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Rakesh Kumar Vs. State

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Court : Delhi

Decided On : May-30-2014

Judge : Kailash Gambhir

Appellant : Rakesh Kumar

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on: May 30, 2014 + CRL.A. 513/1998 RAKESH KUMAR Through: ..... Appellant Mr. K.B. Andley, Senior Advocate with Mr. M.L. Yadav, Advocate versus STATE Through: ..... Respondent Ms. Richa Kapoor, Additional Public Prosecutor for the State CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
KAILASH GAMBHIR, J1 By this appeal filed under section 374 of Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.), the appellant seeks to challenge the impugned judgment dated 17.10.1998 and order on sentence dated 27.10.1998 passed by the learned Additional Sessions Judge, whereby the appellant is convicted for committing an offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as IPC) and was sentenced to undergo rigorous imprisonment for life, together with payment of fine of Rs.1,000/- and in default of payment of fine, he has been sentenced to further undergo simple

imprisonment for a period of one month.

2. The germane case of the prosecution in brief is summarized as under:

Deceased Nirmala was a resident of House no.B2/44 (third floor), Lajpat Nagar. She was residing at the said address with her daughter Madhavi. Her sister Poonam used to visit her as she was doing the course of Hotel Management and Nirmala used to help her with her projects. On the night of 28/29.01.1994, one Pankaj Arora and Pankaj Bhalla were invited on dinner at their residence. They left at 12 in the night and Poonam left the house at 10:30 a.m. next morning. When she returned at 3:30 p.m., she found the door towards the stairs open and found it unusual. When she entered the house, she found Nirmala lying on the kitchen floor in a pool of blood with a cut around her throat. Madhavi was lying over Nirmala with a cut on her neck. Madhavi rushed towards Poonam as soon as she saw her, and Poonam took her to the clinic of Dr. Bhatia. Meanwhile, Devender, brother of Poonam arrived there and Madhavi was taken to AIIMS at 5 p.m. Report vide D.D. No.11-A was lodged at the police station, Lajpat Nagar regarding the commission of murder at the top floor of House No.43, Lajpat Nagar at about 4:05 p.m. and that injured Madhavi had been taken to AIIMS. Sub Inspector Satpal and Constable Raju Ram reached the spot where they found the dead body of deceased in the kitchen in a pool of blood. They also found a razor in the kitchen and a yellow frock in the courtyard. On information through Constable Vikram Singh, they reached AIIMS at 5 p.m. and found Madhavi admitted there. Madhavi was declared unfit to make statement and thereafter they recorded the statement of Poonam on the basis of which F.I.R under Section 302/307 IPC was recorded. On 11.2.1994 the accused Rakesh surrendered in the court by making application. Accused Ram Sewak was identified by accused Rakesh near the Yamuna bridge towards Gandhi Nagar side and was arrested. After completion of investigation, charge under Sections 302/34 IPC read with 324/34 IPC and separate charge under Section 397/348 IPC and alternate charge under Section 404 IPC were framed.

3. To prove its case, the prosecution examined as many as 29 witnesses. The statement of the appellant was recorded under Section 313 Cr.P.C. The accused

was confronted with the entire incriminating evidence adduced by the prosecution and in response to the various questions put to him, the accused pleaded his innocence and false implication.

4. On behalf of the Appellant - Rakesh Kumar, arguments were addressed by Mr. K.B. Andley, Ld. Senior Advocate. The State was led by Ms. Richa Kapoor, learned Additional Public Prosecutor.

