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

Judgment reserved on: 10th February, 2020
Judgment Pronounced on: 28th February, 2020

+ **CRL.L.P. 620/2019**

STATE (GNCT of Delhi)

..... Petitioner

Through: Ms. Neelam Sharma, Additional Public
Prosecutor for the State with Inspector Jaspal
Singh, PS-Mangol Puri.

versus

SANDEEP

..... Respondent

Through: Mr. M. L. Yadav, Advocate (Amicus Curiae)

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

CRL.L.P. 620/2019

1. By the present Leave Petition filed under Section 378 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'), the State seeks leave to appeal against the impugned judgment dated 09.07.2019 passed by Additional Sessions Judge, North West District, Rohini Courts, New Delhi, whereby the respondent (accused before the Trial Court) was acquitted of the charged offences punishable under Sections 302/394 read with Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC').

2. It would be necessary to set out the brief facts of the case which gave rise to the present Leave Petition. The brief facts of the case, as stated by the learned Trial Court are reproduced as under:

“Brief facts of the prosecution case are that on 24.08.2014 vide DD no. 62B constable Vishal gave information through telephone that one Harish s/o Gauri Shanker r/o Prem Nagar, was injured in a quarrel at NDPL near under pass. One Gyan Prakash had got him admitted in SGM hospital vide MLC No.16091/14. Doctor declared him brought dead. The said DD was marked to SI Bijender Dahiya. On receipt of DD, SI Bijender Dahiya went to SGM Hospital and obtained MLC of deceased. Statement of complainant Gyan Prakash was recorded whereby he stated that deceased Harish Pandey was working with him in a factory of making cooler at DSIDC, Rohtak Road Nangloi. On 24.08.2014 at about 9.20 pm, they were returning to their home after completing their work. When they crossed Underpass and reached NDPL Industrial Area Phase 1 Mangolpuri, two boys were standing on the road. One of those boys entangled his leg with the leg of Harish Pandey (deceased). On this, Harish Pandey (deceased) objected to the said conduct. A quarrel took place between them. One of those boys took out knife from his pocket and stabbed Harish Pandey (deceased) in his stomach. Thereafter, those two boys ran away. He stated that he do not know those boys but can identify them if shown to him.

On the basis of said complaint present case was registered under Section 302 IPC. After registration of FIR, further investigation was handed over to PW-29 IO Inspector Dinesh Kumar. During investigation IO inspected the spot; photographs of the spot were taken; site plan was prepared; post-mortem of dead body was got conducted and dead body was got identified by father and cousin of deceased. During investigation IO recorded supplementary statement of complainant Gyan Prakash whereby he stated that deceased had told him that while

he was stabbed those boys had snatched his mobile phone of make Micromax bearing SIM No.8802324510. The said number as well as IMEI number of mobile handset was put on surveillance and it was revealed that mobile handset of deceased was being used with another number 9582808207. It was revealed that mobile number 9582808207 was issued in the name of one Praveen Tyagi. From inquiry, said Praveen Tyagi informed that he had given the said number to his friend Sahil. Thereafter, Sahil was interrogated who disclosed that he had purchased Micromax mobile from his friend Bharat @ Bali for a sum of Rs.1200/-. Thereafter, said mobile along with SIM was given by him to his friend Sajida @ Simran for use. Sahil got recovered said mobile phone from Sajida. Thereafter at the instance of Sahil, accused Bharat @ Bali was apprehended from his house. He was interrogated and confessed commission of murder in this case. Thereafter accused Bharat got apprehended his co-accused Sandeep from his house.

Disclosure statements of both accused persons were recorded. It was disclosed by both of them that on 24.08.2014, at about 9.30 pm both of them had taken liquor from liquor shop at Industrial Area Phase-1, Mangolpuri. While they were going towards Mangolpuri from Udyog Nagar underpass, they saw two persons. One of them was talking on phone. Accused Sandeep asked accused Bharat to snatch the mobile. Accused Bharat entangled his leg with the leg of person (deceased) who was talking on phone. A quarrel took place. Accused Sandeep caught hold of the person (deceased) who was talking on phone and accused Bharat stabbed that person (deceased) in his stomach with knife. Thereafter, they both ran away from there. Accused Bharat sold the mobile phone to one Sahil for a sum of Rs.1200/-. Accused Bharat further disclosed that he could get recover the knife and clothes worn by him at the time of incidence from his house.

