

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

Judgment reserved on : 08th March, 2017

Date of decision : 20th June, 2017

+ **CRL.A. No. 369/2015**

BADSHAH

..... Appellant

Through: Mr. K. Singhal and Mr. Sachin
Agrawal, Advocates.

Versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for the
State.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. This appeal has been instituted by the appellant Badshah son of Shri Jainul assailing the impugned judgment dated 04.09.2014 and impugned order on sentence dated 10.09.2014 of the then learned District & Sessions Judge (East), Karkardooma Courts, Delhi in Sessions Case No. 67/2013 in relation to FIR No. 141/2013, Police Station Preet Vihar.

2. Vide the impugned judgment dated 04.09.2014, the accused/the appellant herein Badshah was convicted for the commission of the

offences punishable under Sections 120B r/w 396 & 460/396/412 of the Indian Penal Code (IPC), 1860 and Section 14 of the Foreigners Act, 1946. Vide the impugned order on sentence dated 10.09.2014, the accused/the appellant herein Badshah was awarded imprisonment for life and fine of Rs.10,000/- for the offence punishable under section 120B read with section 395 IPC, 1860 and in default of payment of fine, he was further directed to undergo simple imprisonment for six months. The accused/the appellant herein Badshah was further awarded imprisonment for life and fine of Rs.10,000/- for the offence punishable under section 396 IPC, 1860 and in default of payment of fine, he was further directed to undergo simple imprisonment for six months. The accused/the appellant herein Badshah was further awarded rigorous imprisonment for ten years and fine of Rs.10,000/- for the offence punishable under section 412 IPC, 1860 and in default of payment of fine, the accused/the appellant herein Badshah was directed to further undergo simple imprisonment for six months. The accused/the appellant herein Badshah was further awarded rigorous imprisonment for five years and a fine of Rs.10,000/- for the offence punishable under section 14 of the Foreigners Act, 1946 and in default

of payment of fine, the accused/the appellant herein Badshah was directed further to undergo simple imprisonment for six months. The accused/the appellant herein Badshah was however held entitled to the benefit of Section 428 Cr.P.C., 1973 i.e. set off of the period of detention already undergone by him and it was directed that all the sentences awarded to him would run concurrently.

Vide the impugned order on sentence dated 10.09.2014, it was further directed that the amount of fine, if realized, would be released to the complainant.

3. Along with the Criminal Appeal no. 369/2015, there was an application Criminal M.A. No. 4450/2015 seeking condonation of delay of 116 days, which was allowed vide order dated 25.03.2015. The appeal was thus admitted and notice of Criminal Appeal No. 369/2015 was issued to the State.

4. Arguments were addressed on behalf of the accused/the appellant herein Badshah by his learned counsel Mr. K. Singhal, Advocate and on behalf of the State by Ms. Aashaa Tiwari, learned Additional Public Prosecutor for the State.

PROSECUTION VERSION

5. On 25.04.2013, an information vide DD no. 5A was received in the Police Station Preet Vihar, which was entrusted to ASI Ranbir Singh (PW-17), who was on emergency duty. Inspector O.P. Sinha also reached the spot i.e. B-33, Madhuban, Preet Vihar, Delhi along with the other staff and at the spot it was learnt that that the victim Animesh Datta had been taken to the Metro Hospital. The Crime Team and Dog Squad were called at the spot and the statement Ex.PW2/A of the eye witness Mr. Sumer Kumar Datta s/o Late Sh. B.N. Datta (PW-2), the father of the victim Animesh Datta was recorded. The version put forth through Ex.PW2/A as set forth in the impugned judgment is to the effect that :

“In his statement Ex.PW2/A, the complainant Sumer Kumar Datta (PW2) has stated that on 25.04.2013 at about 3.00 a.m., he along with his wife was sleeping in the bedroom when he suddenly woke up and saw 6-7 boys in the bedroom and he had been over-powered by two boys at the point of knife and chopper. His hands and feet were tied by tearing the bedsheet into pieces. One of those boys put country made pistol like

object at his neck and they tied his mouth tightly with the piece of cloth. Hands and feet of his wife were also tied by those boys. They asked for the keys of almirah and cash/jewellery and when the complainant showed his ignorance, they started breaking open the door of almirah and ransacking. Thereafter, they went to the room of his son Animesh. They heard some lighter voice from that room and thereafter the sound stopped coming. His wife succeeded in loosening her hands and feet and thereafter she untied the complainant. They went to the room of their son and saw their son lying in his bedroom. They shook him and called him but there was no response from him and they realised that he was no more. The son of the complainant had also been tied by the dacoits. One pillow stained with blood was lying on the floor. After sometime, his daughter Bushra Attrey and his son in law Love Kumar reached there who might have informed the police. His son was removed to hospital. The complainant has further stated that the dacoits were between the age group of 20-25; were of medium built having dark complexion and everyone was armed with chopper, knife, sickle etc. Dacoits had

taken away ring from his hand; gold bangle, two rings and ear rings from his wife; two Nokia mobile phones belonging to complainant and cash in the form of wads of Rs.50 and Rs.10 totaling to Rs.10,000/-. Dacoits had covered their face with handkerchief and that handkerchief of one of the dacoits had fallen down and his face was seen. Complainant has also stated that he could identify him if produced before him.”

