

Nawal Kishore Vs. State

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Court : Delhi

Decided On : Nov-02-1982

Reported in : 1983(1)Crimes943; 23(1983)DLT178; 1983RLR146

Judge : Avadh Behari Rohatgi, J.

Acts : Criminal Law; Commonwealth Law; [Indian Penal Code \(IPC\), 1860](#) - Sections 395/397

Appeal No. : Criminal Appeal No. 45 of 1981

Appellant : Nawal Kishore

Respondent : State

Judgement :

Avadh Behari Rohatgi, J.

(1) These are five appeals from the order of the Additional Sessions Judge dated February 20, 1981. This judgment will govern them all.

(2) These five appellants namely, Muksh, Dewan Ghand, Munim Kumar, Kishan Lal and Nawal Kishore were tried for offences under Sections 395/397 of the Indian Penal Code. They were found guilty. They were convicted. Each of them was sentenced to eight years rigorous imprisonment. From their conviction and sentence they appeal to this court.

(3) These are the facts. On November 23, 1977 at about 9.15 p.m. a robbery was committed at the shop of Dr. L.D. Malhotra in Beedan Pura, Karol Bagh, New Delhi. Dr. Malhotra lodged a first information report on November 24, 1977 at 11.00 a.m. He complained that at his clinic on November 23, 1977 at night when he had finished his day's work and was leaving two persons entered his shop. One of them requested him to give some medicine to his companion who was wrapped in a white sheet but whose face was not muffled. These two persons were identified as Munim and Mukesh by the doctor in court. The doctor refused to give medicine as it was his closing time. Then both the accused left the clinic. After two or three minutes these two persons Along with three other persons re-entered the shop. These were identified as Dewan Ghand, Nawal Kishore and Kishan Lal in court. Doctor's compounder, Harish Ghander, was proceeding towards the gate and the doctor was following him. Mukesh gave a push to Harish Ghander. He whipped out a knife and made him sit on the chair. Munim also stood by the side of the compounder. Dewan Ghand had a revolver in his hand. Kishan Lal was armed with a knife. They motioned the doctor to go back, to the examination room. Nawal Kishore bolted the door from inside and pulled down the curtains on the window. He was also armed with a knife. The doctor was frightened seeing these men all around him. He obeyed them and sat on the chair. Dewan Ghand then showed him a loaded revolver. Four bullets were in the chamber and one socket was vacant. Dewan Ghand and Kishan Lal asked the doctor to hand over to them whatever was in his possession. The doctor took out the purse from his pocket. He handed over Rs. 700.00 which he had in the purse. The accused persons then searched the purse to ascertain whether it contained more money. Then they asked the doctor to hand over the watch which he did. Then the accused asked him to hand over the key of the drawer which he gave to him. Kishan Lal went to the outer room and opened the drawer. He took out Rs. 400.00 from the drawer. Munim and Mukesh divested Harish Ghander compounder of his watch and Rs. 15.00 which he had on his person. Thereafter all the five accused left the clinic threatening the doctor that if he reported the matter to the police he would be done to death. After that the doctor and the compounder left for their respective houses. The doctor was mortally afraid. He did not make any report to the police until next morning. Before doing so he consulted his brother-in-law Harbans Lal Talwar and

his own brothers. They all advised him to lodge a report. After talking to them he decided to lodge the report. He went to the shop where he met Talwar and his brothers. The doctor, Harish Chander compounder, and these persons then went to the police station and lodged the report.

(4) A large number of witnesses were examined by the prosecution. The trial judge mainly relied on the evidence of the doctor and his compounder. He found them trustworthy witnesses. He based his conviction and sentence primarily on their testimony.