Both accused persons refused for their judicial TIP. During investigation PC remand of both accused persons was obtained. Weapon of offence i.e. knife, SIM card of deceased and clothes of both accused persons were recovered. Subsequent opinion regarding weapon of offence was obtained. Exhibits were sent to FSL. Statements of witnesses were recorded. After completion of investigation, charge-sheet was filed in Court.”

3. To bring home the guilt against the accused Sandeep, prosecution examined 32 witnesses in all. Statement of accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he claimed to have been falsely implicated in the present case and chose not to lead any evidence in his defence.
4. During the trial co-accused Bharat @ Bali expired and vide order dated 23.07.2018, proceedings against him abated.
5. Ms. Neelam Sharma, learned APP opened her submissions by contending that the impugned judgment dated 09.07.2019 was based on conjectures and surmises, the same was against the facts and settled law; that the learned Trial Court failed to appreciate that the conviction can be based on the testimony of sole eyewitness, in present case the testimony of the sole eye witness PW2 is coherent, consistent and cogent and is fully supported by medical evidence and thus the prosecution had been able to prove the charges beyond all reasonable doubt; that there are no material contradictions or improvements or variations in the testimony of PW-2; that the learned Trial Court was misdirected in over emphasizing the minor discrepancies in the testimony of PW-2, the sole eye witness of the occurrence; that the

learned trial failed to appreciate that during the proceedings, both the accused persons refused their Judicial Test Identification Proceedings.

6. She further contended that the learned Trial Court completely erred in discarding the medical evidence and the testimony of Post-mortem doctor PW-5, who had stated that the injury no.1 is possible with the weapon of offence, i.e. the knife recovered at the instance of accused (Bharat); that the learned Trial Court failed to appreciate that the mobile phone of the deceased was duly recovered during the investigation and the prosecution has been able to bring on record as to how the said mobile phone reached to the last user; that the learned Trial Court failed to appreciate the fact that the FIR was registered at 12.40 AM on 25.08.2014, which was approximately 3 hours after the incident and the statement of the sole-eyewitness PW-2 was recorded on the same day as that of the registration of the FIR. Hence, there was no occasion for PW-2 to concoct any false story as he would already have been under tremendous mental pressure and shock at that point of time.
7. Per contra, learned Amicus Curiae supporting the impugned judgment contended that the Trial Court after evaluating the evidence on record, has fairly acquitted the respondent, hence, the same does not warrant any interference by this Court.
8. He further contended that the testimony of PW-2 (Gyan Prakash), who claims to have witnessed the entire incident, has major contradictions and is therefore highly doubtful.
9. He further contended, that the recoveries of the SIM card of the deceased and the clothes of the Respondent at the instance of the

Respondent (Sandeep) were unreliable as the same were recovered after a delay of six days.

10. We have heard the learned counsel for the parties and carefully examined the impugned judgment and the material available on record as well.

SOLE-EYEWITNESS TESTIMONY

11. During the course of the argument, learned APP for the State submitted that the learned trial court erred in ignoring the testimony of the sole-eyewitness, PW-2 (Gyan Prakash) who had deposed about the incident in detail. She further submitted that PW-2 (Gyan Prakash) was an independent eye witness.
12. The case of the prosecution revolves around the sole testimony of eye witness PW-2 (Gyan Prakash). In such cases, the Court before acting upon the testimony, has to be cautious as to whether the testimony of witness is corroborated, either by the other witnesses or by other documentary or expert evidence. It is well settled proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. There is no legal impediment in convicting a person on the basis of the sole testimony of a single witness. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on the value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

13. The Apex Court in ***Veer Singh & Ors. Vs State of UP*** reported in **(2014) 2 SCC 455** has discussed the evidentiary value in the testimony of the sole-eyewitness and has held as under: -

