HIGH COURT OF GUJARAT (*D.B.*)

SINDHI DAFER HAYAT DAUD

Versus

STATE

Date of Decision: 26 June 2003

Citation: 2003 LawSuit(Guj) 342

Hon'ble Judges: N G Nandi, Ravi R Tripathi

Case Type: Criminal Appeal

Case No: 731 of 1999

Subject: Criminal

Acts Referred:
Indian Penal Code, 1860 Sec 332, Sec 397, Sec 342, Sec 395
Bombay Police Act, 1951 Sec 135

Final Decision: Appeal dismissed

Advocates: K D Parmar, R C Jani, Amita M Shah, K C Shah

Cases Referred in (+): 2

[1] This appeal filed under Section-374(2) of the Code of Criminal Procedure, 1973 is directed against the judgement and order dated 5th June, 1999 passed by the learned Additional Sessions Judge, Mehsana in Sessions Case Nos.267 of 1998 and 268 of 1998, by which the appellants-accused are convicted under Sections 395 and 114 of the Indian Penal Code and punished the accused-appellants with rigorous imprisonment for 10 years and a fine of Rs.10,000=00 (Rupees Ten Thousand Only), in default to undergo simple imprisonment for two years and six months.

[2] The case of the prosecution is that on 20th September, 1994, at about 1.15 a.m. the accused had come with about 10 unknown persons at the railway crossing on Palavasana to Vijapur road situated in the sim of Village-Shobhasan, District:Mehsana. They all detained the Railway Gateman on duty by tying him with a rope and closed Palavasana Railway Crossing. The case of the prosecution is that as Palavasana railway crossing was closed, vehicles like truck, tanker, matador, etc. plying from Palavasana to Vijapur and Vijapur to Palavasana were stopped. At that time, the accused along with

the persons accompanying them, robbed off the golden and silver ornaments and cash amount totalling to Rs.43,954=00 from the driver, cleaner and passengers of the vehicles, by showing knife and scaring them of hurting grievously or killing them and caused grievous hurt with the help of hammer and eloped from the scene. The case of the prosecution is that the accused, thus, have committed offence punishable under Sections 395, 397, 332 and 342 of the Indian Penal Code and Section 135 of the Bombay Police Act.

[3] One Varsangji Takhuji Thakore, complainant, filed a complaint, which was registered as FIR under Section 154 of the Code of Criminal Procedure at Mehsana Taluka Police Station, and was recorded by one J.B.Rana, Police Sub Inspector of Mehsana Taluka Police Station. The same was investigated by Shri J.G.Parmar, PSI, Local Crime Branch (LCB), Mehsana. The investigation was with Shri J.B.Rana, PSI, Mehsana Taluka Police Station, who was assisted by the PSO, Mehsana Taluka Police Station. As there was no likelihood of tracing the accused in near future, a report under Section-173 of the Code of Criminal Procedure was filed through Shri F.R.Jhala, PSI, Mehsana Taluka Police Station before the Court. Thereafter, the Local Crime Branch, Mehsana was informed about accused nos.1, 2 and 3 by Anti Dacoity Squad, Surat, and the accused were brought under the transfer warrant.

[4] The investigating agency, after having obtained the custody of accused nos.1, 2 and 3 by transfer warrant on 30th June, 1998, arranged for Test Identification Parade (hereinafter referred to as "TIP" for short) on 7th July, 1998. As some of the witnesses, who were called for identifying the accused, could/did not remain present, the second TIP was held on 15th July, 1998.

[5] The PSI, J.G.Parmar, (LCB), Mehsana, then investigated the offence and after the investigation was over, filed chargesheet against accused no.1-Sindhi Dafer Hayat Daud, accused no.2-Sindhi Dafer Mithu Umar and accused no.3-Sindhi Dafer Jumma Umar.

