

\$~R-21 & 22 (Part-B)

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

Date of decision: 9th October, 2015

+ **CRL.A. 174/2000**

VIKRAM Appellant

Through Mr. Pradeep Kumar Arya, Mr.
Narinder Chaudhry, Mr. Pankaj
Tanwar, Mr. Narinder Tomar and
Mr. Raj Karan Sharma, Advs.

versus

STATE Respondent

Through Ms. Aashaa Tiwari, APP with Insp.
Baljit-PS Vikas Puri

+ **CRL.A. 265/2000**

GOPAL Appellant

Through Mr. Pradeep Kumar Arya, Mr.
Narinder Chaudhry, Mr. Pankaj
Tanwar, Mr. Narinder Tomar and
Mr. Raj Karan Sharma, Advs.

versus

STATE Respondent

Through Ms. Aashaa Tiwari, APP with Insp.
Baljit-PS Vikas Puri

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J. (ORAL):

1. Vikram (son of Mange Lal) and Gopal, in these connected appeals, impugn common judgment dated 24.02.2000 convicting them under Sections 396 of the Indian Penal Code, 1860 (IPC, for short) for dacoity and murder of Kishan Miglani and Usha Miglani in the intervening night of 15th and 16th September, 1996 at G-85, Vikas Puri, Delhi. The appellants have also been convicted under Section 412 IPC for possessing stolen property. By order on sentence dated 06.03.2000, the two appellants have been sentenced to undergo imprisonment for life for the offence under Section 396 IPC and rigorous imprisonment for a period of seven years for the offence under Section 412 IPC. The punishments would run concurrently and Section 428 of Code of Criminal Procedure, 1973 (Cr.P.C., for short) would apply.

2. The impugned judgment also convicts Rajmal and Bikram (son of Bhagirath), who were similarly sentenced. However, the said Rajmal and Bikram (son of Bhagirath) have expired and the appeals filed by them have abated.

3. The appellants do not dispute that Usha Miglani and Kishan Miglani had suffered homicidal death in the intervening night between 15th and 16th September, 1996 at their residence G-85, Vikas Puri, Delhi. The said factum has been proved beyond doubt and debate. Before referring to the ocular evidence of Diksha (PW4), we would begin with the testimony of Dr. Reena Garg (PW-1) who had proved the MLCs (Ex.PW-1/A and Ex.PW-1/B) in the handwriting of Dr. Naresh. The said Dr. Naresh had left the services of DDU Hospital and his whereabouts were unknown. The MLCs recorded at 5.45 and

5.46 AM on 16.09.1996 mention that Kishan Miglani and Usha Miglani were brought dead to the said hospital. Dr. L K Barua (PW-2), who had conducted post-mortem on the two dead bodies, in his reports Ex.PW-2/A and Ex.PW-2/B and his ocular testimony, has referred to the lacerated wounds, abrasions, contusions and defused contusions etc. PW2 has opined that Kishan Miglani had suffered fracture of right zygomatic bone, that the left side soft tissues of the neck contained full black (sic. blood) clot and the left jaw bone was fractured. The second and third cervical vertebrae of Kishan Miglani were fractured with contusion of the spinal cord. The death, he opined, was due to spinal shock as a result of injuries to the neck, associated with other injuries. Usha Miglani had suffered lacerated wound on the lateral aspect of left side forehead with the left eye ball coming out and lacerated wound between the left eye and tragus of the left ear. Usha Miglani had bruises on the lateral aspect of the left eye and back of the left arm. On internal examination, PW-2 observed that left temporal bone extending up to middle crania fossa was fractured. The brain showed generalized subdural haemorrhage. Orbital plate of left frontal bone was also fractured. These injuries were ante-mortem. The injury to the head was sufficient to cause death in the ordinary course of nature. The death was due to coma resulting from this injury.