*"21. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. The evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. (Vide *Vadivelu Thevar v. State of Madras* [AIR 1957 SC 614 : 1957 Cri LJ 1000], *Kunju v. State of T.N.* [(2008) 2 SCC 151: (2008) 1 SCC (Cri) 331 : AIR 2008 SC 1381], *Bipin Kumar Mondal v. State of W.B.* [(2010) 12 SCC 91: (2011) 2 SCC (Cri) 150: AIR 2010 SC 3638], *Mahesh v. State of M.P.* [(2011) 9 SCC 626: (2011) 3 SCC (Cri) 783], *Prithipal Singh v. State of Punjab* [(2012) 1 SCC 10: (2012) 1 SCC (Cri) 1], *Kishan Chand v. State of Haryana* [(2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807 : JT (2013) 1 SC 222] and *Gulam Sarbar v. State of Jharkhand* [(2014) 3 SCC 401 : (2013) 12 Scale 504].)"*

14. In ***Prithipal Singh and Ors. v. State of Punjab and Anr.*** reported in **(2012) 1 SCC 10**, it was held as under:

"49. This Court has consistently held that as a general Rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the

number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the Accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.”

15. In view of the settled law, we shall now examine whether the evidence adduced by the prosecution, more particularly the testimony of the sole eye-witness PW-2 (Gyan Prakash), is cogent, trustworthy and can be relied upon. PW-2 (Gyan Prakash) stepped into the witness box and deposed that: -

“The incident took place on 24.08.2014, that was Sunday. On that day after finishing my duty hours, I along with my colleague Harish Pandey for the factory permission at about 9.05 PM. Harish Pandey also used to work as Supervisor in DSIDC, Udyog Nagar and he used to reside in Prem Nagar. I alongwith Harish Pandey was returning to Mangol Puri from DSIDC on foot. After crossing underpass of Udhog Nagar, we reached near the office of NDPL. There was NDPL Office on our right side and an open space of CRPF camp on the left side of that road. We saw two persons were coming from our opposite direction and they stood near a tree which was also on the right side of that road. When we were going on the road and crossed that place where both those persons were standing, one of them, who was tall, entangled his leg win the leg of Harish Pandey to our backside (Usne Apne Pair Se Harish Pandey Ke Pair Me Peeche Se Adangi Laga Di). On this, I and Harish

Pandey objected to the aforesaid conduct of that person. The other person who was short in height gave 2-3 fists blows to Harish Pandey. The tall person caught hold of the hands of Harish Pandey and the short person started taking out something from the right side of his pant. On seeing the conduct of a short person, I became apprehensive and thought he would take out some weapon to kill Harish Pandey. On seeing this, I ran away to a distance of about 10-12 steps and started shouting. I saw that the short person took out knife and stabbed abdomen of Harish Pandey. Both the culprits started taking search of the pockets of the clothes of Harish Pandey and did snatching (Unhone Harish Pandey Ke Sath Cheena Jhapti Ki). Both the offenders fled away from the spot. I raised alarm and requested 1-2 passersby for help but none stopped. I saw one battery rickshaw was coming. I stopped that rickshaw and took injured Harish Pandey to SGM Hospital. The security persons who were present near the gate of SGM Hospital informed police. Harish Pandey was taken to emergency hall on stretcher and he was examined by the doctors. After about 10-15 minutes, the doctors informed me about the death of Harish Pandey. Police reached in SG Hospital. I informed all the facts to police statement was recorded which is now EX.PW-2/A.

On the next day, the relatives of deceased came to SGM Hospital and identified the dead body of Harish Pandey. The dead body was handed over to his relatives after the post mortem examination. Police officials were also present in the hospital. I informed police that Harish Pandey was carrying a mobile phone make MICROMAX black colour with him at the time of incident. However, no mobile phone was recovered from the deceased. I along with IO also visited the spot and I had shown the place of incident to him. I had also shown the place where I was standing and the deceased was stabbed by those two offenders.