INVESTIGATION CONDUCTED

6. As per the charge sheet submitted under Section 173 Cr.P.C., 1973, the Crime Team and Dog Squad had been called to the scene of the occurrence. The spot was got inspected by them. ASI Ranbir Singh, who was on emergency duty, had been initially entrusted DD No. 5A and came back to the spot from the hospital and was handed over MLC No. 20/2013 (Ex.PW22/A) prepared by Dr. Dinesh Kumar Bharti (PW-22) of the deceased Animesh Datta in which he was declared “brought dead”. Dr. Dinesh Kumar Bharti (PW-22) also handed over the clothes, which were used for tying the hands and mouth of the deceased Animesh Datta Ex.P-3, which were seized vide seizure memo Ex.PW4/C.

7. The scene of the crime, as per the charge sheet, was inspected, the bedroom in the house was found ransacked, almirahs open/broken and in the drawing-cum-living room, a blood stained pillow was found and few pieces of torn clothes were also lying there which were used for tying the victims. Inspector Om Prakash (PW-36) made the endorsement Ex.PW36/B on the statement of the complainant for registration of the FIR and the FIR no. 141/2013 Police Station Preet Vihar was then registered. During the course of the investigation, the dead body of the victim Animesh Datta had been shifted to the mortuary and had been identified by the sister and brother-in-law of the deceased and the postmortem on the dead body of the victim Animesh Datta was conducted by Dr. S. Lal (PW-11) vide detailed PM report Ex.PW11/A.

8. During the course of the investigation, the statement of Smt. Chandraprabha Datta w/o Sh. Sumer Kumar Datta was also recorded who corroborated the statement made by her husband Sh. Sumer Kumar Datta.

9. As per the investigation conducted, the chance prints from the spot were lifted by Ct. Ashok (PW-15) and the spot was inspected by

the CFSL, CBI and chance finger prints marked as Q-1 to Q-16 were lifted, the photographic copies of the prints are Ex.P-31/1-16 and the detailed report dated 01.05.2013 Ex.PW31/A.

10. SI Karamvir (PW-6), Crime Team Incharge, also visited the spot and had prepared his report Ex.PW6/A and Ex.PW6/B and had handed over the same to the Investigating Officer.

11. Photographs of the scene of the crime were taken by HC Sanjeev (PW-14), who proved the 29 negatives collectively Ex.PW14/A and developed the photographs collectively as Ex.PW14/B.

12. Exhibits were also seized by the Investigating Officer from the spot, which comprised of a screw driver wrapped in piece of newspaper Ex.P-3, two bed sheets, one pillow seized from the room of victim Animesh Datta Ex.P-5 (colly), 8 pieces of bedsheet of two different beds Ex.P-6, four pieces of torn clothes of bedsheet used for tying the victims Ex.P-7 and a small piece of cloth having blood stains Ex.P-8 and the same were seized vide seizure memos Ex.PW4/A, Ex.PW36/A and Ex.PW4/B. The Investigating Officer had also prepared the site plan Ex.PW36/C.

13. During the course of investigation, the complainant Sh. Sumer Kumar Datta (PW-2) the complainant informed the I.O. that out of the stolen cash, 40 notes of Rs.10/- denomination had been left behind out of which he handed over three notes of Rs.10/- denomination to the I.O., which were seized as samples vide seizure memo Ex.PW2/B. The complainant Sh. Sumer Kumar Datta (PW-2) also produced telephone bills and invoices of the mobile phones which are Ex.PW2/C-1, Ex.PW2/C-2, Ex.PW2/C-3 and Ex.PW2/C-4. The Investigating Officer deposited the seized articles in the malkhana vide entry Ex.PW32/A and during the investigation IMEI numbers of the two robbed mobile phone belonging to the complainant Sh. Sumer Kumar Datta (PW-2) bearing no. 7838190633 and 8447131622 were sent for tracking.

14. As per the investigation conducted, Inspector K.S, Rawat (PW-37), who as SHO Police Station Preet Vihar had supervised the investigation being conducted by ASI Ranbir Singh (PW-17) (*to whom DD no. 5A and DD no. 6A regarding the dacoity in the premises B-33, Madhuban, Preet Vihar, Delhi had been entrusted*) and the investigation conducted by Inspector O.P. Singh ATO, stated

that he had deployed his sources to trace out some clue about the persons who had committed the crime and that on 13.05.2013 on Inspector O.P. Sinha being transferred from the police station, he submitted the file to the MHC (R) and thus he Inspector K.S. Rawat, SHO PS Preet Vihar, took over the investigation of the present case and attempts were made to trace out the criminals but there was no clue despite CCTV cameras of the surrounding areas having been checked.

