
2023 (3) GLR 2080

Before the Hon'ble MR. A. Y. KOGJE, JUSTICE the Hon'ble MR. M. R. MENGDEY, JUSTICE

ADAM @ JAVID SIDIK SANDHI Vs. STATE OF GUJARAT

CRIMINAL APPEAL No: 1329 of 2015 , Decided On: 27/04/2023

(A) Indian Penal Code, 1860 (45 of 1860) - Secs. 302, 394, 397 & 341 - Arms Act, 1959 (54 of 1959) - Secs. 25(1-B)(A), 27 & 29 - Appreciation of evidence - First informant and his brother while travelling from Rajkot to Jamnagar in Tata Safari Car, appellants on Motorcycle intercepted their Car - Appellants asked them to hand over Car to them - When they protested appellants took out fire arms and fired on them - Brother of first informant sustained severe injuries and died - Appellants fled with Car - First informant identified both appellants at T.I. Parade and in the Court - Contentions by appellants that, since incident lasted only for 2 to 5 minutes first informant could not remember faces seen in such a short time - Contention negatived - Considering on facts that, incident lasted for sufficiently longer time for first informant to observe and remember faces of appellants - Held, conviction confirmed.

(B) Indian Penal Code, 1860 (45 of 1860) - Secs. 302, 394, 397 & 341 - Arms Act, 1959 (54 of 1959) - Secs. 25(1-B)(A), 27 & 29 - Eye-witness identified both appellants at Test Identification Parade - Contention by appellants that, there is a delay of two years in holding T.I. Parade hence same doubtful - Contention negatived - Since appellants were apprehended after two years and T.I. Parade held immediately after their arrest - Held, there is no delay in holding T.I. Parade - Further, since Executive Magistrate who conducted T.I. Parade is examined, not examining panchas does not affect credibility of T.I. Parade - There is not infirmity in T.I. Parade, hence same credible.

(C) Indian Penal Code, 1860 (45 of 1860) - Secs. 302, 394, 397 & 341 - Arms Act, 1959 (54 of 1959) - Secs. 25(1-B)(A), 27 & 29 - Appellants discovered weapons used in commission of offence - Weapons found in working condition and were used - Medical evidence shows, bullets recovered from bodies of deceased and eye-witness - Ballistic report indicates, bullets found from body of deceased and witness were fired from weapon Mark-1 which was used by appellant-A. - Ballistic report does not indicate which of bullets were fired from weapon attributed to appellant-M. - Held, when eye-witness to incident says that, appellant-M. also fired from weapon he was carrying there is no reason to disbelieve same - Both appeals dismissed.

It is also required to be noted that, during the course of the incident, the accused persons had an argument with the deceased, and thereafter, the witness also had a scuffle with one of the accused persons. The witness in his cross-examination goes on to say that, he had caught hold of one of the accused persons. Having regard to these facts, it can be said that, the incident had not lasted for merely 2 to 5 minutes, but had lasted for sufficiently longer period. The time, therefore, for which the incident in question had lasted appears to be sufficient enough for the witness to observe and remember the faces of the accused persons. At this stage it is required to be noted that, the witness had lost his real younger brother in the incident, and therefore, it is quite obvious

that he would remember the faces of the assailants. (Para 15)

In his cross-examination, the suggestion is put to the witness by defence that during the entire incident the faces of the accused persons were covered. The witness has denied this suggestion. He also goes on to say that the accused persons had removed their headgears during the course of incident. This fact gets corroborated by the scene of occurrence panchnama vide Exh. 187. The Motorcycle which was used by the present appellants, was found lying at the scene of occurrence and a monkey cap was also found lying on the said Motorcycle. This fact clearly indicates that the accused persons were not wearing their headgears through out the incident. If the faces of the assailants were covered throughout the incident, the witness would not have correctly identified the said M. as a pillion rider. (Para 16)

In the said Parade also, the witness had successfully identified both the appellants. (Para 17)

Appellants were apprehended in connection with the present offence after a period of more than 2 years from the date of incident. The appellants herein had kept themselves away from the rigours of Investigating Agency for this period, and therefore, it cannot be contended by the appellants that there was delay in holding T.I. Parade of 2 years. It is required to be noted that there is no delay in holding the T.I. Parade after the appellants were apprehended in the present case. Moreover, there is nothing on record to indicate that there was any fault or lacuna in conduct of the T.I. Parade. The witness-M. has been thoroughly cross-examined as regards the T.I. Parade and it is put to him that he was shown the photographs of the accused persons before the T.I. Parade was conducted. This fact has been categorically denied by the witness in his cross-examination. It is also sought to be contended on behalf of appellants that the panchas of the T.I. Parade panchnama have not been examined by the prosecution, however, the fact remains that the Executive Magistrate, who conducted the T.I. Parade has been examined by the prosecution vide Exh. 151. Therefore, merely not examining the panchas of T.I. Parade does not hamper the entire process of T.I. Parade. (Para 17)