5. Addressing arguments on behalf of the appellant Mr. K.B. Andley, Senior Advocate argued that the prosecution utterly failed to prove its case against the appellant but yet the appellant has been convicted by the learned trial court for committing an offence punishable under Section 302 IPC. Learned senior counsel also submitted that the impugned judgment and order on sentence passed by the learned trial court are bereft of any sound reasoning and therefore, they are liable to be set aside. Making his submissions good, learned senior counsel submitted that the appellant is neither named in the FIR nor was arrested at the spot so in such circumstances it was incumbent upon the prosecution to have conducted the TIP of the appellant but since no TIP could be conducted by the prosecution due to refusal of the child witness Madhavi to participate in the same, therefore, in the absence of his identification, the appellant could not have been prosecuted and then convicted for an offence which he never committed. Learned senior counsel also submitted that the appellant was shown to the child witness - Madhavi in the Police Station and therefore identification of the appellant by Madhavi during the court proceedings has no evidentiary value. Learned senior counsel also submitted that conviction of the appellant is solely based on the evidence of the child witness Madhavi and as per the settled legal position, the testimony of a child witness has to be carefully scrutinised before the same is relied upon. Learned senior counsel further argued that PW-4 - Madhavi in her examination-in-chief failed to give any details of the incident as to how and when the entry of the assailant had taken place and what transpired after their alleged entry in the house and then what led to the alleged commission of crime by the assailants. In the absence of any such details, contention raised by the learned senior counsel was that no reliance can be placed on the testimony of a child witness to base the conviction of the appellant.

6. Learned senior counsel also argued that the alleged recovery of ornaments on 19th February 1994 at the instance of the appellant, pursuant to his disclosure statement dated 14th February 1994 cannot be relied upon as no disclosure statement has been made by the accused. Learned senior counsel also submitted that the alleged disclosure statement of 14 th February 1994 was fabricated by the police after taking the signatures of the appellant on blank papers and this fact gets support from the personal search memo which was prepared on 14th February 1994. Learned senior counsel also argued that at the time of TIP of the articles/ornaments which were allegedly recovered from the appellant and the other coaccused separately but the same were found sealed in one sealed packet which is not possible as the same were recovered on different dates i.e. after a gap of two days.

7. Learned senior counsel also submitted that on the same set of evidence, learned trial court has acquitted the co-accused Ram Sewak on the premise that the statement of Madhavi was not found wholly reliable but so far as the appellant is concerned, he has been convicted based on the statement of Madhavi on the same set of evidence. Counsel thus contended that the co- accused Ram Sewak was given benefit of doubt on the same set of facts and evidence and therefore the appellant cannot be treated differently to fasten his guilt.

8. Learned senior counsel also submitted that the learned trial court has already acquitted the appellant for the offence punishable under Section 397/398/34 of IPC but, yet based on the same evidence he has been convicted under Section 302 of IPC. Learned senior counsel also submitted that no motive of the appellant was proved by the prosecution and in the absence of any strong motive, there could be no reason for the appellant to have committed the murder of the deceased.

9. Based on the above submissions, learned senior counsel for the appellant strongly urged for setting aside the impugned judgment dated 17.10.1998 and order on sentence dated 27.10.1998 passed by the learned Additional Sessions Judge. In support of his arguments, learned counsel for the appellant placed reliance on the judgment of the Apex Court in:a) 10. Radhey Shyam v State of

Rajasthan, 2014 (3) SCALE7Per contra, Ms. Richa Kapoor, Ld.Additional Public Prosecutor for the State submitted that the case of the prosecution is based on direct evidence of an injured witness - Madhavi (PW-4) and no needle of suspicion can be raised on her testimony who not only had witnessed the appellant committing the said crime of committing murder of her mother but got herself injured at the hands of Ram Sewak.

11. Learned APP also argued that the TIP is not a substantive piece of evidence and therefore, even in the absence of TIP, there was sufficient evidence proved on record by the prosecution to inculpate the appellant for committing the murder of the deceased. Learned APP also submitted that the said child witness - Madhavi could not participate to identify the appellant in TIP because she got frightened on seeing the atmosphere of the jail and also when she was asked to take three rounds of the queue formed to identify the assailant. Learned APP further submitted that the child witness suddenly started weeping bitterly and then tried to run out of the room. Learned APP also submitted that the frightened conduct of the child witness was taken into consideration by the Magistrate and she was allowed to leave the place without conducting TIP Proceedings.

12. Learned APP further submitted that the said child witness had recognised the appellant during the course of the proceedings and there can be no reason to disbelieve the child witness who had clearly seen the appellant committing the crime on the date of the incident. Learned APP also argued that the appellant was not a new face to the child who earlier also had been visiting the house of the deceased, as per the deposition of Madhavi (PW-4).