15. As per the investigation conducted on 09.07.2013, Inspector K.S. Rawat received an information from Police Station Anand Vihar vide DD no. 51B that one Badshah r/o Bangladesh had been arrested in FIR no. 197/2013 PS Anand Vihar, who had made a disclosure statement about the present case and one mobile phone had also been recovered from him in addition to other articles and that the accused/the appellant herein Badshah would be produced before the concerned Court of PS Anand Vihar for taking necessary action. Inspector K.S. Rawat is stated to have gone along with other staff to the PS Anand Vihar at about 1.30 p.m where the accused/the appellant herein Badshah, was in police custody and Inspector K.S. Rawat met

the concerned IO SI Narender who handed over him copy of disclosure statement and seizure memo of the mobile phone as well as copy of FIR no. 197/2013 PS Anand Vihar. The said disclosure statement stated to be recorded in FIR no. 197/2013 PS Anand Vihar of the accused/the appellant herein Badshah is on the record as Ex.PW12B and the seizure memo of one of the looted mobiles belonging to the complainant stated to have been recovered from the possession of the accused/the appellant herein Badshah u/s 102 Cr.P.C. is Ex.PW12/C. During interrogation the accused/the appellant herein Badshah allegedly disclosed that he along with Shahid Master, Alamgir, Khalid, Kalia and Chotu Vakil had committed the dacoity cum murder and his disclosure statement Ex.PW10/A was recorded by Inspector K.S. Rawat whereafter the accused/the appellant herein Badshah was arrested vide arrest memo Ex.PW37/A. Inspector K.S. Rawat further stated that **he muffled the face of the accused/the appellant herein Badshah at PS Anand Vihar** and prepared the arrest memo Ex.PW37/A on which signatures of the accused/the appellant herein Badshah were also taken and he was produced before the concerned Court of PS Anand Vihar where Inspector K.S. Rawat

moved an application for judicial remand of the accused/the appellant herein Badshah in muffled face and the accused/the appellant herein Badshah was sent to judicial custody in muffled face.

16. As per the testimony of Inspector K.S. Rawat (PW-37) on 10.7.2013, he moved an application for conducting the Test Identification Parade of the accused/the appellant herein Badshah, which was assigned to the learned Relieving Judge on 10.07.2013 but as the learned Relieving Judge had already left for TIP proceedings and was not available, therefore, Inspector K.S. Rawat moved a fresh application for conducting TIP of the accused/the appellant herein Badshah before the learned CMM on 11.07.2013, which was assigned to the learned Relieving Judge for the same day and the proceedings were renotified for 12.07.2013 at the Tihar Jail on which date the complainant Sh. Sumer Kumar Datta (PW-2) and his wife Smt. Chandraprabha Datta who had been informed by Inspector K.S. Rawat for participating in the TIP proceedings fixed for 12.07.2013, reached at the Tihar Jail where Inspector K.S. Rawat was also present.

17. The accused/the appellant herein Badshah however refused to participate in the TIP proceedings. The said TIP proceedings

Ex.PW27/B conducted by Sh. J.P. Nahar, learned MM (PW-27) indicate that the accused/the appellant herein Badshah despite having been warned that the refusal to participate in TIP proceedings may result into adverse inference being drawn against him during trial, stated to the effect that ***“25 to 30 people have taken about 50-60 photographs of mine at the police station and a number of people had appeared and seen my face at police station. Many were told by one police officer that they have to identify me. I was taken unmuffled face inside Karkardooma Court premises.”***

18. During the course of the investigation, the TIP of the case property was also conducted by the learned MM Sh. J.P. Nahar where Smt. Chandraprabha Datta mother of the victim Animesh Datta correctly identified all the articles i.e. one silver glass, three silver coins, two silver steel chains with one locket and 16 old antique coins, though, the other witness Sh. Sumer Kumar Datta (PW-2) could identify few coins from the bunch of coins.

19. The charge sheet indicates that during the course of investigation, the Call Detail Report of mobile phone no. 9540813219 carried by the accused/the appellant herein Badshah was obtained and

the analysis of the Call Detail Report revealed that the accused/the appellant herein Badshah was present at the place of occurrence at the time of incident. The certificate u/s 65-B of the Indian Evidence Act, 1860 was also submitted for placing the CDR on record.

20. As per the charge sheet, the recovery of the mobile phone of the victim from the possession of the accused/the appellant herein Badshah, recovery of some of the looted case property such as artificial jewellery, locket, chain, ear tops etc. old/vintage coins of various countries which were duly identified by the victims and refusal of the accused/the appellant herein Badshah to participate in the judicial TIP proceedings establish his involvement in the crime committed in the present case. It was further submitted that the location of the accused/the appellant herein Badshah at or near the place of occurrence as per analysis of CDR of the mobile phone of the accused/the appellant herein Badshah was an added evidence of his involvement in the commission of crime. *Inter alia*, it is submitted through the charge sheet that the accused/the appellant herein Badshah was a Bangladeshi resident and was staying in India without any valid documents which made him liable to be prosecuted under Section 14

of the Foreigner's Act, 1946.

21. The supplementary charge sheet under Section 173 Cr.P.C., 1973 was further submitted after receipt of the FSL result bearing no. FSL-2013/B-7533 BIO NO. 1015/13.

