

*

IN THE HIGH COURT OF DELHI

Judgment reserved on : February 09, 2009

%

Judgment delivered on : February 16, 2009

+

CRL.A.04/2001

NARESH KUMAR Appellant
Through: Mr.D.C.Mathur, Sr. Advocate with
Mr.Vikram Singh Panwar, Advocate.

versus

STATE Respondent
Through: Ms.Richa Kapoor, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE ARUNA SURESH

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

: PRADEEP NANDRAJOG, J.

1. Case of the prosecution is that the appellant Naresh was a poor relation of the deceased Dr.Dinesh Jayant, and hence either with a desire of enriching himself or out of jealousy planned to murder Dr.Dinesh Jayant and on the intervening

night of 1st and 2nd June 1985, accompanied by his co-accused Pramod Kumar, murdered the deceased. That when the appellant and his co-accused were throttling the deceased, the gurgling sound of the deceased was heard by the neighbours who woke up and raised a hue and cry compelling the appellant and his co-accused to flee and while they were fleeing, were seen by John Massey PW-17, W.C.Chhabra PW-18 and Hira Lal PW-12. As per the prosecution, when the police entered the house, they found that not only was Dr.Dinesh Jayant murdered but even his servant, Shankar was murdered. The injuries showed that a sharp edged weapon was used to inflict injuries on the two. As per the prosecution, after the appellant was arrested he made a disclosure statement Ex.PW-27/D and pursuant thereto got recovered a gandas, the stated weapon of offence. The gandas had blood stains thereon and the serologist opined that the blood was of a human being and was of the same group as that of Shankar.

2. At the end of the trial, vide judgment and order dated 18.10.2000, the appellant has been convicted for the offence of murdering Dr.Dinesh Jayant and Shankar. The co-accused Pramod has been acquitted.

3. We note that the only evidence surfacing against the co-accused Pramod was the testimony of Hira Lal PW-12 who

deposed that he saw Pramod along with the appellant. PW-17 John Massey could only depose that the second person whom he saw in the night was of the same built and similar features as those of Pramod, but he was not definite that Pramod was the second person.

4. We note that in the impugned decision, the learned Trial Judge has not spoken with clarity as to why he was disbelieving PW-12 with respect to his testimony of having identified Pramod as one out of the two persons whom he had seen at the time of the incident, but there are traces in the impugned decision which show that since the incident had taken place at around 2.00 AM on the intervening night of 1st and 2nd June 1985 the learned Trial Judge was not satisfied that said witness was in a position to identify Pramod, inasmuch as the testimony of PW-12 showed that if at all, he had a fleeting glance of the second person who was accompanying Naresh. (If at all Naresh was the first person).

5. The appellant has been held guilty because the learned Trial Judge has returned a finding that John Massey PW-17, whose statement was recorded by the police immediately after the incident, which statement we note has formed the first information report, had stated that when two persons were seen coming out of the house of Dr.Dinesh Jayant, he had accosted

them and had asked them who they were; to which, one of them responded that he was Naresh and was a family member of the deceased. The learned Trial Judge has held that pertaining to his claim of having seen the appellant leave the house of the deceased immediately at the time of the incident, the deposition of John Massey inspired confidence. The second evidence held against the appellant is the recovery of a gandasā pursuant to the disclosure statement of the appellant and it being identified as a weapon of offence which John Massey PW-17 saw in the right hand of the appellant when he was seen running out of the house of the deceased coupled with the fact that the FSL report has opined that human blood of the same group as that of Shankar was detected on the gandasā. The learned Trial Judge has found corroboration to the testimony of John Massey with reference to the testimony of Hira Lal PW-12, who also deposed that in the night in question, he had seen Naresh running away from the spot accompanied by another person.

6. We eschew a detailed discussion of the entire gamut of the evidence led for the reason Shri Dinesh Mathur, learned senior counsel for the appellant and learned counsel for the State Ms. Richa Kapoor conceded during arguments that the fate of the appellant would depend upon the quality of the deposition of John Massey and Hira Lal.

7. But, our decision would look a little truncated if we do not note certain back ground evidence, for the reason, the same forms the background while evaluating the testimony of Hira Lal and John Massey.