After about one month of the incident, I was called by police in PS. About 10-12 persons were shown to me in PS and I was asked to identify the two offenders. I identified both the offenders in PS who had committed murder of Harish Pandey. Both the accused are present in the court today (correctly identified). Witness pointed towards accused Bharat and states that he is the same accused who stabbed Harish Pandey. He further points out towards accused Sandeep and states that he caught hold of Harish Pandey.

I again visited the spot with IO and other staff where the measurements of the spot were taken at my instance.

I can identify the case property, if shown to me.

(At this stage. MHC(M) has produced the case property containing five sealed parcels sealed with the seal of FSL and bearing the particulars of the case. The first parcel bearing serial no. 1 is opened and contents are taken out. It contains one shirt with dark brown stains, on pant, one cut sleeves baniyan with dark brown stains and one underwear. There are one cut on the shirt and on baniyan. The clothes are shown to the witness and after he has seen the same, he is further examined.)

The clothes produced today are the same which were worn by my colleague Harish Pandey at the time of incident. The clothes of deceased are collectively exhibited as Ex.P-4.

The second parcel bearing serial no. 3 is opened and content is taken out. It contains one long knife with wooden handle. The knife is shown to the witness and after he has seen the same, he is further examined.)

The knife produced today is the same which was used by accused persons at the time of commission of offence. The knife is Ex.P-5.

The third parcel in unsealed condition is produced by MHC(M) which is containing one mobile phone make Micromax having one SIM and memory card. The same is shown to the witness and after he seen the same, he is further examined.

The mobile phone make Micromax produced today is the same phone which was being used by Harish Pandey. The mobile phone is already exhibited as Ex.P-1.”

In his cross-examination, he deposed as under: -

“I had stated to the police in my statement that when I and Mr. Harish Pandey reached near NDPL office, we saw two persons were coming from our opposite direction. (Confronted with the statement Ex.PW2/A where it is not so recorded).

I had stated to the police in my statement that the person who was 'tall' entangled his leg with the leg of Harish Pandey (Confronted with the statement Ex.PW-2/A where the description of the boy i.e. tall is not mentioned.

I had stated to the police in my statement that when I and Harish Pandey objected to the conduct of that offender (entangling his leg with the leg of Harish Pandey), then the other person who was short in height gave 2-3 fist blows to Harish Pandey. (Confronted with the statement Ex.PW-2/A where it is not so recorded).

I had stated to the police in my statement that the tall person caught hold the hands of Harish Pandey and the short person started taking out something from the right side pocket of his pant and on seeing the conduct of that short person I became apprehensive and thought that he would take out some weapon to kill Harish Pandey and I ran away to a distance of about 10-12 steps and started shouting. (Confronted with the statement Ex.PW2/A where it is not so recorded).

I had stated to the police in my statement that I saw that the short person took out knife and stabbed abdomen of Harish Pandey. (Confronted with the statement Ex.PW2/A where the words 'I saw' are not mentioned).

I had stated to the police in my statement that both the culprits started taking search of the pockets of the clothes of Harish Pandey and did snatching (cheena-jhapthi) (Confronted with the statement Ex.PW-2/A where it is not so recorded).

I took the injured Harish Pandey to hospital in a battery rickshaw. After sitting in battery rickshaw I tried to make call to police but at that time the call could not be connected. I did not make any effort second time to call police when I was on the way to the hospital. It took me about 7-8 minutes in taking the injured to the hospital by battery rickshaw. There was no other person in the battery rickshaw at that time except myself. Harish Pandey and rickshaw puller. The rickshaw puller was not known to me. He did not take fare from me. The police did not reach hospital in the presence of that rickshaw puller. I lifted the injured Harish Pandey with my arms from the spot and then boarded the battery rickshaw. On the way to the hospital the head of injured was on my legs. The clothes of the injured got some blood stain however the blood was not oozing from the injuries sustained by him in his abdomen. The surrounding area of the injury in abdomen got swollen and his intestine was visible. I could not try to wrap the injury sustained by Harish Pandey as I was not having any cloth. On the way Harish Pandey was not in a condition to speak anything. Harish Pandey himself came to that place where I was standing at the time of incident of stabbing. At that time, Harish Pandey could speak 3-4 words. He said 'hamara mobile chheen liya aur chaku mar diyaa'. I asked him as to who had stabbed him and snatched his mobile. Harish Pandey replied that the persons who were running had stabbed him and snatched his mobile “wooh jo ladke bhaag rahe haien unhone chaku mara aur mobile cheena”. At that time those boys were at a distance of about 15-20 foot from me. Vol. He told me that the person who had entangled his leg had stabbed him. I did not try to chase those persons who were running from the spot.