4. On the question that there was forced intrusion and robbery in House no.G-85, Vikas Puri, Delhi in which Kishan Miglani and Usha Miglani had suffered homicidal death, we have the testimony of their daughter Diksha (PW-4), who was about 11 years of age when her deposition was recorded in the Court on 30.04.1998. Thus, Diksha

(PW4) was about 9 years of age on the date of occurrence i.e. the intervening night of 15th and 16th September, 1996. The trial court judge, before recording her testimony, had asked preliminary questions for ascertaining and verifying whether Diksha (PW-4) was capable of logically answering questions put to her. PW-4 has deposed that on the fateful night, she had slept in the bedroom with her parents and her younger brother aged about five years. At about 3 A.M., PW-4 woke up upon hearing her mother's scream and cry. PW2 saw that someone was beating her father with a *balli* like weapon in his hand. There were in all four assailants in the bedroom. The intruders were taking out articles and keeping them in a bag which had been brought by them. They had also taken with them a small piano and money. One of the assailants had beaten her mother but she could not recollect the object with which her mother was beaten. The weapon *balli* with which her father was beaten was left behind. PW-4 was warned not to raise any alarm or she too would be killed. The four assailants escaped taking with them the looted articles. After the assailants had left, PW-4 noticed that the locks of the lobby gate and the entrance gate were broken to make a forced entry. Diksha (PW4) had called her grandmother Krishna Devi (PW-10) on the telephone and informed her about the occurrence.

5. Diksha (PW-4) was the first informant and on her statement (Ex.PW4/A), FIR No.515/96 (Ex.PW-3/A) was registered. The testimony of Diksha (PW-4) about the occurrence in the intervening night of 15th and 16th September, 1996, as noticed above, is corroborated and supported by the medical evidence. Diksha's version

is supported by the deposition of Krishna Devi (PW-10), grandmother of Diksha (PW-4), who immediately after the telephone call made by PW-4, had rushed to their residence. Krishna Devi (PW-10) affirms having received a call at about 4.15 or 4.30 A.M. informing her that four trespassers and robbers had murdered Kishan Miglani and Usha Miglani and looted their belongings. PW10, on reaching the spot, had seen dead body of her son Kishan Miglani and daughter-in-law Usha Miglani. The bodies were blood-soaked with multiple injuries. This factual position is reiterated by the police officials namely, Const. Naresh Kumar (PW-12) and SI Jagbir Singh (PW-14), who were first to arrive at the place of occurrence. They affirm that the locks of the house were broken and Kishan Miglani and Usha Miglani were found murdered in the bedroom on the ground floor. The household articles were lying scattered and blood could be seen all over.

6. The prime contention raised by the appellants is that they are innocent and were not involved in the crime in question. They dispute and challenge their identification by Diksha (PW-4).

7. Diksha (PW-4) had identified the two appellants along with Bikram (son of Bhagirath) and Rajmal as the four intruders who had entered the house, committed murder and looted their belongings. Her dock identification is categorical and unambiguous. Diksha (PW-4), in her examination-in-chief, has asserted that she could identify the four assailants and had thereafter, identified the two appellants i.e. Vikram (son of Mange Lal) and Gopal as well as Rajmal (since deceased) and Bikram (son of Bhagirath) (since deceased). She has professed that the appellant Vikram (son of Mange Lal) was the intruder and assailant

who had hit her father with a *balli* like weapon of offence and the appellant Gopal was the perpetrator who had killed her mother.

8. Learned counsel for the appellants states that the said identification should be disbelieved for the FIR (Ex.PW-3/A) does not mention and record specific physical description or physical features of the assailants. A reading of the FIR (Ex.PW-3/A) would indicate that one of the assailants was described by Diksha (PW4) as a long-haired boy who had given blows with a *balli*-like object and other assailants were described as boys. They were wearing trousers and shirts. The stolen articles, it stands recorded, were kept in a bag. The looted property included a small piano, cash and other valuables. FIR (Ex.PW-3/A) does record PW4's categorical assertion that she could identify the four assailants.

9. The appellants herein were arrested on 15.12.1996. As per the police version and testimony of SI Haridya Bhushan (PW-16), the appellants were arrested from a bridge near Rewari Railway Station. PW16 has deposed that after the arrest, the two appellants along with Bikram (son of Bhagirath) and Rajmal (both since deceased) were asked to keep their faces muffled. The said appellants were produced before the Metropolitan Magistrate on 16.12.1996 and an application for conducting test identification proceedings (TIP, for short) was filed. The application marked Ex.PW-19/A specifically records that the appellants had been asked to keep their faces muffled. Judicial orders dated 16.12.1996 passed on the said application mention that the two appellants and Bikram (son of Bhagirath) (since deceased) and Rajmal (since deceased) were asked to appear for TIP proceedings in the jail

