

'
Crl.A.No. 837 OF 1999
ITEM NO.110

COURT NO.11

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

CRIMINAL APPEAL NO. 837 OF 1999

STATE OF RAJASTHAN

Appellant (s)

VERSUS

KANHIYA

Respondent(s)

Date: 06/10/2004 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ARIJIT PASAYAT
HON'BLE MR. JUSTICE C.K. THAKKER

For Appellant(s) Ms. Madhurima Tatia,Adv.
Mr. Aruneshwar Gupta,Adv.

For Respondent(s) Mrs. K. Sarada Devi,Adv.

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

The appeal is allowed to the extent indicated in the
signed order.

(Neena Verma) (Vijay Aggarwal)
Court Master Court Master

Signed order is placed on the file.
IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.837 OF 1999

State of Rajasthan
...Appellant

Versus

Kanhiya
...Respondent

O R D E R

This appeal by the State of Rajasthan is directed against the judgment of a learned Single Judge of the High Court of Rajasthan, Jaipur Bench, Jaipur. Respondent Kanhiya @ Mard was convicted.

ted by the Trial Court for an offence punishable under Section 397 of the Indian Penal Code, 1860 (in short the 'Act') and was sentenced to seven years rigorous imprisonment. The High Court, by the impugned judgment, set aside the judgment of conviction and sentence. It was the case of prosecution that while PW-1 and other three were traveling in a Truck driven by Ram Kishan, seven persons got into the truck on some pretext and waylaid them using fire arms and knife and robbed the articles being carried and also money from Ram Kishan and PW-1 Bhagwat Dayal.

Placing reliance on the evidence of identification done by PW-1, the Trial Court found the respondent-accused guilty. In appeal before the High Court, essentially two points were raised. Firstly, it was submitted that Section 397 IPC had no application because there was no charge relating to the offence under Section 395 IPC. Secondly, it was submitted that the Test Identification Parade where PW-1 purportedly identified the accused, was not in accordance with law. PW-1 had the opportunity to see the accused and, therefore, the Test Identification had no value. The High Court held that in fact charge was framed under Section 395 IPC and in any event, Section 397 IPC is an aggravated form of Section 395 IPC. The High Court, however, accepted the second plea overlooking the objections by the prosecution that there was no scope for any prior identification or pointing out, as claimed by the accused. So far as the second argument relating to the legality of Test Identification is concerned, the High Court pointed out to two circumstances. Firstly, it was noted that the possibility of the witness having seen the accused in jail, was not ruled out. Secondly, when the Test Identification Parade was conducted, other persons who claimed to have seen the accused, should have also been made a party to the Test Identification Parade. On the ground that there was possibility of the accused having been pointed out and Test Identification having not been done in respect of other witnesses, the Trial Judge was held to be in error.

In support of the appeal, learned counsel for the appellant-State submitted that the conclusions of the High Court are clearly erroneous. There was no evidence to point out that prior to the Test Identification Parade, the accused was pointed out to the witnesses. The fact that prosecution did not avail the opportunity of conducting Test Identification Parade in the presence of other persons who claimed to have seen the occurrence that would not take away the effect of identification by PW-1. In response, learned counsel for the respondent-accused submitted that it is unbelievable that PW-1 who had visited the jail did not have the occasion to see the accused on being pointed out by the police officials. Further, when the opportunity was available, prosecution having not got the test identification conducted by other persons who claimed to have seen the accused, the evidence by PW-1 was really not credible.

We find that the conclusions of the High Court are essentially hypothetical. So far as the first aspect is concerned, there was no evidence on record to show that accused was earlier shown to PW-1 and/or it was pointed out to him that he is the culprit. The conclusions of the High Court about the possibility of that having done, has no legal foundation. So far as the second question is concerned, the identification of the respondent-accused by PW-1, does not get diluted merely because other persons who had claimed to have seen the accused persons were not made a party to the Test Identification Parade when it was done. On both grounds, the High Court's conclusions are unsustainable. That being so, we set aside the judgment of the High Court and restore that of the Trial Court. The respondent shall surrender to custody forthwith to serve the remainder of sentence, if any.

The appeal is allowed to the extent indicated above.

(ARIJIT PASAYAT)

.....J.

.....J.
(C.K. THAKKER)

New Delhi,
October 06, 2004.