The record also indicates that vide Exhs. 134 and 165, the present appellants had discovered the weapons, which were used for commission of the offence in question. The panchas to both the said panchnamas have categorically supported the panchnama as well as the case of the prosecution. It is also required to be noted that the weapons, which were discovered by the present appellants were in a working condition and were also used before they were sent for examination to the F.S.L. At this stage, it is also required to be noted that the medical evidence in the form of the deposition of the Doctor, who conducted the post-mortem examination upon the body of the deceased, post-mortem note as well as the deposition of the Doctor, who examined and treated the witness-M. clearly indicate that there were bullets recovered from the bodies of the deceased as well as the witness and these bullets have been identified by the said Doctors during the course of their deposition. The ballistic report also indicates that the bullets found from the body of the deceased as well as the witness were fired from the weapon Mark-I, which was used by the appellant-A. (Para 19.1)

The ballistic expert, in his report vide Exh. 259 has clearly opined that the bullets vide Mark-F, G, G, G1, G2 and C3 were fired from the weapon Mark-I. Therefore, the said report cannot be said to be inconclusive about the weapon from which above marked bullets were fired. (Para 20)

The report does not clearly indicate as to which of the mark bullets were fired from the weapon Mark-H. The weapon at Mark-H is attributed to the appellant-M. It is, therefore, sought to be contended that no bullet from the weapon, which was attributed to the appellant-M. was fired. (Para 21)

Referring to decision by Supreme Court in case of Himanshu Mohan Rai v. State of Uttar Pradesh, 2017 (4) SCC 161, the Court observed as

under :-

Therefore, when the eye-witness to the incident has categorically stated in his deposition and the appellant-M. had also fired from the weapon which he was carrying, merely because the bullets collected from the scene of offence and from the bodies of the deceased as well as the eye-witness do not appear to have been fired from the said weapon, there is no reason to disbelieve what is stated by the eye-witness in his deposition as well as in the F.I.R. (Para 22)

Cases Relied on :

(1) Himanshu Mohan Rai v. State of Uttar Pradesh, 2017 (4) SCC 161

Cases Referred to :

(1) O.M.A. @ Omprakash v. State of Tamil Nadu, 2013 (3) SCC 440

(2) Hemraj v. State of Haryana, 2005 (10) SCC 614

(3) Heera v. State of Rajasthan, 2007 (10) SCC 175

(4) Shambhu Dayal v. Subash Chandra, 1998 SCC (Cri.) 900

(5) Ravi @ Ravichandran v. State represented by Inspector of Police, 2007 (15) SCC 372

Criminal Appeal No. 1329 of 2015 : Virat G. Papat, for the Appellant. Ms. Divyangna Jhala, A.P.P., for the Respondent. Criminal Appeal No. 1650 of 2016 : Ms. Shunbha B. Tripathi, for the Appellant. Ms. Divyangna Jhala, A.P.P., for the Respondent.

(અ) ભારતીય દંડ સંહિતા, ૧૮૬૦ — કલમ ૩૦૨, ૩૦૪, ૩૦૭ અને ૩૦૧ — હથિયાર અર્થિનિયમ, ૧૯૫૯ — કલમ ૨૫(૧-બી) (એ), ૨૭ અને ૨૮ — પુરાવાનું મૂલ્યાંકન — પ્રથમ માહિતી આપનાર અને તેના ભાઈ જ્યારે રાજકોટથી જામનગર ટાટા સફારી કારમાં નુસાફરી કરતા હતા ત્યારે અપીલકર્તાઓએ નોટર સાઈકલ પર આવી તેમની કાર આંતરેલી — અપીલકર્તાએ કાર તેમને સોંપી દેવા કહેલું — જ્યારે તેમણે બચાવનો પ્રયાસ કર્યો ત્યારે અપીલકર્તાઓએ બંદૂક કાઢેલી અને તેમની પર ગોળીબાર કરેલ — પ્રથમ માહિતી આપનારના ભાઈને ગંભીર ઈજાઓ થયેલી અને તે નુપુ પાનેલા — અપીલકર્તાઓ કાર સાથે ભાગી છુટેલા — પ્રથમ માહિતી આપનારે બન્ને અપીલકર્તાઓને ઓળખ પરેડ અને અદાલતમાં ઓળખી બતાવેલા — અપીલકર્તાઓની રજૂઆત કે, બનાવ માત્ર ૨ થી ૫ મીનીટમાં જ બનેલો તેથી પ્રથમ માહિતી આપનારને આ ટૂંકા સમયમાં જોયેલા ચહેરા યાદ ના રહી શકે — રજૂઆત નકારવામાં આવી — એ હકીકતને ધ્યાનમાં લેતાં કે, પ્રથમ માહિતી આપનાર અપીલકર્તાને જોઈ શકે અને તેમના ચહેરા યાદ રાખી શકે તેટલા સમય પૂરતો બનાવ બનેલો હતો — ઠરાવવામાં આવ્યું, દોષિત ઠરાવેલા તે માન્ય રાખવામાં આવ્યું.