On seeing that one person taking out something, I ran away and stood after crossing the road. There was light where I was standing after crossing the road. I had

shown the place to the police where I stood after crossing the road.

I was taken to PS for identification of the offenders. There were about 10-12 persons present in the PS who were shown to me. I identified both the accused persons in PS before the police. IO had also informed me that I had to identify the culprits before Ld. MM during TIP. I went to Rohini Jail for joining the TIP proceedings of accused persons however I was informed that both the accused persons had refused to join the TIP proceedings. This fact regarding refusal of accused persons was informed to me by Inspector Dinesh. Thereafter I returned to my house. I saw both the accused persons, thereafter in the Court.

It is wrong to suggest that I had identified accused Sandeep at the instance of IO of the case. It is wrong to suggest that I did not witness the incident. It is wrong to suggest that I have been falsely introduced as an eye witness by the police. It is wrong to suggest that I reached the spot later on and only removed the injured to the hospital. It is wrong to suggest that I am deposing falsely.

I did not know the address of Harish Pandey. I know the father and younger brother of Harish Pandey. I informed Mr. Kuldeep, relative of Harish Pandey regarding his death. I knew Mr. Kuldeep as earlier he had worked with me. I telephonically informed Mr. Kuldeep regarding death of Harish Pandey. Now, I do not remember the complete mobile number of Mr. Kuldeep due to lapse of time however, it was starting with 880..... My clothes did not get blood stained when I lifted injured from the spot and took him to hospital. The accused who stabbed Harish Pandey was wearing green colour shirt. Again said, he was wearing dark green coloured shirt.

It is wrong to suggest that I did not witness the incident or that I have been falsely planted as eye witness by the police.

I had seen the knife at the spot when it was being taken out by accused Bharat @ Bali. It is wrong to suggest that I did not see the knife at the spot or that I did not see

the incident. It is wrong to suggest that I am deposing falsely.

(At this stage, the Addl. PP has requested for permission to re-examine the witness as he has given a different version regarding the stabbing of Harish Pandey by accused in his examination in chief and cross-examination. Considered. Allowed)”

16. A perusal of the aforesaid testimony of PW-2 (Gyan Prakash) brings out certain doubts with regard to the eye-witness account of PW-2 (Gyan Prakash). In his examination in chief, he has stated that he had witnessed the entire incident taking place, whereas in his cross-examination he stated the following: -

“He said "hamara mobile chheen liya aur chaku mar diyaa". I asked him as to who had stabbed him and snatched his mobile. Harish Pandey replied that the persons who were running had stabbed him and snatched his mobile “wooh jo ladke bhaag rahe haien unhone chaku mara aur mobile cheena”. At that time those boys were at a distance of about 15-20 foot from me. Vol. He told me that the person who had entangled his leg had stabbed him. I did not try to chase those persons who were running from the spot.”.

17. The cross-examination of PW-2 (Gyan Prakash) reflects that he had not witnessed the entire incident and therefore he asked the deceased-victim as to what happened. The testimony of the sole-eyewitness, PW-2 (Gyan Prakash) suffers from inconsistencies and therefore cannot be the sole basis for the conviction of the Respondent.