From the record, it transpires that in the FIR, allegations were made against one Dafer Sindhi Daud Mira Bhoja also, with other persons. It appears that as Dafer Sindhi Daud @ Mira Bhoja was not traceable, he could not be arrayed as an accused in the chargesheet, which, in the first instance, came to be filed against accused no.1, Sindhi Dafer Hayat Daud, accused no.2-Sindhi Dafer Mithu Umar and accused no.3-Sindhi Dafer Jumma Umar. Thereafter, a separate chargesheet was filed when Dafer Sindhi Daud @ Mira Bhoja was arrested and that is how, two separate chargesheets came to be filed against the persons allegedly involved in the incident of 20th September, 1994 at 1.30 a.m. at Palavasana railway crossing. All the accused persons were committed to the Court of Sessions to stand trial for

the offences alleged against them. The Sessions Court framed separate charges. In Sessions Case No.267 of 1998, charge was framed against the accused, Dafer Sindhi Daud @ Mira Bhoja only, and in Sessions Case No.268 of 1998, charge was framed against accused no.1, Sindhi Dafer Hayat Daud, accused no.2-Sindhi Dafer Mithu Umar and accused no.3-Sindhi Dafer Jumma Umar. All these accused persons denied the charge levelled against them and claimed to be tried.

[6] It transpires from the record that as both the chargesheets were filed against the accused persons on the basis of one complaint and the statements of the witnesses recorded in the course of the investigation, were also the same, the accused of both the sessions case were tried together and the evidence of both the Sessions Cases was recorded in Sessions Case No.267 of 1998

The learned Additional Sessions Judge, after appreciating the oral as well as documentary evidence on record, found the accused in Sessions Case No.268 of 1998 guilty of the offence charged against them, and sentenced them as above, while acquitted the accused in Sessions Case No.267 of 1998. The finding of the guilt and the sentence imposed on the accused in Sessions Case No.268 of 1998 has been assailed by the convicts by the present appeal. It may be noted that the State has not challenged acquittal of the accused recorded in Sessions Case No.267 of 1998.

[7] In order to bring home the guilt to the accused persons, the prosecution had examined: (1) Varsangji Takhuji Thakore, complainant, PW-1, Exh.6 (unless specifically mentioned, the number of prosecution witness and the exhibit are as recorded in Sessions Case No.267 of 1998); (2) Ishwarji Dalpuji Darbar, PW-2, Exh.8; (3) Hanifkhan Sikanderkhan Pathan, PW-3, Exh.9; (4) Abdulsattar Daudbhai Bahelim, PW-4, Exh.10; (5) Gabhuji Shankerji Rathod, PW-5, Exh.11; (6) Bhikhusha Imamsha Fakir, PW-6, Exh.12; (7) Amraji Shivaji Thakore, PW-7, Exh.13; (8) Shavajibhai Jesangbhai Rabari, PW-8, Exh.16; (9) Maheshbhai Kantilal Soni, PW-9, Exh.17; (10) Karansinh Gajuji Darbar; PW-10, Exh.19; (11) Champaksinh Gajuji Jhala, PW-11, Exh.21; (12) Rajubhai Bhagwanji Soni, PW-12, Exh.22; (13) Vinodchandra Navinchandra Thaker, PW-13, Exh.23; (14) Manilal Mafatlal Solanki, PW-14, Exh.26, In-charge Mamlatdar, Mehsana before whom the TIP was held on 7th July, 1995; (15) Chandulal Bhogilal Panchiwala, PW-15, Exh.29, Mamlatdar, Mehsana before whom the second TIP was held on 15th July, 1995; (16) Hasmukhbhai Motiji Bhil, PW-16; Exh.33; (17) Rajeshkumar Fulaji Bhil, PW-17, Exh.34; (18) Badsinh Madarsinh, PW-18, Exh.35; (19) Navalsinh Jaswantsinh Chauhan, PW-19, Exh.36; (20) Jaysinh Gulabsinh Parmar, PW-20, Exh.39; (21) Jashuji Babaji Rana, PW-21, Exh.46; and, (22) Kishore Ambalal Parmar, PW-22, Exh.50

Besides the oral evidence, the prosecution also produced the relevant documentary evidence viz. (1) FIR; (2) Panchnama of the scene of offence; (3) Panchnama of recovery of wooden log from the scene of offence; (4) Panchnama of recovering piece of gold ingot; (5) Purshis to add Sections 332 and 342 of the Indian Penal Code in the FIR registered under Section 154 of the Code of Criminal Procedure; (6) Transfer Warrants; (7) Yadis returned by the Mamlatdar-Executive Magistrate of Mehsana for arranging TIP; (8) Panchnama to point out the shop at which the accused no.1, Sindhi Dafer Hayat Daud, had sold golden ornaments; and, (9) Panchnama whereby one of the accused Dafer Sindhi Daud @ Mira Bhoja pointed out the scene of offence.