(બી) ભારતીય દંડ સંહિતા, ૧૮૬૦ — કલમ ૩૦૨, ૩૦૪, ૩૦૭ અને ૩૦૧ — હથિયાર અર્થિનિયમ, ૧૯૫૯ — કલમ ૨૫(૧-બી) (એ), ૨૭ અને ૨૮ — નજરે જોનાર સાક્ષીએ બન્ને અપીલકર્તાઓને ઓળખ પરેડમાં ઓળખી બતાવેલા — અપીલકર્તાઓની એવી રજૂઆત કે, ઓળખ પરેડ યોજવામાં બે વર્ષનો વિલંબ હોવાથી તે શંકાસ્પદ છે — રજૂઆત નકારવામાં આવી — અપીલકર્તાઓ બે વર્ષ બાદ હાથમાં આવેલા અને ઓળખ પરેડ તેમની અટકાયત બાદ તુરંત યોજવામાં આવેલી — ઠરાવવામાં આવ્યું, ઓળખ પરેડ યોજવામાં કોઈ વિલંબ થયેલ નથી — વધુમાં, એકિઝક્યુટીવ મેજસ્ટ્રેટ જેમણે ઓળખ પરેડ યોજેલી તેમણે પંચોને તપાસેલા નહીં તે ઓળખ પરેડની વિશ્વસનીયતાને અસર નહીં કરે — ઓળખ પરેડમાં કોઈ વિસંગતતા નથી તેથી તે વિશ્વસનીય છે.

(સી) ભારતીય દંડ સંહિતા, ૧૮૬૦ — કલમ ૩૦૨, ૩૦૪, ૩૦૭ અને ૩૦૧ — હથિયાર અર્થિનિયમ, ૧૯૫૯ — કલમ ૨૫(૧-બી) (એ), ૨૭ અને ૨૮ — અપીલકર્તાઓએ ગુનામાં વપરાયેલ હથિયાર શોધી આપેલા — હથિયાર ચાલુ હાલતમાં હતા અને તે વપરાયેલા હતા — તબીબી પુરાવો દર્શાવતો હતો કે ગોળીઓ મૃતક અને પ્રથમ માહિતી આપનારના શરીરમાંથી મળી આવેલી — બેલેસ્ટીક અહેવાલ દર્શાવતો હતો કે, અપીલકર્તા-એ દ્વારા વપરાયેલ આંક ૧ હથિયારમાંથી છોડવામાં આવેલી ગોળીઓ મૃતક અને સાક્ષીના શરીરમાંથી મળી આવેલી — બેલેસ્ટીક અહેવાલ એ નહોતો દર્શાવતો કે, કઈ ગોળી અપીલકર્તા-એમ.એ વાપરેલ હથિયારથી ચલાવેલી — ઠરાવવામાં આવ્યું, જ્યારે નજરે જોનાર સાક્ષી એવું કહે છે કે, એમ.એ પોતાની પાસે રહેલ હથિયારથી ગોળીબાર કરેલો તો તે ના માનવાને કોઈ કારણ નથી — બન્ને અપીલકર્તા રદ કરવામાં આવી.

M. R. MENGDEY, J. Both the present appeals have been preferred by the respective appellants challenging the judgment and order of conviction dated 18-9-2015 passed by the 7th (*ad-hoc*) Additional Sessions Judge, Jamnagar in Sessions Case No. 90 of 2007 (Main) with Sessions Case No. 51 of 2009, whereby the appellants have been convicted for the offence punishable under Secs. 302, 394, 397 and 341 of the Indian Penal Code, Secs. 25(1B)(A), 27 and 29 of the Arms Act. For the offence punishable under Sec. 302 of the I.P.C., the present appellants had been sentenced imprisonment for life and fine of Rs. 5,000/- and in default of payment of fine, further simple imprisonment of 2 years is imposed. For the offence under Sec. 394 of the I.P.C., the present appellants had been sentenced rigorous imprisonment for a period of 10 years and fine of Rs. 5,000/- and in default of payment of fine, further 2 years simple imprisonment is imposed. For the offence under Sec. 397 of the I.P.C., the present appellants had been sentenced rigorous imprisonment for a period of 7 years. For the offence under Sec. 341 of the I.P.C., the present appellants had been sentenced simple imprisonment for a period of 1 month. Beside this, both the appellants have been convicted for the offence under Sec. 25(1)(B-A) of the Arms Act and present appellants had been sentenced simple imprisonment for a period of 1 year. For the offence under Sec. 27 of the Arms Act, the present appellants had been sentenced simple imprisonment for a period of 7 years and for the offence under Sec. 29 of the Arms Act, the present appellants had been sentenced simple imprisonment for a period of 1 year. All the sentences imposed upon the appellants run concurrently.