13. We have heard learned counsel for both the parties at a considerable length and given our thoughtful consideration to the arguments advanced by them. We have also gone through the records of the learned trial court.

14. The case of the prosecution is primarily based on the testimony of an injured child witness Madhavi who entered into the witness box as PW-4. On the date of incident this child Madhavi was the only one who was present alongwith her mother - Nirmala. She was studying in second standard and was of 7 years of age on the date of the crime. The statement of Madhavi was recorded by the police

under Section 161 Cr.P.C. and later she was examined in court as PW-4. This witness fully supported her statement recorded under Section 161 of Cr.P.C. in her court deposition. As per her statement, she gave a clear and vivid account of the incident which had occurred on 28/29.01.1994. The learned trial court had referred to the following portion of the deposition as made by PW-4 and the same can be reproduced as under:

.....the day blood oozed out from the mother. On that day persons had visited the house. Firstly, two persons came. They had visited to correct the drain. They demanded from the mother money for cement. I do not know the amount. They want away after getting money for cement. Later three persons came with cement. Two persons started repairing the drain inside and one was standing outside in balcony. Other two were repairing the drain in the 2nd balcony. I was playing games in the room..... I saw these two who were repairing the drain were going towards the kitchen. In the kitchen my mother was preparing meal. Suddenly I heard cry of mother. I said I am coming. As soon as I moved towards kitchen one person caught me and closed my mouth. This was that man, who was standing alone in the balcony, that man is accused Ram Sewak present in the court. The witness told of her own by pointing out at him. Catching my mouth he took me in the kitchen killed me and my mother. Accused Ram Sewak had beaten me. Accused Rakesh whom the witness pointed out and one more healthy and wheatish (sawla) they killed my mother. After some time I went inside to wear chappal, then these people were not there. I went towards stairs so that someone may save. Suddenly I felt giddy then I went to the mother and fell over her, when I fell down over the mother she was not speaking. After about 1/2 an hour maternal aunt came. Seeing her I stand up. She took me to clinic. I was injured at the neck and the forehead. Blood was oozing out. On the neck I was hit by Ram Sewak accused.....

15. The said child witness was cross-examined at length by the defence but nothing could be elicited by the defence to controvert or rebut her statement. Before recording her statement, the learned trial court put certain questions to test the competence and intellect level of the witness and the court was fully satisfied after finding that she could give rational answers to the questions put to her and

thereafter her deposition was recorded by the court. PW-4 Madhavi was nine and half years of age at the time of her court deposition.

16. Under Section 118 of the Indian Evidence Act, there is no age prescribed to test the competence of a witness. The section gives right to all persons to testify and it is only where the court finds that any such person is prevented from understanding the questions put to him or from giving rational answers to the questions because of tender years, extreme old age, disease, whether of body or mind or any of the same kind, he or she may not be considered competent to testify before the court. There is no prohibition of age or any minimum age prescribed so far the competency of a witness giving his evidence is concerned.

17. The Honble Supreme Court in the case of Dattu Ramrao Sakhare Vs. State of Maharashtra, (1997) 5 SCC341 while dealing with the competency of a child witness made the following observations:

A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.

18. One of the main arguments raised by the learned counsel for the appellant was that the testimony of the child witness has to be carefully scrutinised and it may not be safe to base the conviction of the appellant solely based on the evidence of the child witness. To support his arguments learned counsel for the appellant has relied upon the recent judgment of the Apex Court in the case of

Radhey Shyam (supra). In this case, before the Apex Court the child was of ten years of age. After analysing the testimony of the child the court found that he had changed his versions frequently and therefore a doubt was created as to whether he really saw the incident. The court also observed that if as per the deposition of this child witness if throats of two children were cut, it was inconceivable that he would not have heard the cries of the children. It is in this background of incoherent and conflicting version of the child witness, the Apex Court took a view that in a such like situation it is difficult to place reliance on the testimony of the child witness and it would be necessary to look for corroboration to his evidence from evidence. The court further found that the other prosecution evidence did not corroborate the evidence of the child witness and it is therefore difficult to rely upon the evidence of such a child witness. In this very judgment the court placed reliance on previous judgment of the Apex Court in the case of Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat, reported in (2004) 1 SCC64where also the court considered the evidentiary value of the testimony of child witness and observed as under:

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge who notices her manners, her apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as her understanding of the obligations of an oath.

