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the trees are of spontaneous or wild growth or are planted by the grantee they form part of the land on which they stand. This principle is based on the well known maxim *quicquid plantatur solo solo cedit*, i.e. whatever is planted on the soil becomes the part of the soil. The Privy Council in *Harichand's* case cited above made no such distinction as suggested by Mr. H. L. Sarin for the appellant and in fact held that the grantee was not entitled to compensation on the ground that he had done something in the way of utilizing it. Mr. H. L. Sarin strongly relied on *The Governor-General in Council* v. *Mr. D. E. Rivett and others* (1). In that case Falshaw, J., was dealing with the grantee's right to remove trees that had naturally fallen down without payment of any fee etc., and it was held that the grantee had a right to remove such trees. The present case, however, relates to trees that had been cut down by the grantee and decision of Falshaw, J., is distinguishable on this account. I, therefore, hold that the trees that were cut by the defendant in the present case belonged to the Union of India. It was not urged before me that the value of the trees that were cut down was not Rs. 96.

The result is that I dismiss this appeal but in the circumstances of the case, I leave the parties to bear their own costs.

APPELLATE CRIMINAL

Before Falshaw, J.

ROSHAN,—*Appellant.*

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 90 of 1955

1955

October, 28th

Evidence Act (I of 1872)—Section 32(2)—Record of evidence at an identification parade held by a Magistrate —Whether record of such proceedings is admissible in

(1) 1953 P.L.R. 224

evidence as proof of its contents without the evidence of the Magistrate—Proof of Magistrate's signature, whether of any consequence.

Held, that the record prepared by a Magistrate of proceedings at an identification parade conducted by him cannot be regarded as a statement made by him in the ordinary course of business, and that such a document cannot be admitted under section 32(2) of the Evidence Act and treated as a substantive piece of evidence and the proceedings of parades can only be proved by the oral deposition of the Magistrate who held them. Admittedly Magistrates are called on occasionally to hold identification parades as part of their duty but this is a special form of duty, and seeing that liberty or even the lives of accused persons may depend on the result of such evidence, it is highly important that the proceedings in an identification parade should be properly proved by the deposition of the Magistrate who could then be subjected to cross-examination.

Appeal from the order of Shri Gurbux Singh, Magistrate, 1st Class, with section 30 powers, Palwal, dated the 31st December, 1954, convicting the appellant.

P. C. PANDIT, for Appellant.

HAR PARSHAD, Assistant Advocate-General, for Respondent.

JUDGMENT

FALSHAW, J. These are eight appeals by Roshan, Jage, Joginder Singh, Labh Singh, Gurcharan Singh, Hukam Singh, Ram Singh and Narain Singh who have been convicted by Section 30, Magistrate at Palwal (Gurgaon) under section 395, Indian Penal Code, read with 109 in the case of Joginder Singh, and sentenced to six years' rigorous imprisonment each. **Falshaw, J.**

The case is a very old one as the dacoity took place as long ago as the night of 4th of August,

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1953, and the crime was fairly quickly investigated, but for various reasons set out in the judgment of the lower Court it became necessary after more than forty prosecution witnesses had been examined to start a *de novo* trial in August, 1954, a year after the occurrence.

Briefly the prosecution story is that a gang of dacoits numbering about ten invaded the house of Bakhtawar P.W. on the night in question and after remaining for two hours or more in the house the dacoits departed. Hukam Chand P.W. 1, a neighbour of Bakhtawar, had set off for the Police Station at Jatusana, 6½ miles from Jeora, before the dacoits had left, but as it was a wet night and the path was difficult he only arrived at the Police Station at 5.15 a.m. and made his report. Head Constable Sohan Lal reached the village at 6.30 a.m. where he took possession of list of stolen property which had been prepared by Bakhtawar in the meantime and six spent cartridges. The assistance of a tracker was quickly obtained and the tracks of eight men were traced to a well about five furlongs from the village close to the road running between Rewari and Jhajjar. It was then seen that a car which had been standing at that spot had apparently come from Jhajjar and then, after being turned, had gone back in that direction and it was through the intensive efforts made to trace the car in question that the accused were caught. The number of the car was found to be PNG 1166 and it was traced to the ownership of Inderjit Singh P.W. through whom the Police were able to lay hands on Joginder Singh accused who had been employed by Inderjit Singh as a driver. Joginder Singh was arrested on the 10th of August, and a portion of one of the stolen ornaments was recovered from him. The arrest of the remaining accused followed within the next two

or three weeks and on the 21st of August, 1953, Joginder Singh made a confessional statement before a Magistrate.