2. Since both the appeals are arising out of the same common judgment and order, both the captioned appeals are taken up for final disposal by this common judgment.

3. The short facts giving rise to filing of present appeals are as under :

3.1. On 4-11-2004, the first informant *viz.* Malde Ramsinh Chavda and his brother Karsan @ Kana Ramsinh Chavda were travelling from Rajkot to Jamnagar in Tata Safari Car bearing Registration No. GJ-10-N-8668. The said car was driven by the brother of the first informant *viz.* Karsan @ Kana Ramsinh Chavda. At about 10-30 p.m., when they were passing through the highway and reached Near Dhunvav Village, at that time, their vehicle was intercepted by 2 persons riding on Hero Honda Motorcycle bearing Registration No. GJ-3-AF-2286. Both the persons, who had intercepted the said vehicle Tata Safari Car, wanted to loot the vehicle belonging to an Angadiya Pedhi moving on Morbi to Rajkot route. They were in need of some vehicle for commission of the said loot, and therefore, with an intention to commit loot of the said vehicle being Tata Safari Car, they had intercepted the said vehicle. After the said vehicle being Tata Safari Car stopped, both the aforesaid persons stopped the motorcycle near Tata Safari Car and asked the first informant as well as his brother to hand over the said Tata Safari Car to them. The First Informant as well as his brother protested against the said persons, and thereupon, both the aforesaid persons took out the fire arms which they were carrying and fired upon the First Informant as well as his brother. The brother of the First Informant sustained severe injuries in the incident and succumbed to the same. The accused persons thereafter, fled from the scene with the Tata Safari Car.

3.2. The offence in this regard was registered on 5-11-2007 with Panch 'A' Division Police Station, Jamnagar being C.R. No. I-122 of 2004 for the offence punishable under Secs. 302, 394, 397, 341 of the I.P.C., Secs. 25(1B)(A), 27 and 29 of the Arms Act and Sec. 135(1) of the Bombay Police Act.

4. During the course of investigation, the present appellants were apprehended in connection with the said offence after the period of 2 years from the date of incident. The Investigating Agency, after conclusion of the investigation, filed charge-sheet against the present appellants. Since the offence alleged against the present appellants was exclusively triable by the Sessions Court, the Judicial Magistrate First Class committed the case to the Sessions Court under the provision of Sec. 209 of the Code of Criminal Procedure.

5. The Sessions Judge framed charges against the present appellants *vide* Exh. 16. Since both the appellants pleaded not guilty, they were put to trial. The prosecution had adduced oral as well as documentary evidence to prove the charge against the present appellants. The Sessions Judge, after considering the evidence adduced on record, *vide* impugned judgment and order of dated 18-9-2015, was pleased to convict and punish the present appellants, as stated hereinabove.

6. Being aggrieved and dissatisfied with the said judgment and order of conviction, the appellants have preferred captioned appeals.

7. Heard Mr. Viral Popat, learned Advocate for the appellant in Criminal Appeal No. 1329 of 2015. He submitted that as per the case of prosecution, the incident in question had occurred on 4-11-2004, at around 10-30 p.m., which was a winter season. He further submitted that there was no chance for the first informant to have seen the faces of the assailants at the time of incident, as it was dark at the time of incident. It is submitted, that therefore, the First Informant in the F.I.R. has not given any description about the looks of the assailants.

7.1. It is submitted that the First Informant in the F.I.R. as well as in his deposition has categorically stated that the person, who was driving the motorcycle was wearing a black coloured helmet and the pillion rider was wearing a monkey cap, and therefore, the First Informant had no occasion to see the faces of the assailants.

7.2. It is submitted that both the appellants were subjected to T.I. Parade at the hands of the First Informant. The said T.I. Parade was conducted after the period of more than 2 years from the date of incident. In the circumstances narrated herein above, it is hard to believe that the First Informant would identify the present appellants as assailants in the present case. Therefore, the identification of the present appellants in the T.I. Parade is doubtful.

7.3. It is submitted that panchas of *panchnama* of the T.I. Parade were not examined on behalf of prosecution for the reasons best known to it, and therefore, the contents of *panchnama* of the T.I. Parade are not proved.