19. The Apex Court in the same judgment also referred to the case of Panchhi and others vs. State of UP, reported in (1998) 7 SCC177 The relevant para of the same is are reproduced as under:

It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on.

20. We may also usefully refer to the observations of the Apex Court in State of U.P. vs. Krishna Master, AIR 2010 SC3071which in it was held as under:

There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

21. In Nivrutti Pandurang Kokate vs. State of Maharashtra, AIR 2008 SC1460 the Honble Supreme Court dealing with the child witness has observed as under:

10. ..7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

22. As can be culled out from the legal principles enumerated by the Apex Court in the aforesaid judgment and various other judgments, the testimony of the child witness has to be carefully scrutinised before the same is believed by the court and if the court comes to the conclusion that the testimony of the child is found reliable, trustworthy and truthful, then the same cannot be discarded on the mere premise that the witness happened to be a child witness. Undoubtedly, the child witnesses are amenable to tutoring and often live in a world of make belief but this would not mean that a child who is able to give a credible account of the incident or any fact concerning the crime and has evidence by the court is found to be of unimpeachable character but yet be not been taken into consideration because of the age of the child witness. The only precaution which the courts are required to take is to ensure that such a child witness is free from any kind of tutoring or influence and his/her testimony also finds adequate corroboration. Once the testimony of the child witness is supported by other evidence on record, then the same can be accepted without any kind of obstacle or hesitation.

23. In the facts of the present case, the child has not only seen the crime herself, but was a victim of the crime herself, having received injuries on her neck and forehead. The MLC of this child witness is proved on record as Ex. PW- 18/A, in the deposition of PW-18, Dr. Pankaj Hari. It is a settled legal position that in a case where the presence of injured witness at the place of occurrence is natural and indisputable then the evidence of such an injured witness should be attached highest testimonial value. The reason for attaching more credence to the testimony of an injured eye witness is that an injured person would not normally falsely implicate the accused and leave out the real culprit of the crime.

24. In State of Uttar Pradesh vs. Naresh and ors., (2011) 4 SCC324 the Apex Court has observed as under:27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an

injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide Jarnail Singh v. State of Punjab, Balraje v. State of Maharashtra and Abdul Sayeed v. State of M.P.) 25. In another judgment in Abdul Sayed vs. State of Madhya Pradesh, (2010) 10 SCC259 the Honble Supreme Court has observed as under:

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

26. On the point of special evidentiary status accorded to the testimony of an injured witness, the Honble Supreme Court in Jarnail Singh v. State of Punjab, (2009) 9 SCC719 observed as under:Darshan Singh (PW4 was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

22. In State of U.P. v. Kishan Chand a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the

injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana). Thus, we are of the considered opinion that evidence of Darshan Singh (PW4 has rightly been relied upon by the courts below.

27. On the point of evidentiary value of injured witness, the Honble Supreme Court in State of Madhya Pradesh v. Man Singh (2003)10 SCC414has observed as follows:

The evidence of injured witnesses have greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. Merely because there was no mention of a knife in the first information report. That does not wash away the effect of evidence tendered by the injured witnesses PWs 4 and 7. Minor discrepancies do not corrode credibility of otherwise acceptable evidence. The circumstances highlighted by the High Court to attach vulnerability to evidence of the injured witnesses are clearly inconsequential. Though, it is fairly conceded by learned counsel for the accused that though mere non-mention of the assailants' names in the requisition memo of injury is not sufficient to discard the prosecution version in entirety, according to him it is a doubtful circumstance and forms a vital link to determine whether prosecution version is credible. It is a settled position in law that omission to mention the name of the assailants in the requisition memo perforce does not render prosecution version brittle.

28. The Apex Court in State of U.P. v. Kishan Chand reported in (2004) 7 SCC629 has discussed the testimony of an injured witness in the following words:

The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross- examination and nothing can be elicited to discard his testimony, it should be relied upon.

