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**(1980) 11 MP CK 0004**

**Madhya Pradesh High Court**

**Case No:** Criminal A. No. 158 of 1976

Abdul Haque and another

APPELLANT

Vs

State of M.P.

RESPONDENT

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**Date of Decision:** Nov. 25, 1980

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 307, 34, 456

**Citation:** (1982) JLJ 744

**Hon'ble Judges:** A.R. Naokar, J

**Bench:** Single Bench

**Advocate:** Rajeev Gupta, for the Appellant; V.K. Saxena, Panel lawyer for State, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

A.R. Navkar, J.

This is an appeal against an order of conviction recorded by the Additional Sessions Judge, Datia, convicting the appellants u/s 456 of the Indian Penal Code read with section 34 IPC and S. 307 IPC read with S. 34 IPC and sentencing them to one year and three years rigorous imprisonment each in Sessions Trial No. 25 of 1978, through Judgment dated 8-6-1978.

2. The appellants and one Ezaz Bux were tried for offences u/s 456 read with section 34 IPC and section 307 read with section 34 IPC on the allegation that they have committed lurking house trespass by night in the house of the complainant Madar Bux and attempted at the lives of Bakridan, Madar Bux and Rahiman.

3. The prosecution case, in short, is that in the night of 9-10-1977, at about 2.00 a.m. Bakridan (PW 1) got up and went to urinate and thereafter when she went to sleep, someone opened the door of her room. She thought that her mother in-law might have opened the door. When she tried to close the door, someone gave a knife blow through the gap of doors and two persons forcibly entered it to the room. They

dragged Madar Bux, who was lying on the cot, out in the Court-yard and caused him knife injuries. Ob this. Bakridan and Rahiman raised hue and cry and tried to save Madar Bux. The miscreants caused injuries to Rahiman also. Then the miscreants ran away. Bakridan (PW 1) lodged the report at 2.45 a.m. at Police Station, Bhandar.

4. The defence of the appellants was that they have not committed any offence whatsoever and they have been falsely implicated. The prosecution examined Bakridan (PW 1), Chandu (PW 2), Madar Bux (PW 3), Shakoor Khan (PW 4), Vaidehi Charan (PW 5), Jagdish Prasad (PW 6), Abdul Hakeem (PW 7), Mubin (PW 8), Guttu (PW 9), Dal Chand (PW 10), Dr. L. Prasad (PW 11), Dr. R. N. Gupta (PW 12) and other witnesses.

5. The prosecution examined Bakridan (PW 1) and Madar Bux (PW 3) as eye-witnesses of the incident. Basing its finding on the evidence mentioned above the learned Additional Sessions Judge convicted the accused appellants, but giving benefit of doubt, he acquitted other accused, namely Ezaz Bux. Against the conviction and sentence, the present appeal is filed,

6. After going through the evidence, I am of the opinion that the appeal deserves to be accepted and the conviction and sentence set aside.

7. I will take the evidence of each and every witness one by one. The first witness examined by the prosecution is Bakridan (PW 1). In para I of her statement, she has stated that while she was trying to close the door, at that time, from outside somebody gave a knife blow, which struck her fingers. When the knife blow fell on her fingers, she cried out that somebody has given a knife blow to her. When she opened the door, she saw two persons and they caught hold of her husband and took him to the Court yard. Hearing her cries, her mother-in-law came out and one of the miscreants gave a knife blow to her mother-in-law, which struck her mother-in-law in the stomach. Further, she has stated that in the room, there was a lamp burning, but it fell down and because of the fall, it went off. At this time, her husband told her that he has identified the miscreants and at the same time one of the miscreants cried "Shakil Bhag Jao" Hearing this, all the miscreants ran away. The reason for not believing the statement of this witness is that she has stated further in her statement that the miscreants were of young age and they had covered their faces with cloth. But, in the struggle, the cloth of one miscreants gave way and because of that she could identify the miscreants, In para 5 of her statement, she admits that when the incident took place, no lamp was burning in the Court yard and the alleged beating took place in the Court yard. Now if I turn to the first information report, which is lodged by her, there is no mention that there was a lamp burning as she has stated in her statement So also, there is no mention that the miscreants were identified by her husband. Further more, there is no mention that one of the miscreants shouted "Shakil Bhag Jao", Neither it mentions that she could identify one of the miscreants because in the struggle the cloth with which the miscreants hid their faces, came off. She was put a direct question in

cross-examination that her husband did not identify any of the miscreants, nor he mentioned any body's name She further admits that at the time of beating accused Ezaz Bux was not there.

