Supreme Court of India
Budhsen vs State Of U.P on 6 May, 1970
Equivalent citations: 1970 AIR 1321, 1971 SCR (1) 564
Author: I Dua
Bench: Dua, I.D.

PETITIONER:
BUDHSEN

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT:
06/05/1970

BENCH:
DUA, I.D.
BENCH:
DUA, I.D.
RAY, A.N.

CITATION:
1970 AIR 1321 1971 SCR (1) 564
1970 SCC (3) 128
CITATOR INFO :
D 1972 SC2478 (5)
RF 1978 SC1770 (25,26)

ACT:
Evidence Act (1 of 1872),s.9-Identification parades-Manner of holding-Weight to be attached-Constitution of India, 1950, Art. 136-Evidentiary value attached to identification parades-Erroneous Interference by Supreme Court.

HEADNOTE:
The two appellants B and N, along with two others who were acquitted by the High Court, were charged with the offence of murder by shooting the deceased, committed on September 12, 1967. The evidence against them mainly consisted of six witnesses who had identified them at test parades. The High Court rejected the evidence of three of them and relied upon the evidence of the remaining three. Two of them claimed to be present at the time of the occurrence and the third came on the scene after hearing pistol shots and the alarm raised by others. The appellants were strangers to all the witnesses.
One of the eye witnesses (P.W. 1) gave the first information to the police, but there was no description of the

assailants in it. The P.S.J. recording the report also did not question the informant for the purpose of securing more information about the description of the assailants in order to be able to take measures to discover and arrest them. P.W. 1 identified the appellants at two identification parades conducted by a Magistrate. The identification parade in respect of N was held on October 21, 1967 and in respect of B on October 28, 1967. In the form relating to the identification parade, there is a footnote stating that it is very useful to note whether the witness knew the name of the person he had come to identify or only described him and that the witness should not be asked in a general way to identify whomsoever he knew. The Magistrate gave evidence that he had asked witnesses who had come to identify the accused (named) as to what he had seen the accused doing and recorded whatever the witness told him. Whatever the first witness bad told him was recorded word for word and since the other witness bad repeated the same thing he noted down against their names the words as above. The identification memorandum as regards the other accused, prepared by the Magistrate at the time of his identification parade, was similar. There was also unexplained error as to the date on which appellant B was admitted into the jail. In both identification memos there were no- remarks by the Magistrate in respect of the steps taken by the jail authorities to ensure proper conduct of proceedings. The eye witnesses also did not specify in court the accused who had actually fired the pistol.

The second eye witness admitted in cross-examination that he had gone to the jail for identification on three occasions and that on two occasions be had identified the accused but on the third occasion be did not identify any. He was unable to state as to which accused he identified in the first and which in the second parade.

The third witness deposed that he bad identified the accused who had a jhola in his hand (he was alleged by) by the three witnesses to have

565

taken a pistol from the Jhola) at one identification parade and the other accused at the second identification parade.

Appellant 'N' had stated during the identification parade that he had been shown to the witnesses and had also been photographed.

On the question whether the conviction could be sustained on this evidence :-

HELD : Facts which establish the identity of an accused person are relevant under s. 9 of the Evidence Act. The substantive evidence of identification is the statement of the witness in court. But the evidence of identification at the trial for the first time is from its very nature weak. A prior test identification, therefore serves to corroborate the evidence in court. The purpose of identification parades which belong to the investigation stage is to enable

the witnesses to identify persons concerned in the offence, who are not previously known to them, and thereby to satisfy the investigating officers of their bona fides by pointing out the persons they recognise as having taken part in the crime. These parades, thus furnish evidence which corroborates the testimony of the identifying witnesses in court. These parades do not constitute substantive evidence. Keeping in view the purpose of identification parades, the precautions to eliminate suspicion of unfairness and to reduce chances of testimonial error. They must take intelligent interest in the proceedings bearing in mind two considerations : (i) that the life and liberty of an accused may depend on their vigilance and caution, and (ii) that justice should be done in the identification. Generally, the Magistrates must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The persons required to identify an accused should have had no opportunity of seeing him after the commission of crime and before identification and secondly that they should make no mistakes or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly disincline. [570 H; 571 A-H; 572 A-C]