29. As can be seen from the above discussion there can be no reason to dispute the presence of PW-4 - Madhavi at the time of commission of the crime and the fact that she herself had sustained injuries at the hands of one of the assailants lends support to her testimony that she had personally seen all the three

assailants who were present and involved in carrying out the murder of her mother and to cause injuries to her. PW-4 - Madhavi was subjected to lengthy cross-examination and this child of nine and half years gave very convincing and satisfactory answers to all the questions put to her during her cross-examination and nothing could be elicited to disbelieve or discard her testimony. She denied the suggestion given by the defence that she had identified the assailant because the assailants were shown to her by the police. She categorically denied the suggestion of the defence that on 19th February 1994, Rakesh was brought by the police to her residence so that in court she could tell that he was the person who had killed her mother. She also denied the suggestion of the defence that her father had sent two persons to commit the said crime because of the marital discord between her father and mother. This nine and half years old girl gave correct answers to all the material questions put to her by the defence in so far as the material aspects of the prosecution case are concerned. We thus find no reason to disbelieve or doubt her testimony.

30. Learned counsel for the appellant laid much stress on his argument that the prosecution had failed to conduct Test Identification Parade of the appellant and therefore in the absence of his identification, the appellant cannot be convicted for such a serious offence. The Test Identification Parade is conducted by the police to test the veracity of the witness on the question of his/her capability to identify the person alleged to be an assailant. The evidence of Test Identification Parade however can never be used as substantive piece of evidence but it can be used as a corroborative piece of evidence. In Dana Yadav vs. State of Bihar, AIR (2002) 7 SC295the Apex Court took a view; in case either prayer for holding the Test Identification Parade is not granted or granted but no Test Identification Parade held, the same ipso facto cannot be a ground for throwing out the evidence of identification of an accused in Court when evidence of then witness, on the question of identity of the accused from before, is found to be credible. Then main thrust should be answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in affirmative, the fact that prayer for holding TIP was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in Court in relation to identity of the accused. But if,

however, such evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in the Court.

31. The Apex court eloquently summed up the principles behind holding Test Identification Parade in a recent case of Prakash v. State of Karnataka 2014 (5) SCALE83. The relevant paragraphs have been reproduced as under; ..the Court quotes Professor Glanville Williams from an eminently readable and instructive article in which he says: ...if the suspect objects [to an identification parade]. the police will merely have him "identified" by showing him to the witness and asking the witness whether he is the man. Since this is obviously far more dangerous to the accused than taking part in a parade, the choice of a parade is almost always accepted. With reference to the second type of identification evidence, Professor Glanville Williams says: Since identification in the dock is patently unsatisfactory, the police have developed the practice of holding identification parades before the trial as a means of fortifying a positive identification...The main purpose of such a parade from the point of view of the police is to provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual prosecution. The advantage of identification parades from the point of view of the trial is that, by giving the witness a number of persons from among whom to choose, the prosecution seems to dispose once and for all the question whether the Defendant in the dock is in fact the man seen and referred to by the witness. A similar view was expressed by the Canadian Supreme Court in Mezzo v. The Queen [1986]. 1 SCR802 An Identification parade is not mandatory, nor can it be claimed by the suspect as a matter of right. The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim, then an identification Parade is desirable unless the suspect has been seen by the witness or victim for some length of time. However, if the suspect is known to the witness or victim or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media, no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise

established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence.

32. Similarly, the case of Ashok Debbarma @ Achak Debbarma v. State of Tripura, 2014 (3) SCALE344reiterated the position taken by the Apex Court in the case of Malkhansingh and Ors. v. State of Madhya Pradesh, AIR 2003 SC2669 which is reproduced as under:

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.

33. In another case reported as Vijayan v. State, 1993 CriLJ2364(Mad), the Honble Supreme Court took a view that it cannot be held that in the absence of Test Identification Parade, the evidence of the eye witnesses identifying the accused for the first time during trial would become inadmissible or totally useless. The credence of such evidence would always depend on the facts and circumstances of the case.