7.4. It is submitted that in the deposition of the Investigating Officer, the Investigating Officer has deposed that on 26-11-2007, during the course of investigation of the case of vehicle theft of Dwarka Police Station, the accused in that case had stated during the course of interrogation that the vehicle stolen in that case was handed over to the appellants herein and the present appellants with the use of the said vehicle being Hero Honda Motorcycle bearing Registration No. GJ-3-AF-2286 had committed the present offence. He submitted that as per the record of that case, the accused *viz.* Keshu @ Kishan Karnabhai Chavda was arrested on 3-1-2007, whereas present appellants were arrested in connection with the present offence on 28-11-2006. Thus, the present appellants were arrested in the present offence prior to the arrest of the said Keshu Chavda. Therefore, the story of the prosecution case that the names of the present appellants were reflected in the present case on the basis of statement of Keshu Chavda does not appear to be true.

7.5. It is submitted that there are material contradictions between the deposition of the First Informant and the F.I.R. as regards the sequence and the manner in which the incident has taken place. These contradictions go to the root of the matter and thus, weaken the case of prosecution.

7.6. It is submitted that ballistic report which is on record *vide* Exh. 259 does not support the case of prosecution to the effect that the weapons discovered by the present appellants were actually used in the present offence.

7.7. It is submitted that most of the panchas examined except for the *panchnama* of recovery of weapon at Exhs. 164, 178 and 133, demonstration *panchnama* at Exh. 99 and inquest *panchnama* at Exh. 72 are hostile and do not support the case of prosecution.

8. Learned Advocate for the appellant has relied upon the following judgments in support of his submissions :

(i) *Himanshu Mohan Rai v. State of Uttar Pradesh*, reported in 2017 (4) SCC 161.

(ii) *O.M.A. @ Omprakash v. State of Tamil Nadu*, reported in 2013 (3) SCC 440.

(iii) *Hemraj v. State of Haryana*, reported in 2005 (10) SCC 614.

(iv) *Heera v. State of Rajasthan*, reported in 2007 (10) SCC 175.

(v) *Shambhu Dayal v. Subash Chandra*, reported in 1998 SCC (Cri.) 900.

(vi) *Ravi @ Ravichandran v. State represented by Inspector of Police*, reported in 2007 (15) SCC 372.

He, therefore, submitted to allow the present appeal and quash and set aside the judgment and order of conviction impugned in present appeal and acquit the appellant from the charges levelled against him.

9. Ms. Shubha Tripathi, learned Advocate for the appellant in Criminal Appeal No. 1650 of 2016 has adopted the aforesaid arguments and prayed to quash and set aside the judgment and order of conviction impugned in present appeal and acquit the appellant from the charges levelled against him.

10. Learned A.P.P. Ms. Divyangna Jhala has opposed the both the appeals and submitted that the first informant *viz.* Malde Ramsinh Chavda, who happens to be the brother of the deceased and was present in the vehicle at the time of incident. He had also sustained bullet injury in the present incident. Therefore, he is an injured eye-witness in the present case. In his F.I.R. as well as in his deposition, he had vividly described the incident, as it took place. She submitted that the first informant had sufficient time to see the faces of the assailants, and has therefore, rightly identified the present appellants in the T.I. Parade as well as during the trial before the Court.

10.1. It is submitted that other circumstances being the clothes worn by the appellants at the time of incident being blood-stained, weapons discovered by the present appellants having been found to be used in the present incident etc., corroborate the deposition of the first informant and make the deposition of the first informant as well as F.I.R. credible.

10.2. It is submitted in her written argument as regards ballistic report *inter alia* contending that the ballistic report at Exh. 259 clearly supports the case of prosecution. She, therefore, submitted that the prosecution has successfully proved the charges levelled against the present appellants beyond reasonable doubt. She, therefore, submitted to dismiss the present appeals.

11. Heard learned Advocates for the respective parties and perused the documents on record.

12. In present case, P.W. 7-Malde Ramsinh Chavda, who was examined at Exh. 44 on behalf of prosecution is the direct evidence against the present appellants. As per the case of prosecution, this witness is an eye-witness to the incident, as he was travelling with his deceased brother in the Tata Safari Car at the time of incident. This witness is also a person, who had lodged the First Information Report.

13. Upon perusal of deposition of this witness, it appears that the witness has narrated the complete sequence and the manner in which the present incident had taken place. The defence has sought to discard the deposition of this witness on various grounds. It is contended on behalf of appellants that there are material contradictions in the deposition of this

witness as well as F.I.R. lodged by him. Upon examination of the record in this regard, it appears that no doubt there are some contradictions in the deposition of this witness as well as the F.I.R. lodged. In the F.I.R., it has been stated that the incident had taken place at about 10-30 p.m., whereas in the deposition, the witness states that the alleged incident had taken place around 9-30 p.m. The other contradiction is with regard to sequence of incident. In the F.I.R., it has been stated that after the deceased got down of the car, the accused persons had fired upon him, whereas as per the deposition, the deceased was shot at while he was sitting in the car. These contradictions taken at their face value do not appear to be having any adverse effect on the case of prosecution. The witness has categorically stated that the persons, who had intercepted their vehicle by motorcycle had fired upon his deceased-brother as well as himself. Even if the aforesaid contradictions are accepted, these contradictions do not affect what has been stated by the witness in his deposition. By these contradictions, the version of the witness that the present appellants had fired upon the deceased as well as the witness does not get dislodged. Therefore, these contradictions cannot be said to be material contradictions having any adverse effect on the case of prosecution.