In the present case the evidence shows that the Magistrate paid scant attention to the direction in the identification memos. The memos do not show that the parades were held by the Magistrate with the degree of vigilance, care and anxiety their importance demanded, and they were filled up in a very casual manner. They could only have a somewhat fleeting glimpse of the assailants. The prosecution has also not explained why the second eve witness had to go to the jail for identification a third time. The two eve witnesses did not state in evidence what particular part the two appellants played in the occurrence. The third witness who come on the scene on hearing the alarm could only have had a still more fleeting glimpse. [572 F-G; 573 D-E; 577 C-D]

The statements of the three witnesses were also otherwise unimpressive and coupled with the fact that there was a possibility of their having seen at least one of the accused (appellant B) outside jail gates a week before the identification parades were held, the test identification parades could not be considered to provide safe and trustworthy evidence on which the appellants' conviction could be sustained. [577 E]

(2) The entire case depended on identification of the appellants and the identification was founded solely on test

identification parades. The
5 66
High Court did not correctly appreciate the evidentiary value of the parades and proceeded on the erroneous assumption that it is substantive, evidence and that on the basis of that evidence alone the conviction could be sustained. The High Court also ignored. important evidence on the record in regard to the manner in which test identification parades were held and the connected circumstances suggesting that they were held more or less in a mechanical way without the necessary precautions being taken to eliminate unfairness. This is an erroneous way of dealing with test identification parades and since it has caused failure of justice, this Court is justified in interfering under Art. 136 [577 H; 580 C-G]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 199 and 200 of 1969.

Appeals by special leave from the judgment and order dated April 28, 1969 of the Allahabad High Court in Criminal Appeal No. 2623 of 1968 and Referred No. 160 of 1968. K. Baldev Mehta, for the appellant (in Cr.A. No. 199 of 1969).

G. L. Sanghi, P. N. Tiwari, J. B. Dadachanji,0. C. Mathur and Ravinder Narain, for the appellant (in Cr. A.No. 200 of 1969).

O. P. Rana, for the respondent (in both the appeals). The Judgment of the Court was delivered by Dua, J.-These two appeals by special leave arise out of a joint trial of the present appellants and Jagdish and Sugriv. All the four accused were convicted by the trial court; the present appellants were sentenced to death under S. 302 read with s. 34 I.P.C. and Jagdish and Sugriv to life imprisonment under S. 302 read with s. 109, I.P.C. They challenged their conviction by separate appeals to the Allahabad High Court. By means of a common judgment the High Court dismissed the appeal of the present appellants (Crl. A. No. 2623 of 1968) and allowed that of their co- accused Jagdish and Sugriv (Crl. A. No. 2648 of 1968). The sentence of death imposed on the present appellants under s. 302, I.P.C. for the murder of Lala Hazarilal was confirmed. According to the prosecution story Jagdish and Sugriv related to each other as cousins belonged to village Bidrika. They used to harass the poor inhabitants of that village whereas deceased Hazarilal used to espouse their cause. As a result, there was not much love lost between Jagdish and Sugriv on the one side and Hazarilal on the other. Some years ago Jagdish, along with some others, was prosecuted for forging accounts of a Co-operative Society and was found guilty the Assistant Sessions Judge, though released on probation under the U.P. First Offenders' Pro-

bation Act. Bhoodev, at whose instance, that prosecution was initiated, presented a revision petition in the High Court 'against the order of the Assistant Sessions Judge challenging the benefit given to

Jagdish under the U.P. First Offenders' Probation Act. The High Court allowed the revision on July 26, 1967 and imposed on Jagdish a substantive sentence of rigorous imprisonment for two years. Bhoodev had the support of Hazarilal in the trial court and the revision to the High Court was also preferred by him at the instance of Hazarilal. This further enraged Jagdish and Sugriv and Jagdish is stated to have threatened Hazarilal with death about ten days before his 'murder. This happened before Jagdish was taken into custody pursuant to the order of the High Court imposing on him the sentence of, imprisonment. This was alleged to be the immediate motive for Hazarilal's murder. In 1962 also Jagdish and Sugriv had also been prosecuted by Hazarilal under s. 452/326 and s. 147, I.P.C. but they were acquitted. Ever since then, according to the prosecution, Jagdish and Sugriv had been harboring ill feelings towards Hazarilal and planning to have him murdered through hired assassins. On September 11, 1967 Ghaziuddin (P.W. 2) is stated to have gone to the house of Jagdish and saw Jagdish and Sugriv in the company of four unknown persons and over-heard Jagdish saying that the said four persons had left the job unfinished though they had visited the village often and telling them that the balance would be paid to them only after the job was accomplished. The following day at about 10 a.m. when it was drizzling Hazarilal was sitting in his Gher also described as Nohara on a cot and his brother Inderjit (P.W. 1) and Kanwar Sen (P.W. 3) were squatting on a heap of fodder nearby. They were all sitting in the Duari because that was the only place ;which provided protection against rain. Suddenly four unknown persons entered the Nohra through the Duari. Two of them caught hold of Inderjit and Kanwar Sen, one of them sat on the cot of Hazarilal and pressed his legs and the fourth who was carrying a red jhola in his hand, took out a pistol from the jhola and fired at Hazarilal from point blank range. Hazarilal fell down. The fourth man re-loaded his pistol and fired another shot which hit Hazarilal on the chest killing him instantaneously. Inderjit and Kanwar Sen raised alarm. On hearing their alarm and the sound of pistol fire, Ram Singh, Imam Khan and Ranchor (P.W.

