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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON : 22nd November, 2012

+ **CRL.A. 817/2012**

MONTU @ BAHADUR Appellant
Through : Mr.S.K.Sethi, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent
Through : Mr.Sanjay Lao, APP.
Insp.Digvijay Singh, PS Ambedkar
Nagar.

+ **CRL.A. 1111/2012**

SAURAV @ KHOKAN Appellant
Through : Ms.Rakhi Dubey, Amicus Curiae.

versus

STATE (NCT OF DELHI) Respondent
Through : Mr.Sanjay Lao, APP.
Insp.Digvijay Singh, PS Ambedkar
Nagar.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J. (OPEN COURT)

1. The appellants impugn their conviction under Section 302 and 394 read with Section 34 of the Indian Penal Code 1860 (IPC for short). For the offence under Section 302 IPC, the appellants have been

sentenced to life imprisonment and fine of ₹10,000/- each, in default of payment of fine, they are to undergo rigorous imprisonment for two months. For the offence under Section 394 IPC, the appellants have been sentenced to rigorous imprisonment for ten years and fine of ₹2,000/- each, in default of payment of fine, they are to undergo rigorous imprisonment for fifteen days. The prosecution case, accepted by the Trial Court, is that the two appellants had committed robbery at N-10, Sanik Farm, New Delhi, on 3rd October, 2003, at about 08.00 P.M., and in the course, committed murder of Ajay Kumar, who expired the same day, and injured Pamela Parkash (PW-2).

2. Homicidal death of Ajay stands established, beyond doubt, by Dr. Asad (PW-7) who conducted and proved the MLC marked Ex.PW-7/A. He has stated that, on 3rd October 2003, Ajay was brought to the hospital but, on clinical examination, it was observed that he had already expired.

3. As per the Post Mortem Report (Ex. PW-3/A) and the statement of Dr. Chitranajan Behra (PW-3), who had conducted the post-mortem, the deceased Ajay had the following ante mortem injuries :

“1. Chop wound of length 17 cm., gaping 4.5 cm., abrasion at upper margin, obliquely placed over left upper neck 4 cm. below left mastoid process, inner end 3 cm

lateral to anterior mid line, 11 cm. above the left shoulder tip and 150 cm. from left heel. Under-mining occurs in downward and back ward direction with depth ranging from 4 cm. to 6.5 cm. where the medial end is deep. On dissection over the wound underlying subcutaneous tissues, left sterno-cleidomastoid muscle, left external jugular vein, left internal jugular vein, left carotid artery, spine of c3 and c4 is cut associated with haematoma.

2. Chop wound of length 6 cm. gaping 1 cm. obliquely present over left upper postero-lateral neck, 1 cm. below and parallel to injury no.1, inner end 12 cm. Left lateral to anterior midline, undermining occurs in downward and backward direction with depth 2 cm. On dissection over the wound the underlying subcutaneous tissues, muscles and occipital bone is cut associated with aematoma.

3. Chop wound of length 11 cm. gaping 5 cm. bone deep obliquely present over the left neck in middle 1/3rd 1.5 cm. below and parallel to injury no.2 medial end 7.5 cm. left lateral to midline. Undermining occurs in downward and backward direction. On dissection over the wound the subcutaneous tissues left sterno-cleidomastoid muscle, underlying vessels, spine of vertical coloumn c5 cut associated with haematoma.

4. Superficial incised wound of length 3 cm. horizontally present over left upper face 1 cm. below and lateral to lateral angel of left eye.

5. Multiple contusion of size ranging from (9 cm. x 5 cm.) to (5 cm. x .5 cm.) obliquely placed over left shoulder region anterior side. ”

4. PW-3 had further opined that the cause of death was hemorrhagic shock, as a result of injury No.1, 2 and 3, caused by a heavy, sharp-edged weapon. Injury No.1 and 3 were sufficient to cause death individually, as well as collectively, in the ordinary course of nature.

Injury No.4 was caused by a sharp-edged weapon and injury No.5 was caused by blunt force.

