

Aditya Gupta @ Babloo Vs. State

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Court : Delhi

Decided On : Nov-22-2012

Judge : Sanjiv Khanna

Appellant : Aditya Gupta @ Babloo

Respondent : State

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :

05. h October, 2012 Date of Decision:

22. d November, 2012 CRIMINAL APPEAL 478 2011 ADITYA GUPTA @ BABLOO Appellant Through Ms. Saahila Lamba, Advocate. versus STATE Respondent Through Ms. Richa Kapoor, APP for the State. CRIMINAL APPEAL 936 2011 BABU HASAN Appellant Through Ms. Aishwarya Rao, Advocate. versus STATE Respondent Through Ms. Richa Kapoor, APP for the State. CRIMINAL APPEAL 989 2011 DHARMENDER KUMAR Appellant Through Ms. Aishwarya Rao, Advocate. versus STATE Respondent Through Ms. Richa Kapoor, APP for the State. CRIMINAL APPEAL 895 2012 SHAMBHU @ SHYAM SHARMA Appellant Through Mr. Jawahar Raja, Advocate. versus STATE Respondent Through Ms. Richa Kapoor, APP for the State. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE S.P.GARG SANJIV KHANNA, J.

Subject matter of challenge in these four appeals by Aditya Gupta @ Babloo, Babu Hasan, Dharmender Kumar and Shambhu @ Shyam Sharma is the common judgment, dated 30th October, 2010 in Session Case No.978/2008, arising out of FIR No. 102/2008, Police Station Binda Pur. The four appellants have been convicted under Section 302 of the Indian Penal Code, 1860 (IPC) and sentenced to rigorous imprisonment for life and fine of Rs.25,000/- each, which has to be paid to the family of the deceased-Garima as compensation. In default of payment of fine, they have to undergo simple imprisonment for six months. The four appellants have also been convicted under Section 394 IPC and sentenced to rigorous imprisonment of seven years and fine of Rs.5,000/- each. In default of payment of fine, they have to undergo simple imprisonment of one month. Shambhu @ Shyam and Dharmender have also been convicted under Section 307 IPC and sentenced to rigorous imprisonment of 10 years with fine of Rs.10,000/- each. In default of payment of fine, they have to undergo simple imprisonment for two months.

2. It is undisputed that the deceased-Garima was found dead in her house, at A-39, Jeevan Park, Uttam Nagar on 16th April, 2008. As per the Post Mortem Report (Ex.PW-9/A), Garima was strangled to death. Dr. Komal Singh (PW-9) had conducted the post mortem. On external examination, he found that there was contusion on the inner surface of the upper lip, nail marks over the right tip of the nose, left cheeks and at centre of the forehead. Ligation mark of 27cm 8mm was found over the entire circumference of the neck except at the right upper side of the neck. The cause of death, as opined, was asphyxia subsequent to the ligation strangulation over the neck and smothering incontinence. Both were sufficient to cause death in ordinary course of nature, together or individually. In the cross-examination, he has clarified that if the ligation mark is due to use of a wire or a rope for strangulation, then it would have made different impressions over the neck, though it is not necessary that in all the cases there would be cut marks if strangulation was by means of a metallic wire.

3. There is evidence that the baby Astha, aged about 3-4 years, was also strangled and then put inside the box bed (Diwan). Her injuries have been proved by her father Naveen Kumar (PW-1), brother Sarthak (PW-2), neighbour

Savitri Devi (PW-7) and police officials, who had visited the place of occurrence.

4. Regarding the involvement of the four appellants, the prosecution case, as is apparent from the facts narrated below, is premised upon the statement of Aastha, who was present in the house and was injured in the alleged incident, and on recovery of the stolen articles.

5. Savitri Devi (PW-7) is the complainant, who was residing in the neighbourhood. She has deposed that at about 3-3.30 P.M., Sarthak came to the roof of her house and called her through the Jaal that her mother was not opening the house door. She telephoned Garima but no one responded. She, along with Sarthak, succeeded in entering Garima's house, from the rear entrance. They saw that house was ransacked, the almirah and the bed were open and Garima was lying dead. Her daughter Astha was heard crying in other room, and Sarthak took his sister out from the box bed. PW-7 came out and raised an alarm. Husband of Garima, Naveen Kumar (PW-1) was informed on the telephone and the police was called. PW-7's statement was recorded (Ex.PW-7/A). PW-7's statement has not been contradicted and cannot be doubted. But the statement does not implicate the appellants as perpetrators of the crime.