EVIDENCE LED

22. 37 prosecution witnesses were examined by the State during the trial of whom Sh. Sumer Kumar Datta (PW-2) and his wife Smt. Chandraprabha Datta (PW-8) were the only eye witnesses to the incident, who put forth the version set forth in the FIR through the statement of the Sh. Sumer Kumar Datta (PW-2). *Interalia*, both these witnesses identified the accused/the appellant herein Badshah being the person, who along with other co-accused persons committed lurking house tress pass into the house of the Sh. Sumer Kumar Datta (PW-2) and had committed dacoity at his house and in the process thereof committed murder of their son. Furthermore, both Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8) identified the accused/the appellant herein Badshah as being the person, who had put the pistol on the neck of the Sh. Sumer Kumar Datta (PW-2).

FINDINGS OF THE LEARNED TRIAL COURT

23. The learned trial Court on a consideration of the testimonies of Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8) has held that their testimonies are reliable and trustworthy and they had duly identified the accused/the appellant herein Badshah in the Court as one of the dacoits and there was nothing to disbelieve their testimonies and that there was no enmity that had been alleged or suggested to these witnesses in their cross examination by the accused (i.e. the appellant herein Badshah) in the statement under Section 313 Cr.P.C. nor had any suggestion been given as to why they had been named or why they had forcibly implicated the accused (i.e. the appellant herein Badshah) in the present case. The learned trial Court has thus held the testimonies of Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8), who were the eye witnesses of the incident and had suffered from the hands of the accused/the appellant herein Badshah, were sufficient to convict the accused (i.e. the appellant herein Badshah).

24. The learned trial Court also observed to the effect that the accused had refused to join the TIP proceedings and that the

statements of both Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8) were specific that the accused (i.e. the appellant herein Badshah) was one of the dacoits, who along with other associates robbed their valuable articles and had committed the murder of their son and that the accused (i.e. the appellant herein Badshah) was the person who had pointed the pistol on the neck of the complainant Sh. Sumer Kumar Datta (PW-2) at the time of the commission of the dacoity.

25. The learned trial Court also held that the complainant Sh. Sumer Kumar Datta (PW-2) and his wife Smt. Chandraprabha Datta (PW-8) had duly identified one silver glass, three silver coins, two silver steel chains with one locket and 16 old antique coins collectively exhibited as Ex.P1 and the mobile phone of make NOKIA Ex.P2 in Court and that they had identified the case property as having been robbed from their house on the date of the incident.

26. The learned trial Court also observed that these articles Ex.P1 (collectively) and the mobile phone make NOKIA Ex.P2 were recovered from a polythene bag pursuant to the disclosure statement Ex.PW10/A made by the accused/the appellant herein Badshah from

the first floor of his rented house at B-58, Govind Puri, New Delhi belonging to one Smt. Raj w/o Budh Singh, which were exclusively in the knowledge of the accused/the appellant herein. The learned trial Court thus held that the prosecution having successfully established that the robbed articles of the complainant Sh. Sumer Kumar Datta (PW-2) were got recovered by the accused/the appellant herein Badshah apart from his having been found in possession of the mobile phone of the make NOKIA Ex.P2, and the same was an additional circumstance to prove that he along with his associates had committed dacoity in the house of the complainant Sh. Sumer Kumar Datta (PW-2) on the day of the incident and in the process of committing dacoity had murdered his son.

27. The learned trial Court also held to the effect that the testimonies of Sh. Sumer Kumar Datta (PW-2) and the other eye witness i.e. the wife of the complainant Smt. Chandraprabha Datta (PW-8) were categorical to the effect that his co-associates had entered their house and that all of them had covered their faces with handkerchiefs except the accused/the appellant herein Badshah and that all the accused persons were armed with deadly weapons i.e.

chopper, pistol etc. and had overpowered them and dacoity of cash, jewellery and other valuables was committed in their house and it was thus held that the non arrest of the remaining accused persons could not be fatal to the prosecution version as the complainant Sh. Sumer Kumar Datta (PW-2) and his wife Smt. Chandraprabha Datta w/o Sh. Sumer Kumar Datta (PW-8) had specifically stated that at the time of the dacoity, the accused/the appellant herein Badshah was accompanied with 6-7 other associates. The learned trial Court has thus held that the accused/the appellant herein Badshah along with co-accused persons had committed criminal conspiracy to commit the dacoity.

28. The defence of the accused/the appellant herein Badshah that he was doing the work of POP at Village Vidya Nanglai, Bijnour, UP from 23.04.2013 to 26.04.2014 and returned to Delhi in the evening around 8.00 p.m. on 26.04.2013 and was lifted on the night of 7/8.07.2013 from the house of his Sadu (brother in law) Kali Sharan at 12.30 a.m. at Village Hari Nangla, District Badayun when his Sali Manju and his wife were present there and that he was brought to Delhi to PS Anand Vihar and was shown to the witnesses, was not

accepted by the learned trial Court observing to the effect that the accused/the appellant herein Badshah had not examined any witness nor produced any material or evidence on record to show that he was not present at the spot at the time of the incident or that at the time of incident, he was somewhere else which was too far from the spot to rule out the possibility of his presence at the spot.

29. The learned trial Court further observed to the effect that apart from the mere statement of the accused/the appellant herein Badshah that he was at Village Vidya, Nanglai, Bijnour, UP on the date of the incident, there was no other evidence or material placed by the accused/the appellant herein Badshah that he was not present at the place of incident and was at another place.