4) came to the scene of occurrence and saw the four assailants running away from the Nohra. According to the prosecution, the four unknown assailants murdered Hazarilal at the instigation of Jagdish and Sugriv. First information report was lodged by Inderjit at police station Iodged, about ten miles away from the place of occurrence at 2.35 p.m. the same day (September 12. 1967). On his return from the police station Inderjit met Ghaziuddin (P.W. 2) from whom he learnt, what he (Ghaziuddin) had seen and heard a day previous, at the house of Jagdish. S. K. Yadav, Sub-Inspector with whom the F.I.R. was lodged reached the scene of the occurrence at 6.15 p.m. the same day. He found one discharged cartridge and two wads at the place of the occurrence. He recorded the statements of some witnesses, including Ghaziuddin on the following day. Further investigation was conducted by Sub-Inspector Harcharan Singh (P. W. 21). Jagdish and Sugriv on whom suspicion had fallen were not traceable with the result that warrants for their arrest were made over to Sub-Inspector Yadav. Proceedings under ss. 87 and 88, Cr. P.C. were started against them but soon thereafter they surrendered themselves in court on September 29, 1967. During investigation the Investigating Officer learnt about the complicity of the present appellants and Naubat was arrested on October 9, 1967. Budhsen, however, was arrested in connection with some other case on October 14, 1967 by Sasni police. Magistrate Pratap Singh (P.W. 20) held identification parade of Naubat on October 21, 1967 and of Budhsen on October 28, 1967.

The trial court came to the conclusion that Jagdish and Sugriv had abetted the murder of Hazarilal and appellants Naubat and Budhsen, had committed the murder. Naubat and Budhsen were, therefore, Sentenced to death and Jagdish and Sugriv to life imprisonment.

On appeal the High Court re-summoned Lakhan Singh, Head Constable of Thana Sasni, District Aligarh, who had already appeared at the trial as P.W. 14 and recorded his additional statement. Lakhan Singh had taken Budhsen in custody at police station Sasni. His statement as P.W. 14 left some doubts in the minds of the Judges of the High Court to clear which it was considered necessary to examine him again in the High Court. After considering the entire evidence the High Court acquitted Jagdish and Sugriv but maintained the conviction and sentence of Budhsen and Naubat, appellants. The statement made by Ghaziuddin, (P.W. 2) was not believed by the High Court and his version was described as unnatural and improbable. That court also ignored the evidence of Chandrapal (P.W. 5), Girendra Pal Singh (P.W. 7) and Lakhanpal (P.W. 8) on the ground of their being either irrelevant or unreliable. The existence of inimical relations between Jagdish and Sugriv on one side and Hazarilal on the other was not considered to be a sufficiently strong circumstance against Jagdish and Sugriv so as to hold them guilty of instigating Hazarilal's murder. As against Naubat and Budhsen, appellants in the opinion of the High Court primary evidence consists of their iden- tification by some of the witnesses. The court took into consideration the identification parade for Naubat held by Magistrate pratap Singh on October 21, 1967 and that for Budhsen on October 28, 1967. It was principally the evidence of identification on which reliance was placed for holding the present appel-