34. In State (NCT) vs. Navjyot Sandhu, AIR 2005 SC3820the Apex Court held that the failure to hold Test Identification Parade cannot be a ground to eschew the testimony of witnesses whose evidence was concurrently accepted by the trial and appellate court.

35. In the background of legal principles discussed as above, legal position which emerges is that the failure to hold Test Identification Parade by itself cannot discredit the testimony of an eye witness, where it finds sufficient corroboration from the other credible evidence proved by the prosecution. In the facts of the present case, the defence cannot raise a plea that the police did not take steps to conduct the Test Identification Parade of the appellant for the purposes of his identification by the eye witness PW-4 Madhavi. The accused had surrendered before the court on 11.2.1994 and he made a request for conducting his Test Identification Parade. The TIP proceedings were accordingly fixed by the learned Magistrate (PW-27) on 16.2.1994. Since necessary arrangements were not made by the Jail authorities to conduct the Test Identification Parade therefore on 16th February 1994 Test Identification Parade proceedings could not be held. The date for conducting TIP proceedings was fixed as 18th February 1994 at 2 PM. On 18th February 1994 all the necessary arrangements were made by the jail authorities to conduct the TIP of the accused. PW-4 Madhavi was brought to the jail and she was asked to take three rounds of the queue of 10 under trials hurriedly to identify the appellant, if she could. This child witness suddenly started weeping bitterly and then abruptly tried to run away out of the room, where the TIP proceedings were being held. The child was offered a glass of water but the witness wanted to go outside. She again started weeping more loudly despite the fact that the judicial officer tried to persuade her, but she was getting out of control. The child made a request that she did not want to join the identification proceedings and therefore, she should be permitted to go outside. The judicial officer allowed the child to leave the proceedings and in the proceedings, he observed that the child was too young to join the Test Identification Parade and therefore the witness has left the room without joining the identification proceedings. Before the commencement of the proceedings also, the judicial officer had observed that on 16th February 1994, the behaviour of the child was unusual and on the day of the TIP also she seemed to be frightened but still had assured him that she will identify the accused. He also

observed that the witness stated that she would not go alone inside Tihar Jail. It can be seen from the above that the steps for conducting the Test Identification Parade proceedings were taken by the police but it was because of the atmosphere in the Jail which was surrounded by the police officials and the under trials, coupled with the fact that she was an eye witness to the brutal murder of her mother at the hands of the accused and has seeing him. It was obvious that the child got terrified and started weeping to immediately leave the room. PW-27 - Mr. D.K. Sharma, Ld. MM, who had conducted the Test Identification Parade proceedings in his deposition referred to such conduct indicating the harassment of the child by deposing that as far as I remember that the witness being of tender age could not adjust herself in that atmosphere. This child witness (PW4) in her court deposition also stated that she got frightened in the jail with the apprehension that the assailant may kill her. She also deposed that she was not frightened in the court since she had grown up now and did not have any fear from anything. In the light of these facts, we cannot subscribe to the contention raised by counsel for the appellant that in the absence of the TIP proceedings, he should not be held guilty for committing the said crime.

36. Dealing with the next contention raised by the learned counsel for the appellant that the alleged recovery of ornaments on 19 th February 1994 at the instance of the appellant pursuant to his disclosure statement dated 14th February 1994 cannot be relied upon, firstly because there was no disclosure statement made by the appellant on 19.2.1994, secondly the disclosure statement dated 14.2.1994 was fabricated by the police after taking his signatures on blank papers and thirdly, the articles/ ornaments which were allegedly recovered from both the accused persons were found sealed in the same parcel. The accused in this case had surrendered before the concerned Magistrate on 11th February 1994 and his disclosure statement was recorded on 14th February 1994 He requested for conducting his Test Identification Parade which was ordered to be held on 16th February 1994. Since Test Identification Parade of the accused was to be conducted, as such, he was remanded to judicial custody. The Test Identification Parade could not be held on 16th February 1994 and the same was fixed for 18th February 1994, but on that day also Test Identification Parade proceedings could not be held due to child getting frightened of the jail atmosphere and its

surroundings. Since recovery was to be conducted at the instance of accused in pursuance to the disclosure statement made by him, as such, on 19 th February 1994 itself an application was moved by the Investigating Officer seeking his police remand which was granted. Thereafter, on 20th February 1994 the accused was taken to District Ghonda, U.P. to recover the said ornaments as per disclosure statement made by him.