8. It all began when Mrs.Poonam Ralhan PW-4, a resident of the first floor of house bearing Municipal No.D-105 Saket, New Delhi, while sleeping with her husband and children on the terrace heard a terrible cry of a man as if being throttled, woke up her husband Mr.Satish Ralhan PW-5. The sound was coming from the ground floor of the house i.e. the residence of Dr.Dinesh Jayant. The exact time was 2.10 AM. The husband and wife, indeed which would be a normal conduct of neighbours, raised a hue and cry to alert other fellow neighbours. They succeeded.

9. The sleep of W.C.Chhabra PW-18, a resident of D-106 Saket i.e. the immediate neighbouring building was disturbed, who came out of his house. So was the sleep of John Massey PW-17, disturbed and he also came out on the street. He was a resident of D-84 Saket, a building right opposite D-105 Saket.

10. Whereas Mr.Ralhan and Mrs.Ralhan continued to raise a hue and cry from the terrace, John Massey probably being a little brave, positioned himself outside the gate of D-105. Mr.Ralhan went towards the rear of the terrace to keep a

watch at the rear court-yard of the house, probably for the reason, he suspected that whosoever was inside the house may flee from the rear door. Mrs.Ralhan stationed herself towards the front of the terrace and kept a watch on the drive-way on the ground floor.

11. Two men of medium built (as per the statement of John Massey made to the police) came out of the house. Obviously, Mr.Ralhan who was at the rear of the terrace could not see them. Mrs.Ralhan who was on the terrace could obviously not see their face but could have a glimpse of the two from the rear. According to John Massey, when the two persons came out of the house he accosted them and asked who they were to which one of them replied: "*mein naresh hun. Hum ghar ke aadmi hein*". Both of them ran away. Mr.W.C.Chhabra also saw the two.

12. D-Block Saket spans a distance of over 1 km. House No.D-11 to D-22 are at a distance of about a kilometer from D-105. PW-12 Hira Lal, a night watchman, to keep a watch on house Nos.D-11 to D-22 was patrolling the streets on which the eleven houses were constructed and claims to have heard the shouts of 'thief-thief'; which shouts, ostensibly attracted him towards the sound. He moved in the said direction and claims

to have seen two persons run out from a park towards the bus stop on the road leading outside the colony, Saket.

13. Mr.W.C.Chhabra PW-18, rung up the police where DD No.37, Ex.PW-14/A was recorded by Aas Mohd. PW-14 at 2.55 AM on 2.6.1985. SI Santosh Kumar accompanied by Const.Shiv Dayal and HC Devinder Singh left for the spot. They met the Ralhan couple, Mr.W.C.Chhabra and Mr.John Massey outside the house No.D-105. Hira Lal was nowhere to be seen. Statement Ex.PW-17/1 made by John Massey was recorded at around 4.30 AM and the same was forwarded for registration of FIR. SI Suresh Kumar PW-29 registered the FIR Ex.PW-22/B at 4.50 AM on 2.6.1985.

14. In his statement Ex.PW-17/A, recorded contemporaneously i.e. soon after the incident, John Massey stated to the police as under:-

“Statement of Mr.John Massey S/o Shri K.G.Massey R/o D-84 First Floor, Saket, New Delhi aged about 34 years.

I am residing in above said house since last 4 years as a tenant. Opposite my house one Dr.Dinesh Jayant was also putting up on the ground floor. These days Dr.Dinesh Jayant was alone with his servant Shankar as such his wife and children have gone to Bombay. Tonight around 2.10 AM I heard noise from the neighbors who were shouting “*chor-chor*”. On hearing their noise I immediately came down to the ground floor to inform the police. By the time I saw two persons come out from Mr.Jayant’s house. I was standing near my gate. Those two persons came from the outer gate of Mr.Jayant. Then I asked them who you are. Thus one of them said that I am Naresh “*mein Naresh hun*.”