lants to be responsible for the murder of Hazarilal. The three witnesses on whose evidence in regard to the identification the High Court relied are Inderjit, Kanwar Sen and Ranchor. The additional evidence recorded by the High Court consisted of the statement of Lakhan Singh. That court also inspected the original entries in the general diary of the police as well as their carbon copies. Lakhan Singh stated in the additional evidence that he had made entry at sl. no. 9 of the general diary of the original re- port under s. 307, I.P.C. and s. 25 Arms Act made by Pannalal against Budhsen (Ex. Ka. 10). He denied that blank space had been left in the general diary for entering the particulars of the pistol (tamancha) and cartridges etc. In regard to this denial in Lakhan Singh's statement the High Court observed that the weapon of offence with which the offence under s. 307, I.P.C. was said to have been committed by Budhsen was probably a later addition though the court did not consider it proper to record a firm finding to that effect. A major part of the judgment of the High Court is confined to the evidence in regard to the identification parade and to the question whether the identifying witnesses had an opportunity of seeing the appellants before their identification. Holding that there was no opportunity for those witnesses to see the appellants before their identifications the court confirmed their conviction and sentence as already observed. In this Court Shri Sangi and Shri K. Baldev Mehta addressed us in support of the appeals of their respective clients Naubat and Budhsen. According to their submission the evidence in regard to the identification parades is of an extremely weak character and is wholly uninspiring. According to them it does not bring home to the appellants the offence of murder beyond reasonable doubt. It was also urged that according to the prosecution evidence four unidentified, persons having participated in the unfortunate murder of Hazarilal there is no reliable evidence showing that any one of the present appellants actually fired the fatal shot. Evidence regarding any specific part

played by the appellants, they contended, is also not forthcoming on the record. On this ground it was emphasised that in any event the extreme penalty of death is uncalled for. Since according to the High Court the primary evidence against the appellants is that of their identification by the witnesses the crucial point seems to us to be the admissibility and' value of the evidence regarding the identification of the appellants. We accordingly consider it necessary, on the facts and circumstances of this case, to examine that evidence. The High Court, as already observed by us, has ignored the evidence of Chandrapal (P.W.

5) Girendrapal (P.W. 7) and Lekhraj (P.W. 8) as either irrelevant or unreliable. The identification of the appellants is.

57 0 thus confined to the testimony of Inderjit (P.W. 1), Kanwar Sen (P.W. 3) and Ranchor (P.W. 4). Turning first to the evidence of Inderjit it is important to bear in mind that he claims to be present at the time of the alleged occurrence along with Kanwar Sen. He also lodged the first information report at 2.35 p.m. on the day of the occurrence. In the report, this is what P.W. I stated in regard to the identification of the alleged assailants and the respective parts played by them in the commission of the offence:

> "Today at about 10 O'clock in the day I and my brother Hazari Lal and his partner (Sajhi) Kumar Sen son of Chidda Jatav of my village were present at the Gher, and it was raining a little, that four persons dame to the Gher and out of them, one man sat on the cot near my brother and two persons caught hold of me and Kumar Sen and the fourth man having taken out the Katta (pistol) from inside the Jhola which he was carrying in his hand, fired shot at my brother Hazari Lal. My brother jumped and fell down the cot, and he fired another shot at my brother, who had fallen down which hit Hazarilal at his chest as a result whereof he died. We both raised alarm. On hearing our alarm Imam Khan son of Lal Khan, Ranchor Jatav and Ram Singh tailor of my village also came up and then the accused persons having come out and ran away. These persons have also seen the four accused persons, while coming out of the gher and running away. Jagdish and Sugriv having called, these four Badmashes have got committed the murder of my brother. We all can recognise these Badmashes on being confronted."

This description of the assailants could hardly provide the investigating authorities with any firm starting point from which they could proceed to take the necessary measures for the discovery and arrest of the alleged offenders as required by S. 157, Cr. P.C. It is unfortunate that the Sub-lnspector S. K. Yadav, (P.W. 19) did not care to get more information about the description of the alleged assailants by questioning the informant. Of course, Jagdish and Sugriv were mentioned in the F.I.R. as the persons who had employed the four assailants for murdering the deceased but having been acquitted they do not concern us. Now, facts which establish the identity of an accused person are relevant under S. 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came

to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly. considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify per'sons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by s. 162, Cr. P.C. It is for this reason that the identification parades in this case seem to have been held under the supervision of a Magistrate. Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must, therefore, take intelligent interest in the proceedings, bearing in mind two considerations : (i) that the life and liberty of an accused may depend on their vigilance and caution and (ii) that justice should be done an the identification Those proceedings should not make it impossible for the identifiers who, after all, have, as a rule, only fleeting glimpses of the person they are supposed to identify. Generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify, it may be kept in view, varies according to the power of observation and memory of the person identifying and each case depends on its own facts, but there are two factors which seems to be of basic importance in the evaluation of identification. The persons required to identify an accused should have bad no, opportunity of seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny by the Court. Shri Pratap Singh, Magistrate, who conducted the identification, has appeared at the trial as P.W. 20. The identification memo in respect of Naubat, appellant, is Ex. Ka 20 dated October 21, 1967 and in respect of Budhsen is Ex. Ka 21, dated October 28, 1967.

