IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 11TH DAY OF AUGUST 2023 / 20TH SRAVANA, 1945

CRL.REV.PET NO. 36 OF 2016

AGAINST THE JUDGMENT IN CC 352/2012 OF JUDICIAL MAGISTRATE OF FIRST CLASS-I, VAIKOM

CRA 128/2014 OF FIRST ADDITIONAL DISTRICT COURT, KOTTAYAM

REVISION PETITIONER/APPELLANT/ACCUSED:

PAULY
S/O KOCHUVAREED, KALLELI HOUSE, KUTTIKKAD DESOM,
PARIYARAM VILLAGE, MUKUNDAPURAM TALUK.

BY ADVS.
SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.M.A.MOHAMMED SIRAJ
SRI.P.PRIJITH
SRI.THOMAS P.KURUVILLA

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SHRI M P PRASANTH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 20.07.2023, THE COURT ON 11.08.2023, DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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Crl.R.P.No.36 of 2016

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Dated this the 11th day of July, 2023

O R D E R

This Revision Petition has been filed under Sections 397 and 401 of the Code of Criminal Procedure (`Cr.P.C' hereinafter) and the revision petitioner is the sole accused in C.C.No.352/2012 on the files of the Judicial First Class Magistrate Court-I, Vaikom. Respondent herein is the State of Kerala. The revision petitioner assails judgment in C.C.No.352/2012 dated 07.05.2014 rendered by the Judicial First Class Magistrate Court-I, Vaikom as well as the judgment in Crl.Appeal No.128/2014 on the files of the First Additional

Sessions Court, Kottayam dated 28.09.2015.

2. Heard the learned counsel for the revision petitioner/accused and the learned Public Prosecutor appearing for the State.

3. The precise allegation of the prosecution is as under:

The prosecution case is that at about 7.30 p.m on 12.05.2012 the accused herein had driven a tanker lorry bearing Registration No.KL63/5206 through Thalayolaparambu – Peruva Public Road in a rash and negligent manner so as to endanger human life. While driving so, the tanker lorry dashed against an Activa Scooter bearing Registration No.KL36B/2322, ridden by one Babu along with a pillion rider `Anandu'. The prosecution allegation is that as a result of the rash and negligent driving of the accused, `Babu', the rider of the Motorcycle, died and the pillion rider `Anandu' sustained injuries and thereby the accused committed offences

punishable under Sections 279, 337 and 304A of the Indian Penal Code (`IPC' for short hereafter) as well as 134(a) r/w Section 187 of the Motor Vehicles Act (`M.V Act' for short hereafter).

4. The learned Magistrate Court took cognizance of the matter and secured the presence of the accused for trial. Later on complying the formalities before trial, the accused was tried. During trial, PWs 1 to 15 were examined and Exts.P1 to P12 were marked. When the prosecution evidence was completed, the accused was questioned under Section 313 of the Code of Criminal Procedure and provided opportunity to him to adduce defence evidence, but no defence evidence adduced.

5. Thereafter, the Magistrate Court appraised the evidence after hearing both sides and convicted the accused for the offences punishable under Sections 279, 337 and 304A IPC as well as 134(a) r/w Section 187 of the Motor Vehicles Act and sentenced

the accused as under:

> *"The accused is sentenced to undergo simple imprisonment for a period of 6 (Six) months and to fine of Rs.1,000/- of theoffence u/s.279 of IPC. In default of fine he shall undergo simple imprisonment for a period of 1 (one) month. He is again sentenced to undergo simple imprisonment for a period of one month and to fine of Rs.500/- of the offence u/s.337 of IPC. In default of fine he shall undergo simple imprisonment for a period of 15 days. He is against sentenced to undergo simple imprisonment for a period of 2 (Two) years and to fine of Rs.10,000/- of the offence u/s.304-A of IPC. In default of fine he shall undergo simple imprisonment for a period of 4 (four) months. He is further sentenced to fine of Rs.500/- u/s.134(a) r/w 187 of M.V.Act. In default of fine he shall undergo simple imprisonment for a period of 10 days. If the fine amount is remitted Rs.1,000/- shall be given to PW2 as compensation u/s.357(1) Cr.P.C. All the substantive sentence shall run concurrently. Hence the licence of the accused is hereby cancelled. He is disqualified from driving heavy vehicles for the period of 6 months from today."*

6. The accused challenged the conviction and sentence imposed by the trial court before the Sessions Court, Kottayam. The learned First Additional Sessions Judge on re-appreciation of evidence, dismissed the appeal confirming the conviction as well

as the sentence, vide judgment dated 28.09.2015.