5. Dr. Rakesh Yadav (PW-6), who proved injuries caused to Pamela Parkash (PW-2), has stated that, on 3rd October 2003, PW-2 was brought with the alleged history of trauma and vomiting, to the hospital, and, on examination, there was swelling tenderness on occipital region and 1 cm. cut on left side occipital region. Her MLC was proved as Ex.PW-6/A. In the cross-examination, he has stated that the injuries could be caused by a sharp cut or blunt object but it cannot be determined what weapon was used, to cause these injuries, because of excessive swelling.

6. The core issue, argued before us, pertains to whether the appellants were the perpetrators of the said crime.

7. FIR No.497/2003 was registered under Section 302/394/397/34 IPC, in Police Station, Ambedkar Nagar, on 4th October 2003, on the basis of statement by Aditya Parkash (PW-1) S/o Pamela Parkash (PW-2). The FIR records that PW-1, on returning home, on 3rd October 2003, at about 08.00 P.M., entered the house via the iron-gate, which he opened from inside, and then he went through the kitchen door. He saw his mother, in an injured condition, in his parents' bed room. She was lying on the bed and was trying to get up. In front of the bed, on the

floor, Ajay Kumar, the house cook, was lying with his throat slit and blood oozing out. His hands and legs were tied. Bed room's almirahs were open and articles, including jewellery boxes, were found scattered around. PW-1 raised an alarm '*chor chor*', and, on that, his gardener and servant came, from the servant quarters. One or two neighbourhood servants also came to the spot. Ajay's hands and legs were untied. Telephone No.100 was dialed and ambulance was called. PW-2, his mother, was taken to Modi Hospital, where she was admitted. Ajay was taken to Batra Hospital where he was admitted but declared as "brought dead". At this stage, we may record that none of the witnesses, including PW-1, knew the name, address or the identity of the assailants who had entered the house, had committed the robbery and inflicted injuries on Ajay, who subsequently died because of the injuries, and injuries caused to PW-2. The identity of the assailants/robbers was unknown.

8. On 21st February 2004, the appellants Saurav @ Khokhan and Montu @ Bahadur were arrested, in FIR No.100/2004, Police Station, Mehrauli, under Section 186/353/307/34 IPC and Section 25/27/54/59 Arms Act. The prosecution alleges that the two admitted their involvement in the present case and disclosed the names of two other assailants/associates as Monu and Mona. The disclosure statements

(Ex.PW-19/A and Ex.PW-19/B), of the two appellants, were recorded by Insp.Vikram Singh (PW-21), Investigating Officer of FIR No.100/2004, Police Station Mehrauli. Statements or confessions, made by the accused, to the police officers when in custody, are admissible to the extent the statement or portion thereof is covered under Section 27 or 8 of the Evidence Act. Otherwise or other parts these statements/confessions are inadmissible, under Section 25 and 26 of the Evidence Act. We do not think that reliance can be placed upon the aforesaid disclosure statements, under Section 27 of the Evidence Act, as no recoveries have been made. Section 8 of the Evidence Act can be applied to the limited extent that the arrest, of the two appellants, gave a lead/clue to the police through which they solved FIR No.497/2003, registered in the present case.

9. After the arrest of the appellants, on 21st February 2004, in FIR No.100/2004, an application for conducting Test Identification Parade (TIP), by PW-2, was moved by the prosecution. PW-2, in the TIP, held on 5th March, 2004, identified the appellant Saurav. The appellant Montu @ Bahadur refused to participate in the TIP proceedings conducted by Ms. Barkha Gupta-Metropolitan Magistrate (PW-18). We shall refer to her statement subsequently, when we examine the contention, of the appellants, that the TIP identification was invalid and inconsequential.