14. The deposition of this witness is also sought to be discarded on the ground that the alleged incident had lasted only for the period of 2 to 5 minutes. It is submitted that when the incident has lasted for such a short span of time, it is difficult for a person to remember the faces which has been seen by him for such a short time, after a period of more than 2 years. Upon examination of the record in this regard, as the facts have come on record, when the deceased and the witness were travelling in the Tata Safari Car they were being chased by 2 motorcyclist and when they reached near Village : Dhunvav, their vehicle was intercepted by those motorcyclists, and therefore, the deceased, who was driving the Tata Safari Car had stopped the vehicle. The motorcyclist thereafter got down of the motorcycle, came to the Tata Safari Car and asked the deceased to hand over the Tata Safari Car to them. Thereafter, there were some heated exchanges between the deceased and the 2 motorcyclists. Thereafter, the deceased was fired upon by one of them upon which the witness got down of the Tata Safari Car and had scuffle with one of the motorcyclists, thereafter, one of the motorcyclists fired a gunshot upon the witness, and thereafter, the accused persons fled away with the Tata Safari Car.

15. Having regard to this sequence in which the incident has taken place, it can safely be said that the incident would have lasted for the period of more than 5 minutes. It is also required to be noted that during the course of the incident, the accused persons had an argument with the deceased, and thereafter, the witness also had a scuffle with one of the accused persons. The witness in his cross-examination goes on to say that he had caught hold of one of the accused persons. Having regard to these facts, it can be said that the incident had not lasted for merely 2 to 5 minutes, but had lasted for sufficiently longer period. The time, therefore, for which the incident in question had lasted appears to be sufficient enough for the witness to observe and remember the faces of the accused persons. At this stage it is required to be noted that the witness had lost his real younger brother in the incident, and therefore, it is quite obvious that he would remember the faces of the assailants.

16. It is contended on behalf of the appellants that as per the case of the prosecution, the person who was driving the motorcycle was wearing a Helmet covering his entire face and the pillion rider was wearing a monkey cap. The witness also states in his deposition that the accused persons were wearing the aforesaid headgears when they left the scene of offence, and therefore, this witness had no occasion to see the faces of the accused persons. In his cross-examination, the suggestion is put to the witness by defence that during the entire incident the faces of the accused persons were covered. The witness has denied this suggestion. He also goes on to say that the accused persons had removed their headgears during the course of incident. This fact gets corroborated by the scene of occurrence *Panchnama vide* Exh. 187. The motorcycle which was used by the present appellants, was found lying at the scene of occurrence and a monkey cap was also found lying on the said motorcycle. This fact clearly indicates that the accused persons were not wearing their headgears through out the incident. It is also required to be noted that the witness during the course of his deposition identifies the appellant-Mahendra @ Tako and says that he was a pillion rider on the motorcycle at the time of incident. If the faces of the assailants were covered throughout the incident, the witness would not have correctly identified the said Mahendra @ Tako as a pillion rider.

17. It is pertinent to note here that when the appellant-Mahendra @ Tako was identified by this witness before the Court the other appellant viz. Adam @ Javid was not present before the Court and subsequently, when Adam @ Javid was present before the Court, witness-Malde Ramsinh Chavda successfully identifies this accused person before the Court. It is also required to be noted that it is not for the first time that the present appellants have been identified before the Court by this witness. The appellants herein were subjected to T.I. Parade at the hand of witness-Malde Ramsinh Chavda and in the said T.I. Parade also, the witness had successfully identified both the appellants. The process of T.I. Parade is also sought to be assailed by the appellants on the ground that it was conducted after a period of more than 2 years from the date of incident. It is an admitted position on record that the present appellants were apprehended in connection with the present offence after a period of more than 2 years from the date of incident. The appellants herein had kept themselves away from

the rigours of investigating agency for this period, and therefore, it cannot be contended by the appellants that there was delay in holding T.I. Parade of 2 years. It is required to be noted that there is no delay in holding the T.I. Parade after the appellants were apprehended in the present case. Moreover, there is nothing on record to indicate that there was any fault or *lacuna* in conduct of the T.I. Parade. The witness-Malde Ramsinh Chavda has been thoroughly cross-examined as regards the T.I. Parade and it is put to him that he was shown the photographs of the accused persons before the T.I. Parade was conducted. This fact has been categorically denied by the witness in his cross-examination. It is also sought to be contended on behalf of appellants that the panchas of the T.I. Parade *panchnama* have not been examined by the prosecution, however, the fact remains that the Executive Magistrate, who conducted the T.I. Parade has been examined by the prosecution *vide* Exh. 151. Therefore, merely not examining the panchas of T.I. Parade does not hamper the entire process of T.I. Parade.