on 18.12.1996. The TIP proceedings dated 18.12.1996 (Ex.PW-19/B) record that the two appellants and Rajmal (since deceased) had refused to participate in the TIP proceedings. This was despite recorded warning that adverse inference could be drawn on account of their refusal to participate in the TIP. Bikram (son of Bhagirath) had participated in the TIP proceedings. Diksha (PW-4) was asked to identify the perpetrator from the persons present and standing before her. She was asked to take three rounds. In the second round, PW4 had correctly identified Bikram (son of Bhagirath) (since deceased). She reaffirmed that Bikram (son of Bhagirath) (since deceased) was the person who had intruded into their house and killed her parents by giving them beatings. D.S. Sidhu, M.M. (PW19), on an application, had allowed the legal guardian of Diksha (PW-4) i.e. Rajiv Miglani to be present during the TIP. The TIP proceeding does mention about the presence of Rajiv Miglani, PW4's guardian. Rajiv Miglani was permitted to remain present but was not allowed to be involved or help in identification.

10. Diksha (PW-4), in her cross-examination, has affirmed and did not deviate or negate her dock identification. A suggestion was given on behalf of Bikram (son of Bhagirath) and the appellant Gopal to PW-4 that there was a small bulb in the bedroom. Answering this question, Diksha (PW-4) had stated that everything was visible as the light was on when the occurrence took place. She denied the suggestion that Bikram (son of Bhagirath) (since deceased) and Gopal were shown to her prior to TIP proceedings. She has clarified that her uncle Rajiv Miglani accompanied her to the Tihar Jail but was standing separately

in a corner. No suggestion was given on behalf of the appellant Vikram that he was shown to Diksha (PW-4) before the TIP proceedings. The suggestion given on behalf of Gopal that he was shown to Diksha (PW-4) prior to the TIP proceedings is unsustainable and invertible. The suggestion does not state, the time, date or the place when he was shown to Diksha (PW-4). It is not the case of the appellant that their photographs were taken and the said photographs were shown to Diksha (PW-4). It also is apparent that the occurrence including looting had gone on for some time, for Diksha (PW-4) had made the call to her grandmother Krishna Devi (PW-10) only at about 4.15/4.30 PM.

11. In view of above discussion, we accept the dock identification of the two appellants namely, Vikram and Gopal by Diksha (PW-4). Two decisions in *Budhsen and Anr. v. State of U.P.* 1970 (2) SCC 128 and *Manzoor v. State of Uttar Pradesh* (1982) 2 SCC 72 relied upon by the appellants, according to us, would not be applicable. In the first case, the issue raised relates to the evidentiary value of the TIP proceedings and whether conviction can be solely based on identification by witnesses during TIP proceedings. It was observed that the description of the assailants could provide the investigating agency with the starting point to proceed and take steps for identification and arrest of the offenders. On the said aspect, we have the deposition of SI Haridya Bhushan (PW-16) who had inspected the scene of crime and thereafter, had suspected involvement of the appellants noticing the peculiar *modus operandi*, the injuries caused and the manner in which the offence was committed. In *Manzoor* (supra), the Supreme Court

noticed that at the earliest opportunity, the eyewitnesses had failed to mention any identifying features of the accused persons when they were examined by Investigating Officer. In the said factual background, the Supreme Court held that identification of the accused by one of the witnesses nearly two months later in the TIP was a suspect.

12. It would be appropriate and proper to quote the Supreme Court in *Malkhan Singh & Others v. State of M.P.* 2003 (5) SCC 746 on the question of the TIP proceeding, wherein it has been observed as under:

“7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and

these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Admn. AIR 1958 SC 350 , Vaikuntam Chandrappa v. State of A.P. 1960 SC 1340, Budhsen v. State of U.P. (1970) 2 SCC 128 and Rameshwar Singh v. State of J&K (1971) 2 SCC 715.

The aforesaid judgment was quoted and the case law on the subject examined in depth in *Manu Sharma v. State (NCT of Delhi)* AIR 2010 SC 2352. This decision in categorical terms holds that substantive evidence is the deposition of the witness in the Court after she/he has been administered oath. TIP proceedings are a part of the investigation and not substantive evidence. Earlier, in *Dana Yadav v. State of Bihar* (2002) 7 SCC 295, after examining the case law on the subject, it was held:

“It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous Identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an

accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by catena of decisions of this Court in the cases of Kanta Prashad v. Delhi Administration, Vaikuntam Chandrappa, Budhsen, Kanan v. State of Kerala, Mohanlal Gangaram Gehani v. State of Maharashtra, Bollavaram Pedda Narsi Reddy, State of Maharashtra v. Sukhdev Singh, Jaspal Singh v. State of Punjab, Raju v. State of Maharashtra, Ronny, George V. State of Kerala, Rajesh Govind Jagesha, State of H.P. v. Lekh Raj and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat.”