10. Pamilia Prakash (PW-2), an housewife, who is the injured victim and also an eye witness, in the present case, has, in clear and categorical terms, recapitulated the occurrence and identified the two appellants, as perpetrators of the crime. She has stated that the appellants had tress-passed in the house, caused injuries to her and had committed the robbery. She recollected that, on 3rd October, 2003, she came back to the house and was resting when she noticed that four unknown boys had entered her bed room, with her servant Ajay. One boy pounced on her and covered her mouth and her nose, in such a way, that she could not breath. The other boy caught hold of her hands and pushed her down so that she could not get up. They demanded keys of the almirahs which were given to them. They opened the cup-boards and took out jewellery, silver, watches and cash. They forced Ajay to sit down on the floor. They also pushed her down and made her sit near him. One of the boys asked her to give more cash. She went to the cupboard and took out her wallet and gave the cash. However, the assailants/ robbers were not satisfied and wanted more cash and jewellery. She went towards the telephone to call her husband, to arrange for more money, when one of the assailants/ robbers, who had a dagger and was repeatedly asking for more money, closed her mouth. Then she was attacked, with the dagger, on the back of

the head and she became unconscious. After some time, when she regained semi consciousness, she found her son had just entered the house and Ajay was on the floor, with his throat slit and blood oozing out. She was removed to the hospital, by her son, where she was medically examined. She later came to know that Ajay had expired. She averred that she could identify the culprits. She correctly identified Saurav to be the one who had the 'dao', had closed her mouth and had demanded jewellery money/cash. She also identified Montu @ Bahadur, as one of the assailants, who had removed the money and jewellery items from the almirah. It is relevant to note here that the third accused Abdul Mohan was not identified by PW-2, in the Court, and she was sure/certain that she had not seen him, at the time of the occurrence. She was cross-examined, by the learned APP, but she stuck, on her stand, that accused Abdul Mohan was not involved in the offence and he was accordingly acquitted, by the Trial Court.

11. PW-2 has averred that she had gone to Tihar jail, to identify the accused person, and had identified one of them. She identified and proved the TIP proceedings which were marked as Ex.PW-2/A.

12. We have examined the cross-examination of PW-2, but there is nothing doubtful or debatable about the identification of Saurav and

Montu, made by PW-2. In the cross-examination, PW-2 has stated that the assailants/ robbers had not covered their faces at the time of the incident. She denied that she had been tutored or was shown the accused, before her statement was recorded.

13. Learned counsel for the appellants has submitted that PW-2, in her examination-in-chief, has used the word 'boy'. Our attention was drawn to the statement of PW-2, recorded under Section 161 Cr.P.C., where she had stated that one of the assailants was 20 to 25 years old and other three assailants were in the age group of 18 to 20 years. As per the Trial Court judgment, the appellant Saurav @ Khokan was 40 years and Montu @ Bahadur was 46 years old, on the day of their conviction i.e. on 24th December 2011. The order on sentence was pronounced nearly seven years from the date of occurrence. Estimation regarding age, on the basis of physical appearance, can be deceptive and is always based on approximation. This estimation, on the basis of physical appearance, given under Section 161 Cr.P.C. statement, cannot be the sole ground to discredit the categorical identification, made in the Court/TIP proceedings. We do not think the statement, under Section 161 Cr.P.C., creates doubt about the identity or identification of the appellants in the court. PW-2 has referred to the assailants as "boys", in her statement, but

had, at certain places, referred to them as 'person'. We do not think the aforesaid word (boy) creates a doubt about the appellants' identification, made by PW-2, in the Court. Identification by the victim who is also an injured eye witness has its own sanctity, credence and acceptance if it is found that the evidence is credible then it merits acceptance and reliance. It should not be discarded.

14. It is relevant to note that, in the present case, the Investigating Officer Insp. Jagdish Yadav (PW-23) had moved an application, for TIP proceedings and identification of the two appellants, by PW-2. The application was moved on 24th Feb 2004, within two days of the arrest of the appellants, in FIR No.100/2004. The TIP was conducted on 5th March, 2004 in the presence of Ms. Barkha Gupta (PW-18). In the TIP proceedings, conducted in the Tihar jail, on 5th March, 2004, the appellant Montu @ Bahadur refused to participate in spite of warning and caution by PW-18. The TIP proceedings were proved by PW-18 as Ex.PW-18/B. The same day, the appellant Saurav @ Khokan was produced and he agreed to join the TIP proceedings. When the appellant Saurav was produced, before PW-18, no one else was present. The appellant Saurav was asked to pick other under trials, of similar physique and built. All necessary and required precautions were taken and