18. The witness-Malde Ramsinh Chavda in his deposition also describes the clothes worn by the accused persons at the time of incident and also identifies the said clothes during the course of his deposition.

19. The Investigating Officer P.W. 28-Mr. Rajendra Jayantilal Barot was examined at Exh. 213 on behalf of prosecution. In his deposition, he states that during the course of investigation of an offence pertaining to theft of vehicle of Dwarka, the accused of the said offence had stated that the vehicle stolen by him in the said case was handed over by him to the present appellants and the said vehicle *i.e.* Hero Honda Motorcycle was used by the present appellants for commission of offence in question. In this regard, it is a case of the appellants that the offence of theft of Hero Honda Motorcycle bearing registration No. GJ-3-AF-2286 was lodged with Pradhyumnagar Police Station, Rajkot City and the accused in the said case was arrested on 3-1-2007, whereas the present appellants were arrested in connection with the present offence on 24-11-2006. Therefore, the story of prosecution that the present appellants were apprehended in connection with the present offence on the basis of information provided by the accused of the motorcycle theft, does not inspire confidence. The accused, who as per the case of prosecution, had committed a theft of Hero Honda Motorcycle was one Keshu @ Kishan Karnabhai Chavda. The charge-sheet filed by the police in the said case is on record *vide* Exh. 281. As per the said charge-sheet, the said accused person was arrested in connection with the said offence on 3-1-2007, however, upon perusal of the entire record, it appears that the police had recorded the statement of the said accused person on 24-11-2006, where this person had stated that he had handed over Hero Honda Motorcycle stolen by him to the present appellants. Thus, the argument on behalf of the appellants that since the said accused-Keshu was arrested in connection with the theft of motorcycle on 3-1-2007 and the present appellants were arrested prior to him, it cannot be believed that the said Keshu had named the present appellants, does not appear to be correct.

19.1. The record also indicates that *vide* Exhs. 134 and 165, the present appellants had discovered the weapons, which were used for commission of the offence in question. The panchas to both the said *panchnamas* have categorically supported the *panchnama* as well as the case of the prosecution. It is also required to be noted that the weapons, which were discovered by the present appellants were in a working condition and were also used before they were sent for examination to the F.S.L. At this stage, it is also required to be noted that the medical evidence in the form of the deposition of the Doctor, who conducted the *post-mortem* examination upon the body of the deceased, *post-mortem* note as well as the deposition of the Doctor, who examined and treated the witness-Malde Ramsinh Chavda clearly indicate that there were bullets recovered from the bodies of the deceased as well as the witness and these bullets have been identified by the said Doctors during the course of their deposition. The ballistic report also indicates that the bullets found from the body of the deceased as well as the witness were fired from the weapon Mark-I, which was used by the appellant-Adam @ Javid.

20. Learned Advocates appearing for the appellants have also tried to create doubt about the ballistic report which is on record *vide* Exh. 259. It is contended on behalf of the appellants that the language of the said report does not appear to be properly used, and therefore, the said report appears to be inconclusive. Upon perusal of the said ballistic report, it appears that the ballistic expert, in his report *vide* Exh. 259 has clearly opined that the bullets *vide* Mark-F, G, G, G1, G2 and G3 were fired from the weapon Mark-I. Therefore, the said report cannot be said to be inconclusive about the weapon from which above marked bullets were fired.

21. The report does not clearly indicate as to which of the mark bullets were fired from the weapon Mark-H. The weapon at Mark-H is attributed to the appellant-Mahendra @ Tako. It is, therefore, sought to be contended that no bullet from the weapon, which was attributed to the appellant-Mahendra @ Tako was fired.

22. It is pertinent to note that the eye-witness-Malde Ramsinh Chavda clearly states in his deposition as well as in his F.I.R. that the appellant-Mahendra @ Tako had also fired from the weapon which he was carrying. The Apex Court in its decision in case of *Himanshu Mohan Rai* (supra) has observed as under :

"26. In this case, the ballistics report need not be rejected as untrue; it simply states that the empty cartridges found at the scene of the crime were not fired from the gun recovered from the accused. But this had no bearing on the credibility of the deposition of P.W. 1 that the accused shot the deceased with a gun, particularly as it is corroborated by the bullets in the body. In this case, we find it safe to accept the evidence of Himanshu Mohan Rai and disregard the apparent contradictions."