8. Now to weigh the truthfulness of the statement given by Bakridan (PW 1) witness before the Court, I will have to consider the evidence of her husband Madar Bux (PW 2). I may mention here that the katned trial Court acquittal Ez.z Bux, holding that the statement of Bakridan (PW 1) is not worth credence. Madar Bux (PW2) has stated in his statement, the sequence of incidents in the same way as is stated by his Wife Bakridan (PW 1). But, in his statement, he has stated that one of the miscreants said "Mummy Bhag Jao" and fro a his voice, he could identify that he is Ezaz, the acquitted accused and for identifying by voice, he has stated that Ezaz resided behind the house which is owned by him and as such, he could identify Ezaz from the words uttered by him. I may add here that Bakridan (PW 1) stated in her statement that one of the miscreants cried "Shakil Bhag Jao", while Madar Bux (PW 2) states "Mummy Bhag Jao". But, when he was confronted with his statement recorded as dying declaration (Ex, D/1), he admitted that he had stated the portion marked in his statement with letters B to B. If translated into English, it will read as under :

The miscreants who entered his house, had covered their faces and as such, he could not identify them.

The above statement was recorded on 9-10-1977 at 3.30 a.m. and it bears the signature of Madar Bux (P. W 2). This is an earlier statement given by the witness. If this statement is taken into consideration, then I have no doubt in holding that Madar Bux (P. W 2) is a false witness and he could not see the miscreants and similarly his wife who says that she identified the miscreants cannot be believed. As to identifying the accused by his voice. I may refer to [State Vs. Manka Ramdayal Sonar and another](#), in which it was laid down as under:

11. We are mindful of the fact that eye witnesses are fallible, and there are many cases in law reports which tell us of miscarriage of justice due to faulty recollection and identification by eyewitnesses. (See the case of Adolf Beck and the observation of Sir Hen Collins, the Master of the Rolls, in the Back Report that Evidence of identity is perhaps of all classes of evidence the least to be relied upon and therefore unless supported by other facts an unsafe basis for the verdict of the jury ") This branch of proof is often time described as "notoriously delicate" and the distrust of the English Courts is probably based on the proved instance of miscarriage of justice through honest mistake in identification in the case of Adolf Beck. In his summing up for the jury lord Guthrie in Oscar Stattr"s case said: --

Next we must consider the evidence of identification and its value" Not a word too much has been said on that matter by the Lord Advocate and Mr. M. Clure. It is extremely important I express the point thus: it would not be safe to convince the

prisoner merely on the evidence of personal impression of his identity" with the man seen flying from the house, on the part of strangers to him, without reference to any marked personality or personal peculiarities, and without corroboration derived from other kinds of evidence. My proposition involves a distinction between the identification, by personal impression, of a strange person, and the identification, by a personal impression of a familiar person, suppose a father told you that his son, who was resident in his house, had been seen by him in Princess Street yesterday. That would be admirable evidence. But if a person who had only seen the son once in his life told you that he had seen him in Princess Street yesterday that would be evidence of slender value, unless the son had a marked personality, or unless he had some peculiarity about him, such as a very peculiar walk or unless there were corroboration such as that the man, when spoken to, answered to the name of the particular individual. The distinction may be vitally important in this case. Some of us may have doubles. We have been told that we have been in such and such a place by a competent and honest witness, who is quite sure about it, and yet we had never been there at all. The most august case is that of His Majesty the King. The illustrated papers are fond of publishing a double of His Majesty, a person who has superficially a startling resemblance to the King, but who would never be mistaken for the King by any one about the Court. Then, again, people, differ as to the extent of a resemblance, or even whether there is any. You may have seen a strong resemblance, but one of your friends says that he can see no resemblance at all, and when the two people are brought together, you see that there is nothing but a very general similarity. That applies to the personal impression of a stranger in reference to a stranger.

(Notable British Trial of Os Car Slater, Fourth Edition, Edited by William Roughead, PP. 238-239).

12. Bearing the aforesaid observations in mind let us examine what identification evidence implies.

13. The term "identification" means;--

The proving that a person, subject or article before the Court is the very same that he or it is alleged, charged or reputed to be.

and the word "identity" may be termed as:

to become the same; to establish the identity of; to make to be the same, to prove the same with something described, claimed or asserted" Identification is almost always a matter of opinion or belief (Corpus Juris, Vol. 37 P. 237).