Very little of the stolen property in this case has been recovered and the evidence against most of the accused simply consists of their identification at parades held soon after their arrest by members of the household of Bakhtawar and by one Parbhu Singh P.W. who claimed to have seen some members of the gang getting out of the car which was traced to Joginder Singh.

The chief identifying witnesses from the house-hold are Siri Chand, a nephew of Bakhtawar, and his wife Shrimati Shanti, P.Ws 13 and 14, who saw most of the dacoits as they were actually ill-treated and given injuries at the hands of some of them and had kerosene oil poured on their clothes with a threat of being set on fire in order to make them reveal the whereabouts of the valuables and a group consisting of Jagmal P.W. 2, Suraj Mal P.W. 3 and Jaggu P.W. 5, who are alleged to have been in the house when the dacoits entered and to have immediately run outside from where they kept looking from time to time on what was going on. There was no moon on the night of the occurrence but it is alleged that a lamp was lit in the *nauhra* of the house and that the dacoits used electric torches from time to time.

Although the dacoits do not appear to have numbered more than eight according to the track evidence, eleven men were actually prosecuted, but two named Amar Singh and Mangal were discharged and one named Sher Singh was acquitted.

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Against two of the appellants, Roshan and Jage, the only evidence consists of their alleged identification by some of the witnesses at a parade held on the 17th of August by a Magistrate named Mr. R. C. Aggarwal who was not available to appear as a witness at the time of the trial as he had gone abroad to Holland on some course of study. The evidence of the identification by the witnesses in the parade thus consists entirely of the record of the proceedings prepared by the Magistrate and proved by his former Reader who knew his handwriting. The question which arises is whether this record of the proceedings is admissible in evidence as a proof of its contents without the evidence of the Magistrate, which is the ordinary way in which identification proceedings are proved. The lower Court was of the view that the record of the proceedings could be read as substantive evidence without the deposition of the Magistrate under the provisions of section 32 (2) of the Evidence Act. This section deals with the proof of statement by persons who cannot be called as witnesses and subsection (2) furnishes the proof of such a statement when it was made by the person no longer available as a witness "in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty ; or of any acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him ; or of the date of a letter or other document usually dated, written or signed by him". The record prepared at the time of an identification parade certainly is not covered by any of the later items in this subsection and it certainly cannot be regarded as an entry or memorandum in a book kept in the ordinary course of business.

It was, however, argued by the learned Assistant Advocate-General, that the record was covered by the first part of the subsection, namely that it was a statement made "in the ordinary course of business." Neither party was able to cite any reported case dealing with a record of proceedings in an identification parade nor could I find anything in either Sarkar's or Munir's commentaries on section 32 (2) which deals with a matter in any way similar. The nearest approach is the case *Mohan Singh* v. *King Emperor* (1), in which Sulaiman and Mukerji, JJ. accepted as admissible in evidence under section 32(2) the *post mortem* report in a murder case prepared by a doctor who had died in the meantime. There is very little discussion on the point in the judgment and the document was accepted as admissible on the ground of being a statement made by a dead person in the ordinary course of business and in the discharge of his professional duty. It is not even made clear in the judgment how the *post mortem* report was proved and it may well be that it was proved by a compounder or other assistant of the doctor who had actually been present when the *post mortem* examination was carried out, and it is, moreover, observed that quite independently of the report there was ample evidence to show how the deceased had met his death which was apparently by the smashing of the bones of his skull.