(5) The first and foremost question in this appeal is about the identification of the accused persons. There was no test identification parade. An identification parade was fixed for December 5, 1977 in jail. But the accused refused to participate in the identification parade on the ground that they had been shown to the witnesses before. All the accused were identified by the doctor and his compounder in court as the persons who had robbed them on the night of 23rd November, 1977. The question is : Has there been a proper identification of the accused persons on which a conviction can be safely based? In the evidence of the prosecution witnesses same facts are prominent. Harbans Lal Talwar (Public Witness 5) in his evidence says: All the accused were sent to the shop of Dr. Malhotra separately'. Three of the accused namely, Mukesh, Kishan Lal and Dewan Chand were arrested on November 24, 1977. Nawal Kishore and Munim were arrested on November 25, 1977 from a park near the cremation ground. Talwar in his evidence says: 'wherever we went the arrested accused were also with us'. Then he says: 'It is correct that after three accused had been arrested on 24-11-77 we went to the shop of Dr. Malhotra.....'. Then he says, 'when we came to the shop of Dr. Malhotra, Mukesh was also brought to the shop but kept outside.' Jai Prakash (Public Witness 7) in his evidence says: 'when we went to arrest the accused Dr. Malhotra was with us. At that time I did not know the name of Dr. Malhotra, but later on I came to know that he was Dr. Malhotra. Whenever the accused were arrested Dr. Malhotra never used to say that he was the same accused.' The doctor in his evidence has certainly denied that the accused were shown to him by the police. But the evidence of Talwar and Jai Prakash clearly shows that Mukesh, Kishan Lal and Diwan Chand were shown to the doctor on 24-11-77 and that he

did not say that at the time of their arrest that he identified these persons and that they were the very same persons who came and robbed him. Both the doctor and the compounder in their evidence say that on December 10, 1977 five accuse

(6) Since an identification of the accused by a witness while he is in the dock is only of trifling value it is essential that there should be an identification parade. It is improper to show the witnesses the accused alone and ask : 'Is that the man'? There is an obvious danger of the identification simply being based on the witness's assertion that the police have got the correct person. A conviction can be quashed if the accused is pointed out to the witness by the police before an identification parade. 'Identification seems to be a matter on which personal pride has a strong effect: the witness often resents it when his ability to recognize someone is questioned.' (Prof. Glanville Williams: The proof of Guilt 3rd Ed. pp. 88) The following is a helpful exposition of the law on the subject. 'The accuracy of a witness's observation depends first, of course, upon his eyesight. Secondly, it will be affected by the circumstances in which he saw the person in question ; the state of the light, how far away he was, whether he was able to see him from an advantageous position, how long he had him under observation. Thirdly, impressions of appearance may be distorted by the witness's prejudices and preconceptions. He may expect people who behave in a particular way or belong to a certain class to have some physical characteristic, which he will ascribe to such a person without having verified his belief by observation. Fourthly, his ability to form an accurate impression will be affected by his state of mind. Did he have any reason to take particular notice or was his attention concentrated upon something else? Did he really see who was there, or did he think he was seeing the person whom he expected to be there? Was he in a state of mind to make a trustworthy observation of anything? Fifthly, the distinctiveness of the persons appearance. The court will be able to observe whether the accused has any peculiar features, but some people look distinctive to one witness and not to another. Thus to a person of one race, everyone belonging to another race tends to look alike, and to a lesser extent the same is true of different age groups. On the other hand, a person well known to the witness may register a distinctive impression even though the witness is unable to mention any peculiar features.

(7) Recollection depends, first) upon the strength of the witness's memory. Very sound and very old people tend to forget more easily than others. Secondly, the nature of the original impression; for example, whether it was accompanied by any unusual incident which made it likely that the witness's impression would be preserved. Striking features are more likely to be remembered than ordinary ones, and if the person in question was known to the witness, he will be able to preserve the shorthand recollection 'I saw X' better than he would remember X's individual features. The time-lag is of course important, and perhaps most crucial of all is the extent to which the witness's original impression had been overlaid by subsequent suggestion and imagination. If a witness is shown a person who is alleged to have been the criminal, he is very likely to make a subconscious substitution of that person's features for those which he actually observed. The more he seems of the accused, the more certain he will become that he is the person whom he actually saw. The same process can happen if the witness is shown a photograph of the accused, or if it is suggested to him that the person whom he saw had certain features. It is because the possibility of suggestion seriously diminishes the value of identification evidence that the courts have insisted upon the holding of identification parades subject to stringent precautions. Convictions may be set aside because, instead of holding an identification parade, the police simply take the accused to the sole identifying witness and ask him whether he is the right man. Evidence of identification in such circumstances can have very little value. The same may be said of the usual question 'Do you see the man in court?' The witness would look very silly if he pointed to anywhere other than the dock. An identification witness should be asked to give a detailed description of the alleged criminal at the earliest possible moment. If there is a delay he is not only likely to forget but may have an opportunity to compare notes with other witnesses, which would diminish the value of his evidence. For the same reasons, an identification parade should be held as soon as possible.

