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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 13th August, 2009

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CRL.A. 389/2001

KHARAK BAHADUR

..... Appellant

Through: Mr. Sumeet Verma, Advocate

versus

STATE

..... Respondent

Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

PRADEEP NANDRAJOG, J. (ORAL)

1. Vide impugned judgment and order dated 30.7.1998, the appellant has been convicted for offences punishable under Section 394 IPC and Section 302 IPC.

2. Vide order dated 30.7.1998, the appellant has been sentenced to undergo rigorous imprisonment for 6 years for the offence punishable under Section 394 IPC. Fine in sum of Rs.200/- has also been imposed for said offence. For the offence punishable under Section 302 IPC, the appellant has been sentenced to undergo imprisonment for life. Fine in sum of

Rs.2,000/- has also been imposed. It has been directed that in case of default of fine, appellant shall undergo further RI for 1 month.

3. From the evidence led before the learned Trial Judge and the charge sheet filed against the appellant, it is apparent that the prosecution was relying upon three circumstances to nail the guilt of the appellant. The first was the direct participation of the appellant in the crime, for which there was an eye witness; namely, Neha Gupta PW-4, the daughter-in-law of Smt.Laxmi Devi who suffered a brutal death in her house on 9.1.1993 in the late afternoon. The time being around 3:10 PM. The second incriminating circumstance sought to be proved against the appellant was of a gold ring Ex.P-13 being recovered pursuant to the disclosure statement Ex.PW-7/L made by the appellant which ring was identified by Neha Gupta in the TIP proceedings Ex.PW-14/C conducted on 27.2.1993 as that of the deceased; the ring being recovered from house No.A-1286 Jahangir Puri, which was seized as recorded in the memo Ex.PW-7/M. Lastly, the refusal of the appellant to participate in the Test Identification Proceedings conducted on 5.2.1993.

4. The learned Trial Judge has held that the incriminating evidence pertaining to the recovery of the ring Ex.P-13 could not be used against the appellant as incriminating evidence, for the reason there was evidence on record that a

day prior to the recovery of the ring, the police had visited house No.A-1286, Jahangir Puri from where the ring was recovered.

5. The conviction has been sustained with reference to the testimony of Neha Gupta PW-4 and the refusal by the appellant to participate in the Test Identification Proceedings held on 5.2.1993.

6. We note straightaway, the testimony of Neha Gupta PW-4. She has deposed as under:-

“1. On 9.1.1993, at about 3.10 PM, Myself, my mother-in-law Smt. Laxmi Devi and two children were at home, alongwith our servant Mr.Ramu. We were watching the TV. My mother-in-law was also sitting near me. In the meantime, two persons, came there and both of them over-powered myself and my mother-in-law. They struck something heavy on my head and I became unconscious. When I regained consciousness, I did not see those robbers. Then I was taken to the hospital for treatment.

2. After few days, I was told that those persons have killed my mother-in-law Laxmi Devi.

3. On checking, I found that the cash of Rs.30,000/- or Rs.35,000/-, gold chain, two bangles, a pair of topas, nose pin which I was wearing, at the time of incident, were missing. One bangle, and one pair of topas, which my mother-in-law was wearing alongwith one ring, were missing. From the Almirah, one kundan set, one ginni-set, one Hasli-set, 2/3 pairs of karas, 5 or 6 pairs of topas, about 3-4 chains, and two or three rings, about 2-3 pairs of topas of children, about one or two chains of the children, all made of gold, were missing.

4. The accused present in court, is one of those

two robbers who had committed robbery in our house. The accused present in court, tied a 'mufler' around the mouth of my mother-in-law Laxmi Devi. My mother-in-law Laxmi Devi died because of suffocation, because the 'Mufler' tied on her mouth was very tight.

5. On 26.4.93, at the Instance of police, I came to Tis Hazari Court, alongwith my husband. I saw the accused present in court in Tis Hazari Court, when he was produced before the Magistrate and I identified him to be one of those persons, who had committed robbery/murder in our house. I do not know whether any rope was also used by the accused persons, for tieing my mother-in-law.

6. After this incident, our servant Ramu disappeared.

7. On 27.2.1993, at Model Town Police Station, I identified one gold ring, to be belonging to my mother-in-law, which he was wearing at the time of occurrence. Again stated, I identified the said ring before the Magistrate on the said date, at Tis Hazari Court and not at the police station.