the door of the room was closed so that the appellant could not be seen. The appellant had one cut mark, in the middle of his eye brows which was an identification mark. Accordingly appellant and all other under trials, part of the live up assembly, were asked to cover the said area, with a paper slip, so that the said mark could not be seen and used as the basis for identification. Yet, PW-2 correctly identified the appellant Saurav @ Khokan, as one of the assailants/ robbers, in the TIP proceedings (marked and proved as Ex.PW-2/A). We may note here that the counsel for the appellants did not cross-examine PW-18.

15. Learned counsel for the appellant-Saurav has submitted that the TIP proceedings should be disbelieved as, in the present case, the participants were asked to affix a paper slip, on their face, to hide the mark on the face of the appellant. We do not agree. As observed above, this made the task of identification more difficult and accordingly, free from doubt. We do not think the decision in '*Chaman vs. State of UP*', AIR 1992 SC 601 has any application in the present case. In Chaman case (supra) the size of paper rendered the TIP unreliable. There is no such allegation, in the present case. The paper slip, put on the head of the appellant, did not render identification or recognition impossible or unreliable. No such suggestion was given to PW-2 or PW-18.

16. Learned counsel for the appellants submitted that PW-4 (Chhuna), one of the servants in the house, did not recognize the two appellants and therefore, the testimony of PW-2 should be rejected. We have examined the statement of PW-4 who was working as a servant. He has stated that he was taking rest in his room, after meals, when 2 or 3 persons entered his room. They grabbed his mouth and tied his hands, with a rope, from behind. He was asked to stay quite otherwise they threatened that he would be killed. They pushed him and covered him with the blanket. Thereafter, they left the room. After five or ten minutes, he managed to cut the rope, with a knife, open the door and came out, from the room. He found that blood was oozing out, from PW-2's head, who was standing at the gate. She asked him to see Ajay and accordingly, he went inside the room of PW-2. He found Ajay, on the floor, with his neck slit and his hands and legs tied. In the meantime, other people came there. The police reached the spot and took Ajay to the hospital. He recollected that there was one tall boy, with the knife in his hand, but he was not able to identify the assailants because it was dark, at the time of incident. He was cross-examined, by the Add L.P.P. The statement of PW-4 reflects his own version, of the incident, and what he had recollected. This does not mean that PW-2, who is an injured eye witness,

had no occasion to see the assailants and, corollary, her identification should be disbelieved. Assailants had entered her bed room, harmed her and had continuously pressurized her to give money. It is reasonable to accept that she had ample opportunity to see the assailants. Her testimony is truthful, credible and should be accepted. Since she was in doubt, about the involvement of the third accused Abdul Mohan, she accordingly, did not identify him in the Court.

17. In law, testimony of an injured witness has its own relevance and efficacy, as has been reiterated in *Abdul Sayeed v. State of Madhya Pradesh*, (2010) 10 SCC 259:-

“28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. “Convincing evidence is required to discredit an injured witness.”

18. In light of observations above, we uphold the conviction of the two appellants under Section 302 IPC read with Section 34 IPC for murder of Ajay and under Section 397 IPC read with Section 34 IPC for

robbery with injuries. The sentence of imprisonment and fine is also affirmed. However, we modify the direction of rigorous imprisonment in default of payment of fine to simple imprisonment, for a period of two months, for failure to pay fine of ₹10,000/-, for the offence under Section 302/34 IPC, and simple imprisonment, for fifteen days, for fine of ₹2,000/- imposed for offence under Sections 394 IPC and 397 IPC. The appellants should be entitled to benefit of Section 428 Cr.P.C. The appeals are accordingly disposed of.

19. Ms.Rakhi Dubey, Advocate, who has appeared as Amicus Curiae in the present case, will be entitled to fee which shall be paid by Delhi High Court Legal Services Committee as per rules/schedule.

(SANJIV KHANNA)
JUDGE

(S.P.GARG)
JUDGE

NOVEMBER 22, 2012

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