6. Sarthak (PW-2), son of the deceased and brother of Astha, has deposed on identical lines. On the date of occurrence, he returned from school at about 2-2.30 P.M. and found that the main door of the house was locked from inside. He knocked at the door and called his mother, but she did not open the door. He climbed over the terrace and called his mother from the Jaal, on the terrace. PW-2 could hear his sister crying. He went over to PW-7's house and asked her to call her mother Garima. When no one responded to the phone calls, PW-7 and PW-2 came to the terrace and then the front door but could not gain entry. Ultimately, they discovered that the rear side door was bolted from outside. They entered the house and found it ransacked. Garima, his mother, was lying dead on the floor. PW-7 raised an alarm and called other neighbours. Aastha, his sister, was entangled in the diwan, under the mattress, in the middle room. Her upper portion of the torso was outside the Diwan and her rear portion was inside the Diwan. There is nothing in the cross-examination which dents or casts doubt over the

testimony of PW-2. It is apparent that Aastha was crying and PW-2 stated that she was in a state of shock. However, he was not aware if his father (PW-1) made inquiries from Aastha because he was sent to a neighbour's house. He remembered that carpentry work was being carried out, till the evening before the incident.

7. Naveen Kumar (PW-1), who worked as a Junior Engineer in CPWD, had left for office at 8.30 A.M., on the date of occurrence. His daughter Aastha, a student of LKG, had not gone to school that day, but his son Sarthak, studying in the 5th standard, was at school. When PW-1 left home, both Garima and Aastha were present in the house. At about 4.00 P.M., he received a telephone call from his neighbour, who said that there had been a mishap with his wife. PW-1 left for home with a senior, and when he reached, he saw that his wife Garima was lying dead on the floor, in the rear bedroom. The cupboard adjoining the bed was ransacked and there were marks on Garima's neck. Savitri Devi (PW-7) was taking care of his children. Aastha, when asked by the police, had stated that Shyam uncle had come to the house. PW-1 has averred that there were abrasions on the neck of his daughter and she was sent to the hospital for medical examination. After returning from the hospital, when asked by her father, she had revealed that Shyam uncle had come with 2-3 other persons. She could not give much information and, being in a state of shock, she started weeping. PW-1, therefore, did not push her for further information. He testified that one Shyam @ Shambhu had worked as a Carpenter, at his house, on 2-3 occasions, and, at times, for longer period of duration and this could be the reason why his daughter had referred him as Shyam uncle. He averred that his wife usually wore one gold chain, two gold kara, a pair of tops and a nose pin which were missing. He has stated that cash of about Rs.26,000/- to 27,000/-, silver coins, 3-4 silver statues of God/Goddess, rings, 3-4 pairs of tops, three gold chains, three silver anklets, a heart shaped plate and other jewellery were missing from the cupboard. He had participated in the TIP proceedings (Ex.PW-1/A) and identified a pair of gold tops, three silver coins, a gold necklace, a pair of gold tops, a gold kada, two silver coins, gold necklace (chain type), silver statue of God Krishna, silver plate, one gold nose pin, statue of Goddess Durga, an artificial necklace and pair of silver anklets marked Ex.P-1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 respectively. He

identified the different currency notes, marked Ex. PW-15 to 17, allegedly recovered from the appellants-Dharmender and Aditya Gupta. In the cross-examination, he deposed that the appellant Shyam Sharma was introduced to him by his cousin, Anand Prakash Mittal. Shyam had earlier worked in Anand Prakash Mittals house. The kara, worn by the deceased, belonged to his mother and he had seen his mother wearing it since his childhood. He deposed that the robbed money belonged to him and the rest was a gift which had been received by his wife on various occasions.