In *Ravi Kapur v. State of Rajasthan* AIR 2012 SC 2986, earlier law on the subject including judgment in *Shyamal Ghosh v. State of West Bengal* (2012) 7 SCC 646 was referred, to observe that in every case, it is not necessary to hold TIP proceedings and the said exercise is necessary to check veracity of the claim made by the witnesses that they had seen the culprits at the time of the occurrence. Failure to hold TIP proceedings would not by itself render identification in the court inadmissible or unacceptable. TIP proceedings strengthen the trustworthiness of the evidence which is subsequently produced in the Court for it is a rule of prudence to generally look for corroboration before relying on the sole testimony as to identity of the accused, when it is alleged that a stranger had committed the offence. Being a rule of prudence, it is subject to exceptions. Recently, the Supreme Court in *State v. Sunil Kumar & Anr.* (2015) 8 SCC 478 has observed:

“Furthermore, the appellant had gone to the extent of stating in her first reporting that she would be in a position to identify the offender and had given particulars regarding his identity. The clothes worn by the offender were identified by her when called upon to do so. In the circumstances there was nothing wrong or exceptional in identification by her of the accused in court. We find her testimony completely trustworthy and reliable. Consequently we hold that the case against Respondent No.1 stands proved. Since the trial court had found the age of the Appellant to be 10-13 years of age, we take the age to be on the maximum scale i.e. 13 years. In our considered view, the High Court was not justified in dismissing the revision. No other view was possible and the case therefore warrants interference by this Court.”

13. When we turn to the facts of the present case, it is noticed that the police had moved an application for holding the TIP proceedings. Diksha (PW-4), in the said proceedings, identified Bikram (son of Bhagirath) (since deceased). The two appellants Vikram and Gopal; and Rajmal had refused to participate in the TIP proceedings which were conducted before Mr. D.S. Siddhu, Metropolitan Magistrate on 18.12.1996. The said Metropolitan Magistrate has deposed and testified as PW19.

14. Court identification of the two appellants by Diksha (PW-4) is duly corroborated by the recoveries made from the two appellants on their arrest on 15.12.1996. SI Haridya Bhushan (PW-16) has deposed that one gold ring was recovered from appellant Vikram and two silver glasses were produced by appellant Gopal. Two glasses and a casio piano were recovered from Rajmal (since deceased). Similarly, one gold ring was recovered from Bikram (son of Bhagirath) (since

deceased). The gold ring and the two silver glasses recovered from Vikram and Gopal were duly identified by Krishna Devi (PW10) in the Court. She admitted that the two glasses were missing and had been looted at the time of occurrence in the intervening night between 15th and 16th September, 1996. Noticeably, Diksha (PW-4) had identified the piano which was recovered from Rajmal (since deceased). The aforesaid articles were subjected to TIP proceedings which were conducted on 22.02.1997 vide Ex.PW-19/D, pursuant to an application moved on 17.02.1997 by SI Jai Parkash. These TIP proceedings were also conducted by Mr. D.S.Sidhu (PW-19).

15. Learned counsel for the two appellants have submitted that, in fact, four gold rings were recovered as per the personal search memos, Ex.PW-16/D of Rajmal (since deceased), Ex.PW-16/C of Bikram (son of Bhagirath) (since deceased) and Ex. PW-16/B of Vikram (son of Mange Lal). The contention does not support the appellants. Rather it affirms and assures that Krishna Devi (PW-10) only identified the articles which were robbed from the house of her son and daughter-in-law. She had identified the two gold rings which were seized from Vikram (son of Mange Lal), one of the appellants herein and Bikram son of Bhagirath (since deceased). She did not identify the gold rings seized from Rajmal (since deceased) (Ex.PW-16/D).