8. At this stage, one pullanda, sealed with the seal of AS is opened and is found to containing one bed-sheet of Mehroon colour of a double bed, which is blood-stained. The bed-sheet Ex.P-1 is the same, which was laid on the bed & over which all of us were sitting, watching the TV. The half woman-sweater Ex.P-2 and 'Salai' Ex.-3 are the same, which were kept near my mother-in-law as she was knitting the said sweater. The clip Ex.P-4 is the same, which I was wearing at the time of incident. Three pieces of rope are also taken out from the pullanda. Hand-towel Ex.P-5 was also kept, near us, which is also slightly blood stained. The pair of socks Ex.P-6/1 & 2 are the same, which my son was wearing at that time. Shawl Ex.P-7 is the same, which my mother-in-law was wearing. One knife is also taken out from the said pullanda.

9. At this stage, another sealed packet, seal with the seal of PS is opened and is found to contain a 'mufler', which is a knot, wherein long hairs of

white and black colour are entangled. I cannot identity the 'Mufler' again said, it appears that my mother-in-law was tied with the Mufler same as Ex.P-8. I have seen the pair of socks Ex.P-9/1, the Petticot Ex.P-10 and the blood stained blouse Ex.P-11, Saree Ex.P-12, which is also blood-stained and identify the same to be clothes, which my mother-in-law Laxmi Devi was wearing at the time of commission of robbery and when she was killed.

At this stage, a sealed packet, sealed with RKJ is opened and is found to contain one gold ring, wherein four jwells are imbedded. Ring Ex.P-13 is the same, which my mother-in-law was wearing at the time of commission of robbery and was robbed by the robbers."

7. Neha Gupta has been subjected to cross examination. Nothing has been brought out in her cross examination, indeed, nothing has been pointed out to us, wherefrom it can be even urged that Neha Gupta has not successfully withstood the test of cross examination.

8. The learned Trial Judge has rightly held that Neha Gupta's presence in the house cannot be disputed for the reason even she received a grievous injury and became unconscious in the house where she was residing with her mother-in-law. We may note, with reference to her testimony, that when two persons intruded into the house and over powered her and her mother-in-law, something heavy was struck on her head and she became unconscious. No questions have been put to Neha Gupta on this aspect when she was cross examined. Thus, said part of her testimony has gone un-

rebutted. From the testimony of Neha Gupta, it is apparent that she and her mother-in-law, deceased Laxmi Devi and two children of Neha Gupta were at their home. Their servant Ramu was also in the house. The family was watching television. Two persons entered the house and over powered Neha Gupta and her mother-in-law. She saw that her mother-in-law was gagged with a muffler. At that point, she was struck with a heavy object on her head and she became unconscious. She regained consciousness in the hospital and learnt that her mother-in-law had been killed.

9. Only one of the two persons referred to by Neha Gupta in her testimony could be apprehended, being the appellant. The other could not be traced.

10. Neha Gupta has categorically deposed that the appellant was one of the two persons who had committed robbery.

11. Challenging the conviction of the appellant, two main submissions and a third in the alternative have been urged at the hearing of the appeal today.

12. It is firstly urged that Neha's statement under Section 161 Cr.P.C. was recorded after 19 days of the incident. Thus, learned counsel urges that it casts a serious cloud on what Neha Gupta told the police, for she was given an unexplainable time to ponder over her thoughts and make a tailor made statement

to the police. The second submission made by learned counsel is that Neha Gupta's statement categorically shows the presence of servant Ramu in the house. Drawing our attention to the testimony of the investigating officer, Insp.Dharambir Gupta PW-13, who deposed that when he reached the house, the servant was absconding, counsel urges that there is every possibility of Ramu being involved in the crime. Counsel wonders as to why Ramu has not been cited as a witness of the prosecution if the prosecution was convinced that Ramu was not involved. Another limb of this submission is that Neha Gupta has deposed that her children were present in the house. Counsel submits that admittedly there is no evidence of the children being injured. It is urged that an adverse inference should be drawn against the prosecution for not examining Neha's children as witnesses. Extending this argument a little further, learned counsel draws our attention to the answers given by Neha Gupta in her cross examination wherein she stated that she raised an alarm and mohalla people gathered at her house. She claims not to have remembered as to who informed the police. She remembers being taken to the hospital by their neighbour Tanu in her car. Further, in her cross examination, she stated that she told the persons who had gathered to take care of her mother-in-law. The sum and substance of the submission made is that Neha Gupta has

deposed inchoately and hence is an unreliable witness.

13. The alternative submission made by learned counsel is that the part of the statements of Neha Gupta in para 4 of her testimony in chief where she states that her mother-in-law died due to suffocation because of muffler being tied very tightly on the mouth of her mother-in-law was suggestive of the fact that the intention of the robbers was not to kill Laxmi Devi but was to stifle her voice. The intention behind gagging a person is to stifle his or her voice.