8. What is noticeable in the statement of PW-1 is that Aastha had told him that Shyam uncle had come with 2-3 other persons. After that she had not given much information and had started weeping. She was in a state of shock and, therefore, PW-1 did not ask for more details. He further deposed that Aastha had said, in the SHOs presence, that Shyam uncle had come to the house. We record here that the testimony of PW-1, that Aastha had stated Shyam uncle to be with 2-3 persons, was not specifically questioned in the cross examination. However, to our mind, this is irrelevant, as the statement of Aastha, to her father or to the police, would substantially fall in the category of hearsay, except to the limited extent that certain leads were provided by Aastha. Aasthas recollection of events has to be examined and evaluated separately, when we deal with her testimony to the Court. On the said aspect, we note that PW-1, in his initial statement under Section 161 of the Code of Criminal Procedure, 1973 (Cr.P.C.), has stated that Aastha had mentioned the presence of one other person with Shyam uncle, but, in the subsequent statement, he has stated that, according to Aastha Shyam uncle, had come with 2-3 other people. PW-1 was not confronted, in the cross-examination, with these statements. However, it would be pertinent to refer to the testimony of the Investigating Officer. ASI Mahender Singh (PW-15) has deposed that he visited the occurrence/site after the initial information was recorded, as DD No.40A and 41-A at about 3.55 P.M. on 16th April, 2008. He reached the spot, along with the SHO Inspector Ranjeet Singh and others. There he found a girl, namely Aastha, aged about 5 years, and she was found to be scared. Aastha informed them that one Shyam uncle, along with another, had come to their house and, thereafter, she started weeping. SHO prepared the rukka and the case was registered. He remained at the spot, till 8.00 P.M., along with SHO Inspector Ranjit

Singh.

9. Inspector Dig Vijay Singh (PW-22) has deposed on similar lines. On the date of occurrence, he was posted as Inspector (Investigations). He was directed to conduct further investigation in the case. He reached at the spot and recorded statement of the witnesses. One girl Aastha, 4 years old, met him there, but she was very scared. In PW22s presence, father of Aastha spoke to her and she revealed that Shyam uncle and another uncle had come to the house. PW-1 said that Shyam had worked as a carpenter, in his house. This raised suspicion against Shyam and inquiries were made but he was found to be absconding and untraceable. On 25th April, 2008, they received secret information that Shyam was spotted around C-1, Janakpuri. PW-22, along with staff members, in civil clothes, reached there and at about 2.00 P.M. apprehended Shyam. He was arrested vide memo Ex.PW16/A.

10. The testimonies of ASI Mahender Singh (PW-15) and Inspector Dig Vijay Singh (PW-22) create doubt regarding whether Shyam was accompanied by one or more than one person, according to Aastha. PW-15 and PW-22 deposed that according to Astha, Shyam had come with another person and not with 2-3 persons. PW-15 and PW-22 were not cross-examined by the Public Prosecutor on this aspect.

11. Aastha was not examined as a prosecution witness due to her tender age and incoherent statements, to her father and the police officers. In the Trial Court, final arguments were heard and judgment was reserved. Thereafter, vide order dated 7th October, 2010, the Additional Sessions Judge directed that statement of Aastha should be recorded as a court witness. She was, therefore, examined, as a Court witness, on 8th October, 2010, about 26 months from the date of occurrence. At that time, she was about 6-7 years of age while at the time of occurrence she was aged 4 years. The Additional Sessions Judge posed several questions to Aastha, to satisfy that she had maturity to depose. Aastha identified the appellant- Shyam, in the court. Dharmender was also identified by her, in the court, as the one who had caught her legs along with Shyam and both of them had thrown her in the Diwan. She identified Babu Hasan and Aditya Gupta, as the