[8] Mr.budhbhatti, learned Advocate for appellant no.1-accused no.1, Sindhi Dafer Hayat Daud, assailed the conviction mainly on the ground that the TIP was not held in accordance with the provisions in this regard in the Gujarat Police Manual. He contended that the investigating agency, who arranged for TIP, did not keep sufficient number of dummies present in the TIP, and the dummies, who were kept present, were not of the same physiognomy, height, structure, etc. similar to that of the accused.

[9] The next contention to assail the conviction of appellant no.1 made by Mr.Budhbhatti is that the prosecution has failed to examine the independent witnesses. He submitted that the persons, who were called for TIP, were not examined, while some of the witnesses, who were examined, were not called for TIP. He also submitted that identification of appellant no.1 before the Court by PW-8, Shavajibhai Jesangbhai Rabari, is of no avail inasmuch as the evidence of the witnesses examined by the prosecution in general is that there was no light, much less the sufficient light at the time of occurrence, to identify the accused. The learned Advocate submitted that in fact, some of the witnesses have even volunteered to say that, 'there was no light from any source'. Mr.Budhbhatti strenuously submitted that the identification of appellant no.1 in the Court after a lapse of five years is required to be appreciated in light of the fact that the witness had an occasion to see the accused in the hustle of the incident, and in peculiar circumstances, with an added disadvantage of insufficient light. He submitted that the evidence of these witnesses should not be relied upon so as to hold that the accused is rightly identified. He next submitted that though the presence of accused, appellants, was obtained by the investigating agency on 30th June, 1998, the first TIP was held on 7th July, 1998, while the second TIP was held on 15th July, 1998. Thus, there being a delay in holding the TIP, the same is vitiated. He, therefore, submitted that the evidence of TIP be discarded in view of the decision of this Court in the matter of Harish Natvarlal Mistry and Ors. etc.etc. vs. State of Gujarat, reported at 1993 (1) Crimes 451.

In support of his submissions on the point of validity of TIP, Mr.Budhbhatti also relied upon the authorities reported at (i) 1993(1) G.L.H.33; and, (ii) 1996(1) G.L.H. 919;

[10] Mr.budhbhatti also submitted that in the present case, only three persons are convicted for an offence under Section-395. He submitted that for conviction under Section-395, ingredients of Section-391 of involvement of minimum five persons must have to be fulfilled. He submitted that as in the present case the ingredients of Section-391 are not fulfilled, the conviction under Section-395 could not have been recorded against the appellants. In support whereof, he relied upon a judgement of the Apex Court in the matter of Ram Lakhan vs. State of Uttar Pradesh, reported in AIR 1983 SC 352.

[11] Mr.budhbhatti also submitted that the prosecution is not able to bring home the guilt by showing recovery of either any weapon or cash or ornament alleged to have been looted in the incident. He submitted that the prosecution has also failed to prove infliction of any injury to any of the victims in the incident.

[12] The learned Advocate for appellant no.1 and the learned Advocate for appellant nos.2 and 3 emphatically submitted that the prosecution has failed to examine the gateman, who would have been the star witness, inasmuch as it is the case of the prosecution that the accused along with other persons had first reached Palavasana railway crossing and had tied the gateman so as to achieve their object of closing the railway crossing, making the vehicles stop and then carrying out their ill designs of committing robbery.

[13] Mr.k.i.patel, learned Advocate for appellant no.2, Sindhi Dafer Mithu Umar, and appellant no.3, Sindhi Dafer Jumma Umar, placed reliance on the same authorities, as relied by Mr.Budhbhatti. In addition, Mr.Patel accentuated that the witnesses had not given any description of any of the accused either at the time of filing of the complaint or before the TIP. He submitted that it is for the prosecution to prove that there was sufficient light so as to make it possible to identify the accused by the witnesses. He submitted that on the contrary, the prosecution witnesses have stated that there was no light. Not only that, even some of them have stated that there was no moonlight. He further submitted that some of the witnesses have volunteered and said that, 'there was no light from any source'. He, therefore, submitted that identification by any of the witnesses, either in TIP or before the Court, would not rouse any confidence in the so-called identification of the accused by the witnesses.