7. While impeaching the veracity of the concurrent verdicts of conviction and sentence, it is argued by the learned counsel for the revision petitioner that the finding of the courts below that there was sufficient light available at the place of occurrence from the petrol pump to identify the accused by PW2 and PW3 is incorrect. It is submitted further that no such statements were given by PW2 and PW3 before the police and the said version was given before the trial court for the first time. Therefore, the said evidence is an improvement made with malafide intention to create false evidence against the accused and the courts below ought not have relied upon the said evidence to see availability of light at the place of occurrence and to prove the identity of the accused. Further, the evidence of PW2 and PW3 to the effect that after the incident, the accused stopped the lorry,

came out and looked at the place of occurrence, then ran away is also evidence tendered before the trial court for the first time and such statement also was not given to the police. It is argued that there is no proper identification of the accused in this case to fasten criminal culpability upon him since PW2 and PW3 identified the accused for the first time before the court, without any previous familiarity. Further PW1 not stated anything regarding the physical appearance, body features or any identification marks of the accused before the police. It is argued further that as per Ext.P2 scene mahazar, the petrol pump, where from the light was available, as stated by PW2 and PW3, is not adjacent to the place of occurrence since the same is not vividly narrated in Ext.P2 scene mahazar. Apart from the feeble evidence of PW2 and PW3, the courts below given emphasis to the version of PW15, the brother of the owner of the tanker lorry, to hold that the accused

was the person who was driving the vehicle at the time of occurrence. It is argued that the evidence available to hold that the accused was the driver of the tanker lorry at the time of occurrence was not fully established and the prosecution case is in the midst of doubts. According to the learned counsel for the accused, for these reasons the concurrent verdicts under challenge would require interference at the hands of this Court.

8. Whereas it is submitted by the learned Public Prosecutor that in this matter the allegation of the prosecution is that the tanker lorry bearing Registration No.KL63/5206 was driven by the accused in a rash and negligent manner so as to endanger human life, through Thalayolaparambu – Peruva Public Road and hit against the Activa Scooter bearing Registration No.KL36B/2322, ridden by one `Babu' along with `Anandu' (PW2) as pillion rider. He would submit that PW2 the pillion rider had given consistent

evidence as to the occurrence and rashness on the part of the accused and identified the accused as the person who had driven the tanker lorry at the time of accident. Similarly PW3 also supported the evidence of PW2. PW15 also stated that the accused was the driver of the lorry at the time of accident and he identified the accused at the dock. In view of the matter, none of the contentions raised by the learned counsel for the revision petitioner/accused to unsustain the concurrent verdicts of conviction and sentence would sustain.

9. It is argued by the learned Public Prosecutor further that the question of identity of the accused was seriously challenged before the appellate court highlighting the necessity of test identification parade and the appellate court held that identification of the accused in court by the witness would constitute substantive evidence and even if such identification was for the first time, at

the trial. Therefore, for that reason alone, the evidence cannot be ignored. It was also found by the appellate court that the Code of Criminal Procedure did not oblige the investigating officer to hold a test identification parade and evidence collected during test identification parade is not substantive evidence and weight must be given to the identification in court, being substantive evidence. The learned Public Prosecutor also submitted that the appellate court relied on the decision reported in [2012 (4) KLT SN 14 (C.No.16)], ***Manikuttan v. State of Kerala*** and the decision reported in [(2003) 5 SCC 746], ***Malkhansingh & Ors. v. State of M.P***. to hold that the evidence of PW2 and PW3 read along with PW15, who authorised the accused to drive the lorry at the time of occurrence, substantiated that the accused was the driver at the time of accident. Therefore, concurrent verdicts entered into by the trial court and the appellate court do not require any

interference and as such the revision petition must fail.

10. Before going to address the contentions based on the argument mooted by the learned counsel for the revision petitioner as well as the learned Public Prosecutor on the merits, I shall address the legal question emerges here. The question is, what is the best evidence to prove the identification of an accused before a court ? And in what circumstances, test identification parade shall be insisted as corroborative piece of evidence to act upon the identification of the accused at the dock by the occurrence witness(es)?