other two people who had come with Shyam. Aastha stated that she was lying in a different room and, after some time, Shyam uncle came and pressed her neck while other man caught her legs and both dumped her in a diwan. She has stated that Aditya, Babu Hassan and Dharmender had come to the house with Shyam. The question is whether the identification made by Aastha, of the appellants Aditya Gupta, Dharmender and Babu Hasan stands proved and should be accepted by the Court? We have grave reservations in view of the statements of the Investigating Officer (PW-15) and Inspector Digvijay Singh (PW-22). In addition to their statements, we have in the trial court record Aasthas statement, recorded under Section 164 Cr.P.C. The application for recording her 164 Cr.P.C statement was filed by Inspector Dig Vijay Singh on 22nd July, 2008. In the application, it was stated that Aastha had uttered Shyam uncles name to her father. Aastha was about four years of age and was extremely nervous, as the accused had tried to kill her. She, therefore, could not be examined as a prosecution witness. Her father had also stated that Aastha was not in a position to give a statement. We may note that the appellants herein were arrested earlier i.e. before the application dated 22nd July, 2008 was filed. In the application, it was not mentioned that Aastha could recognize the other accused or that she had indicated that there were 2-3 other persons, who were present with Shyam uncle. Aastha, on 23rd July, 2008, in her statement, under Section 164 Cr.P.C., before the Metropolitan Magistrate stated as under: Shyam uncle had come that day. His friends (dost) had also come with him. Their names are not known. One of them was Shyam uncle. Do not know how many friends had come. Earlier I was sleeping. I woke up as soon as they came. They had come to steal the money. Two persons had strangulated me. Shyam uncle had also strangulated me. At that time my mother was packing the clothes. She was keeping them in the Almirah. I found my mother lying on the floor. She was not getting up. I had gone to the hospital later. My mother has died. She has become a star. I remember that Shyam uncle had come. I am not able to recollect anything else.

12. CW-1, Aastha was a very young child at the time of occurrence, aged about four years. She had gone through a traumatic experience, which had petrified and shocked her. She was extremely nervous and was not in a position to speak cogently and to recall the entire incident or to indicate the number of persons, who

had come with Shyam. With regard to the number of persons who had come to her house, her statement under Section 164 Cr.P.C., is to the contrary and cannot be reconciled with her testimony in the court. She has used the word dost, in her statement under Section 164 Cr.P.C., which can be both singular and plural. However, on a specific question, she has stated that she does not remember how many others were there. She has stated that two persons had pressed her neck and Shyam uncle had also pressed her neck. In the end, she has stated that she does not remember anything other than the presence of Shyam uncle. The statement of Aastha (CW-1), recorded under Section 164 Cr.P.C., necessarily creates doubt and suspicion on the testimony of CW-1 in the Court, in which she had recognized the appellants Dharmender, Aditya Gupta and Babu Hassan. In her statement, before the Court, she has stated that there were three more persons with Shyam uncle.

13. Recently, the Supreme Court in *K. Venkateshwarlu v. State of A.P.* (2012) 8 SCC 7, has observed that evidence of child witness should be subjected to closest scrutiny and can be accepted only if the Court comes to the conclusion that the child understands the questions put to him and is capable of giving rational answers (see Section 118 of the Evidence Act, 1872). A child witness, by reason of his tender age, is a pliable witness and can be tutored easily either by threat, coercion or inducement. The Court, therefore, should be satisfied that child witness is not giving his/her statement under influence of someone or under threat, fear or coercion. The evidence of child witness should be evaluated to ensure that evidence is truthful and is not by a tutored witness. It may be safe and prudent to look for corroboration because there is scope that a child witness may give evidence on the basis of intimidation and may develop fear and may not tell truth.

14. We may note that the courts have relied upon child witnesses and their testimonies, but after ensuring that the child witness is not tutored and was not under any pressure, threat or coercion either to implicate or exonerate any of the accused. Several aspects have to be kept in mind, while relying upon statement of child witness, and due care should be taken to decide that to what extent a child witness's testimony can be relied upon and acted upon. In *Criminal Investigation: A Practical Handbook* by Dr. John Adam et J.