(8) The procedure for the conduct of the parade is largely a matter of police practice, but judges have occasionally suggested rules which should be observed if the accused is not to be prejudiced and the parade is to have maximum probative value. The cardinal principle is fairness to the accused. Care should be taken that the witness does not see the accused in custody before the parade, or

while the parade is being formed. Courts have commented adversely upon witnesses being put into a room with a window through which they might have seen the parade. The prosecution should also eliminate, as far as possible, the chance that someone may have told the witness which man to pick out.

(9) If there are several witnesses, they should be segregated or kept under supervision before the parade to prevent them from comparing notes about the criminal's appearance, and a witness who has completed his identification should not be allowed to rejoin the others'. (Heydon Evidence Cases & Materials-p 94-95).

(10) In *Craig v. R.* , 49 C L R 429, the question of personal identity was considered by the High Court of Australia. An honest witness who says, 'The Prisoner is the man who drove the car,' while appearing to affirm a simple, clear and impressive proposition, is really asserting, (1) that he observed the driver, (2) that the observation became impressed on his mind, (3) that he still retains the original impression, (4) that such impression has not been affected, altered, or replaced by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance but of identity. The fact that the accused were shown to the identifying witnesses before hand seriously discounts the probative value of a positive identification. It is undesirable that witnesses should be asked to identify an accused for the first time in the dock at his trial; and as general practice it is preferable that he should have been placed previously on a parade with other persons so that potential witnesses can be asked to pick him out. There ought to be no prompting or suggestion) however intentional, on the part of the police when they are dealing with potential identification witnesses, who should not be permitted to see the suspect before the parade is held Similarly the suspect should not be described to those witnesses. (Halsbury-Laws of England 4th Ed. p. 199).

(11) In this case the doctor and the compounder are the only identifying eye-witnesses. The conviction is based on their visual identification. Though no doubt a crime was committed, the only issue is whether the accused persons were the criminals. This raises the question of identity. The direct evidence of identification

in court is suspect where there has been no previous identification of the accused by the witness. If there is any degree of resemblance between the man in the dock and the person previously seen by the witness, the witness may very well think to himself that the police must have got hold of the right person, particularly if he has already described the latter to them, with the result that he will be inclined to swear positively to a fact of which he is by no means a witness. The correct procedure is to hold an identification parade before the trial, placing the accused with a sufficient number of other people, leaving the witness to pick him out if he can, without assistance. The rules of the law are devoted to ensuring the most scrupulously fair conduct on the part of the police, and this is why the courts again and again have insisted on holding identification parades whenever the subject of identification evidence has arisen. There are dangers in convicting on evidence of visual identification. 'People have mistakenly identified friends and relations well known to them with sufficient frequency to make them question the propriety of convicting an accused person on nothing more than the visual identification of a single witness who may only have had a fleeting glance of him in poor light.' (Gross on Evidence 5th Ed, p. 59). The Criminal Law Revision Committee in England regarded mistaken identification as 'by far the greatest cause of actual or possible wrong convictions'. (See Gross p. 58) 'The highly reputable, absolutely sincere, perfectly coherent, and apparently convicting witness may, as experience has often shown, be mistaken.' (Devlin-The Judge P. 192).

(12) The crucial question is always about the quality of the evidence. If it is poor the judge should acquit in the absence of supporting evidence. If there are circumstances or items of evidence capable of supporting it, it will be safe to convict. Otherwise the verdict will be unsafe or unsatisfactory. Much depends upon the quality of the evidence in each case. Quality is what matters in the end. (R.V. Turnbull, (1977) Qb 224. 'A capable judiciary', Wigmore has said, 'and an effective jury system (both depending upon a conscientious citizenship and a sound condition of politics) are in the end the only real safeguards of an innocent man' (Wigmore on Evidence 3rd Ed. Volume VII para 2044 page 286). Applying these principles what do we find in this case? There is no description of the features, complexion, or likenesses of the accused in the first information report except that some accused is described as tall and the other short statured and all are

described as young man. There was no identification parade because the accused refused to participate in the parade. It is established on the evidence of Jai Parkash and Talwar that the accused had been shown to the doctor and the compounder before hand. The doctor never picked out the accused nor did he say when he was shown 'These are the men who robbed me'. Similarity of the appearance of the accused persons to that of the culprits is not established beyond reasonable doubt. The quality of the identification evidence is not good. This is the conclusion I have arrived at in this case.

(13) Then there is no evidence that the accused were asked to keep their faces muffled. So the possibility of their being shown to the identifying witnesses cannot be ruled out. On December 10, 1977 they were all taken to the doctor's clinic where they explained their respective roles to the doctor.