37. PW-26 - Sub-Inspector Satpal Singh left for that place alongwith the other police officials and he also took the assistance of one local police constable - Triveni Chobbey from the Balpur Police post. The accused - Rakesh got recovered one nose pin, one pair of tops and one small size chaku from a chappar/jhuggi in front of his house. The recovery of these ornaments were duly proved by the prosecution with the help of the testimonies of three witnesses, i.e., PW-24 - Triveni Chobbey, PW-26 Sub-Inspector Satpal Singh and PW-17 - Jai Bhagwan. Recovery of the said ornaments were believed by the learned trial court and view taken by the trial court was that the said three police officials and one amongst them was local police official of the area in which the house of the accused was located were competent witnesses in the absence of any hostility attributed to them and therefore, there is no reason to disbelieve their testimonies with regard to the recovery of the said ornaments effected by them. Learned trial court also observed that it cannot be accepted that Delhi Police had planted the articles on the accused and had there been such an intention, then at least they would not have taken the exercise of recovering the articles from such a far flung area of eastern Uttar Pradesh. We are thus not persuaded to accept the contention raised by the learned counsel for the appellant to disbelieve the recovery of ornaments in terms of the disclosure statement made by the accused. The variation in the date of recovery of the articles and the disclosure statement is natural because of the intervening TIP proceedings and steps taken by the police to seek police remand of the accused and then taking him to an outstation place.

38. Dealing with the next contention raised by learned counsel for the appellant that on the same set of evidence learned trial court acquitted the accused - Ram Sewak but has held the appellant guilty for committing the offence. To counter this argument of the counsel for the appellant, learned APP for the State placed

reliance on the judgment of the Apex Court in Sunder Singh and others vs. State of Punjab, AIR1962(2) SC221 wherein the Apex Court took a view that the wrong acquittal of an accused person by the learned trial court based on the same evidence cannot come in the way of the High Court to take a different view after considering the whole of the evidence in respect of the other accused person. Undoubtedly, the other co-accused Ram Sewak was also identified by PW-4 Madhavi at the time of her court deposition being one of the assailants, who had caused injuries to her but the learned trial court has given him the benefit of doubt feeling suspicious in the manner in which he was arrested and also the suspected recovery of gold chain from his pocket at the time of his arrest. The suspicions raised by the learned trial court on the story of the prosecution so far the accused Ram Sewak is concerned are not wholly unfounded and unpalatable, yet taking into consideration the import of the judgment in the case of Sundar Singh (supra), this appellant against whom the prosecution has succeeded to establish its case with the help of cogent and clinching evidence cannot claim any benefit of doubt.

39. We also do not find any merit in the contention raised by learned counsel for the appellant that there was no strong motive on the part of the appellant to have committed the said crime. The recovery of stolen gold articles from the possession of the appellant clearly indicates his motive to commit the said crime, although the case in hand is based on the eye witness account of PW-4 - Madhavi and to prove motive in such like cases is hardly of any significance.

40. Before parting with this case, we deem it necessary to give certain directions to the Director General (Prisons), Delhi for making some congenial and conducive environment to conduct the TIP proceedings in a case where the witness happens to be a child below the age of 12 years. There may be many child witnesses like the one in the facts of the present case, who may get frightened and traumatised to the unfriendly and unfamiliar environment of Jail where at every step there is a deployment of police and para-military forces firstly to reach the room meant for conducting TIP proceedings, after passing through several entry points. No normal child can be expected to remain undeterred or un-influenced with such kind of frightening atmosphere surrounded by gun toting police officials and then ultimately coming across the criminals engaged for participation in the Test

Identification Parade. It is very normal for a child to get apprehensive and frightened as has happened in the present case where the child was of below 12 years of age and she got frightened on seeing the atmosphere of the jail and when she was asked to take three rounds so as to identify the accused person, she started weeping bitterly and then tried to run out of the room. = insert the note on Human Rights violation of a child.

