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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 03.02.2012
PRONOUNCED ON: 17.02.2012

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CRL.A. 1029/2011, CrI.M. (Bail) 1454/2011

VISHWAJIT DASS @ NIRMAL DASS Appellant
Through: Mr. Deepak Vohra, Advocate.

versus

STATE Respondent
Through: Ms. Richa Kapoor, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. The appellant in this case challenges the judgment and order of the learned Additional Sessions Judge dated 16.02.2004 in a case arising out of FIR No.133/2000. The appellant was convicted for the offences punishable under Section-396/450/34, IPC.

2. The prosecution's allegations were that pursuant to the complaint of one Pratima Gupta, the concerned FIR was recorded in respect of the incident which occurred on 14.4.2000 at about 08:45 PM. She was working in her kitchen and her husband was in the drawing room. The door bell rang; it was attended to by her

husband. The complainant then heard some noise and when she went to the drawing room, she saw that a person had pushed her husband on to the floor and was sitting on his chest, strangling his neck. There were four others. One of them pointed a knife at her throat and demanded that she should give everything or else she would be stabbed. She, therefore, removed her gold chain, five bangles, ear top and a ring and handed them over to the attackers. She also told them that she would give them anything they wanted but to spare their lives. One of the attackers asked where the valuables had been kept; they all said they had information that Rupees Five lakhs and a huge quantity of foreign currency in dollars was kept in the house. The complainant handed over all keys of the house to them and told them that the locker contained Rupees Ten thousand. One of the assailants said that they badly needed Rupees Two lakhs and that she ought to arrange it or else they would kill her. Four attackers took her to a room, made her to sit on a chair and ransacked cupboard and locker. On their way out, they tied the complainant to a chair and gagged her mouth. Later she freed herself and went to the drawing room where she saw that her husband was lying on the floor. He too had been gagged and his feet were tied. She went out of the house and alerted the neighbours who in turn called the PCR. The police reached the spot and took her husband to the hospital. It was later discovered that her husband had died. The complainant claimed that she could identify all the five attackers who spoke in Bangla as well as Hindi and were in the age groups of 18-25 years, of dark

complexion and medium built. All of them were dressed in pants and shirts, one of them was known as Dalip and two of them were holding large swords like knife.

3. On the basis of the statement, the FIR Ex.PW-9/A was recorded. The accused, i.e., Shankar, Mohd. Israel, Pankaj Biswas, Vishwajit Dass, Vinod and Sunil were arrested and after the conclusion of the investigation, charged with committing the offences described in the earlier part of this judgment. They denied guilt and claimed trial.

4. After considering the materials placed on record - in the form of 22 prosecution witnesses besides the documentary evidence, the Trial Court, in the impugned judgment, convicted all the accused for committing the offence. They were sentenced to undergo imprisonment for life for the offence under Section-396, IPC and also undergo lesser punishments in respect of the other offences. The sentences were directed to operate concurrently.

5. The other accused, i.e., Pankaj Biswas, Vinod, Mohd. Israel, Shanker and Sunil had preferred Appeals (being Crl. Appeal Nos.831/2004, 369/2004, 609/2004, 513/2005 and 275/2006). By a common judgment and order dated 22.01.2010, another Bench of this Court allowed the Appeal of accused Vinod (Crl. Appeal No.369/2004) and rejected the other appeals i.e. Crl. Appeals Nos.831/2004, 609/2004, 513/2005 and 275/2006.

6. The Trial Court noticed that PW-12 entrusted with the investigation reached the spot and recovered a sword type weapon Ex.P-1. He also recovered another knife, Ex.P-5. Apart from this,

Ex.P-2 a tie, dhoti and three pieces of cloth were seized. PW-1, the photographer, clicked 40 photographs Ex.P-1 to P-40. The body of the deceased i.e. the complainant's husband reveals that death was caused by strangulation which left a ligature mark 12 CM in length.

7. The prosecution alleged that no movement in the investigation took place till November, 2000 when in respect of another incident FIR No.347/2000 was registered by the same Police Station i.e. PS Chittaranjan Park, three individuals, i.e. Zahoor Alam, Pankaj Biswas and the present appellant Vishwajit Dass were arrested. Apparently, Shankar who was also implicated in this case was arrested and he revealed his involvement in the present case and that of others i.e. Pankaj Biswas and Vishwajit Dass. The prosecution alleges that all the three accused in the present case were part of a gang which used to routinely commit dacoity. It was alleged that the four accused including the present appellant made disclosure statements that led to the recovery of a "Nagraj idol" made of silver which had been hidden by them after it was stolen from the complainant's house. This was also seized as Ex.P-6. The prosecution claimed that sample finger prints of the accused Vinod had been lifted by them and relied upon the report of the finger print expert Ex.PW-22/O and further stated that it matched with that of Vinod.