11. In this connection it is pertinent to refer the observations in ***Malkhansingh & Ors. v. State of M.P*** *(supra*) while dealing with Section 9 of the Indian Evidence Act and the necessity of test identification parade and failure in consequence thereof. While dealing with question of identification of the accused the Apex

Court held in paragraphs 7, 10 and 16 as under:

> *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. 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.*
>
> *But failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The identification parades belong to the stage of investigation, and there is no provision in the Cr.P.C which obliges the investigating agency to hold, or confers a right upon the accused to claim a test*

identification parade. These parades do not constitute substantive evidence. 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 appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

12. In this connection, a recent decision of the Apex Court reported in [(2022) 9 SCC 402], ***Amrik Singh v. State of Punjab*** is also relevant, where the Apex Court considered the consequence of non holding of test identification parade and held as under:

As per prosecution, appellants came on a scooter and after thworing red chilli powder into the eyes of the complainant and killing the deceased by firing shot at him, took away their scooter and cash amounting Rs.5 lakhs lying in the dicky of the scooter – In the FIR, the complainant merely stated that the accused were three young persons out of which two were clean shaven and the one Sikh (sardar)who had tied a thathi having the age of 30-32 yrs – Complaint also not stated in his first version that he had seen the accused earlier and that he will be able to identify the accused.

-- While identifying the appellants in court, complainant tried

to improve the case by deposing that he had seen the accused in the city on one or two occasions and he specifically and categorically admitted in the cross-examination that it is incorrect that the accused were known to him earlier -- Hence, non-conducting of TIP, held, fatal in the present case and the conviction based solely on identification of the appellants by the complainant for the first time in court, held not sustainable and set aside."

13. The legal position is no more *res integra* on the point that the identification of the accused person at the dock during trial, in cases of direct evidence, for the first time from its very nature is inherently of a weak piece of evidence. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. Thus test identification parade (TIP) is considered as a safe rule of prudence generally to 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. At the same time, 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.

14. No doubt, failure to hold a test identification parade would not make inadmissible the evidence of identification in court, if such identification is wholly reliable. Indubitably, identification parades as a rule of prudence to be resorted to at the stage of investigation, and there is no provision in the Cr.P.C which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Test identification

parades do not constitute substantive evidence. 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 appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

15. Further, while identifying the accused in court, if the witness says that he had seen the accused on one or two occasions prior to the occurrence or the witness had occasion to identify the accused at the time of occurrence with certainty, without giving such a statement to police, the same is a serious omission to be read as contradiction to disbelieve the identification of the accused at the dock. The same is to be read as a vital and material

improvement made by the witness/witnesses in Court, which would attract less probative value. In such cases, non-conduct of test identification parade (TIP), to be held as fatal and the conviction based solely on identification of the accused by the occurrence witness/witnesses for the first time in court is not sufficient.

16. Reverting back, in the case at hand, PW2 `Anandu' is the pillion rider, on the scooter, at the time of the accident. According to PW2, the tanker lorry came from behind, hit and thrown the scooter in a rash and negligent manner and thereby Babu died and PW2 sustained injuries, though he survived. He identified the accused at the dock and also stated that the number of the tanker lorry is KL63 5206. According to him, soon after the occurrence the accused/driver came out, looked at them and ran away. He had also given evidence that occurrence was near the petrol pump and there was light at the petrol pump to see the

occurrence. During cross examination, omission as regards to the presence of light at the place of occurrence available from the petrol pump was pointed out to PW2 and he stated that he had stated so before the investigating officer. During cross examination of PW13, the Additional Sub Inspector of Police who recorded the previous statement of PW2 and PW3, had given evidence that PW2 had not given statement to the effect that the accused got down from the lorry, looked at them and thereafter ran away from the place of occurrence. Further, PW2 had not also given statement to the police that there was light at the place of occurrence and he had witnessed the occurrence from the light available at the petrol pump.

17. Coming to the evidence of PW3, PW3 also given statement in support of the prosecution stating that the driver came down from the lorry, looked at them and then ran away. Thereby

she could identify the accused and accordingly she identified the accused at the dock. During cross examination of PW13, who recorded the statement of PW2 and PW3, PW13 stated that PW2 and PW3 did not give statement to the effect that the accused came down from the lorry, looked at them and ran away.