41. To understand the prevalent system of conducting Test Identification Parade proceedings, Mr. Sunil Gupta, Law Officer, Delhi Jails was called. He has informed the court that presently the Test Identification Parade proceedings are conducted in a room adjacent to the room of Jail Superintendent where a semi reflective screen has been installed so that any witness can see the persons participating in the Test Identification Parade but not with the same clarity the accused and other persons forming part of the Test Identification Parade can see the other side. He also submitted that even the Magistrate conducting the TIP proceedings also sits on the side of the witness to record the proceedings after he completes the initial procedural formalities.

42. Mr.Gupta has also informed the court that there are three court rooms attached with the Tihar Jail and if the Test Identification Parade proceedings for a child witness are held in any of the court rooms, then the child will not be required to undergo the ordeal of passing through the various entry gates from the main entry gate of the Jail complex to reach the Test Identification Parade room.

43. In the above circumstances and with a view to provide friendly congenial and conducive atmosphere to the child witness, below 12 years of age, we direct the Director General (Prisons) to undertake the following measures:a) In every case where witness is a child below the age of 12 years TIP proceedings shall be held in one of the court rooms attached with the main Tihar Jail so that the child does not enter the main Jail Complex to reach the Test Identification Parade room. b) Installation of semi reflective screen or any other screen or mechanism in a room where TIP proceedings will be conducted so that the child witness is not confronted face to face with the criminals participating in the TIP proceedings. c) A person accused of the offence and the others who may be participating in the TIP

will be explained the procedure and the manner of TIP proceedings to be held in a case of child witness. d) No officer below the rank of Deputy Superintendant of Jail shall accompany the child witness at the time of TIP proceedings and endeavour shall also be made by the Jail Superintendent that, so far as possible only female officer is deployed wherever witness happens to be a girl child for the purposes of identifying the accused person. e) No police official shall be seen in a uniform right from the stage when the child enters the TIP Room and till he/she leaves the premises after the completion of TIP proceedings. The child witness shall be entitled to accompany his parents/guardians or any of his close relatives so as to make the child comfortable before participating for identifying the accused in the Test Identification Parade. f) Endeavour shall be made by Director General (Prisons)/Jail Superintendant that a lady officer who is more humane, sensitive and compassionate is given duty to accompany the child witness. g) The child friendly atmosphere will be created in a room where the child is brought first and the stay of the child will be made most comfortable so that the child finds the place to be attractive and conducive to his/her requirements. h) Necessary arrangements for light refreshment to the general liking of children below the age of 12 years shall also remain in place to keep the mood of the child upbeat.

44. In the light of the above discussion, we are of the considered view that the prosecution succeeded in fully establishing its case with the help of cogent and clinching evidence. The star witnesses of the prosecution case, PW-3 and PW-4 had themselves seen the victim wearing the said gold articles, which were later identified by them at the time of their court depositions. Their testimonies remained unimpeachable and unassailable by the defence and the testimonies of the other police officials further found support from the medical evidence proved on record vide Ex. PW11A and post mortem report proved on record as Ex. PW12A. The case of the appellant has been sufficiently proved and therefore he is not entitled to be given any benefit of doubt. Therefore the conviction of the appellant can be based on the sole testimony of the child witness and therefore the same can be sustained.

45. We are thus of the view that there is no perversity or illegality in the reasoning given by the learned Additional Sessions Judge in the impugned judgment vide

which the learned trial court has convicted the appellant for the offence committed by him under Section 302 IPC. Hence, the impugned judgment dated 17.10.1998 and order on sentence dated 27.10.1998, passed by the learned Sessions Judge are upheld. Finding no merit in the present appeal the same is dismissed.

46. The appellant is on bail. His bail bond and surety bond is forfeited. He is ordered to be taken into custody forthwith.

47. A copy of this order is sent to the concerned Jail Superintendent and to the Director General (Prisons) for information and necessary compliance. Director General (Prisons) to file a compliance report in respect of directions given in para 43 of this judgment, within a period of six weeks. KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

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