Hum ghar ke aadmi hein". I again asked them as to what is going on inside. By that time both of them started running towards Eastern Park side. One of the person was wearing *sando banayan* and on his right shoulders he was having his shirt. The other person was with pant and shirt. They were all thin built and small heights. I can recognize them if produced before me. While escaping, one of them has left right foot sandal on the road opposite house No.D-103 Saket which has been seized/taken by the police. In the meantime Mr.Chhabra informed the police on phone who arrived immediately on the spot at house No.D-105 Saket where Dr.Jayant's domestic servant Mr.Shankar was lying dead in the pool of blood on the outer room whereas Dr.Dinesh Jayant was found lying dead in his bedroom with deep cut injuries. It appears that the persons who I saw while escaping from the house might have committed murder of Dr.Dinesh Jayant and his servant Shankar."

15. When the police entered the house of Dr.Dinesh Jayant and carried out a search, they found a brief-case containing a photograph of the appellant and few belongings of the appellant. A supplementary statement of John Massey was recorded after the photograph of the appellant was found from a brief-case inside the house of Dr.Jayant as per which, on seeing the photograph he told the police that the person who disclosed his name as Naresh was the same person whose photograph was shown to him. Since John Massey, in his statement Ex.PW-17/A, had informed the police that one of the person had disclosed his name as Naresh and had told him that he was a member of the house, needless to state the needle of suspicion pointed towards the appellant Naresh. He was apprehended and the police claims that he named Pramod as the second

person with him. The police seized the right foot sandal from outside house No.D-103 Saket as also a shirt from the gate of D-105 Saket.

16. The appellant is stated to have made a disclosure statement Ex.PW-20/D admitting his guilt and disclosing to the police that the weapon of offence used by him was a *gandasa*. He stated that the *sandal* which was left behind at the spot was his and that the second *sandal* as well as the *gandasa* could be got recovered by him. He took the police to a culvert and underneath the bridge above the culvert, got recovered a *gandasa* and the second sandal. The two were seized vide seizure memo Ex.PW-25/A.

17. At the trial, Mr.Ralhan and Mrs.Ralhan deposed of having heard sounds made by a person who was being throttled emanating from the house of Dr.Dinesh Jayant and that there upon they raised a hue and cry attracting the attention of Mr.W.C.Chhabra and Mr.John Massey. But, both of them did not identify either the appellant or co-accused Pramod as the persons who they had seen leave the house of the deceased, for the reason Mr.Ralhan stated that he was keeping a watch at the rear of the house when his wife told him that two persons had come out of the house on the ground floor from the front. Mrs.Ralhan stated that she saw two persons coming out of the

house when she was at the terrace. Obviously, she could not have seen the face of the two persons.

18. Mr.W.C.Chhabra deposed having come out of his house on hearing a commotion outside. He deposed that he saw two persons come out of the house and walk past the gate after crossing the drive-way of the house. But, truthfully stated that he was not in a position to identify the two accused as the persons whom he had seen come out of the house.

19. Mr.John Massey deposed that the cries of *chor-chor* from the opposite house i.e. the house of Dr.Dinesh Jayant broke his sleep and he came out of his house and the moment he came out, he heard a latch opening sound of the door of the house of Dr.Dinesh Jayant. Being relevant for our present discussion, we note his testimony thereafter as spoken by him:-

"I saw two persons come out from Dr.Dinesh Jayant's house. I asked one of those two persons as to who were they. One of those persons said that he was Naresh and thereafter they started running. The person who told his name as Naresh is present in Court (the witness correctly identified the accused Naresh present in Court). The other person was of the same height as the co-accused Pramod present in the Court. I, however, did not identify him. The co-accused Pramod resembles in height and in features to that of the person who was accompanying accused Naresh at that time but I did not truly identify him. Accused Naresh was wearing at that time a cut banayan (without sleeves) and full pants. He was holding something on his right shoulder and that thing was covered with his shirt. The other man was wearing pants and shirt. While the persons were leaving the spot, the right side sandle of one

*of them was left in front of gate of house No.D-103
.....”*

20. Half way down his testimony, John Massey started fumbling and the learned APP sought permission to cross-examine him, stating that John Massey was resiling from his earlier statement. The request was allowed. On being cross-examined by the learned APP, John Massey stated that it was correct that the person who told his name as Naresh also said *“hum idhar ke aadmi hein”*. He stated that it was correct that a shirt lying on the outer main gate of the house having blood stains thereon was seized and that the same was Ex.PW-1 and that the seizure memo pertaining to the seizure of the shirt namely Ex.PW-17/C was prepared in his presence. He stated *‘it is correct that I had stated to the police that the accused Naresh Kumar, with whom I had a talk was carrying a chopper. It was visible under the light. I can identify the chopper. I have seen chopper Ex.P-16. It is the same which was being carried by accused Naresh on his right shoulder’*.

