

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 801 OF 2021
(Arising out of S.L.P.(CrI.) No. 4399 of 2019)

UMESH CHANDRA & ORS. APPELLANT(S)

VERSUS

STATE OF UTTARAKHAND RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 802 OF 2021
(Arising out of S.L.P.(CrI.) No. 6145 of 2019)

BABBI SHARMA @ L.N. SHARMA APPELLANT(S)

VERSUS

STATE OF UTTARAKHAND RESPONDENT(S)

O R D E R

Leave granted.

The four appellants stand convicted under Sections 395 and 397, IPC having been sentenced to seven years with a default stipulation.

A dacoity took place on 28.08.1992 at about 7.30 p.m. in the house of the informant Hukumchand. Seven accused intruded and looted cash and jewelry while the family was watching television along with a neighbour Rajendra, and fled away. The FIR was lodged by Hukumchand at 8.30 p.m. At about 10.30 p.m. in the night, the appellants are stated to have been apprehended at the police check post travelling in a Maruti van. They are stated to have confessed having committed dacoity at the house of Hukumchand and to have looted cash and jewelry which were recovered from them along with weapons on their person. During the pendency of the trial the informant Hukumchand and Rajendra have been deceased. The primary

witnesses are PW-1, the wife of Hukumchand and PW-2 the son of Hukumchand who was about 13 years of age at the time of occurrence.

The appellants are stated to have been identified in a test identification parade (TIP) and on the basis of which their conviction has followed. The recovery not having been proved as the original seizure memo was never produced, they have been acquitted of the charge under Section 412, IPC. The appellants have also been acquitted of the charge under the Arms Act. The acquittals have attained finality as it was not questioned by any.

Ms. Vibha Datta Makhija, learned Senior Counsel appearing for one of the appellants, submitted that conviction based on the TIP is unsustainable as no TIP has been proved to have been held in accordance with law. Repeated TIPs have been held only after which the appellants are stated to have been identified. PW-1 did not identify any of the appellants. PW-2 is stated to have identified the appellants in the third or fourth round. Repeated TIP parades nullify the whole identification. The appellants have been acquitted of the charge under Section 412 IPC. The TIP being only corroborative evidence, in absence of any substantive evidence connecting them to the crime, the conviction is not sustainable. One other accused has been acquitted by the Trial Court itself for lack of identification. Two others who were tried separately have also been acquitted.

Mr. D.S. Matya, learned counsel for other appellants, submitted that in the trial of two acquitted accused PW-2 turned hostile denying identification of the recovered items or the accused in the TIP, stating that his signature was obtained on it

by the police. It was also contended that some of the accused were shown to the witnesses even before the TIP thus vitiating the same.

Dr. Rajiv Nanda, learned counsel for the State relied on the TIP to sustain the conviction. PW-2 identified the appellants in the TIP as also in the dock. Acknowledging that acquittal under Section 412 IPC has not been questioned, it was submitted that it would not be very relevant once the identification of the appellants stood established in the TIP which was held properly after covering the face of the accused relying on the evidence of the police officer PW-3 as also certain observations in the Trial Court judgment.

We have considered the submissions on behalf of the parties. The FIR was registered against unknown persons. The case of the prosecution solely rests on identification in the TIP. The acquittal of the appellants under Section 412, IPC and Arms Act has attained finality. No doubt the test identification parade was conducted within about a month of the occurrence. It has also to be kept in mind that PW-2 was a minor aged about 13 years at the time of occurrence.

A test identification parade under Section 9 of the Evidence Act is not substantive evidence in a criminal prosecution but is only corroborative evidence. The purpose of holding a test identification parade during the stage of investigation is only to ensure that the investigating agency prima facie was proceeding in the right direction where the accused may be unknown or there was a fleeting glance of the accused. Mere identification in the test identification parade therefore cannot form the substantive basis

for conviction unless there are other facts and circumstances corroborating the identification.