30. The learned trial Court also convicted the accused/the appellant herein Badshah for the commission of the offence punishable under Section 14 of the Foreigners Act, 1946 as he was a resident of Village Dhamsagar, P.O. Moralganj, District Bagerhaat, Bangladesh and had not disputed his address nor the fact that he was a national of Bangladesh and not of India and that he had not produced any document or evidence or material to show that he had any valid Visa

or valid document for stay in India at the time of the apprehension.

**CONTENTIONS OF THE ACCUSED/THE APPELLANT
HEREIN BADSHAH**

31. Through the appeal, the accused/the appellant herein Badshah submitted that the verdict of the learned trial Court is based on conjectures and surmises and that the prosecution had failed to prove its case beyond a reasonable doubt. It was also submitted on behalf of the accused/the appellant herein Badshah that the testimonies of Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8) the alleged eye witnesses of the incident, who are interested witnesses, cannot be relied upon as they are the parents of the deceased and that their testimonies do not inspire confidence and that there were material contradictions and discrepancies in the statements of Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8). It was also submitted on behalf of the accused/the appellant herein Badshah that the accused/the appellant herein Badshah was shown to the witnesses and therefore, his participation in the TIP refusal cannot be read him. It was also submitted on behalf of the accused/the appellant herein Badshah that the recoveries have been planted on him and that the Investigating Officer had specifically stated in his cross

examination that no public witnesses were joined nor any notice was given to the public persons to join the investigation.

32. It is also submitted on behalf of the accused/the appellant herein Badshah that he was a permanent resident of Delhi having property in the name of his wife in Uttranchal and that he was residing and doing work in India with a valid ration card, election I.D. etc. in his name and in the name of his family members and that his address was not recorded on the basis of his information but on the basis of the address stated in the charge sheet. Thus, it was contended that the accused/the appellant herein Badshah had been wrongly convicted and is entitled to be acquitted in relation to the accusations against him qua FIR No. 141/2013, Police Station Preet Vihar for the alleged commission of the offence punishable under Sections 120B r/w 396 & 460/396/412 of the Indian Penal Code (IPC), 1860 and Section 14 of the Foreigners Act, 1946.

CONTENTIONS OF THE STATE

33. On behalf of the State, it was submitted by Ms. Aashaa Tiwari, learned Additional Public Prosecutor for the State that the testimony of the prosecution witnesses Sh. Sumer Kumar Datta (PW-2) and Smt.

Chandraprabha Datta (PW-8) were categorical, consistent and clear, and established beyond a reasonable doubt and that the accused/the appellant herein Badshah was the person who had put the pistol on the neck of the complainant Sh. Sumer Kumar Datta (PW-2) i.e. the father of the deceased. It was thus submitted on behalf of the State that all the testimonies of the witnesses Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8), who are the eye witnesses of the incident and the recovery of the robbed mobile phone Ex.P2 belonging to the complainant Sh. Sumer Kumar Datta (PW-2) from the accused/the appellant herein Badshah and the articles of the complainant Sh. Sumer Kumar Datta (PW-2) collectively Ex.P1 at the pointing out of the accused/the appellant herein Badshah, establishes the guilt of the accused/the appellant herein Badshah beyond a reasonable doubt and that there was no infirmity in the impugned judgment nor in the impugned order on sentence.

ANALYSIS

Identification of the accused/the appellant herein

34. It is noteworthy that the appellant herein Badshah was first arrested on 9.7.2013 in FIR No. 197/2013 PS Anand Vihar registered

under Sections 395/397/452/506/412/34 IPC r/w 25 of Arms Act, 1959 r/w 14 Foreigner's Act, 1946, who had allegedly disclosed about his involvement in the present FIR NO. 141/2013 Police Station Preet Vihar and as per the testimony of Inspector K.S. Rawat, SHO Police Station Preet Vihar, he had gone to PS Anand Vihar on receipt of information of the arrest of the accused/the appellant herein Badshah r/o Bangladesh vide DD no. 51B and of his having made a disclosure statement about the present case and of the recovery of a mobile phone from him in addition to other articles and of the information that the accused/the appellant herein Badshah would be produced before the concerned Court of PS Anand Vihar for taking necessary action. Inspector K.S. Rawat testified further that he along with other staff reached the PS Anand Vihar at about 1.30 p.m where the accused/the appellant herein Badshah, was in the police custody. Inspector K.S. Rawat is categorical that thereafter he took the disclosure statement Ex.PW12/B regarding FIR no. 197/2013 PS Anand Vihar and seized the mobile phone seized already u/s 102 Cr.P.C. vide seizure memo Ex.PW12/C and that he, Inspector K.S. Rawat interrogated the accused/the appellant herein Badshah and recorded his disclosure

statement and arrested him in the present case i.e. FIR No. 141/2013, Police Station Preet Vihar **and that he, Inspector K.S. Rawat muffled the face of the accused (i.e. the appellant herein Badshah) in PS Anand Vihar itself** and thereafter, the accused/the appellant herein Badshah was produced before the concerned Court of PS Anand Vihar where the accused/the appellant herein Badshah was sent to judicial custody in muffled face and moved an application for TIP proceedings in which the accused/the appellant herein Badshah refused to participate.