21. On being cross-examined by learned counsel for the appellant, Mr.John Massey admitted as under:-

“I had seen the accused Naresh staying in the house of Dr.Dinesh Jayant but I do not know whether accused Naresh was doing chartered accountancy.

22. We note that the Ralhan couple and Mr.W.C.Chhabra, on being cross-examined, also admitted that Naresh had been staying in the house of the deceased three to four months back and had stayed in the said house till about 14 days prior to the incident; the day when the wife of the deceased and her children had left for Bombay.

23. Hira Lal PW-12 deposed that he was on duty as a chowkidar for house No.D-11 to D-22 and while on patrol duty, at around 2.30 AM, saw somebody wearing chappals was running. That one out of the two persons was wearing a banyan and the other was wearing a pant and a shirt. He enquired from the man wearing a banyan as to what they were doing. They said that two thieves were running away and they were going to catch the thieves. He identified Naresh as the person with whom he had a dialogue. He identified co-accused Pramod as the other person he had seen. He further deposed that the person wearing banyan was having something in his hand and that the two persons were seen by him running towards bus route No.501 and that he chased the said persons.

24. On being cross-examined, he admitted that the distance between the house No.D-105 and the lane on which house Nos.D-11 to D-22 were constructed was about a kilometer away. He admitted that in his statement under Section 161

Cr.P.C. he had not disclosed the fact of having seen somebody wearing chappals and that the person who was wearing a banyan had something in his hand. He also admitted not having told the police that he chased the said two persons. He also admitted that he never told the police that in the night, he had gone to house No.D-105. He admitted that if one comes out of the lane on which house No.D-105 is constructed, either one runs down the road to reach the lane where house No.D-11 and D-22 are constructed or one could get across a small park and a big park spanning a distance of two furlongs (250 meters) to reach there. He admitted that he was not present outside D-105 when the police came but explained that when the accused persons ran away, and in spite of chasing them he could not catch them he completed his duty and went back to sleep in his jhuggi and got up at around 8.00 AM to go to house No.D-105.

25. It is not in dispute that appellant Naresh is the first cousin of Dr.Dinesh Jayant and in connection with a course in chartered accountancy had come to Delhi and had stayed for nearly three months in the house of the deceased. Indeed, the neighbours i.e. the Ralhan couple, Mr.W.C.Chhabra and even John Massey admitted said fact. All admitted having seen Naresh live in the house of the deceased. The Ralhan couple even admitted that Naresh used to play with the children in the

park and that the children of Dr.Dinesh Jayant addressed him as "cha cha".

26. The learned Trial Judge has discussed the impact of the testimony of John Massey and the qualitative worth of his deposition as under:-

"58. Accused Naresh had come to the house of Dr.Dinesh about three months prior to 12/5/85, the date on which Aruna Jain (PW-2) had left for Bombay. Accused Naresh used to come off and on during the period of three months immediately preceding three months from 12/5/85. This has been so stated by Aruna Jayant (PW-2). Since, there is no cross-examination as far as these facts are concerned, these facts will have to be accepted as correct. How does one know a person? In villages and in towns people mix up so frequently that they know an individual not only by face but also by name. In the Metropolitan Cities the concept is altogether different. People do not know even a person residing the next door. It may be because of the life style or because of the changing moral values. John Massey (P.W. 17) was not a permanent resident of Saket. He was a tenant. He used to leave his house at about 8.30 A.M. and used to come back by 7.30 or 8 P.M. This was his routine. There is no evidence that P.W. 17 was thick with Dr. Dinesh Jayant and used to visit his house quite often. He may be having an idea that someone resides in the house of Dr. Dinesh. It was for this reason that on Page 8 of his cross-examination (last three lines), he has stated that he had seen the accused Naresh staying in the house of Dr. Jayant but he does not know whether accused Naresh was doing Chartered Accountancy and whether he was the cousin of Dr. Jayant and whether (Naresh) was related to the deceased (Dr. Jayant). The witness further added that he had seen the accused Naresh living in the house of Dr. Jayant but he cannot say as he does not know whether he is member of Dr. Jayant's family. He has further stated that he had seen accused Naresh playing with the children outside the house on the road. Now when the accused were confronted by John Massey (P.W. 17), they were inside the gate. Since John Massey was unable to see them properly, therefore, he had enquired