14. "Identification evidence" consists of statements of witnesses to the impression formed by them of the identity of the accused from their recollection of their recognition of him from his general form face, voice or any such characteristic which may have impressed themselves on their minds at the time of

recognition. People differ widely in their power of observation and recollection, and consequently Courts always pay special regard to the circumstances in which the recognition took place and the time which had elapsed before their observation and recollection was to test coupled with the circumstances under which the tests were held.

15. Borrowing the phraseology of *Craig v. The King* 49 C. L. R. 439 at P. (sic), which one of us (Naik, J) employed in criminal appeal No 414 of 1958 decided on 30th July 1959, when an honest witness affirms that the accused was a person who was one of the dacoits who committed the dacoity, he is merely asserting--

(1) that he observed the accused;

(2) that the observation became impressed upon his mind;

(3) that he still retains the original impression;

(4) that such impression has not been affected, altered or replaced, by any incident happening subsequently; and

(5) that the resemblance between the original impression and the accused is sufficient to base a judgment not of resemblance, but of identity.

16. In order to test his assertions, it therefore, becomes necessary to pay attention to the following circumstances;

(a) whether the witness was a stranger to the accused whom he was identifying or whether he was known to him from before ? How intimate was his knowledge and whether the circumstances under which he observed him were such as to permit a lasting impression on his mind ?

(b) whether the accused had any marked personality or any special peculiarities which at the time of the witness's first observation impressed themselves upon him ?

(c) whether the length of the time which had elapsed between the date of the incident and the date when he was first asked to identify him was not such as to totally affect or considerably dim his original impression ?

(d) whether any incident had happened subsequently which had affected, altered or replaced his original impression ? For example, a suspect Or his photograph may have been shown to a witness, before he was asked to identify him in the parade or in the Court or he may have; seen a photograph of the accused in the new papers (where he was alleged to be the offender), which may have created a bias in his mind so that he may have persuaded himself to the belief that the suspect was the offender.

(e) whether the circumstances under which the witness was first asked to identify the accused were such that it could fairly be said that the resemblance between the

original impression and the accused was sufficient to base a judgment, not of resemblance but of identity ? The test identification must, therefore, be conducted under circumstances free from police influence, by independent persons then the accused is mixed with a sufficient number of persons of like physical appearance so that the possibility of an honest mistake in identification is reduced to a minimum.

9. The corroborative evidence could have been the weapon of offence, that is to say, the alleged knife with which Aakridan (P.W1) or Madar Bux (P. W2) was struck. But when I consider the evidence of recovery of the alleged knife and the blood thereon, I may say that the evidence is not conclusive and for saying this, I rely on a Judgment of this Court in Phoolchand v. The State of M. P. Cr. LR 1980 (MP) 28 which reads as under;--

The circumstance relating to the recovery of the knife is also wholly inconclusive as we do not have the report of the serologist to say that the said knife had stains of human blood on it. Therefore, even if it is assumed that the knife belonged to the appellant and was recovered from his possession, that would not be sufficient to connect that knife with the crime.

10. Further, I may say that the statement of Madar Bux (P.W2) says that there was standing enmity between him and the accused and for the last five or six years, they were not on speaking terms with each other. If this position is accepted, then the identification by mere voice, cannot be relied on and because of enmity, there is a possibility that the appellants might have been wrongfully roped in.

11. Rahiman, the mother in law of Bakridan (P. W1) could not be examined as she expired during the pendency of the trial.

12. Further, it may be mentioned that the knife was recovered on the information given by one of the accused persons, from a place which was accessible to one and sundry. Therefore, the recovery of the knife from such a place is not sufficient to connect the accused appellants with the crime. Therefore, taking into consideration, the evidence produced by the prosecution; the identity of the appellants by merely hearing the voice cannot be accepted. Similarly, it cannot be accepted that the statement given by Madar Bux (P W2) is worth believing and if the statement of Madar Bux (P. W 2) is rejected as untrue then whatever is stated by his wife also loses much of its force and it is not sufficient to hold that she saw the miscreants committing the offence.

13. One more infirmity can be seen from the evidence of the eye witnesses, that is to say that they have improved their story in the Court by saying that there was lamp burning in the room which, in my opinion, is nothing short of falsity. The rest of the witnesses do not support the story of the prosecution.

14. Therefore, the result is that the appeal is allowed, the conviction and sentence imposed against the appellants are set aside. The "accused are already on bail. Their

bail bonds shall stand cancelled.