[14] Mr.k.i.patel, the learned Advocate, submitted that the prosecution has chosen to drop the persons, who were called for TIP, for no valid reasons and, therefore, an

adverse inference should be drawn against the prosecution for dropping such witnesses. He submitted that when there were persons like Lakhdhir Mahadevbhai and Vihabhai Haribhai, who were called for TIP and had identified all the three accused, prosecution ought to have examined them. He submitted that, therefore, an adverse inference should be drawn as the prosecution has not put forward any valid reason for not examining these persons. As against this, the prosecution has chosen to examine a person, who has identified only one accused. Mr.Patel, even at the cost of repetition, submitted that there being no recovery from any of the accused and there being delay in holding the TIP, the evidence of TIP is required to be discarded and in absence of any evidence of TIP, it be held that the guilt of the accused is not brought home and the conviction recorded by the learned trial Judge is required to be set aside by this Court.

[15] Mr.k.c.shah, learned APP, supporting the judgement and the conviction submitted that the submissions made by both the learned Advocates appearing for the appellants are without any substance and the same be rejected and the conviction be upheld.

[16] As regards the submission of the learned Advocates for the appellants of not examining independent witnesses and also concerned persons as prosecution witnesses and the gateman, who could have been the star witness, Mr.Shah submitted that the submission is made without verifying the facts on this point from the record. He submitted that it is on the record of the case that the gateman, Mr.Jujarji Savaji, died on 6th August, 1998 and the summons issued to him returned with an endorsement disclosing this fact. So far as Amratbhai Haribhai, who identified all the three accused in the second TIP held on 15th July, 1995, is concerned, he could not be examined as he also died before the trial on 15th November, 1996.

[17] Mr.shah, learned APP, while replying to the contentions raised and the submissions made by the learned Advocates for the appellants that the conviction recorded by the learned trial Judge under Section-395 is not sustainable in view of the decision of the Apex Court in the matter of Ram Lakhan's case (supra) and in view of the fact that the conviction is recorded only of three persons, submitted that in the instant case, the incident took place on 20th September, 1994, from which arose two criminal cases, namely, Sessions Case No.267 of 1998 and 268 of 1998. He submitted that in both these cases, the learned Judge framed charges on 31st March, 1999, which are to be read together. He submitted that in the charge in Sessions Case No.267 of 1998, it is stated that the accused of that case along with other 10 to 12 unknown persons had committed the offence alleged, while in the charge in Sessions Case No.268 of 1998, it is stated that the accused in that case had closed the railway crossing and detained the gateman after putting him in a room. Mr.Shah submitted that as the incident is 'one', there appears to be an inadvertent omission in the charge

of Sessions Case No.268 of 1998 in not mentioning "and other 10 to 12 unknown persons".

He submitted that taking into consideration the provisions of Section-464 of the Code of Criminal Procedure, which provides for "Effect of omission to frame, or absence of, or error in, charge", at the most, it is an omission on the part of the learned Judge while framing the charge. He submitted that Section-464 provides that "no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby". He further submitted that therefore, it is for the appellants-accused to point out that 'failure of justice' has occasioned. He submitted that in absence of any such plea, the conviction recorded by the learned trial judge does not stand vitiated. Mr.Shah also submitted that assuming for the sake of argument without admitting that the error/omission aforesaid was vital, the provisions of Section-215 of the Code of Criminal Procedure takes care of the same. Section-215 of the Code of Criminal Procedure pertains to "Effect of errors". In the said section, it is clearly provided that "no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

Mr.shah, the learned APP, submitted that the charge was not only framed in the presence of the accused-appellants, but, was also read over and explained to the accused-appellants, as mentioned in the charge itself, and at no stage, it was ever contended on behalf of the accused-appellants that any failure of justice has occasioned. Mr.Shah, therefore, vehemently submitted that this contention should not be allowed to be raised by the accused-appellants at this stage.

[18] Mr.shah, the learned APP, replying to the next contention pertaining to the alleged irregularities in holding TIP, submitted that Rule-181 of the Gujarat Police Manual provides for holding an identification parade, but then, the Gujarat Police Manual, 1975 is in the nature of 'guidelines' to the officers concerned and the provisions of the Gujarat Police Manual are not mandatory in character, and, therefore, breach of any of the guidelines will only be an irregularity and in cases of irregularity, the party concerned, who is contending to have been prejudiced by that, has to satisfy the Court about the prejudice caused to it. He submitted that in the present case, the accused-appellants have not argued before the trial Court that there was an irregularity in TIP causing prejudice to them.