35. It is significant that the accused/the appellant herein Badshah has categorically stated before the learned MM Sh. J.P. Nahar as recorded in TIP proceedings that *“25 to 30 people have taken about 50-60 photographs of mine at the police station and a number of people had appeared and seen my face at police station. Many were told by one police officer that they have to identify me. I was taken unmuffled face inside Karkardooma Court premises.”*

36. **The factum that the accused/the appellant herein Badshah was in an unmuffled face even at the time when Inspector K.S. Rawat reached at PS Anand Vihar is brought out categorically**

through the statement of Inspector K.S. Rawat himself who stated that he muffled the face of the accused/the appellant herein Badshah at PS Anand Vihar itself thereby endorsing the appellant's submission that he was kept unmuffled there.

37. Significantly, SI Narender Kumar, IO of FIR no. 197/2013 PS Anand Vihar has stated that he had produced the accused/the appellant herein Badshah before the concerned Court and he had been remanded to JC and they had handed over the disclosure statement, arrest memo, personal search memo and seizure memo to the concerned IO of Police Station Preet Vihar. He further stated that when he produced the accused/the appellant herein Badshah before the concerned Court, PW-12 had moved an application for conducting TIP but the accused/the appellant herein Badshah had refused to participate in the same.

38. Significantly, the version of the accused/the appellant herein Badshah in his statement u/s 313 Cr.P.C. 1973, in reply to question 57, stated

“I am innocent and have been falsely implicated in this case. I was doing the work of POP at Village Vidya Nanglai, Bijnour,

UP from 23.04.2013 to 26.04.2014 and returned to Delhi in the evening around 8.00 p.m. on 26.04.2013. I was lifted on the night of 7/8.07.2013 from the house of MY Sadu Kali Sharan at 12.30 a.m. at Village Hari Nangla, Distrriect Badayun when my Sali Manju and my wife were present there. I was brought to Delhi to Police Station Anand Vihar and was shown to the witnesses, my photographs were taken. My signatures were taken forcibly on certain blank papers which were later on converted into numerous memos.”

The accused is thus categorical that he had been brought from Village Hari Nangla, District Badayun to PS Anand Vihar by the police and he was shown to the witnesses and his photographs were taken and his signatures were taken forcibly on certain blank papers which were later on converted into numerous papers.

39. The factum that the accused/the appellant herein Badshah was apprehended by IO SI Narender as testified by him as PW-12 on 09.07.2013 in FIR no. 197/2013 PS Anand Vihar at Village Hari Nangla, District Badayun corroborates the statement of the accused/the appellant herein Badshah that he had been picked up from

Village Hari Nangla, District Badayun.

40. Significantly, in Ex.PW2/A, the statement of the complainant Sh. Sumer Kumar Datta (PW-2) dated 24.05.2013, it has been stated that the persons, who had entered into his house and had committed dacoity and had killed his son had their faces muffled except one person whose handkerchief had fallen down in the commission of the offence and that he could identify that person. Significantly in Ex.PW2/A i.e. statement of Sh. Sumer Kumar Datta (PW-2) which forms the basis of FIR, it has not been stated that the person whose handkerchief had fallen down was the person who had put the pistol on his neck.

41. The testimony of Smt. Chandraprabha Datta (PW-8) states that on 12.7.2013, the police officials had called them to Police Station Preet Vihar as one of the accused person was arrested by them and when they reached there, they were informed that the accused/the appellant herein Badshah had refused to join the TIP proceedings and thereafter they returned back to their house. This witness further states that on 19.07.2013, she along with Sh. Sumer Kumar Datta (PW-2) were present in the house and in the meantime, the police officials

with the accused person came to her house and she identified him as one of the dacoits and told the same to the police and that the accused/the appellant herein Badshah had pointed out her house.

42. On being cross-examined on behalf of the accused/the appellant herein Badshah, this witness testifying about 9.7.2013 when the appellant was brought to her house i.e. the scene of the crime categorically states that ***“it is correct that when accused present in the Court was brought by the police was not in muffled face.”*** The dock identification thus of the accused/the appellant herein Badshah by Smt. Chandrabhabha Datta (PW-8) in her testimony dated 06.05.2014 of the accused/the appellant herein Badshah for the first time in Court is rendered wholly doubtful.

43. The statement of the Sh. Sumer Kumar Datta (PW-2) in cross examination recorded on 08.01.2014 wherein he has identified the accused for the first time in Court categorically **being one of the dacoits who put the pistol on his neck along with his associates whereas in his statement Ex.PW2/A he had stated that one of the dacoits had put a pistol on his neck, indicates that Sh. Sumer Kumar Datta (PW-2) does not identify the accused/the appellant**

herein Badshah as being the sole person, who placed the pistol on his neck. The statement of Sh. Sumer Kumar Datta (PW-2) in his testimony on 08.01.2014 is at variance with his statement in Ex.PW2/A, as to the number of the persons who had pointed a pistol at his neck, and this circumstance necessitates the identity of the accused/the appellant herein Badshah being established beyond a reasonable doubt, which in the circumstances of the instant case is however rendered wholly doubtful.