There are undoubtedly a number of cases in the Punjab in which *post mortem* and other medical reports were accepted as evidence on proof by someone familiar with the handwriting of the doctor concerned after the partition in August, 1947, when a large number of Muslim doctors had fled to Pakistan. In such cases there was always

(1) A.I.R. 1925 All. 413

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other evidence such as injury statement prepared by the Police and statements by eye-witnesses regarding how the persons concerned were injured or killed, and I do not find that in any of these cases there was any serious examination of the question whether a *post mortem* report proved in this manner is substantive evidence of its contents. I should imagine that very grave difficulties would arise in any case where there was any serious dispute or doubt regarding the cause of death. In any case I am doubtful whether a case referring to medical reports of this kind is quite the same as a report of the proceedings in an identification parade. I find it difficult to hold that such a record amounts to a statement made by a Magistrate in the ordinary course of business. Admittedly Magistrates are called on occasionally to hold identification parades as part of their duty but it seems to me that this is a special form of duty, and seeing that liberty or even the lives of accused persons may depend on the result of such evidence, I consider it highly important that the proceedings in an identification parade should be properly proved by the deposition of the Magistrate who could then be subjected to cross-examination. After all a *post mortem* report or any medical report containing a description of injuries is not direct evidence against any particular person, but is a mere scientific description more or less on a par with the report of Chemical Examiner, which is admissible in evidence without any further proof. On the other hand evidence of identification in a parade is direct evidence against the persons so identified. There is a situation regarding medical evidence which is somewhat analogous. When a doctor has given his evidence at the enquiry stage his evidence is in the ordinary course transferred to the file of the Sessions Case, and the doctor need not be any further examined

unless either party requires his presence for further questioning. This is so only as long as his evidence is purely medical. If, however, the doctor, apart from dealing with the injuries of a deceased person, is also a witness of a dying declaration, his appearance at the trial in the Sessions Court is necessary to depose regarding the dying declaration, this part of his statement not being automatically transferable from the file of the Committing Magistrate to that of the Sessions Judge. In the circumstances I am strongly of the opinion that the record prepared by a Magistrate of proceedings at an identification parade conducted by him cannot be regarded as a statement made by him in the ordinary course of business, and that such a document cannot be admitted under section 32(2) of the Evidence Act and treated as a substantive piece of evidence and the proceedings of parades can only be proved by the oral deposition of the Magistrate who held them or perhaps, though the point does not arise in this case, by the deposition of some other persons in authority who was present when the parade was held. Thus virtually the only piece of evidence against Roshan and Jage appellants disappears and their guilt cannot be held to be proved.

The case against Joginder Singh appears to be on altogether different footing. He has been identified by a number of witnesses at parades held by a Magistrate who was still able to appear as a witness. Apart from this the fact that a car owned by Joginder Singh's employer and driven by him was used for the purpose of taking the dacoits to a place near the scene of the dacoity and away again afterwards appears to be conclusively established, and there is also the confessional statement recorded on the 21st of August, 1953. He retracted this confession at the trial alleging

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that it was the result of torture by the Police, but he failed to substantiate this allegation and from the evidence of the Magistrate who recorded the confession it would appear that he took every precaution to ensure that it was being voluntarily made. Moreover, a portion of an ornament was recovered from Joginder Singh which he was alleged to have tried to exchange with a goldsmith, who appeared as a prosecution witness, for two rings. In my opinion, the case against Joginder Singh was fully established.

Labh Singh, accused was also only identified in a parade held by the Magistrate who was no longer available as a witness. He is also alleged to have been identified by Parbhu Singh, the witness who saw some of the dacoits arriving in the car, but the statement of this witness was so unsatisfactory that his evidence was rightly not relied on by the lower Court. There is, however, another piece of evidence against Labh Singh in the form of the recovery from his possession on the 24th of August of the ornaments P. 3 and P. 6, regarding which good evidence appears to have been produced by the prosecution to prove that they formed part of the stolen property. Labh Singh admitted the recovery of these ornaments but claimed them as his own, and produced some defence witnesses, who were related to him, in support of his claim. The most extraordinary feature of this case is that these same ornaments have also been claimed by Narain Singh, accused from whom two other ornaments, P. 8 and P. 9, similarly identified as part of the stolen property, were recovered. Narain Singh claimed both the ornaments said to have been recovered from him, and also the ornaments, P. 3 and P. 6, and produced some of his relations in support of his claim. I do not believe the evidence

of either of these sets of witnesses and consider that the identity of these ornaments has been satisfactorily established. Even in the absence of the proper evidence of the identification of Labh Singh, I consider that the recovery of ornaments from out of the proceeds of the dacoity within three weeks is sufficient to establish a case against him under section 412, Indian Penal Code.