8. Learned counsel for the appellant urged that evidence in this case is sketchy and that in the previous common judgment, the Court rejected the alleged recovery of the Nagraj Idol. It was

submitted that such being the position, the appellant deserves the acquittal since the findings recorded against him were based on the sole testimony of complainant/PW-2 who could not possibly have remembered so many individuals, having regard to the time of the attack. It was also urged that the present appellant did not get sufficient legal assistance. Counsel here relied upon the cross-examination carried out on behalf of Vishwajit Dass before the Trial Court and stated that the relevant questions had not been put to him. It was also submitted that there was a strong possibility of false implication since the Delhi Police had in the other case - FIR No.347/2000 also relied upon the recovery of the silver Nagraj idol.

9. Learned Additional Public Prosecutor on behalf of the State argued that the testimony of PW-2 is conclusive as to the appellant's guilt. It was also urged that PW-2 had sufficient opportunity and time to observe the features of those who attacked her husband and fled with their valuables. Learned counsel highlighted that the accused, after his arrest, had been clearly identified in the Test Identification Parade (TIP) conducted by the prosecution.

10. At this stage, it would be relevant to notice that while evaluating the testimony of PW-2, this Court in the other Appeals (Crl. Appeal No.831/2004 and connected cases, decided on 22.01.2010) *inter alia* observed as follows: -

37. As per Pratima, five persons entered her house at around 8:45 PM and remained in the house for about two hours. As per Ex.PW-16/A information was received at the police control room at 9:50 PM that a person has been killed and house No.I-1636 Chittaranjan Park has been looted.

38. The written document Ex.PW-16/A has to be preferred as a correct recording of the time and thus it is apparent that by 9:50 PM the crime got reported to the police. That Pratima said that the dacoits remained in her house for about two hours does not mean that she is a liar. Nobody remembers the time of an event with reference to the watch. One vaguely remembers the time. That Pratima deposed in Court on 30.5.2002 and the crime took place on 14.4.2000 has to be kept in mind. As per Pratima the dacoits entered the house at 8:45 PM. The PCR form records the time at 9:50 PM i.e. with a gap of one hour and five minutes. Thus, the time of one hour being wrongly said as two hours is a minor embellishment and not a serious infirmity in the testimony of Pratima.

39. There are decisions and decisions on test identification to be conducted or not. No useful purpose would be served to make a catalog of all the decisions. Sufficient would it be to state that evidence in Court pertaining to the identity of a person is admissible by virtue of Section 9 of the Evidence Act and Test Identification relates to an investigation and has a sanctity by virtue of Section 162 Cr.P.C.

40. Pertaining to identification of an accused, the genesis of test identification proceedings is rooted in the imperfection of the human mind. With passage of time, memory fades and there may be errors in identifying a person seen after a passage of time.

Pertaining to crimes, a victim or an eye-witness do normally lose emotional balance and this loss of emotional balance disturbs the power of perception thereby introducing the possibility of an identification being distorted. There is another problem. Motives, not necessarily stipulated originally by the accused personally but the desire of vengeance upon a person believed guilty or the desire, conscious or unconscious to find a scapegoat may compel a victim or a witness to even identify an innocent person.

41. Thus, where an accused is not previously known to the victim or the eye-witness, if such accused is identified at a Test Identification Proceedings soon after the crime by an eye-witness or the victim, it lends assurance to the credibility of the deposition in Court and dock identification of the accused. But, as held in the decision reported as AIR 1988 SC 345 Harinath & Anr. vs. State of U.P., the absence of corroboration by Test Identification is not necessary and assumes no importance if either the eye-witness or the victim knows 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.

42. Thus, where the evidence on record shows that the eye-witness or the victim got sufficient opportunity to see the accused where from it can be reasonably inferred that the features of the accused got well etched in the memory of the eye-witness or the victim, not much importance has to be attached to no Test Identification being conducted or there being a taint in the Test Identification Proceedings.

43. A reference to the deposition of Pratima Gupta, contents whereof have been noted in para 4 above show that after the five accused entered her house, she and her husband were overpowered. She pleaded for

their lives and handed over five gold bangles, a heavy gold chain, gold studded ear top and one ruby studded gold ring. Though she has not so deposed, presumably the said jewellery was on her person and she removed the same and handed it over. Time was consumed when these acts were being performed. She deposed that the accused asked where other goods and dollars as also Rs.2 lakhs was kept. She replied that no such things were in the house. This dialogue, face to face with the accused, took further time. She further deposed that she was taken to the adjoining bedroom and was made to sit on the chair and was tied. This would consume further time. All along, the five accused were in her eye-sight. Thereafter, the almirah was ransacked and after looting the house, the dacoits fled. It is apparent that Pratima Gupta saw the accused, if not for more, at least for about an hour. We are satisfied that the evidence establishes that the features of the five dacoits was well etched in the memory of Pratima Gupta, who interestingly, in her statement Ex.PW-2/A has disclosed the broad features of the accused and no arguments have been advanced that the said broad features so disclosed do not match those of the appellants.

