police officer was there and secondly it was done one after the other. There is nothing in the memo to show as to whether the accused persons had any identification mark and if they had any identification mark precaution was taken to hide them. It should have been mentioned specifically in the memo. If they had identification mark, it should have been hidden by pasting slips and similar slips should have been pasted on the faces of the other similar persons mixed in the parade. If there was none, this fact should have also been mentioned. Though it is impossible that there were no mark. As far as the result of test identification parade is concerned, it must be mentioned that there is no evidence which may go to show that after the arrest, the accused persons were kept baparada. It is the duty of the prosecution to establish by cogent and convincing evidence that the accused persons after their arrest were kept baparada. There was no opportunity for the witnesses to see them before the actual test identification parade took place. Unless this possibility is ruled out, the prosecution cannot rely upon the result of test identification parade. In the present case, the prosecution has not been able to show that the accused persons were kept baparada and whenever they were taken out from jail, they were brought baparada and the witnesses had no opportunity to see them. I have already pointed out from the statement of the complainant himself made in para 12 that it was correct that the accused persons were brought to the village by police. It is significant to mention that he has not stated that they were brought baparada. In what manner the accused persons were taken to the village and for what purpose is not on record, it can safely be said that they must have been brought in order to show them to the witnesses and this possibility cannot be ruled out. No evidence whatsoever has been brought on record by the prosecution to establish the fact that the witnesses had no opportunity to see the accused persons or the accused persons kept their faces hidden through out prior to holding of the test identification. It is emphasised upon the prosecution agencies to see that evidence is collected and brought on record rulling out the possibility of showing the accused to the witnesses or in any other manner aiding the witnesses to see the accused after arrest and before identification proceedings. The officer conducting the identification proceedings must observe the above precautions. Under the aforesaid circumstances, I am of the opinion that the identification proceedings conducted by the Naib Tehsildar are of no avail. If we peruse the statement of

the complainant, it shows that the persons who attacked was a tall and fair coloured man but the two accused persons who were in the witness box were not fair as stated by the witnesses mentioned above.

Considering the above facts and circumstances, it can safely be said that the accused persons have not been connected with the offence i.e. the act of causing injury to complainant Ramkishore. In any case the evidence on record cannot be believed to prove that it were the accused persons who caused injury to the complainant. The learned trial Court does not appear to have taken into consideration the law relating to test identification while accepting the conclusions arrived at in the identification parade. I am, therefore, of the opinion that no reliance can be placed upon the test identification parade. Apart from the statement of Ramkishore P.W. 16 and the test identification evidence mentioned there is no material on record in connection with the accused persons with respect to their involvement. The statements of the other witnesses examined by the prosecution too do not connect the accused persons with the offence. I, therefore, hold that the learned trial Court was not justified in accepting the prosecution story and convicting the appellant on the basis of said evidence.

In the result, the order of conviction and sentence passed by the learned Court below cannot be sustained. The appeal is, therefore, allowed. The order of conviction and sentence passed by the learned trial Court against the appellants is set-aside. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged. Fine if any paid, shall be refunded.

Let a copy of this judgment be sent to the Director General of Police for guidance with respect to identification proceedings.