18. Regarding the presence of light at the place of occurrence available from the petrol pump, which was believed by the trial court as well as the appellate court to enter into conviction and sentence, though PW2 given such evidence, PW2 did not state the same before the police. In this connection, it is pointed out by the learned counsel for the accused that in the scene mahazar, no details stated pertaining to the petrol pump. But the learned Public Prosecutor submitted that presence of petrol pump is mentioned in the scene mahazar, marked as Ext.P2. On perusal of Ext.P2, there is narration to the effect that on the north western portion of the

place of occurrence (about 20 metres away on the northern side of the road), house of Kuriachan Pazhayakadavil situated and Bharat petrol pump, on its immediate western side.

19. It is relevant to note that PW15 examined in this case is the brother of the R.C owner of the tanker lorry bearing Registration No.KL63/5206 and he had given evidence that he was managing the affairs of the lorry for and on behalf of his brother and he obtained custody of the lorry by executing Ext.P11 `kaichit'. He also stated that the accused was the driver of the lorry on the date of accident and he identified him at the dock.

20. To be on the crux of the matter, even though presence of light was not stated in the previous statements of PW2 and 3, as per Ext.P2 scene mahazar, presence of Bharat Petroleum pump near the house of Kuriachan Pazhayakadavil was stated in Ext.P2 scene mahazar and PW13 had given evidence in this regard. But during

further cross examination, evidence of PW13 is that the presence of light at the place of occurrence is not stated. But this question was asked without referring to any prosecution records.

21. In this matter, the identity of the accused as the person, who had driven the tanker lorry, is seriously disputed mainly on the ground that the accused was not familiar to PW2 and PW3 and they had identified the accused at the dock when they were examined and there was no prior identification or test identification parade. The occurrence witnesses herein, viz. PW2 and PW3 not stated any familiarity with the accused prior to the occurrence, before the court during chief examination or before the police. In cross examination also, nothing asked regarding this aspect. Therefore, there is no evidence before the court to hold that PW2 and PW3, being eye witnesses to the occurrence, had any familiarity with the accused and they identified the accused at the

dock as a person familiar to them. But PW2 and PW3 stated that they had seen the driver when he came out of the lorry after the occurrence. In fact, PW2 and PW3 did not give such a statement before the investigating officer, as admitted by PW13, though such a statement is a vital material regarding the identity of the accused.

22. It is true that if a witness, who doesn't know the accused at the time of occurrence, had an occasion to see the accused, not as a fleeting glance so as to imprint his face and body structures on his mind with certainly and thereafter identifies the accused at the dock, there is no reason to hold that his testimony in the matter of identification could not be relied on for want of corroboration, by way of test identification parade. But the situation is different when the witness identifies the accused, who is not familiar to him, at the dock and he did not give statement before the police regarding the identity of the accused and the manner in which such

identification was imprinted in his mind with certainty, in such cases corroboration by test identification parade should have been resorted to and in such cases, non conduct of test identification parade (TIP) is fatal.

23. In the instant case, the crucial eye witnesses PW2 and PW3 had not given statement to the police about the manner in which they identified the accused at the time of accident or soon after the occurrence. They did not give statement to the police to the effect that the accused came out of the lorry, looked at them and ran away, so that they got an opportunity to see and identify the accused with certainty. Thus it is emphatically clear that such evidence given by PW2 and PW3 before the trial court for the first time, to be read as an improvement and the said version cannot be believed to hold that the identification of the accused at the volition of PW2 and PW3 is believable and reliable, without corroboration

by test identificatin parade. If so, the corollary is that the evidence adduced by the prosecution to prove the identity of the accused in this case is insufficient to hold that the accused was the driver of the offending lorry at the time of accident. Similarly, the evidence of PW15, the brother of the R.C owner stating that it was the accused who was entrusted to drive the lorry on the date of accident alone is not sufficient to hold that the accused was the driver at the time of the accident, without substantive evidence as that of eye witnesses.

24. To sum up, it is held that the conviction and sentence imposed by the trial court as well as the appellate court on the revision petitioner/accused without properly identifying the accused as the person, who drove the offending lorry at the time of accident, are liable to be set aside and I do so.

In the result, this revision succeeds and the same stands

allowed. In sequel thereof, conviction and sentence under challenge stand set aside and the accused/revision petitioner stands acquitted. The bail bond stands cancelled and he is set at liberty forthwith.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/