RECOVERIES FROM THE RESPONDENT (SANDEEP)

18. During the investigation, recoveries were made from the Respondent (Sandeep). Before delving into the veracity of these recoveries we deem it necessary to discuss the law relating to recovery pursuant to a disclosure. In this context, it is relevant to peruse Section 27 of the Indian Evidence Act which reads as follows: -

“27. How much of information received from accused may be proved.— Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

19. In the light of Section 27 of the Indian Evidence Act, 1872 whatever information is given by the accused in consequence of which a fact is discovered only that would be admissible in the evidence, regardless of the fact that such information amounts to confession or not. The basic idea embedded under Section 27 of the Evidence Act is the doctrine of confirmation by the subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from an accused; such a discovery is true and admissible. ***The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes reliable information.***
20. The Apex Court in a catena of Judgments has extensively discussed the law relating to the admissibility of recovered articles at the instance

of the accused and has held that recovery and pointing out memo which directly link to the commission of the alleged offence is relevant and admissible in the eyes of the law. The Apex Court in the case of ***Debapriya Pal vs. State of West Bengal*** reported at (2017) 11 SCC 31 has held as under: -

“10. ...Under Section 27 of the Evidence Act only so much of recovery, as a result of the disclosure statement, which directly pertains to the commission of crime is relevant. Otherwise, such an evidence is barred Under Section 25 of the Evidence Act. Recovery of laptop does not have any bearing. It is neither the weapon of crime nor it has any cause of connection with the commission of crime. The law on this aspect is succinctly said in the case "Jaffar Hussain Dastagir v. State of Maharashtra: (1969) 2 SCC 872 in the following manner:

5. Under Section 25 of the Evidence Act no confession made by an Accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an Accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the Accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the Section is that the information given by the Accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the

discovery of the fact must relate to the commission of some offence.”

(emphasis supplied)

RECOVERY OF SIM CARD OF THE DECEASED AND THE CLOTHES OF THE RESPONDENT (SANDEEP) WHICH HE WAS WEARING AT THE TIME OF COMMISSION OF CRIME

21. Espousing the finding of the Learned Trial Court, learned Amicus Curiae submitted that the recoveries effected from the Respondent (Sandeep) after his disclosure are unreliable as the same were effected after a delay of six days. He further argued that the delay has not been explained and therefore an adverse inference should be taken against such recoveries.
22. With respect to the recovery of SIM card of the deceased and the clothes of the Respondent (Sandeep) which he was wearing at the time of commission of the offence we deem it necessary to peruse the testimonies of PW29 (Insp. Dinesh Kumar) and PW-32 (SI Kailash Kumar). PW-29 in his testimony has deposed as under: -

“On 20.09.2014 I along with complainant Mr.Gyan Parkash went to Rohini Jail. However, it was informed that accused Bharat @ Bali had refused for joining the TIP proceedings.

On 23.09.2014 I obtained two days police custody remand of both the accused persons. During PC remand both the accused persons were taken to the place of incident where they pointed out the crime spot. I prepared pointing out memos which are already exhibited as Ex.PW 18/A and Ex.PW 18/B bearing my signatures at point B. Then, we visited the house of accused Bharat @ Bali which was found locked. We also visited the house of accused Sandeep and it was found locked. We also visited the

house of accused Sandeep and it was also found locked. So, we returned to PS. On that day complainant Mr. Gyan Parkash Tiwari was called to PS. He identified both the accused persons as same who were involved in the offence. I recorded the supplementary statement of complainant Mr. Gyan Parkash and both the accused persons were sent to lock up.

On the next day I, Ct. Vikram and Ct. Ajay took both the accused to the house of accused Sandeep. I requested 4-5 public persons to join the investigation but none joined. One person namely Mr. Guddu Singh, mausa of accused Sandeep became ready to join the investigation. We entered the room situated at third floor of the said house. Accused Sandeep got recovered one SIM card which was kept beneath of the mattress lying on the bed. He disclosed that the said SIM was taken out from the mobile phone of deceased. The SIM was of Aircel company and the words Aircel prepaid and a long number in several digits were written on the said SIM card. This SIM was seized by me vide seizure memo already exhibited as Ex.PW27/A bearing my signatures at point B. Accused Sandeep also produce his clothes i.e one vest and one pant which were hanging on the "khhonti" by stating that these clothes were same which were worn up by him at the time of incident. I prepared the parcel of these clothes and sealed the same with the seal of DK. The clothes were taken into police possession vide seizure memo already exhibited as Ex.PW27/B bearing my signatures at point B. I checked the SIM number of that SIM card got recovered by accused Sandeep. I obtained the mobile phone of one public person and with the help of that mobile phone I checked the SIM number. I called up either on my mobile phone or the mobile phone of Ct. Vikram by that mobile phone for checking the SIM number. The SIM number was matching with that number of deceased. I recorded the statement of Mr. Guddu. I prepared the site plan of place of recovery which is exhibited as Ex.PW29/K bearing my signatures at

