

RAM NATH MAHTO

v.

STATE OF BIHAR

APRIL 10, 1996

[M.M. PUNCHHI AND SUJATA V. MANOHAR, JJ.]

*India Penal Code : 1860*

*S.396—Accused committing robbery—Test identification—Witness identifying accuse—Trial—Witness refusing to identify accused before trial court—Magistrate who conducted test identification deposing that the witness had correctly identified the accused during test identification—Trial court recording remarks as to demeanour of witness and convicting accused relying on statement of Magistrate—Conviction upheld.*

*Evidence Act, 1872 :*

*S.9—Test identification—Witness who identified accused in test identification refused to identify him in Court—Magistrate who had conducted test identification stated before Court that the witness had correctly identified the accused in the test identification—Held, Court would be entitled to rely upon the evidence as it would be relevant under s.9.*

*Budhsen & Anr. v. State of U.P. , AIR (1970) SC 1321, distinguished.*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 225 of 1996.

From the Judgment and Order dated 17.2.87 of the Patna High Court in CrI. A. No 25 of 1985.

N.R. Choudhary for the Appellant.

Praveen Swarup for pramod Swarup for the Respondent.

The following order of the Court was delivered :

The conviction of the appellant under Section 396 IPC initially visited him with a life sentence, as ordered by the Court of Session, but on appeal to the High Court, it was reduced to ten years, rigorous imprisonment.

A It was a night robbery in a running train. The appellant was allegedly one of the dacoits. A person was killed during the course of commission of dacoity and the dacoits caused hurts to others and looted their property. P.W. 6, Diwakar Yadav, was one such person who was robbed. The Train Ticket Examiner, P.W. 3, was also one of the occupants in the train who was injured. The occurrence took place shortly after the train left Katihar station for its onward journey to Calcutta. This incident happened in the State of Bihar. The matter was reported to the police by P.W. 3. The appellant was later arrested as one of the culprits. He was put to identification parade conducted by Judicial Magistrate, Bharatji Misra, P.W. 7. Thereas, P.W. 6 was able to identify the appellant as one of the dacoits besides others, with whom we are presently not concerned with, and claimed that he was the one who had a revolver with him which he employed during the course of the occurrence.

D At the trial P.W. 7 fully supported the prosecution case, deposing that P.W. 6 had before him identified the appellant as the dacoit carrying a revolver. P.W. 6, however, chose not to identify the appellant at the trial and rather said that he could not recognise the accused whom he had identified at the identification parade. When his pointed attention was drawn towards the appellant, he did not identify him. At that juncture, the trial Judge recorded his remarks as to his demeanour that the witness perhaps was afraid of the accused as he was trembling at the stare of Ram Nath, accused. It thus became evident that the witness was frightened to accord recognition to the appellant at the trial. Despite such bend in the prosecution case, the trial court as also the High Court relied on the statement of the Magistrate, P.W. 7 as to P.W. 6 having identified the appellant before him at the identification parade and held the prosecution case proved beyond doubt. Added thereto was the remark of the trial court about the demeanour of the witness P.W. 6.

G As was done before the courts below, learned counsel for the appellant has relied upon a decision of this Court in *Budhsen & Anr. v. State of U.P.*, AIR (1970) SC 1321 to contend that the evidence of identification parade does not constitute by itself substantive evidence which is governed essentially by the provisions of Section 162 of the Code of Criminal Procedure. In that case, this Court took the view that on the facts established, the Test Identification Parade could not be considered to provide safe and trustworthy evidence on which conviction could be sustained. That

case was distinguished by the courts below and in our view rightly, by taking into account the substantive evidence of the Magistrate, P.W. 7, supported by the remarks of the trial court regarding demeanour of P.W. 6. There can be no dispute to the proposition that oral evidence led at the trial may by itself be substantive evidence whereas evidence of Test Identification Parade may per se be not. In that situation, the Court would certainly be entitled to rely upon such evidence as that would be relevant under Section 9 of the Evidence Act. Here we have, as said before, the evidence of the Magistrate, P.W. 7 to support the prosecution evidence to say that he conducted the identification parade and before him P.W. 6 had correctly identified Ram Nath to be one of the dacoits. And the word of P.W. 7 in the context has been believed by the courts below.

For the foregoing reasons, we do not differ from the view taken by the High Court in maintaining the conviction of the appellant. The appeal therefore fails and is hereby dismissed. The appellant is on bail. He shall surrender to his bail bonds.

R.P.

Appeal dismissed.