Collyer Adam, a translation and adaption of System Der Kriminalistik by Dr. Hans Gross, published by A.Krishnamachari, Egmore, Madras, 1906, it has been observed that children between the age group of 7-10 years, in one sense, can be the best witnesses because they are unaware of ambition, hypocrisy, consideration of religion, rank and social position. These are great advantages accompanied by some corresponding drawbacks. The greatest drawback is that we cannot place ourselves at the point of view of the child. The child perceives things differently from grown up people. The perfectly indifferent facts to us delight or terrify the child, and what, for us, is magnificent or touching, does not affect them in the least. There is another difficulty; the horizon of the child being much narrower than ours and there are number of perceptions, which are outside frame, within which the child can perceive. We, as a rule, should not be distrustful of the capacity of a child. Some of the observations in the said text are debatable, but the aforesaid text does bring out certain aspects, which require notice and due consideration. Care and caution is required before we accept and rely upon the statement of CW-1. (See observations in Rameshwar v. State of Rajasthan AIR 195.SC 54.Mangoo v. State of M.P. AIR 199.SC 95.and State of M.P. v. Ramesh (2011) 4 SCC 786.) In the present case, the child witness in question was four years of age and had undergone a gruesome experience wherein she was strangulated by someone whom she referred to as uncle. She was incoherent and shocked with the sense of losing her mother and having been a victim of violence. She is the sole eye witness who can recognize the culprits. The prosecution had not cited CW-1 Aastha as a witness, obviously for the reason that she, in her statement recorded under Section 164 Cr.P.C., did not implicate the other three appellants. In these circumstances, while evaluating the evidence of Aastha (CW-1), we have to keep in mind her first deposition, the environment, the idiosyncrasy and the opinion of the elders, in her family. In the present case, the appellants are charged with the offence of murder, which entails minimum sentence of life imprisonment. A pertinent observation, in the above noted text, i.e., In Criminal Investigation: A Practical Handbook by Dr. John Adam et J.

Collyer Adam, a translation and adaption of System Der Kriminalistik by Dr. Hans Gross, published by A.Krishnamachari, Egmore, Madras, 1906,on page 92 is:How many times do people speak in its presence of things a child is not supposed to

understand, only to discover later on that it has not only understood very well, but has combined the information with other things heard before or after. Again it must not be forgotten that a child is peculiarly exposed to external influences, whether designed or accidental. Any one, knowing that a child is to appear as a witness in a court of justice, if he is interested in its statements and has the chance of influencing it himself, will almost certainly exert that influence. The child, as yet devoid of principles¹, places great faith in the words of grown-up people; so if a grown-up person brings influence to bear on it, especially some time after the occurrence, the child will imagine it has really seen what it has been led to believe. This result is obtained with certainty if the man proceeds slowly and by degrees, leading the child to the desired goal by repeated simple questions, as, 'Is it not so?' "It was not so, was it not thus?" The result is the same, when the influence is undesigned. An important event happens; it is naturally much talked of, all sorts of hypotheses are started, there is gossip of what others have seen or might in certain circumstances have seen. If a child, which has itself seen something of the occurrence, hears these conversations, they become deeply engraved on its young mind, and ultimately it believes it has itself seen what the others have related.

15. A study conducted by Carole R. Beal, Kelly L. Schmitt and Dawn J.

Kekle on Eyewitness Identification of Children reported in Law and Human Behaviour, Vol.19, No.2, 1995, though not binding or to be treated as precedent, makes an interesting observation that in case of recognition of a suspect, by children, with the constructed lineup, either corporeal or through photographs, which includes the perpetrator, the percentage of success in cases where identification is done by the children is the same or similar as in cases of adults. It observes on page 198:- 1 Statement regarding lack of principles cannot be accepted as a proposition As part of identification process, the witness usually provides a description of the perpetrator to the police, who then construct a lineup that includes the suspect who has been located on the basis of the witnesss description. The lineup may be either corporeal or an array of photographs. If the witness recognizes the suspect among the other people in the lineup, who also fit the description, a positive identification has been made. Positive lineup

identifications by eyewitnesses have been found to be very important influences on jurors decisions about the guilt or innocence of the accused, at times outweighing the impact of other evidence (Wells, 1993). Numerous studies of childrens eyewitness testimony have shown that children are often able to recognize the perpetrator from a lineup at a rate comparable to that of adults (Davies, 1993; Davies, Stevenson-Robb, & Fline, 1988; Dekle, Beal, Elliott, & Huneycutt, 1993; chance & Goldstein, 1984; Goodman & reed, 1986; King & Yuille, 1987; Marin, Holmes, Guth, & Kovac, 1979; Parker & Carranza, 1989; Parker, Haverfiled & BakerThomas, 1986; Parler & Ryan, 1993; Peters, 1991). Children are particularly likely to show good recognition when they have interacted with or had an extended view of the perpetrator. This conclusion is reinforced by case studies in the field. In some instances, child crime victims as young as 3 years old have made convincing and consistent identifications that were eventually substantiated by other evidence (Jones & Krugman, 1986; Perry & Wrightman, 1991).