point A. Then we went to the house of accused Bharat @ Bali.”

23. Further, the testimony of PW-32 (SI Kailash Kumar) is reproduced below: -

“I was not associated with the investigation in the present case except on 19.09.2014, Accused Sandeep was arrested and his disclosure statement was recorded in my presence at about 2.00pm at his residence itself. IO/Insp. Dinesh Kumar was with me at the time of the above proceedings, I can not assign any reason as to inspite of our being at the house of accused Sandeep and his disclosure qua the his intention to get recovered the SIM and the clothing which was worn by him at the time of incident, we did not try to recover those articles at that time. Vol. Only IO can give the reason. I can not tell the time when those articles were recovered. I can't even tell whether those articles i.e. SIM and clothings were recovered or not in he present case. The disclosure statement of accused Sandeep perhaps in the handwriting of IO/Insp. Dinesh Kumar. At the time of arrest of accused Sandeep from the room, other persons i.e the son of Maasi (maternal aunt) namely Akshay was also present in that room

The landlady was also present there. We did not lock the room while leaving with accused Sandeep Since the cousin of accused and the landlady were present in the room, we left the room opened and went to the hospital for medical examination of the accused

It is wrong to suggest that signature of the accused Sandeep was obtained on blank paper or the same were fabricated into various documents including the disclosure statement. It is wrong to suggest that I am deposing falsely.”

24. A conjoint reading of the testimony of PW-29 (Insp. Dinesh Kumar) and PW32 (SI Kailash Kumar) establish that the investigating officers had recovered the SIM card of the deceased as well as the

clothes of the Respondent (Sandeep) worn by him at the time of the commission of the offence. However, there was a large time lapse of six days between the disclosure statement of the Respondent (Sandeep) and the subsequent recoveries of the SIM card of the deceased and the clothes of the Respondent (Sandeep) for which no cogent explanation has been furnished by the investigating officer. In light of such delay and lack of a cogent explanation by the investigating officer, the recoveries of SIM card and the clothes of the Respondent (Sandeep) cannot be relied upon.

TEST IDENTIFICATION PARADE

25. Further, during the course of argument, learned APP for the State submitted that the learned trial court failed to appreciate that during the proceedings, both the accused persons refused their judicial test identification parade and held that no adverse inference should be drawn based on such refusal.
26. The Hon'ble Apex Court in ***Dana Yadav @ Dahu and Ors. Vs. State of Bihar*** reported in ***AIR 2002 SC 3325*** has discussed the law related to Test Identification Parade and has held as under: -

"5.Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce relevant facts. It says, inter alia, facts which establish the identity of any thing or person whose identity is relevant, in so far as they are necessary for the purpose, are relevant. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused at his trial. The identification of an accused by a witness in court is substantive evidence whereas evidence of identification in

test identification parade is though primary evidence but not substantive one and the same can be used only to corroborate identification of the accused by a witness in court. This Court has dealt with this question on several occasions. In the case of Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh AIR 160 SC 1340 which is a three Judge Bench decision of this Court, Wanchoo, J., with whom A.K. Sarkar and K. Subba Rao, JJ. agreed, speaking for the Court, observed that the substantive evidence of a witness is his statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding or any other evidence. The law laid down in the aforesaid decision has been reiterated in the cases of Budhsen and Anr. v. State of U.P. 1970 Cri LJ 1149, Sheikh Hasib alias Tabarak v. The State of Bihar (1912) 4 SCC 733, Bollavaram Pedda Narsi Reddy and Ors. v. State of Andhra Pradesh 1991 Cri LJ 1833, Ronny alias Ronald James Alwaris and Ors. v. State of Maharashtra 1998 Cri LJ 1638 and Rajesh Govind Jagesha v. State of Maharashtra 2000 Cri LJ 380.