44. The testimony of Sh. Sumer Kumar Datta (PW-2) who categorically stated further that he along with his wife visited the Tihar Jail for TIP proceedings but the accused/the appellant herein Badshah did not participate in the TIP proceedings and that later on the accused/the appellant herein Badshah led the police party to the scene of the crime where he along with his associates murdered his son and robbed them and that they had identified the accused/the appellant herein Badshah as being one of the dacoits, makes it apparent that the testimony of Sh. Sumer Kumar Datta (PW-2) also brings forth categorically that the accused/the appellant herein Badshah had been shown to the witness after his refusal to participate

in the TIP proceedings but before his identification in Court by the witness, which makes the testimony of the Sh. Sumer Kumar Datta (PW-2) qua identification of the accused/the appellant herein Badshah, as being one of the dacoits at the time of the commission of the crime, -wholly circumspect.

FORENSIC ANALYSIS

45. Another significant aspect which cannot be over looked is that the spot was inspected by the Crime Team and Dog Squad, and finger prints were taken on different places of articles at the spot by Ct. Ashok on 25.4.2013, Ashok (PW-15) member of the Mobile Crime Team, East District, Delhi from the spot B-33, Madhuban, Preet Vihar, Delhi, who had lifted chance prints from the iron almirah, swift car, wooden bed and wooden window frame and glass.

46. Significantly Ex.PW31/A, the crime scene report prepared by Sh. B. Magesh Krishan Ratnam, SSO-II(FP), CFSL, CBI, New Delhi as PW-31 states that the chance prints Q1 to Q16 had been developed as per photographs taken by Ct. Ashok at the scene of the crime. Significantly Ex.PW36/E, which is a report admissible u/s 293 Cr.P.C. prepared by Mr. Avdhesh Kumar as forwarded by the Director of the

Finger Print Bureau, Delhi Police, Delhi states that photographs and chance prints Q1 to Q16 had been developed by the CFSL and CBI Team and that the specimen finger / palm print slips that had been sent for examination were of the suspects *Mithlesh Kumar s/o Lalo Sharma, Bhogi Malakar s/o Masharu, Jai Nandan Sharma s/o Jugeshwar Sharma, Sanjay Sharma s/o Ram Dev Sharma, Robin s/o Mahender, Manton Sharma s/o Jagdev Sharma, Kailaash s/o Ram Ji Lalu Sharma s/o Bhishan Deve* as suspects and of *Ms. Bushra Atrey w/o Luv Kumar, Mrs. Chander Prabha Dutta w/o S.K. Dutta Sumer Kumar Dutta and Tulsi Devi @ Geeta w/o Arjun Mandal* as inmates and of *Animesh Dutta s/o S.K. Dutta* as the deceased. **The name of the accused as a suspect is not mentioned in this report dated 08.07.2013.**

47. **Undoubtedly the accused/the appellant herein Badshah is alleged to have been arrested on 09.07.2013. However, there was nothing that prevented the investigating agency from sending the finger prints of the accused/the appellant herein Badshah for comparison with the chance prints Q1 to Q16 developed by the CFSL CBI Team to ascertain his alleged participation in the**

commission of the alleged crime.

48. In the circumstances, it is thus held that the identification of the accused/the appellant herein Badshah son of Shri Jainul as being one the dacoits who committed the dacoity at the house of the complainant Sh. Sumer Kumar Datta (PW-2) at B-33, Madhuban, Preet Vihar, Delhi on 25.04.2013 at 3.00 a.m in conspiracy with Shahid Master, Alamgir, Khalid, Kalia and Chotu Vakil, (who were not arrested) to commit lurking house trespass into the house of the complainant Sh. Sumer Kumar Datta (PW-2) and thereafter having committed the murder of his son Animesh Datta which committed the dacoity is not even remotely established. In the circumstances, the alleged recovery of articles i.e. the one silver glass, three silver coins, two silver steel chains with one locket and 16 old antique coins Ex.P1 and mobile phone of make NOKIA Ex.P2 belonging to the complainant from the accused/the appellant herein Badshah with reason to believe that the articles formed the property of the commission of dacoity, thus does not stand established beyond reasonable doubt. Even if it could be held that the recovery of the articles Ex.P1 at the behest of

the accused/the appellant and Ex.P2 from the appellant was established to be of articles which were stolen and retained by the accused/appellant with knowledge or reason to believe that the same were stolen property, the same would at the most constitute an offence punishable under Section 411 of the IPC, 1860, which is punishable with a maximum term which may extend to three years or with fine or with both and it cannot be overlooked that the appellant herein has been in custody since 9.7.2013 for beyond the maximum period of punishment in relation thereto for 3 years and 11 months and 12 days.

49. We also find that so far as the commission of the offence of murder under Section 302 IPC is concerned, the prosecution has led no evidence at all to connect the appellant to the same. Not an iota of evidence ocular or forensic, is forth coming on the record to establish even the presence of the appellant in the room of the deceased Animesh.