Mr.shah in this regard relied upon a judgement of the Apex Court in the case of Bharat Singh vs. State of U.P., reported in AIR 1972 SC 2478. Mr.Shah submitted that the Apex Court was pleased to hold that "validity of identification parade cannot be challenged on the ground of irregularity in the manner of holding it or on the ground of undue delay in holding it when the Magistrate who held the parade and the police officer who conducted the investigation have not been cross-examined in that behalf." Mr.Shah submitted that the learned Advocates appearing for the accused-appellants have read the evidence of the Executive Magistrate, namely, Manilal Mafatlal Solanki, PW-14, Exh.26 and Chandulal Bhogilal Panchiwala, PW-15, Exh.29 at extenso, and they are not able to point out the fact that these witnesses were cross examined on this point and, therefore, the contention raised by the learned Advocates for the accused is without any substance and the same should be rejected by this Court.

Mr.shah, the learned APP, while replying to the next contention urged by both the learned Advocates appearing for the accused-appellants regarding delay in holding TIP, placed reliance on a decision of this Court in the matter of Harish Natvarlal Mistry & Ors. vs. State of Gujarat, reported in II-1993(1) Crimes , 451. Mr.Shah submitted that the decision of this Court holding that the delay of four days caused in conducting the TIP renders the evidence of TIP meaningless, is in the facts and circumstances of that particular case and has no application to the facts of the case on hand. He submitted that the decision of the Apex Court in the case of Ramanand Ramnath vs. State of Madhya Pradesh, reported in (1996) 8 S.C.C. 514, is squarely applicable to the facts of the case wherein the Apex Court was pleased to hold that the evidence of TIP, which was held after 15 days, was valid one and did not discard the same. In that case, the accused was arrested on 29th August, 1981 and the TIP was held on 14th September, 1981. The Apex Court was pleased to hold that there was no unusual delay in holding the TIP. Mr.Shah next relied upon a decision of the Apex Court in the matter of Mararilal Jivaram Sharma and Anr. vs. State of Maharashtra, reported in AIR 1997 SC 1593 wherein the accused were arrested by 26th July, 1986 whereas the TIP was held on 25th September, 1986, that is, almost after two months. The Apex Court was pleased to observe that,

"We do not see any substance in this contention notwithstanding the fact that T.I. parade was held after about two months. The materials on record unmistakably indicate that the investigating officer had sent a letter of request Ex.43(cc) on 13th August, 1986 to the Taluka Executive Magistrate for holding T.I. parade. Repeated letters were written to the Executive Magistrate but because of his pre-occupation, it could not be held before 25th September, 1986. There is no substance in the contention that the eye-witnesses had seen the accused before they were put up

for T.I.parade. After considering the materials on record, we are satisfied that the evidence of identification parade is unimpeachable and we see no reason to discard the same."

Mr.shah, the learned APP, submitted that in the present case except putting forward an argument that there was a delay of seven days in holding TIP after having obtained custody of the accused on the transfer warrant on 30th June, 2003 that the first TIP was held on 07/07/1995, no contention was ever raised before the learned trial Judge about the prejudice caused to the accused on account of that delay. Mr.Shah further submitted that even the learned Advocate appearing herein for the accused-appellants have not pointed out during the course of their arguments as to how the accused were caused any prejudice on account of that delay. Mr.Shah submitted that in absence of any specific plea about the prejudice, mere contention about the delay does not render the evidence of TIP doubtful.

Mr.shah, the learned APP, while replying the point regarding identification of an accused for the first time in the Court by a person, who was not called in TIP, namely, Abdul Sattar Daudbhai Belim - PW-4, and, therefore, chain for identification of an unknown accused which is required to be completed only by identifying such accused in TIP and thereafter before the Court, while the substantive evidence is being recorded, relied upon a judgement of the Apex Court in the matter of Kanta Prashad vs. Delhi Administration, reported in AIR 1958 SC 350, wherein the TIP was not held and a witness identified the accused in the Court. The Apex Court was pleased to observe in paragraph-5 as under :

"5. As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course".

Mr.shah submitted that in this case, veracity of prosecution witnesses is required to be appreciated in light of the fact that the witnesses have given a very natural version of the entire incident. Not only that the witnesses have remained truthful despite the presence of the police officials which can be noticed from the fact that

none of the eight prosecution witnesses have come forward to make a bold and bald assertion of identifying all the three accused at first sight in the Court. Mr.Shah submitted that the deposition of each of these prosecution witnesses is very natural and truthful inasmuch as except the accused, whom the witnesses were able to identify before the Court, they have stated that they were not able to identify because of lapse of time as the incident had taken place on 20th September, 1994 and the trial was conducted in the year 1998.