from these two persons as to who they were. If at that point of time, John Massey (P.W. 17) had been in a position to identify accused Naresh, he would not have questioned them. Accused Naresh, as is the prosecution case, then gave the reply that he was Naresh, an inmate of the house. Thereafter the accused had fled away. The witness had had a fleeting glimpse of both the accused. The I.O. had recorded the facts as narrated by John Massey (P.W. 17). It is the prosecution case that after ruqqa was sent, the witnesses were shown the photograph Ex.P.W. 5/F. S.C. Ralhan (P.W. 5) has categorically stated this fact. This is so mentioned on Page 4 in the examination-in-chief recorded on 30.04.86. P.W. 5 had asserted that on seeing the photograph Ex. P.W. 5/F John Massey had told the police that one of the persons out of the two persons was the same whose photograph was Ex. P.W. 5/F. P.W. 17 John Massey has also stated this fact in his chief (recorded at page – 3). The police had recorded supplementary statement of John Massey on 02.06.85 in which he had asserted the fact that he was shown the photograph Ex. P.W. 5/F and he had identified from the photograph that it was the photograph of that person who had given the reply to his question and stated that he is Naresh. Had the supplementary statement of John Massey been not recorded on 02.06.85, the matter would have been different. In that case, the argument that John Massey (P.W. 17) had not seen the two persons and was unable to identify them would have knocked out the bottom of the prosecution story. In Harpal Singh v/s. Devender Singh AIR 1997 SC 2914 where the informant had lodged the FIR and the police had elicited more details of occurrence from him and his supplementary statement was recorded, it was observed by the Hon'ble Supreme Court that there was nothing abnormal in it and merely because some important facts were got elicited by the police from the witness after lodging of the FIR does not establish that the witness is telling lie.

59. John Massey has no enmity with accused Naresh. The accused has also not alleged any enmity against R.S. Jayant (P.W. 3) and Aruna Jayant (P.W. 2). Then who else could have got incorporated the name of accused Naresh in the ruqqa. The name of accused Naresh had come in the FIR. John Massey had asserted that he can identify the culprits. Fortunately or unfortunately, this Naresh has

been later on found to be the one who used to reside in the house of Dr. Dinesh Jayant. If the mentioning of name of accused Naresh by the eye-witness is concerned, the same finds mention in the ruqqa. The identification of a person can be done not only on the basis of shape of his face but it can be done on the basis of body, gait, manner of walking or even by voice. Reliance can be placed on Kadar Sing V/s. State of Delhi AIR 1999 S.C. 1481. Since John Massey had claimed that he can identify the culprits it became necessary for the prosecution to request for T.I.P. Now here the controversy has arisen. Admittedly, the photograph of the accused was found / recovered from the briefcase which was lying near the dead body of Shankar. Accused Naresh does not dispute the fact that this photograph Ex.P.W.5/F is his photograph. There is no material to hold that this particular photograph was a recent photograph of accused Naresh. Assuming for arguments sake that it was a recent photograph then how did it reach the place of occurrence."

27. The deposition of Hira Lal PW-12 has been discussed by the learned Trial Judge as under:-

"64. Now I take the statement of Hira Lal (P.W. 12). This witness was a chowkidar. He was near D-11 which was about one kilometer away from D-105, when he heard the noise of two persons running. He claims to have had a talk with these two persons. So far as his having met the two persons near D-11 is concerned, it inspires confidence. There was a message flashed to the police stations of the area that two persons suspected of crime be checked, if found. This is evident from D.D. No.39, copy of which is Ex.P.W. 14/DA. It was lodged at 3.40 A.M. However, I am unable to accept the version of P.W. 12 that he did have a talk with these persons. In this regard his statement U/s. 161 Cr. P.c. (Ex. P.W. 12/DA) assumes importance. In this particular statement, he has stated that these two persons were found running towards Mehrauli Badarpur Road. When it was enquired by him as to who they were and why they were running, one of them had said that two persons had fled after committing theft and they (these persons) were catching them. On this Hira Lal raised an alarm "CHOR CHOR". Both these persons had then run away towards jungle. In the statement it was recorded that he