16. Other contentions raised by the counsel for the appellants relate to alleged lapses in investigation. It is submitted that finger prints were not lifted from the scene of crime and the prosecution has failed to examine witnesses to the personal search memos (Ex.PW-16/A to D). The recoveries of the stolen articles were made from Rewari but the

accused including the appellants were not produced before the Metropolitan Magistrate at Rewari. It is also submitted that the police did not record statement of brother of Diksha, aged about 5 years, who was present in the room when the offence had occurred. The last contention or argument raised by the appellant is somewhat contradictory. On one hand, counsel for the appellant had challenged court deposition and identification of the appellants by Diksha (PW-4), aged about 9 years at the time of occurrence, pleading and drawing our attention to her age, yet the appellants protest and plead that PW4's younger brother should have been cited and produced as a witness. It is apparent that the prosecution wanted to rely upon the evidence of the elder child who had better and greater observation ability and power to recollect and narrate the occurrence. PW-4 was in a better position to identify the assailants. Her younger brother was about 5 years of age at the time when the occurrence took place. It is quite clear to us that he was too small and possibly immature to narrate and state the facts. Regarding the arrest of the appellants and recoveries, we find that the said arrest was made by SI Haridya Bhushan (PW-16) and his statement is credible and trustworthy. Regarding lifting of the finger prints, we record that the offence had taken place in a house where two adults and two children used to reside. Lifting finger prints of culprits can be extremely difficult as it is impossible to ascertain and know whose finger prints are being lifted. It is not the case of the prosecution that any finger prints were lifted from the house. Photographs of the occurrence have been produced and proved by the

prosecution (Ex.PW6/12 to 22). The contentions raised have no merit and are rejected.

17. The appellants, as noticed above, have been convicted under Section 396 and 412 IPC. We notice that one Bhuria Singh it is alleged was involved in the said offence. He was also arrested and charge-sheeted but subsequently absconded. Diksha (PW4) has testified that four assailants were inside the house. There is no evidence to show presence of the fifth assailant inside or outside the house. Thus, it is difficult to assume that there was a fifth person who was involved in the commission of the offence. Presence or involvement of the fifth person would be necessary for conviction under Section 396 IPC. Thus, the conviction on that charge cannot be sustained. However, the appellants would be liable and can be convicted under Section 302 and also for offence of robbery under section 392 IPC. In the present case, charges were framed under Section 396 and 412 IPC. This to our mind would not make any difference in view of section 222 Cr.P.C. The Supreme Court in *Shyam Behari v. State of Uttar Pradesh* AIR 1957 SC 320, in similar circumstances has observed that if an accused cannot be convicted under Section 396 IPC, he could be convicted under Section 302 IPC as murder is one of the ingredients of an offence under Section 396 IPC. It was noted that Section 396 IPC contains two ingredients; commission of dacoity and commission of murder. Only when the two ingredients are satisfied, offence under Section 396 IPC would be complete. In these circumstances, the Supreme Court rejected the contention that the appellant therein could not be convicted under

Section 302 IPC once it was held that the offence of dacoity i.e. presence or involvement of 5 or more persons is not made out. Reference in this regard can be also made to the decision of the Supreme Court in *Rafiq Ahmed @ Rafi v. State of Uttar Pradesh* AIR 2011 SC 3114 wherein case law on the subject has been examined. The aforesaid judgments clearly show that in spite of failure of the prosecution to establish involvement of 5 or more assailants, conviction of the two appellants can be sustained under Sections 302 and 392 read with Section 34 IPC. We, thus, modify the conclusion in the impugned judgment and convert the conviction of the appellants from under Section 396 IPC to one under Sections 302 and 392 read with Section 34 IPC. Since, the appellants have been held guilty for the offence of robbery, the conviction under Section 412 IPC is not necessary and the same is set aside.

18. On the question of sentence, we are inclined to punish the appellants with the same sentence as is awarded to them i.e. imprisonment of life for the offence under Section 302 read with Section 34 IPC. For the offence under Section 392 read with Section 34 IPC, they are sentenced to rigorous imprisonment for a period of 8 years. The appellants will also be liable to pay a fine of Rs.5,000/- each separately for the two offences. In default of payment of fine, they shall undergo simple imprisonment for a period of two months on each count. Sentences will run concurrently and Section 428 CrPC would apply.

19. The appellants who are on bail will surrender within a period of 15 days from today to undergo the remaining sentence. The appeals

are accordingly disposed of. Copy of the judgement will be sent to the trial court for record and compliance and in case the appellant do not surrender, for necessary action.

(SANJIV KHANNA)
JUDGE

(R.K.GAUBA)
JUDGE

OCTOBER 09, 2015

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