In Ex. Ka 20 we find a note that Naubat had stated that he had been shown to the witnesses and had also been photographed. Column 7 of the memo requires to be inserted therein the name or description of the person the witness came to identify and this is to be recorded in the words of the witness. In Ex. Ka 20, Inderjit said "I saw the accused while committing the murder. I did not know him before."

As against the other five witnesses namely Kanwar Sen, Ghaziuddin, Imam Baksh, Chandrapal and Ranchor we only find the word "Do" In this connection the note at the foot of the printed form containing the following direction seems to us to be, of some importance:

> "N.B.-It is very useful to note whether the witness knew the name of the person he had come to identify or he only described him in some such way as the man who was standing at the door at the time of the dacoity. The witness is not to be asked in a general way, identify whomsoever you know."

It is obvious that scant attention was paid to the letter and spirit of this note. Shri Pratap Singh (P.W 20) when cross-examined on behalf of Naubat said:"

> "I asked the witnesses who had come to identify accused Naubat as to what they had seen Naubat doing. Whatever they told me was recorded by 'me in col. 7 of the memo. Whatever the first witness Inderjit told was recorded word for word by me and since the other witnesses repeated the same thing I noted down the word 'as above' (uparyukt)". The remarks of the Magistrate were also required against the enquiry on point no. 2 at the bottom of the first sheet of Ex. Ka 20 which relates to the step taken by the jail authorities to ensure the 5 7 3 proper conduct of the proceedings. We do not find any remarks by the Magistrate on this point in Ex. Ka 20. His remarks 'would certainly have provided helpful information on an important point without which the court is left only to guess.
>
> In the identification memo in respect of Budhsen (Ex. Ka 21) in column 7, against the name of Inderjit, witness, we find the following entry:
>
> "I came to identify the person who committed the murder of my brother".
>
> Against the name of Imam Baksh we find the following entry:
>
> "Came to identify the person who committed the murder".
>
> Against the names of the remaining four witnesses, who were the same as mentioned in Ex. Ka 20, we find the word "Do". This means that their answer is the same as that of Imam Baksh. In this form also there are no remarks by the Magistrate in respect of the steps taken by the jail authorities to ensure proper conduct of proceedings. The memos of the identification parades do not show that the parades were held by the Magistrate with the degree of vigilance, care and anxiety their importance demanded. The casual manner of filling the identification memos is further apparent from the fact that Budhsen, appellant's admission into the jail is shown therein as October 15, 1967 instead of October 14, 1967. This mistake was admitted by P.W. 20 in cross-examination without offering any explanation for the mistake.

> We may here appropriately point out that Shri Pratap Singh (P.W. 20) was called upon as a Magistrate only to conduct the identification proceedings and it was beyond his duty to interrogate the witnesses for eliciting other facts or to require them to make any statement beyond mere identification.
>
> This takes us to the evidence of the identifying witnesses. Imam Baksh was not produced at the trial. The other witnesses except three, were not relied upon by the High Court. We need, therefore, confine ourselves only to those three witnesses.
>
> Inder it (P.W. 1) brother of Hazari Lal, deceased, deposed at the trial that on September 12, 1967 at 10 a.m. he, Kanwar Sen and Razarilal were sitting in the Gher, about 50 paces towards the east of the village abadi. Hazarilal was sitting on a cot and Kanwar Sen and the witness were sitting on a heap of- fodder nearby in the Duari because that was the only place affording shelter against rain. The cot on which Hazarilal was sitting was in the middle of the Duari. What the witness next stated now be reproduced in his own words:

"Four unknown persons entered the Duari from outside. One of them sat down by the headside of my brother and another proceeded to wards the charpoy of my brother. Of the remaining two, one caught hold of me, while the other caught hold of Kunwar Sen. Kunwar Sen and I immediately raised an alarm The person, who proceeded towards the charpoy of my brother, took out a country made pistol from the bag and shot at my brother. It was he who was holding the bag in his hand. The shot hit my brother and he jumped from the charpoy and fell down. The person who was sitting by the headside of my brother pressed my brother's legs with his legs. The person, armed with the pistol, again loaded the pistol and shot at my brother's chest. My brother died immediately."

On hearing my shouts and the sound of pistol firing Ram Singh, Imam Khan and Ranchor arrived. The Badmashes escaped through the Duari and ran away towards the east."