But more important than that, the test identification parade being a part of the investigation, has to be proved by the prosecution as having been held in accordance with law. The onus lies on the prosecution to establish that the TIP was held in accordance with law. It is only after the prosecution prima facie establishes a valid TIP having been held, the question of considering any objection to the same arises. If the prosecution has failed to establish that a TIP was properly held by examining the witnesses to the same, there is nothing for the accused to disprove. In the present case, a Magistrate is stated to have conducted the TIP. The Magistrate has not been examined. No explanation is forthcoming why the Magistrate was not examined. The only evidence available is that of PW-4 the Station House Officer that during the investigation the TIP was held in the District Jail, Nainital and he identifies the proceedings in the Court. The identification of the proceedings is irrelevant as obviously he could not have been present during the TIP. The TIP, a part of the investigation, therefore cannot be said to have been proved much less that it was held in accordance with the law. Secondly there cannot be repeated TIPs till such time that the prosecution is successful in obtaining identification of the accused.

We find it extremely disturbing that both the Trial Court and the High Court did not go into this aspect at all to satisfy

themselves if any TIP had been proved to have been held at all and that too in accordance with the law.

If that were not enough, in the TIP, PW-1 who is the mother of PW-2, and both of them are stated to have been present in the house when the occurrence took place, did not identify any of the appellants. What we have before us is identification by a minor boy and that too in the 3rd and 4th rounds insofar as the present appellants are concerned. In the nature of the TIP held it is completely *non est* in the law and the benefit has to go to the accused.

We regret to note that even the original seizure memo was not produced by the prosecution which speaks volumes about the nature of investigation done by the police. We cannot help but notice the very casual manner in which the police conducted the investigation by TIP supported by a claim of recovery to link the two events but failed miserably to establish either.

On the same set of evidence two of the accused, one of whom was also identified in the 4th round and in the 2nd round while the other was never identified have been acquitted in separate trials. PW-2 turned hostile in that trial denying identification of the accused also of the recovered goods.

There is a marked similarity on facts in the present case with *Iqbal and Another vs. State of Uttar Pradesh*, (2015) 6 SCC 623. Doubting the identification in the TIP, coupled with failure to produce corroborative substantive evidence like recovery of the stolen goods or the weapons, the conviction was held to be unsustainable.

In the facts and circumstances of the case, we are unable to uphold the conviction of the appellants. The appeals are allowed and the appellants are directed to be released forthwith unless wanted in any other case.

Pending application(s), if any, shall stand(s) disposed of.

.....J.
(NAVIN SINHA)

.....J.
(R. SUBHASH REDDY)

New Delhi;
August 11, 2021.

ITEM NO.17

Court 9 (Video Conferencing)

SECTION II

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Cr1.) No(s). 4399/2019

(Arising out of impugned final judgment and order dated 13-02-2019 in CRLA No. 62/2003 passed by the High Court of Uttarakhand at Nainital)

UMESH CHANDRA & ORS.

Petitioner(s)

VERSUS

STATE OF UTTARAKHAND

Respondent(s)

(IA No. 90980/2020 - EXEMPTION FROM FILING O.T.

IA No. 40468/2020 - GRANT OF BAIL

IA No. 37171/2019 - PERMISSION TO FILE ADDITIONAL DOCUMENTS /
FACTS / ANNEXURES)

WITH

SLP(Cr1) No. 6145/2019 (II)

(IA No. 136311/2020 - PERMISSION TO FILE ADDITIONAL DOCUMENTS /
FACTS/ANNEXURES)

Date : 11-08-2021 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE NAVIN SINHA

HON'BLE MR. JUSTICE R. SUBHASH REDDY

For Petitioner(s) Ms. Vibha Datta Makhija, Sr. Adv.
Mr. Bhagwant Singh, Adv.
Mr. Mansimran Singh, Adv.
Ms. Vishakha Ahuja, Adv.
Mr. Praveen Gaur, Adv.
Mr. Karan Mangain, Adv.
Mr. Kashish Aneja, Adv.
Ms. Shaiyra Khanna, Adv.
Mr. Prithvi Pal, AOR

Mr. Deepanshu Matya, Adv.
Ms. Tusharika Sharma, Adv.
Ms. Manju Jetley, AOR

Item No. 17

For Respondent(s) Dr. Rajiv Nanda, AOR

**UPON hearing the counsel the Court made the following
O R D E R**

The appeals are allowed in terms of signed order.

Pending application(s), if any, shall stand(s) disposed of.

**(NEETA SAPRA)
COURT MASTER**

**(DIPTI KHURANA)
COURT MASTER**

(Signed order is placed on the file)