6. It is well settled that identification parades are held ordinarily at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject matter of alleged offence or the persons who are alleged to have been involved in the offence. Such tests or parades, in ordinary course, belong to the investigation stage and they serve to provide the investigating authorities with material to assure themselves if the investigation is proceeding on right lines. In other words, it is through these identification parades that the investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits. Reference in this

connection may be made to the decisions of this court in the case of Budhsen, (supra), Sheikh Hasib (supra), Rameshwar Singh v. State of Jammu & Kashmir 1972 Cri LJ 15 and Ravindra alias Ravi Bansi Gohar v. State of Maharashtra and Ors. 1998Cri LJ 4059 . 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 1958 Cri LJ 698, Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan and Ors. v. State of Kerala 197 9 Cri LJ 919, Mohanlal Gangaram Gehani v. State of Maharashtra [1982]3 SCR 277, Bollavaram Pedda Narsi Reddy (supra), State of Maharashtra v. Sukhdev Singh and Anr. 1992 Cri LJ 3454, Jaspal Singh alias Pali v. State of Punjab 1997 Cri LJ 370, Raju alias Rajendra v. State of Maharashtra 1998 Cri LJ 493, Ronny alias Ronald James Alwaris (supra), George and Ors. v. State of Kerala and Anr. 1998 Cri LJ 2034, Rajesh Govind Jagesha (supra), State of H.P. v. Lekh Raj

and another 2000 Cri LJ 44 and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat 1999 Cri LJ 5013."

27. In our considerate view, there can be two results of test identification parade. Firstly, where the refusal to participate in the test identification parade by the accused is without any justification. Such a refusal is a piece of evidence and the courts can take an adverse inference against the accused that if he would have participated in the test identification parade, he would have been identified by the witness and the refusal can be used to corroborate the dock identification by witness. Secondly, the accused has a justifiable reason to refuse to participate in the test identification parade. Where the accused has justifiable reason, no adverse inference can be taken against him.
28. In the present case, the Respondent (Sandeep) refused TIP on the grounds that he was shown to the witness at the Police Station. The same is corroborated from the testimony of PW-2 (Gyan Prakash) who stated *"After about one month of incident, I was called by police in PS. About 10-12 persons were shown to me in PS and I was asked to identify the two offenders. I identified both the offenders in the PS who had committed murder of Harish Pandey"*. In his cross-examination, he stated *"I was taken to PS for identification of the offenders. There were about 10-12 persons present in the PS who were shown to me. I identified both the accused persons in PS before the police. IO had also informed me that I had to identify the culprits before Ld. MM during TIP"*. In view of the above facts, the Respondent (Sandeep) was justified in refusing his test identification parade and therefore no adverse inference can be taken against the Respondent (Sandeep).

CONCLUSION

29. In view of the above facts, we can conclude that the testimony of the sole-eyewitness i.e. PW-2 (Gyan Prakash) is accompanied by major contradictions and is therefore unreliable. In addition, the recovery of the SIM card of the deceased and the clothes of the Respondent (Sandeep) are after a long delay of six days, therefore, the recoveries effected at the instance of the Respondent (Sandeep) are unreliable. Moreover, we find that the refusal to participate in the test identification parade by the Respondent (Sandeep) is justified and no adverse inference can be drawn against the Respondent (Sandeep). Consequently, the prosecution has failed to establish its case against the respondent beyond reasonable doubt and he is entitled to benefit of doubt.
30. We therefore do not find any illegality or perversity in the reasoning given in the impugned judgment. The learned trial court has taken a holistic view in the matter and carefully analysed the entire evidence placed on record.
31. Accordingly, no ground to interfere with the impugned judgment is made out and the leave petition is dismissed.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

FEBRUARY 28, 2020
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