In the case of Gurcharan Singh appellant there is only the evidence that he was identified by Shrimati Shanti, Jagmal, Suraj Mal and Jaggu, P.Ws. at a parade held on the 1st of September, 1953. Only Suraj Mal and Jaggu were still able to identify him at the trial, Shrimati Shanti and Jagmal failing to do so. According to the prosecution Gurcharan Singh was arrested on the 30th of August and put up for identification in a parade only two days later. The case of Gurcharan Singh, however, is that he was arrested on the 24th of August and that in the meantime he was shown to some of the witnesses. It has been admitted by Inspector Bhandari, P.W. 38, that Gurcharan Singh's house was searched on the 24th of August and also that a man named Gurcharan Singh with the same father's name as the present appellant was arrested by the police on that day. He has, however, alleged that this was a different Gurcharan Singh who was subsequently released. On the other hand some respectable witnesses have testified that Gurcharan Singh was arrested on the 24th of August. The Inspector's explanation does not appear to be very convincing and if Gurcharan Singh was arrested six days before he was put up for identification, or in other words, if he was put up for identification eight, and not two, days after his arrest, his identification in the parade becomes rather suspicious and, adding to this the fact that two of the witnesses who are

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supposed to have identified him in the parade could no longer do so in Court, I consider that he is entitled to the benefit of the doubt. He is also alleged to have been identified by a goldsmith as having accompanied Joginder Singh on the occasion referred to above, but the goldsmith was never asked to identify him in a parade, and although he claimed to know him before he admitted that he did not know his name and had only seen him once. This kind of identification is obviously worthless.

Against Hukam Singh and Ram Singh accused there is only the evidence of their identification by a number of witnesses in a parade held on the 1st of September shortly after their arrest. Neither of these accused has brought out any suspicious circumstances regarding his arrest such as exists in the case of Gurcharan Singh. A pistol is also alleged to have been recovered from Ram Singh but this cannot be regarded as a very important piece of evidence, since it does not appear to have been proved that any of the spent cartridges found on the scene was fired from this pistol.

Similar evidence of identification also exists against Narain Singh apart from the recovery of the ornaments, P. 8 and P. 9, to which I have already referred. Narain Singh was only arrested on the 27th of August, and identified by three of the witnesses at a parade held on the 29th and there is nothing in the evidence relating to these three accused to impugn the evidence of the Police that they were kept secluded before the parades were held. It was argued on behalf of the accused that the witnesses had not sufficient opportunity to see the faces of the dacoits to enable them to

identify the latter three weeks or so after the occurrence. I do not, however, find any difficulty in believing both that a lamp was burning outside as well as in the room of the house and that the dacoits also used torches. It was suggested that the witnesses who had run out of the house when the dacoits first came would not have dared even to look back at them, but it is clear from the evidence that the dacoits became so intent on hunting for valuable loot that even their main victims, Siri Chand and his wife Shrimati Shanti, were actually able to escape from the house some time before the dacoits left and, therefore, it is quite feasible to support that witnesses from outside were keeping the dacoits under observation from time to time. On the whole I am not prepared to reject the evidence of identification against these three accused and there is further corroboration in the case of Narain Singh in the form of the recovery of ornaments.

The result is that I dismiss the appeals of Joginder Singh, Hukam Singh, Ram Singh and Narain Singh and accept the appeal of Labh Singh to the extent of changing his conviction from section 395 to 412, Indian Penal Code, and reduce his sentence to three years' rigorous imprisonment. I accept the appeal of Roshan, Jage and Gurcharan Singh and acquit them.

REVISIONAL CIVIL

Before Falshaw, J.

RAM SARUP,—*Petitioner.*

versus

SHRI NATHU RAM,—*Respondent.*

Civil Revision Case No. 155-D of 1954

1955

November, 1st

Delhi and Ajmer Rent Control Act (XXXVIII of 1952) —Section 11—Before 1952 Act came into force applications for fixation of the standard rent heard by Judge,