(14) I now turn to the identity of articles. Same money was found on the persons of the accused at the time of the arrest. This is ambiguous evidence. Money is not a thing which can be subjected to test identification. (Paras v. State, . The other things recovered are the watchel and a revolver. About the watches the prosecution case is that the robbers robbed the doctor and the compounder of their seiko watches. The doctor's watch was recovered from Nawal Kishore and the compounder's watch was recovered from Mukesh. These watches were given on superdari before the trial commenced. These are Ex. P. 2 and P. 44. There is a lot of confusion in the evidence on the identification of the watches because the court did not have them when the witnesses were giving their evidence. The doctor in his evidence says, 'my watch was of Sieko, automatic day and date, in a golden case, and having a golden chain. It is the same watch which I am wearing now. I had obtained this watch from the court on superdari, but prior to that I had identified the watch before a Metropolitan Magistrate.' In his cross-examination he said this : 'It is correct that the back case of the watch is made of steel and the closing links are also of steel.' 'I have stated before the police in my statement that my watch had a golden case with white dial, automatic, day and date.' Whether the watch had a white dial, or golden dial is not clearly established. No doubt both watches are of Seiko make but that alone will not establish the identity of the articles. Apart from this, the important fact is that Shri Dinesh Dayal, the

Metropolitan Magistrate before whom the doctor and the compounder identified their watches, was not produced in court. His non-production would take the wind out of the prosecution sails as the accused had no opportunity to cross-examine him and to find out when and how many other watches were mixed at the time of the identification. Similarly the compounder says that his watch was of 22 jewels while the watch recovered was of 21 jewels. (See Ex. Pw 5/B). The prosecution case is that the revolver had a barrel of white colour. The seizure memo also describes this as a revolver of white barrel. So does the FIR. But Jai Prakash (Public Witness 7) in his evidence says that the revolver was of dirty green. His answer is emphatic : 'The colour of the revolver was of dirty green. It is wrong to suggest that it was silvery white.' There has been no identification of the revolver by the doctor in court. He was not shown the revolver. He was not asked, 'Was this the revolver?'.

(15) It was said that knives were also recovered from the accused. The doctor in the FIR said that the accused were armed with long knives. At the time of recovery of knives from Nawal Kishore and Munim people from the public were not asked to be witnesses of the recovery. Mahesh Chander SI. and Bhim Singh Inspectors (Public Witness 15 and Public Witness 16) stated that people from the neighbouring houses and some persons sitting in the park were asked to join the raiding party but they refused. Sat Parkash S.I. (PW 14) in his evidence says, 'we did not make efforts to summon any public person'. He has contradicted the statement of Mahesh Chander and Bhim Singh on this point.

(16) The prosecution relies on the finger prints of the two accused namely, Kishanlal and Mukesh. It is said that on the glass in the examination room of doctor's clinic the finger prints were found to be of these two accused. The evidence of finger prints is sloppy, discrepant and damning for the prosecution. The photographer Gharan Singh (Public Witness 1) says that he lifted the finger print from the glass lying on the table in the examination room on 24-11-1977. He has categorically denied that he took the glass to the police station. The other witnesses of the prosecution have deposed that photographs of the finger prints were taken on 26-11-77 at the police station after the glasses had been removed from the clinic to the police station in wooden boxes. The in charge of Malkhana

says that the wooden boxes were never opened. So we do not know whether finger prints were taken on 24-11-1977 at the clinic or on 26-11-77 at the police station.

(17) Then there is the damning evidence of scaling. The prosecution case is that the parcels were sealed and the seal was given to Talwar. But Talwar in his evidence says, 'no seal was given to me.' So if the seal remained with the police the recovery becomes tainted.