44. It is true that when cross-examined as to what was exactly done by which accused, Pratima failed to disclose the individual role specific to each accused. But, from said fact no adverse inference can be drawn against Pratima. When the number of accused are many it does happen that when called upon after a considerable gap of time, that the viewer i.e. the witness may not be able to specify as to who exactly did what. The human mind tends to forget the facts at the fringes while remembering the core.

45. An ingenuous argument has been advanced. It is urged that while deposing in Court, Pratima Gupta has not said that any accused strangled her husband. It

is thus urged that it has not been proved that the deceased was murdered by the accused. Hence, it is urged that the offence punishable under Section 396 IPC has not been proved.

46. Now, Pratima has deposed that one accused overpowered her husband. She has deposed that after she was overpowered, she was taken to the adjoining bedroom and tied her to a chair and gagged her. She has deposed that after the dacoits left and she untied herself and came to the drawing room where she saw her husband lying dead on the floor. The post-mortem report Ex.PW-5/A and the testimony of Dr.Sanjeev Lalwani PW-5 clearly establishes that the deceased died due to asphyxia consequent upon strangulation. Who else, other than the accused were responsible for the death of the deceased? On the evidence on record, every reasonable and prudent person would respond: It is the accused – It is the accused.

47. That no recoveries have been effected and the Nagaraj idol Ex.P-6 has not got linked as the recovery got effected by the accused does not mean that there was no dacoity. The testimony of Pratima establishes that gold and diamond jewellery as also money was looted.”

11. We notice that Vishwajit had refused TIP proceedings in this case. Furthermore, PW-2 had deposed that the accused persons' snaps were shown to her by the I.O. prior to their joining the TIP. She also clearly deposed to having identified the three accused in the judicial TIP and that one of them had refused to participate in the proceedings because his photo was published in the Newspaper. During the course of her deposition, she also clearly

stated that no one had shown her the accused outside the Court and that the I.O. did not also advise her to identify any accused before the Court. A careful scrutiny of the entire testimony of PW-2 would reveal that she was in the house at the time of the attack which took place for nearly two hours. During her deposition in the Court, the witness could identify five of the accused; she could not, however, identify Vinod which led to his acquittal. The attack started at around 08:45 PM on 14.04.2000 and ended at about 10:40 PM. The police reached the spot and recorded her statement around 12:00 midnight-12:30 AM. The intimation/statement was dispatched for recording FIR at 12:30 AM - as evident from Ex.PW-2/A. The Crime Team also reached the spot just before 12:00 midnight and proceeded to investigate the occurrence till 02:45 AM, as seen from Ex.PW-3/A. Similarly, a rough sketch map was prepared and some articles including the fingerprints and chance prints were lifted.

12. This Court is of the opinion that the evidence on the record establishes the present appellant's guilt just as in the case of the others. The rejection of alleged recovery stands on a different footing. Although, several valuables were looted, the police was unable to recover any of them. In fact, no headway could be made for a considerable period. A breakthrough occurred only when on 20.11.2000, Mohd. Israel, Pankaj Biswas and the present appellant were arrested - more than seven months after the incident. The other appellants were arrested much later. Although PW-2 did mention in her cross-examination that photographs of the accused

were shown to her, the fact remains that she did not identify all of them and refused to implicate Vinod. This, coupled with two other circumstances i.e. the general description and features given by her to the police immediately after the incident when her first statement was recorded and the further circumstance of her having been a victim who was with the accused for sufficient time - between 1½ - 2 hours, lend credence to her deposition. Whilst, there can be no hard and fast rule that identification of an unknown person or someone who has seen only once, may by itself not be a strong circumstance, at the same time, the surrounding context of the case is material. In this case, the witness - PW-2 underwent a traumatic experience; she was gagged and tied to a chair when the accused looted her house. She observed them and also underwent harrowing experience of seeing her husband dying. These were sufficient for her to form strong impressions for the identity of the accused.

13. We notice that the reasoning for the acquittal of Vinod was failure of PW-2 to identify him; that apart the matching of his fingerprints with the chance prints recovered from the site, were held to be inadmissible by the Division Bench since the procedure prescribed for the same under the Identification of Prisoners Act, 1920, was not followed. Learned APP had urged that the view of that Division Bench has since been subsequently reversed by a Full Bench of this Court. However, we do not have to examine that aspect, since the prosecution has not alleged that such chance print matched with that of the present appellant.

14. In view of the above discussion, we are of the opinion that the appeal has to fail; it is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

February 17, 2012
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