It is noteworthy that this witness has not specifically stated that Naubat, appellant, had fired the pistol shot. It is only by reference to the person holding a bag from which the pistol was taker out that it is sought to be implied that Naubat had fired the shot In court Naubat was not specifically identified as the person firing the shot or even as a person holding the bag the witness has also not stated as to what part the other appellant played in the occur rence. A little lower down the witness proceeds :

> "I never saw before the four persons who had come to my brother's gher on the. day of occurrence. I bad come to the District Jail, Aligarh to identify them. (The witness, having touched the accused Naubat and Budhsen, stated) I identified them in jail. I saw them for the first time on the day of occurrence and thereafter I saw them in jail at the time of identification. I did not see them anywhere in. the intervening period.

The question naturally arises if on this state of his testimony the identification made by Inderjit can be held to be a reliable piece of evidence on which the conviction of the appellants can be sustained.

In evaluating his testimony we may appropriately consider bow far his description of the actual occurrence inspires confidence We are asked to believe that one of the four assailants sat down near the head of Hazarilal and pressed the legs of the latter with 5 7 5 his own legs and he and the deceased were in this position when one of the assailants fired at. Hazarilal, who thereupon jumped down from the cot. When we picture to ourselves the occurrence as narrated we find it to be unrealistic and, therefore, untrust worthy, if not fantastic. There is undoubtedly considerable embellishment in the court version as compared to what was stated by the witness in the F.I.R. This embellishment does not add to the credibility of the story but it certainly suggests that the witness has a highly imaginative mind and is capable of playing on his imagi nation. We, therefore, do not consider it to be safe to hold on his evidence that the two appellants were among the assailants and that Naubat had fired the fatal shots. Kanwar Sen (P.W. 3) deposed that on the day of the occurrence he was sitting in the Nohra of Hazarilal who was sitting on a cot. He and Inderjit were sitting on the fodder because it was drizzling. The statement in regard to the occurrence may now be described in his own words "Four unknown persons came, one of whom had ared jhola. One of them sat down on headside of Hazarilal and another proceeded ahead. The remaining two caught hold of me and Inderjit. Inderjit and I raised an alarm. The person having the red Jhola took out a pistol from the Jhola and fired at Hazarilal. On being hit with the shot, Hazarilal fell down. The badmash, who was sitting on the headside of Hazarilal, pressed his legs with his legs. Having loaded the pistol, the person armed with pistol, fired a shot at Hazarilal.

Hazarilal died. Ram Singh Ranchor and Imam Khan arrived at the spot. The badmashes went away through the eastern side.

I did not know all the four badmashes from before. (Having touched Budh and Naubat, the witness stated) Identified them in jail. I saw these two accused at the spot for the first time and thereafter in jail. I did not see them anywhere in the intervening period." In cross-examination the witness admitted that the assailants has been seen by him only for about three or four minutes. He had gone to the jail for identification on three occasions. On two occasions he identified the accused persons in separate parades but did not identify anyone on his third visit. The third visit deposed by him seems to us to be a somewhat suspicious circumstance and the prosecution has not cared even to attempt to explain this statement. The witness was also unable to state as to which accused had been identified by him in the first parade and which in the second-. He was further unable to tell the dates on which he had gone to the jail for identification. According to him he had gone to the jail at about II or 12 O'clock during the day time.

-576 These two witnesses claimed to have seen the actual occurrence which took three or four minutes. Two assailants held these two witnesses and one sat on the cot of the deceased and pressed the legs of the deceased with his own legs and the fourth one fired two shots having re-loaded the pistol after the first shot. Their glimpses ,of the assailants would of course be somewhat fleeting but the different parts played by the four assailants would certainly have left on their minds a fairly firm impression as to what part the two appellants had played in. that sordid drama. The power to identify undoubtedly varies according to the power of observation and memory of the identifier and an observation may be based upon small minutiae which a witness, especially a rustic, uneducated villager may not be able to describe or explain. In this case we find that P.W. 4 Ranchor does not

know the difference between a minute and a second. An illiterate villager may also at times be found to be more observant than an educated man and his identification in a given case may impress the court without the witness' being able to formulate his reasons for the identification. But on the peculiar facts and circumstances of this case one would expect these two witnesses to state what particular part these two appellants played in the course of the occurrence. Without some clear indication to that effect it would be difficult for a judicial mind to rely for conviction on the general assertion of these witnesses that the appellants were among the assailants who murdered the deceased. Ranchor (P.W. 4) gave his version as follows:

> "It happened 131 months ago. It was 10 a.m. I had gone to the shot) of Sannu Lal Patwari to make purchases. Ram Singh, Darzi, was present at that shop along with me. I heard an alarm from the eastern side in which direction lay the Nohra of Hazarilal. I heard the sound of a fire. Ram Singh and I rushed towards the Nohra. When both of us were at a distance of 15 Dacron from the Nohra, I heard the sound of another fire. I saw four unknown badmashes coming out of the Nohra of Hazarilal. They ran away towards the east. There badmashes were empty handed and one of the badmashes had a Katta in his right hand and a red jhola in his left hand. I went to the Nohra and saw that Hazarilal was lying dead and Tnderjit and Kanwar Sen were present there. Imam Khan also reached the Nohra of Hazarilal after me. I had gone to the District Jail in order to identify the badmashes (Having touched the accused Naubat and Budhsen, the witness stated) I identified them in the District Jail. At first 1 saw them running away from the Nohra. Thereafter, identified them in the District Jail.
>
> 5 77 I never saw them in the intervening period. (Having touched Naubat, accused, the witness stated). He had a Katta in his right had and a jhola in his left hand."

In cross-examination he stated that he had gone to the District Jail, Aligarh twice for identification. In the, first identification he identified the person who had 'a jhola in his hand and at the second identification he recognised the other, Budhsen. He also stated that before identification Proceedings, the Deputy Sahib had enquired from him as to whom he had come to identify to which he had replied that he had come to identify the persons who had committed the murder of Hazarilal. This witness only saw the assailants when they were running away after the alleged murder. Normally speaking, therefore, his would be a still more fleeting glimpse of the assailants as compared to that of the two earlier witnesses. To sustain the conviction on his evidence as to identification one would certainly expect a more firm an(positive reference to the appellant, who was holding a jhola and A pristol (katta). during the identification parade. Vithout such corroborative evidence the statement in court identifying Naubat, appellant, would be of little value.

This is not all. The statements of these three witnesses are otherwise also unimpressive and coupled with the fact that the possibility of these persons having seen at least Budhsen on October 21, 1967 outside the, jail gates whom they are supposed to have identified a week later the test identification parades cannot be considered to provide safe and trustworthy evidence on which the appellants' conviction has been sustained by the high Court.

Shri O. P. Rana on behalf of the State very strongly argued that under Art. 136 of the Constitution this Court does not interfere with the conclusions of facts arrived at on appreciation of evidence and in this case on consideration of the evidence relating to the test identification parades two courts below have come to a positive conclusion that the appellants were two out of the four unknown assailants of Hazarilal, deceased. This Court, so argued the counsel, should affirm that conclusion in the absence of any proved legal infirmity. In regard to the sentence the counsel con- tended that this is a matter which rests in the discretion of the trial court and when the sentence of death is confirmed by the High Court this Court should not interfere on appeal under Art. 136.

It is undoubtedly true that under Art. 136 this Court does not ordinarily interfere with conclusions of fact properly arrived at by the High Court on appreciation of evidence on the record. except where there is legal error or some disregard of the forms of legal' process or a violation of the principles of natural justice resulting 13 Sup. Cl/70-8 in grave or substantial injustice. In Tej Narain v. The Stale of U.P. (1) this Court, after examining its previous decisions in which this Court had not accepted concurrent findings or had re-examined the evidence for itself, said "The above cases show that this Court has not accepted concurrent findings of fact if there is no evidence for the finding or if there has been an omission to notice material points while appreciating evidence or to bear in mind relevant considerations which swing the balance in favour of the accused. It has also on occasions reexamined the evidence in view of the fact that the case against the accused was based on circumstantial evidence and it was of an extraordinary nature. In the case before us, as we will show presently the, High Court appears to have completely overlooked the variation in certain important aspects by P.W. 3, while deposing at the trial from what he had stated earlier' and consequently the High Court could not apply its mind to their significance. In view of this infirmity in the judgment and other considerations which will be pointed out later we are satisfied that this is one of the exceptional cases in which we should undertake the examination of the entire evidence and appraise it."