(18) The next thing which arouses suspicion in this case is that the police swung into action even before the Fir was lodged. The incident took place at 9.15 p.m. on 23-11-77. The doctor says that he was totally afraid and therefore did not make any report to the police station though it is close by. He went home. He told his wife as to what had happened. His wife advised him to lodge the report. He said to her : 'I shall do so in the morning.' Though he had a telephone he did not lodge the report before 11.00 a.m. on 24-11-77 after he had consulted his brother-in-law Talwar and his own brothers. The defense has laid a great deal of stress on this factor of delay in lodging the FIR. I myself would not have attached much importance to delay but for two facts which have been brought out in the prosecution evidence and on which the defense strongly relies. One is the statement of Hukam Ghand (Public Witness 13) who says, 'on 24-11-77 we reached the shop of Mr. Malhotra around 9.40 A.M. The SHO inspected the place of occurrence. But we all kept waiting outside. I made enquiries from the nearby shopkeepers on the instructions of the SHO.' The other fact is that the doctor made a telephone call to his clinic asking the compounder not to allow patients and others to enter the gate. This was done at about 9.30 a.m. when the compounder opened the clinic. The compounder in his evidence affirms that the doctor gave him this instruction on telephone at 9.30 a.m. He says, 'He told me no one should be allowed to enter the clinic. I bolted the door and sat there.' It is possible that out of abundant caution the doctor may have given this instruction but what is intriguing is that the police starts the investigation even before the lodging of the FIR. The defense counsel argued that this shows that there was consultation, manipulations and discussions between the police and the doctor and those who accompanied him to the police station before report was lodged at

11.00 a.m.

(19) Counsel for the defense attacked the arrest of Munim and Nawal on 25-11-77. On 24-11-77 Mukesh, Kishanlal and Dewan Ghand were arrested at the instance of Jai Prakash, though Jai Prakash denies it. This much is established that he joined the investigation whether he came to the doctor's shop to join the police or went to the police station itself or joined the police party at the nullah, is not material. But there was some informer to suggest the names of Mukesh, Kishan Lal and Dewan Ghand which ultimately led to their arrest. But how did police come to know about Nawal and Munim that they were sitting in a park near the cremation ground and that they were the culprits composing a party of five robbers who committed the dacoity at the doctor's shop There is nothing in the prosecution evidence to show how these two persons came to be arrested by the police and how did the police get scent that they were sitting in the park on 25-11-1977.

(20) Originally six persons were put on trial. Besides the five appellants one Tek Ghand was also arrested from U.P. and was brought to Delhi to stand his trial. The compounder in his evidence says that he saw a person having a fat physique roaming outside the clinic in suspicious circumstances on the day of occurrence at about 8.40 p.m. when he went out of the clinic to answer the call of nature. The trial judge found no evidence against Tek Chand. He acquitted him. The remaining five, he convicted.

(21) Bhim Singh (Public Witness 16) in his evidence deposed that he took Kishan Lal and Mukesh on foot to police post Tank Road. This is belied by the defense witness Rampal Singh (DW 3). He categorically said : 'The accused were not taken to the police post Tank Road'.

(22) Counsel for the prosecution argued that the evidence of the doctor and the compounder should be believed. He said that the prosecution has proved the case beyond reasonable doubt. He argued that though there are discrepancies in the evidence the corpus of the crime has been clearly proved. I do not agree. The identification evidence is of poor quality. The doctor had a fleeting glimpse of the culprits. The conditions for accurate observation were difficult. The doctor was in mortal danger. He did not know any of these men previously. The incident took 10

minutes. This is not a case where the witness was identifying some one he knew well or who had been under frequent or prolonged observation. There was no identification parade. There was only dock identification. The identification in parade is an essential preliminary to identification in the dock. The danger of unsafe convictions in cases of disputed identity is always present.

(23) The accused have been awarded long sentences of eight years rigorous imprisonment each. The court would expect proof beyond reasonable doubt of the guilt of the accused. The greater the crime, the stricter the proof. This maxim applied to this case. The burden of establishing the guilt of the accused beyond reasonable doubt always lies on the prosecution which never shifts. In *Woolmington v. Director of Public Prosecutions*, (1935) Ag 462 Viscount Sankey said :

'NO matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.'

This principle is a fundamental part of the English Criminal Justice. So with us. The same position prevails in the Criminal law in India.

(24) The investigation has been most unfair in this case. The Cardinal principle is fairness to the accused. This principle has not been observed in the investigation. All precautions and safeguards intended for the benefit of the accused were thrown to winds. There was no upright and clean investigation. The evidence is not confidence-inspiring. Leaving frills and embroideries aside, the evidence of prosecution witnesses cannot be accepted, conflicting as it is in material particulars. It will be unsafe to convict the accused on the unsatisfactory evidence led by the prosecution. On the whole case my conclusion is that the prosecution has failed to establish the guilt of the accused beyond reasonable doubt.

(25) For these reasons I accept all the five appeals. I set aside the convictions and sentences of the appellants. The appellants are acquitted. They will be set at liberty at once unless required in any other case. I announced this order on October, 14, 1982 at the conclusion of the hearing of the appeals. Now I have

given my reasons for so doing.

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