had seen these persons from behind while they were running. The I.O. erased the words "Piche Se" which is clearly decipherable in Ex.P.W. 12/DA and added the words "Zor Se". The word "Zor Se" does not make out any sense in the context in which it has been sought to be used. The witness was duly confronted with his statement. Accused Naresh and his companion must have been confronted by Hira Lal P.W. 12 but it is not possible to rely on his statement so far as identity of the accused Pramod is concerned. Further neither in the statement of John Massey (P.W. 17/A) nor in the statement of Hira Lal(P.W. 12), the detailed description of accused has been mentioned. No recovery has been effected at the behest of accused Pramod. Keeping in view the fact that John Massey (P.W. 17) and Hira Lal (P.W. 12) had had a fleeting glimpse of accused Pramod, I am unable to conclude that both these witnesses were in a position to clearly see the salient features of accused Pramod so as to be able to identify him properly. Further (Hira Lal) P.W. 12 had not gone to the jail to join the T.I.P. John Massey (P.W. 17) when appeared in the court to make statement, was having some doubt about the identity of accused Pramod. He has stated that the other person was of the some height of the co-accused Pramod is. He was however unable to identify him and stated that he does not identify him. He further stated that Pramod resembles in height and features to that of the person who was accompanying accused Naresh at that time but he does not surely identify him."

28. Shri Dinesh Mathur, learned senior counsel for the appellant submitted that the learned Trial Judge has ignored a very fundamental principle of evaluation of evidence, in relation to a witness being known to the accused and not naming the accused, at the first available opportunity to the police. Learned senior counsel urged that all the residents, viz. the Ralhan couple, Mr.W.C.Chhabra and even Mr.John Massey admitted during cross examination that the appellant had lived in the

house of the deceased and was seen by all over a period of nearly three months and that the appellant had left the house about two weeks ago. Learned senior counsel urged that in his statement Ex.PW-17/A, Mr. John Massey was so sure of himself as regards the identity of the two persons he had seen come out of the house, that he told the police: *I can recognize them if produced before me.* Counsel urges that this shows that the imprints, in the memory of John Massey, of the physical features and the face of the two persons were so firmly etched soon after the incident, that he confidently told the police that if the two were brought before him he would immediately recognize them. Counsel urged that it becomes unexplainable as to why John Massey did not tell the police that Naresh was the person, who had been living in the house of the deceased, and was seen in the neighbourhood for nearly three months.

29. We note that the learned Trial Judge has glossed over this argument in para 58 of the impugned decision by recording:-

“In villages and in towns people mix up so frequently that they know an individual not only by face but also by name. In the Metropolitan Cities the concept is altogether different. People do not know even a person residing the next door. It may be because of the life style or because of the changing moral values. John Massey (P.W. 17) was not a permanent resident of Saket. He was a tenant. He used to leave his house at about 8.30 A.M. and used to come back by 7.30 or 8 P.M. This was his routine. There is

no evidence that P.W. 17 was thick with Dr. Dinesh Jayant and used to visit his house quite often. He may be having an idea that someone resides in the house of Dr. Dinesh.”

30. We wonder, what was the need for the Judge to speculate and indulge in hypothesis. It is not a case where, on being cross-examined, John Massey said that he had not seen the accused living in the colony and the accused made a submission that it was not possible for a person living opposite the house to have not seen a relative of his neighbour living right opposite, especially when the relative had stayed for three months. In said scenario, there was some scope to discuss the impersonal nature of urban bred people. But, in the instant case the witness has categorically deposed that he had seen the accused Naresh stay in the house of Dr. Jayant. This statement of the witness leaves no scope for any hypothesis to be built. It is apparent that the learned Trial Judge has entered into the realm of surmises and conjectures.

31. We note that the learned Trial Judge has held that since accused Naresh had exchanged dialogues with John Massey, it was not a case of John Massey having a fleeting glance of Naresh. The learned Trial Judge has found sustenance to the finding that John Massey could have identified Naresh, because he had more than a fleeting glance of him, meaning thereby, had seen him enough to remember his face.