In that case the following observations of Hidayatullah J., (as the present Chief Justice then was) from the judgment in Anant Chintaman Labu v. The State of Bombay (2) were reproduced with approval:

> "Ordinarily, it is not the practice of this Court to reexamine the findings of fact reached by the High Court particularly in a case where there is concurrence of opinion between the two Courts below. But the case against the appellant is entirely based on circumstantial evidence, and there is no direct evidence that he administered a poison, and no poison has, in fact, been detected by the doctor, who performed the postmortem examination, or by the Chemical Analyser. The inference of guilt having been drawn on an examination of a mass of evidence during which subsidiary findings were given by the two Courts below, we have felt it necessary, in view of the extraordinary nature of this case, to satisfy ourselves whether each conclusion on the separate aspects of the case, is supported by evidence and is just and proper. Ordinarily, this Court is not required to (1) Crl. As. Nos. 81, 112 and 132 of 1964 decided on 23-10-1964.

(2) [1960] 2 S.C.R. 460.

enter into an elaborate examination of the evidence, but we have departed from this rule in this particular case, in view of the variety of arguments that were addressed to us and the evidence of conduct which the appellant has sought to explain away on hypotheses suggesting innocence. These arguments, as we have stated in brief, covered both the factual as well as the medical aspects of the case, and have necessitated a close examination of the evidence once again, so that we may be in a position to say what are the facts found, on which our decision is rested "

In Mahebub Beb v. The State of Maharashtra(1) this Court observed :

"We have been taken through the entire evidence of all the important witnesses by counsel for the appellants and we do not think that the conclusion recorded by the Sessions Judge and confirmed by the High Court was one which could not reasonably be arrive d at by those Courts. There are undoubtedly certain discrepancies in the statements of the four witnesses, Anna, Kisan, Sahebrao and Sukhdeo. But what weight should be attached to the evidence of the witnesses was essentially a matter with which the Court of first instance, before whom the witnesses were examined was concerned, and if the view taken by that Court is confirmed by the High Court, even assuming that this Court may, if the case were tried before it, have taken a different view, (though we do not say that in this case we would have so done) we would not be justified in making a departure from the settled practice of this Court and proceed to review the evidence."

In Brahmin Ishwar Lal Manilal v. The State of Gujarat (2) Court stated the position thus :

"We have dealt with the arguments of Mr. Shroff at some length but we wish to restate that this Court will not examine for itself evidence led in a criminal case unless it is made to appear that justice has failed by reason of some misapprehension or mistake in the reading of the evidence by the High Court. The High Court must be regarded as the final court in criminal jurisdiction and special leave given in a criminal case does not entitle the person to whom the leave is given to canvass the correctness of the findings by having the evidence read and ra- (1) Crl. A. No. 120 of 1964 decided on 19th March, 1965.

(2) Ctl. A.No. 129 of 1963 decided on August 10, 1965.

appraised. There must ordinarily be a substantial error of law or procedure or a gross failure of justice by reason of misapprhension or mistake in reading the evidence or the appeal must involve a question of principle of general importance before this Court will allow the oral evidence to be discussed."

In G. V. Subbramanyam v. State. of Andhra Pradesh (1) this Court appraised the evidence on the plea of self-defence and allowed the appeal because the approach of the High Court on this plea was found to be incorrect. Again, in Raja Ram v. State of Haryana (2) because of special features like rejection by the court below of a considerable mass of evidence on serious charges, this Court looked into the evidence to see how far the case as framed against the appellant could be held proved.

Before us the entire case depends on the identification of the appellants and this identification is founded solely on test identification parades. The High Court; does not seem to have correctly appreciated the evidentiary value of these parades though they were considered to be the primary evidence in support of the prosecution case. It seems to have proceeded on the erroneous legal assumption that it is a substantive piece of evidence and that on the basis of that evidence alone the conviction can be sustained. And then that court also ignored important evidence on the record in regard to the manner in which the test identification parades were held, and other connected circumstances suggesting that they were held more or less in a mechanical way without the necessary precautions being taken to eliminate unfairness. This is clearly an erroneous way of' dealing with the test identification parades and has caused failure of justice. Shri Rana laid great emphasis on the fact that there is no enmity shown between the witnesses and the appellants. In our opinion, though this factor is relevant it cannot serve as a substitute for reliable admissible evidence required to establish the guilt of the accused beyond reasonable doubt. The evidence in regard to identification having been discarded by us as legally infirm and which does not connect the appellants with the alleged offence it cannot by itself sustain the conviction of the appellants. Non-disclosure on the record as to how and when the Investiga to the lacuna in the prosecution case. These appeals are allowed and the accused acquitted.

Y.P. Appeals allowed..

(1) [1970] 1 S.C.C. 225.

(2) crl. A. No. 62 of 1968 on March 26, 1970 5 81