Mr.shah, learned APP, submitted that the Honourable Apex Court in the matter of State of Haryana vs. Daya Singh & Ors., reported in AIR 2001 SC 1188, was pleased to hold that the delay in trial and identifications of accused in the Court after seven or eight years would not affect evidence of the said witnesses. In the case before the Apex Court, the witnesses had identified the accused after seven or eight years and it was contended on behalf of the accused that such evidence is required to be discarded. The Apex Court was pleased to observe in paragraph-11 as under:

"11. It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. It is also rightly said that "Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material to promote order and not surrender it by excessive theorising or by magnifying what in practice is really unimportant"."

[19] The learned Advocates appearing for the accused-appellants in reply to the submissions made by the learned APP reiterated their contentions and submitted that taking an overall view of the matter, it is required to be held that the prosecution witnesses in general, have not only stated that there was no light, but, have stated that neither there was moonlight nor there was light from any other source, so as to enable the witnesses to identify the accused-appellants; that taking into consideration the fact that the first TIP was held after a week and the second TIP was held after two weeks of the accused being available, the evidence of TIP is required to be discarded; that in view of the fact that the persons, who were called in TIP, were not examined, while some of the persons, who were examined as witnesses, were not called for TIP, it is to be held that the identification link is not established and, therefore, accused are required to be given benefit of the same and they are to be acquitted of the charges levelled against them.

[20] Mr.k.i.patel, the learned Advocate, relied upon a judgement of the Apex Court in the case of Kanan and Ors. vs. State of Kerala, reported in AIR 1979 SC 1127 and submitted that when an accused is not identified in the TIP, his identification in the Court is of no consequence. He also relied upon a judgement of the Apex Court in the matter of State of Andhra Pradesh vs. Dr.M.V.Ramana Reddy & Ors., reported in AIR 1991 SC 1938 to say that delay in holding TIP is fatal.

In reply to the contentions of Mr.Shah, the learned APP, Mr.Budhbhatti, the learned Advocate, adopted the arguments advanced by Mr.Patel.

[21] We have heard the learned Advocates for the appellants-accused and the learned APP at length and considered the evidence placed on the record of the case.

[22] The first submission made by the learned Advocate for the appellants that as there was no sufficient light, it was not possible for the prosecution witnesses to identify any of the accused, does not find favour with the Court for the reason that the incident had taken place on the night of 19th and 20th September, 1994 at the railway crossing which was closed by the miscreants. The fact, which is required to be noted, is that whenever a vehicle approaches a closed railway crossing, it approaches with its light on and only after noticing that the crossing is closed, the driver stops the vehicle, waits for a while, assess as to how long it is likely to take in opening of the railway crossing, and then, if in his assessment if it is likely to take long, the engine of the vehicle is stopped, head lights are switched off. A note of the fact that though the engine of the vehicle is stopped, the parking lights are not switched off. This conduct is the normal conduct of every normal human being driving a vehicle. In such circumstances, when it is on record of the case that number of vehicles had stopped and naturally, these vehicles must have reached the railway crossing only one by one, then, after the first vehicle had stopped and the cabin of that vehicle was approached by the accused and other miscreants, there was necessarily full light of the subsequent vehicles reaching on the spot and even the parking lights of the vehicles once they reached and stopped. In such circumstances, the contention that there was pitch dark and it was not possible for any of the witnesses to identify any of the miscreants, is far fetched, which cannot be accepted. Besides, in light of the fact that 19th September, 1994 was a full moon day as is revealed from "Panchang" (Indian calendar) for 100 years, produced by the learned APP, and the incident had taken place during the night between 19th and 20th September, 1994, the contention that there was not even the moonlight does not warrant any favour and, therefore, it is rejected.