32. But this very reasoning of the learned Trial Judge cuts at the very root of the credibility of the deposition of John Massey, who admitted having seen Naresh live in the house of the deceased and knowing his name as well. If this was so, ordinary human conduct guides us that John Massey would have immediately recognized the appellant and would have so disclosed to the police when his statement Ex.PW-17/A was recorded within an hour of his interaction with the two persons who had left the house and were seen by him so leaving.

33. Not only that, John Massey has made improvements of a vital nature while deposing with respect to identification of the *gandasa*. Further, he contradicted himself.

34. As noted above, at the first instance he deposed that the person who disclosed his name as Naresh was wearing a banyan and was holding something on his right shoulder and that thing was covered with his shirt. A few sentences later, he deposed that Naresh was carrying a chopper which was visible under the light and that he could identify the chopper.

35. If Naresh had kept something under the shirt which was flung across his right shoulder and there was an object under the shirt, the person who saw him could see no better other than to see, that Naresh had hidden an object under his shirt and that the object was on his right shoulder. We fail to

understand as to how such a person could go on to say that he had seen the chopper under the light and recognize the chopper produced in Court.

36. In this connection it is important to note that no other witness has deposed of appellant Naresh carrying any shirt on his right shoulder. It is also important to note that a shirt was recovered from the gate. The same was seized vide seizure memo Ex.PW-17/C. The photograph of the shirt, as per Ex.PW-20/13 (a photograph taken by the police) shows the same hanging from the top of the iron gate; meaning thereby, the same has been hung at the top of the gate and not that when somebody was rushing out of the gate and on the shirt getting entangled with the gate, left the shirt behind.

37. Pertaining to the testimony of Hira Lal we find that the learned Trial Judge has totally ignored his admissions that the lane where house No.D-11 to D-22 were constructed was a kilometer away from the house No.D-105. The learned Trial Judge has not considered whether the shouts of four or five people, a kilometer away, could have attracted the ear of Hira Lal. We note that Hira Lal PW-12 has categorically deposed that he heard noises of 'chor-chor' from house No.D-105.

38. We further note that the conduct of Hira Lal, if indeed he chased the appellant and the co-accused, is strange, because

he admits that after he gave up the chase he continued with his duty and slept in his jhuggi and that he went to house No.D-105 at 8.00 AM. Surprisingly, he says that he went to house No.D-105 at 8.00 AM, when he heard the sounds of 'chor-chor'. Indeed, by 8.00 AM everything was over.

39. The fact that a brief-case of the appellant containing his photograph and a few other personal items were recovered from the house of Dr.Dinesh Jayant is neither here nor there for the reason, admittedly that the appellant, being a relative of the deceased, had stayed with him for about three months.

40. It would not be out of place to note that according to John Massey, when the appellant was running away, his right sandal came off. Indeed, the right foot sandal was recovered by the police from outside house No.D-103. The other foot thereof i.e. of the left foot was ostensibly seized as per the disclosure statement of the appellant, but we find that there is no evidence to show that the size thereof matched the foot size of the appellant Naresh. Indeed, the learned Trial Judge has made no reference thereto. Indeed, no police officer has stated said fact.

41. It probablizes that the sandal did not match the foot size of the appellant, for the reason, had it been so, the same could not have gone unnoticed.

42. The *gandasa* ostensibly recovered, pursuant to the disclosure statement of the appellant, is a common farm implement used for chopping fodder.

43. We need not discuss much on the issue of recovery of *gandasa* for the reason, we are satisfied that the eye-witnesses' account has failed the prosecution.

44. The fact that the appellant refused TIP, cannot be held against the appellant for the reason, all the witnesses of the prosecution i.e. the people in the neighbourhood who had gathered outside house No.D-105, admitted that the appellant was residing there for about three months in house No.D-105 with the deceased. It was of no use to have got conducted TIP proceedings.

45. The appeal is allowed. Impugned judgment and order dated 23.10.2000 is set aside.

46. The appellant is on bail. The bail bond and the surety bond are discharged.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

February 16, 2009

Dharmender