14. It is true that Neha Gupta's statement under Section 161 Cr.P.C. was recorded after 19 days of the incident. The reason appears to be the serious head injury suffered by Neha Gupta requiring her hospitalization. Unfortunately, the prosecution has not proved the medical record pertaining to Neha Gupta's hospitalization. But, the appellant cannot gain anything with respect to said issue for the reason neither Neha Gupta nor the investigating officer has been questioned as to why Neha's statement was recorded belatedly. In the decision reported as Ramanand Yadav Vs. Prabhu Nath Jha AIR 2004 SC 1053 it was held as under:-

"14. The second factor which was weighed with the High Court is the delayed examination of three witnesses i.e. P.Ws. 6, 7 and 9. The evidence of P.W.7 does not appear to be very much credible and the trial Court and the High Court also did not appear to have placed much reliance on his evidence. But so far as P.Ws. 6 and 9 are

concerned, it is clear from reading of the evidence that the Investigating Officer was not asked specifically the reason for their delayed examination. This Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. (See Ranbir & Ors. Vs. State of Punjab AIR 1973 SC 1409 and Bodhraj @ Bodha & Ors. Vs. State of Jammu & Kashmir 2002 (8) SCC 45.”

15. The second submission urged by learned counsel has three limbs and hence we deal with the same as if each limb is a separate submission.

16. The plea that Ramu, the servant employed by the Gupta family, was in the house and there is a possibility of Ramu being involved in the crime cannot be ruled out needs to be dispatched with the answer that the plea begs the question as to what was the appellant doing inside the house of the Gupta family without any valid excuse? If it is established that the appellant had entered the house, in the absence of any explanation from the side of the appellant as to why he entered the house, it becomes irrelevant that Ramu fled from the house for the reason Ramu fleeing from the house is explainable out of fear. In any case, without questioning the investigating officer as to why he has not made Ramu an accused, on hypothesis no arguments can be projected. We find not a question put to the investigating officer as to why conduct of Ramu was not investigated.

17. The second limb pertains to not examining the children of Neha Gupta as a witness. The plea is predicated on the admission of Neha Gupta that her children were present in the house. We wonder what could be deposed to by the children of Neha Gupta? Neha Gupta appeared as PW-4 on 16.2.1996. The incident in question took place on 9.1.1993. Age of Neha Gupta has been recorded as 27 years as on the date when she deposed. Thus, as on 9.1.1993, Neha Gupta would be aged 24 years. It is apparent that her children would be toddlers and hence incapable of being examined as witnesses.

18. The third limb of the second submission pertains to the conduct of Neha Gupta when the crime was committed. As noted in the preceding para, Neha was aged 24 years when the crime was committed. When two men over power two women, one of whom is old and the other is too young, fear is bound to freeze the two women. The younger one sees the older one being gagged. The younger one is fatally assaulted with a blunt object on the forehead. The recollection of contemporaneous event by the young women is bound to be hazy and a little incoherent. Tested in the aforesaid backdrop, we find nothing of serious infirmity in the testimony of Neha Gupta.

19. This takes us to the last and the alternative submission made. When she saw her mother-in-law being

gagged and later on learnt that her mother-in-law had died, the logical mind of Neha Gupta made her speak that her mother-in-law was killed due to strangulation by the accused. But, the cause of death of the deceased is not asphyxia due to strangulation but is the cumulative effect of asphyxia resulting from strangulation and cardiac tympanum. The same is evidenced from the post-mortem report Ex.PW-8/A of the deceased and the testimony of Dr.L.T.Ramani PW-8 who conducted the post-mortem of the deceased. The post-mortem report shows 13 injuries inflicted on the eye lids, lips and chest of the deceased. Second to sixth rib were fractured on the right side and there was extensive bruising of both lungs. Neck tissues showed extra-vascularisation of blood in subcutaneous and submandibular region of the left side of the neck. Sub mucous petechiae were seen on the laryngeal mucosa and epiglottis. Extensive bruising of right auricular region of head with small laceration of anterior auricular wall was also noticed. It is apparent that blunt force was applied all over the chest and even the neck was throttled. Death had to result. It is obvious even to a layman keeping in view the fact that Laxmi Devi was aged 52 years when she was done to death.

20. We repeat that the appellant was identified by Neha Gupta as one of the two assailants. It assumes significance that the appellant refused to participate in the Test Identification

Proceedings conducted on 5.2.1993 and said evidence is another piece of incriminating circumstance against the appellant.

21. We find no merit in the appeal.

22. The appeal is dismissed.

23. The appellant has admitted to bail on furnishing a personal bond. We cancel the personal bond furnished by the appellant and direct the appellant to surrender and suffer the remaining sentence.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

AUGUST 13, 2009
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