[23] The contention raised by the learned Advocates for the appellants that there was irregularity in the TIP as it was not held in accordance with the provisions of Rule-181 of the Gujarat Police Manual; that sufficient number of dummies were not kept

present; and, that the dummies, who were kept present, were not similar to the accused in their physiognomy, structure, colour, etc., cannot be accepted in view of the decision of the Apex Court in the matter of Bharat Singh vs. State of U.P (supra), wherein in no uncertain terms, the Apex Court held that validity of identification parade cannot be challenged on the ground of irregularity in the manner of holding it or on the ground of undue delay in holding it when the Magistrate who held the parade and the police officer who conducted the investigation have not been cross-examined on this point. In the present case, the officers, who conducted the TIP, were examined, but, nothing material could be brought out in their cross-examination and, therefore, the evidence of TIP cannot be discarded.

Perusal of the provision of Rule-181, which prescribes for "holding of identification parade" is in the nature of detailed guidelines. But then, what is required to be kept in mind is that the evidence of TIP is only corroborative in nature. In the present case, two TIPs were held, first on 7th July, 1995 and the second on 15th July, 1995. The officer, who conducted the first TIP, namely, Manilal Mafatlal Solanki, Mamlatdar In-charge, Mehsana, examined as PW-14 at Exh.26, has deposed in detail the manner in which the TIP was held. He has deposed that three accused persons were brought to his chamber with their faces duly muffled and that the police personnel, who accompanied those accused, were asked to go away. He has further deposed in paragraph-5 that the accused were asked to stand along with the dummies and at that time, they were given an opportunity to change their clothes, if they so desire and as a matter of fact, one of the accused, Sindhi Dafer Hayat Daud, accused no.1, did change his shirt. It is in this manner that the TIP was conducted. From the deposition of the officer, it is also clear that after the identification by a witness, every time the accused were given option to change their clothes or places. This officer is cross-examined by the accused themselves. Having done so, now to contend that the officer was not cross-examined by the learned Advocate appearing for the accused in the trial is of no consequence. The cross examination made by the accused was not in the nature of mere formality as can be seen from the contents of the same. All possible suggestions were made to the officer to extract contradiction, but the defence is not able to procure any contradiction which will put the deposition of the officer in the sphere of a doubtful deposition. The deposition of the second officer, who conducted the TIP on 15th July, 1995, Chandulal Bhogilal Panchiwala, PW-15, Exh.29,, is also perused in detail and we do not find anything relevant, by which it can be said that his deposition does not inspire confidence. In view of the discussion hereinabove and the judgement of this Court in the case of Harish Natvarlal Mistry & Ors. vs. State of Gujarat (supra), wherein on account of delay of four days, the evidence of TIP was not considered acceptable in absence of any acceptable explanation. In the

subsequent decisions of the Apex Court on the point in the matter of Ramanand Ramnath vs. State of Madhya Pradesh (supra) and Mararilal Jivaram Sharma and Anr. vs. State of Maharashtra (supra), the Apex Court did not consider the evidence of the TIP not acceptable, though there was a delay of fourteen days and two months respectively. Therefore, while considering the evidence on TIP only, number of days after which TIP was held is not the decisive factor. If the evidence otherwise inspires confidence, the same is required to be accepted.

[24] The contention regarding non-establishment of link of identification of the accused on account of not examining the persons who identified all the accused in TIP and examining some of the witnesses who were not called for TIP, is also not found with any substance inasmuch as five persons, who were called for TIP, are examined as prosecution witnesses and of them, PW-1, Varsangji Takhuji Thakore, identified accused no.1 in the first TIP and before the Court; PW-5, Gambhuji Shankerji Rathod, identified accused no.3 in TIP and before the Court; and, PW-8, Savajibhai Jesangbhai Rabari, identified accused nos.1 and 3 in TIP and accused no.1 before the Court. Savajibhai Jesangbhai is the witness, who was travelling in a matador, along with Kanjibhai Karamsinhbhai Desai, Dharamsinh Devkaranbhai Rabari, Kanjibhai Dajibhai Desai, Laljibhai Karamsinhbhai Rabari, Ajmalji Devkaran Rabari, Vihabhai Harjibhai Rabari, Ratnabhai Varshibhai, etc. Of these, Kanjibhai Dajibhai Desai, Laljibhai Karamsinhbhai, Ajmalji Devkaranbhai Rabari and Vihabhai Harjibhai Rabari were in the same vehicle and, therefore, the prosecution examined one of the aforesaid persons as PW-8 and did not examine the others. As submitted by the learned APP, the summons was issued to one Ajmalji Devkaranbhai, but then, he could not be examined. Non-examination of other persons as witnesses also does not hamper the case of the prosecution, in any manner as the prosecution has already examined one of the person travelling in the same vehicle.