50. Reliance placed by the learned trial Court on the verdict of the Supreme Court in the case *Munna Vs. State (NCT of Delhi) in Criminal Appeal No. 749/1999 decided on 27.08.2003* to hold that as the accused/the appellant herein Badshah had refused to participate in

the TIP proceedings, the identification of the accused/the appellant herein Badshah for the first time in the Court by the witnesses as being the person, who participated in the commission of the crime would have to be accepted, - is wholly misplaced in as much as the accused in that case was throughout in a muffled face whenever produced, whereas in the instant case before examination of Sh. Sumer Kumar Datta (PW-2) and Smt. Chandraprabha Datta (PW-8) in Court on the dates of their testimonies, as brought forth through the testimony of Smt. Chandraprabha Datta (PW-8) and through the testimony of Sh. Sumer Kumar Datta (PW-2) prior to his testimony in Court on 19.07.2013, the accused/the appellant herein Badshah had been taken to the house of the complainant Sh. Sumer Kumar Datta (PW-2) by the police in unmuffled face. In these circumstances, the evidence of the identification of the accused/the appellant herein Badshah at the trial for the first time is as laid down by the Supreme Court in ***Malkhan Singh and Others Vs. State of Madhya Pradesh 2003 (5) JT (SC) 323*** from its very nature is inherently of a weak character. As laid down in this verdict as to what weight must be attached to the evidence of the identification in Court which is not preceded by a Test

Identification Parade, is a matter for the Courts of fact to examine.

51. As observed here in above in the instant case, after the TIP proceedings held on 12.07.2013 in which the accused refused to participate, as testified by PW-27 Sh.J.P. Nahar, the learned Relieving Judge, Karkardooma Court, Delhi on 19.07.2013 itself as testified by Smt. Chandraprabha Datta w/o Sh. Sumer Kumar Datta (PW-8), the police had come along with the accused/the appellant herein Badshah to her home, **in an unmuffled face**. Likewise, Sh. Sumer Kumar Datta (PW-2) states that:

“I alongwith my wife visited Tihar Jail for TIP proceedings but accused to participate in the TIP.

Later on, accused led the police party to the scene of crime where he alongwith his associates murdered my son and robbed us. I identified the accused bring one of the robbers. My statement was recorded to this effect.”

making it apparent that the accused/the appellant herein Badshah had been taken to the house of Sh. Sumer Kumar Datta (PW-2) in an unmuffled face before the testimony of Sh. Sumer Kumar Datta (PW-2) could be recorded in Court.

CONCLUSION

52. In these circumstances as observed hereinabove, the identification of the accused as being one of the assailants in the commission of the alleged commission of offences punishable under Sections 120B r/w 396 & 460/396/412 of the Indian Penal Code (IPC), 1860 is held to be wholly circumspect and thus equally the alleged recovery of the NOKIA phone Ex.P2 and all the alleged robbed articles collectively Ex.P1 from the possession of the accused/the appellant herein Badshah is held to be circumspect and not established beyond reasonable doubt.

53. In view thereof, the conviction of the accused/the appellant herein Badshah and the sentence imposed on the accused/the appellant herein Badshah vide the impugned judgment dated 04.09.2014 and vide the impugned order on sentence dated 10.09.2014 for the commission of the offences punishable under Sections 120B r/w 396 & 460/396/412 of the Indian Penal Code (IPC), 1860 are thus set aside. Likewise the impugned order on sentence dated 10.09.2014 in relation to the commission of said alleged offences is set aside and the accused/the appellant herein Badshah is acquitted in relation thereto.

54. However, as regards the commission of the offence punishable under Section 14 of the Foreigners Act, 1946, the accused/the appellant herein Badshah has given his address as being Village Dhamsagar, P.O. Moralganj, District Bagerhaat, Bangladesh and there is nothing on record to show that he was staying in India with any valid document. The accused/the appellant herein Badshah has thus been rightly convicted for the commission of the offence punishable under Section 14 of the Foreigners Act, 1946.

55. Taking into account the factum that the accused/the appellant herein Badshah has been in custody ever since the date of his arrest i.e. 09.07.2013 and there is no previous conviction established by the prosecution, and the factum that the accused/the appellant herein Badshah has undergone detention for a period of 3 years and 11 months and 12 days, it is considered appropriate to modify the sentence awarded to the accused/the appellant herein Badshah under Section 14 of the Foreigners Act, 1946 to the period of detention already undergone by him of a period of 3 years and 11 months and 12 days of rigorous imprisonment. The sentence of rigorous imprisonment of 5 years and fine of Rs.10,000/- for the offence

punishable under section 14 of the Foreigners Act, 1946 and in default of the payment of the fine to further undergo simple imprisonment for a period of 6 months is thus modified accordingly.

56. Further, the FRRO is directed to take steps for deportation of the accused/the appellant herein Badshah to his native land on the expiry of the 30 days from the date of this judgment.

57. Criminal Appeal No. 369/2015 is disposed of accordingly. The Registry shall ensure that the copy of the judgment is forthwith served to the appellant and the Jail Superintendent, Tihar.

58. The record of the trial Court be returned forthwith.

ANU MALHOTRA, J

ACTING CHIEF JUSTICE

JUNE 20th, 2017/mk