Therefore, when the eye-witness to the incident has categorically stated in his deposition and the appellant-Mahendra @ Tako had also fired from the weapon which he was carrying, merely because the bullets collected from the scene of offence and from the bodies of the deceased as well as the eye-witness do not appear to have been fired from the said weapon, there is no reason to disbelieve what is stated by the eye-witness in his deposition as well as in the F.I.R. It would not be out of place to mention here that the appellant-Mahendra @ Tako @ Salim Naranbhai Wada was convicted for offence under Secs. 302, 307, 188 of I.P.C. and Sec. 42 of the Prisoners Act *vide* judgment and order dated 31-1-2017 passed by the learned Additional Sessions Judge, City Civil and Sessions Court, Ahmedabad in Sessions Case No. 212 of 2013. The said conviction came to be confirmed by this very Bench of this Court in Criminal Appeal No. 869 of 2017 *vide* judgment and order dated 10-4-2023.

23. Mr. Viral Popat, learned Advocate for the appellant in Criminal Appeal No. 1329 of 2015 has sought to rely upon the judgment of the Apex Court in case of *Shambhu Dayal* (supra). In the said case, the Apex Court had found the discovery and identification to be improbable on the ground that there was no possibility for the witness to identify the accused, as the deposition and statement that 60 watt electric bulb was kept burning was not accepted by the Court. In the case before the Apex Court, one of the witnesses has stated in his deposition that no one was identified at night and after the accused were arrested, they were shown to a witness. It was under these circumstances that the Apex Court had not believed the identification of the accused by witnesses. No such circumstances are present in the present case, and therefore, this judgment would be of no help to the appellants.

24. Learned Advocate, has thereafter, sought to rely upon the judgment of Apex Court in case of *Ravi @ Ravichandran* (supra), wherein the Apex Court has held that when the accused are unknown to the complainant and the identification parade was held late, such identification was held to be vague. In the case before the Apex Court, before holding of T.I. Parade, photographs of the accused persons were published in the daily newspapers and the witness, who had come to identify after the first witness, had an occasion to interact with the witness who had earlier identified the accused. It was under this circumstance that the Apex Court had not believed the T.I. Parade. In the present case, as discussed hereinabove, the appellants were apprehended after the period of 2 years from the date of offence and immediately after they were apprehended, they were subjected to T.I. Parade. It has also come on record that the photographs of the present appellants were never published in any newspaper with regard to the present offence nor the accused were ever shown to the witness prior to test identification parade. Therefore, this judgment would also be of no help to the appellants.

25. Learned Advocate, thereafter, sought to rely upon the judgment of the Apex Court in case of *Heera* (supra). In the said case, the Apex Court had held that there was no infirmity and all requisite formalities with regard to T.I. Parade were adopted and followed. In the present case also, there are infirmities have been found in conduct of the T.I. Parade. Therefore, this judgment would also be of no help to the appellants.

26. Learned Advocate, thereafter, sought to rely upon the judgment of the Apex Court in case of *Hem Raj* (supra). In the said case, the Apex Court had observed that the possibility of eye-witness having seen the assailant was doubtful, and therefore, identification was discarded. The Apex Court had found in the said case that the eye-witness had reached to the place of incident after the incident was over, and therefore, the possibility of him seeing all the accused attacking the deceased that too in the night time is doubtful. In present case, as discussed hereinabove, the eye-witness had a scuffle with the accused persons and had also caught hold one of the accused persons after the incident. This proves the presence

of the witness at the time and place of incident, and therefore, what is deposed by the witness in his deposition appears to be quite natural and true. Therefore, this judgment would also be no help to the assailants.

27. Learned Advocate, thereafter, sought to rely upon the judgment of the Apex Court in case of *O.M.A. @ Omprakash* (supra), wherein the Apex Court had held that the accused persons apprehended after 10 years and their identification after 10 years and recovery of rod was doubtful. In the case before the Apex Court, there was no identification parade conducted prior to the identification of the accused persons before the Court. It was under these circumstances that the Apex Court had observed to the aforesaid effect, whereas in present case, as discussed hereinabove, the appellants were subjected to T.I. Parade immediately after they were apprehended. It is also required to be noted that the weapons, which were discovered at the behest of the present appellants were found to have been used before they were sent to the F.S.L for necessary examination. Therefore, this judgment would also be no help to the appellants.

28. In view of aforesaid discussion, the prosecution appears to have successfully proved the charge framed against the present appellants.

29. In the result, both the appeals fail and are accordingly, are dismissed. The judgment and order of conviction dated 18-9-2015 passed by the 7th (*ad-hoc*) Additional Sessions Judge, Jamnagar in Sessions Case No. 90 of 2007 (Main) with Sessions Case No. 51 of 2009 stands confirmed. Record and proceedings be sent back to the concerned trial Court, forthwith.

Appeals dismissed.