[25] So far as the identification of accused no.2, Sindhi Dafer Mithu Umar, is concerned, one Amratbhai Haribhai Panchal, who was called as a witness in the second TIP, on 15th July, 1995 identified all the three accused, coupled with the fact that Hanifkhan Sikanderkhan, PW-3, Exh.9, had identified all the three accused in the first TIP held on 7th July, 1995. Taking into consideration the deposition of Chandulal Bhogilal Panchiwala, PW-15, Exh.29, with the evidence of Hanifkhan Sikanderkhan, PW-3, who deposed that Amratbhai Haribhai was the conductor of the truck driven by Hanifkhan Sikanderkhan Pathan and that he was with him on the truck at the time of the incident, the identification by Amratbhai Haribhai in the second TIP is fully reliable for establishing the identification of accused no.2.

[26] So far as the contention as to not satisfying the ingredients of Section-391 of the Indian Penal Code and, therefore, the conviction of the accused under Section-395 is

bad, is concerned, in view of Sections-464 and 215 of the Code of Criminal Procedure discussed in the earlier part of this judgement, even if there is an omission in framing the charge in Sessions Case No.268 of 1998, when the words, "you accused with 10 to 12 other persons", the same does not hamper the case of the prosecution. The evidence on the record do suggest that the accused were accompanied by 10 to 12 persons and, therefore, there is no question of the ingredients of Section-391 being not satisfied.

From the judgement of the Apex Court in the case of Ram Lakhan (supra), relied upon by Mr.Patel, wherein the appellant was convicted under Section-395, the facts reveal that in the FIR, only nine persons were alleged to have participated in the dacoity; the trial Court had acquitted five persons and convicted four; in appeal before the High Court, remaining three persons were acquitted and Ram Lakhan-appellant only was convicted. In the said judgement, the Apex Court was pleased to enunciate as under:

"The position now is that out of 9 persons named in the FIR who are alleged to have participated in the dacoity Ram Lakhan is alone left. Before an offence under Section 395 can be made out there must be an assembly of 5 or more persons. On the findings of the Courts below it is manifest that only one person is now left. In these circumstances therefore the appellant cannot be convicted for an offence under Section 395."

In the present case, the evidence on record suggests that there was an assembly of more than five persons, including these three accused. Of these accused, only these three accused could be brought before the Court and are convicted, but, that does not reduce the number of persons, who formed the assembly. The aforesaid decision of the Apex Court will, therefore, not be applicable to the facts of the present case and hence, the contention of the learned Advocate for the appellants cannot be accepted.

[27] Mr.shah, the learned APP, relied upon a judgement of the Apex Court in the case of Bharwad Mepa Dana and Anr. vs. The State of Bombay, reported in AIR 1960 SC 289, wherein the Apex Court had an occasion to deal with a situation where an unlawful assembly consisting of more than five persons was alleged to have committed the offence, of which identity of four only could be established and the Apex Court was pleased to uphold the conviction.

In the present case, presence of 10 to 12 persons along with the present accused is established on the record of the case. However, only three accused could be brought before the Court, thus, the facts of the present case are similar to that of

the case before the Apex Court . Therefore, the decision in the case of Bharwad Mepa Dana & Anr. vs. The State of Bombay (supra) will be applicable.

[28] In view of the aforesaid discussion, the conviction under Section-395 is held to be justifiably recorded. No interference is called for.

The sentence under Section-395 is for imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years.

[29] Mr.budhbhatti and Mr.K.I.Patel, learned Advocates appearing for the appellants, submitted that the accused have undergone by now about 8 years, short by four days, which should be considered to be sufficient and, therefore, they prayed for reduction of the sentence to the period undergone.

[30] Mr.shah, the learned APP, submitted that even if there has to be reduction in the sentence, the same should be only in substantive sentence and nothing beyond that.

[31] Having given our thoughtful consideration, we deem fit to reduce the substantive sentence to the period undergone, however, we maintain the amount of fine imposed by the learned Additional Sessions Judge and also the simple imprisonment for two years and six months in case of default in payment of fine.

[32] In the result, the appeal is dismissed, with reduction of substantive sentence to the period already undergone. The amount of fine imposed by the learned Additional Sessions Judge is maintained with two years and six months simple imprisonment in default. If the fine imposed is deposited by the accused, then the convicts shall be released forthwith if not required in any other case.