16. The said article, however, states that the children seem to act differently when the lineup does not include perpetrator i.e. when the children are presented with a target-absent lineup. The study indicates that when children are shown a lineup that does not contain perpetrator, they are more likely than adults to make a false positive identification. This is reflected in the several studies conducted, namely, Davies et al., 1988; Parker & Goodman & Reed, 1986; King & Yuille, 1987; Parker & Carranza, 1989; Parker & Ryan, 1993; Peters, 1987, 1991; Yarmey, 1988. Childrens propensity to identify an innocent person has even been found in tasks even when they had been warned explicitly that the perpetrator might not be in the lineup and that they do not have to choose anyone (Goodman, Bottoms, Schwartz-Kenney & Rudy, 1991; Parker & Carranza, 1989). The said studies reflect upon the causes why children may have a tendency to make false positive identification. They have stated that children do not have any intention to make false identification and enforce false conviction; though, it cannot be stated that the errors made were entirely harmless. Some researches have suggested that one of the factors, which contribute to children identification errors, is that they are simply impulsive in their responses. Another possibility suggested is that young children treat the identification as a mere guess work and they think that their failure to

identify reflects his or her faults or ability. Lastly, a child witness may not be guided and fully aware and conscious of the adverse consequences and the effect of making a false positive identification.

17. In view of the aforesaid discussion and after examining the evidence on record, we feel that the testimony of Aastha (CW-1) cannot be relied upon to implicate that she had seen Dharmender, Aditya Gupta and Babu Hassan. The observation made above must not be read in a manner that the evidence of child witness is stigmatized or not per se reliable. There is no principle of law that states that a child of tender age cannot recapitulate the facts/occurrence or is incapable of being receptive towards events. It will be wrong to state that the deposition of a child must be always corroborated. Law postulates and judgements do, however, require an indepth scrutiny, greater circumspection and caution when we consider deposition of a child. Caution is required before we accept or reject the statement of a child witness. The evaluation has to be done with due care as to whether he or she has fully understood the implication. The credibility and truthfulness of the statement has to be established.

18. Learned counsel for the State is right that, in all probabilities, the offence in question could not have been committed by a single person and, at least, presence of one more person, along with Shyam, is clearly established and beyond doubt. However, in the present case, the argument obfuscates whether the other three accused (individually or together) were with the accused Shyam. The identity of the second person or others, who partook in the commission of said offence, is not clear and established beyond doubt.

19. At this juncture, the other evidence, that is, the recovery of the stolen articles from the four appellants, needs to be examined.

20. With regard to recoveries, as per the endorsement made in the rukka, four articles, worn by the deceased, were found to be missing, namely, gold bangles, gold chain, gold tops and nose ring. However, PW-1, in his statement in the court, has stated that cash of about Rs.26,000-27000/-, silver coins, three-four silver statues (murtis) of God and Goddesses, rings, three-four pair of tops, three silver anklets, one heart shaped plate and other jewellery were found to be missing, from

the cupboard. These details were mentioned in subsequent statement of Naveen Kumar (PW-1), recorded under Section 161 Cr.P.C. The Investigating Officer Dig Vijay Singh (PW-22) has stated that when they made inquiries about accused Shyam, the carpenter, he was found to be absconding from his house RZ-B38, Bindapur Extension and was untraceable. On 25th April, 2008, he received information that Shyam was spotted around Janakpuri area and was arrested at around 2.00 P.M. He was identified by the informer and arrested vide arrest memo (Exhibit PW-16/A). The arrest memo mentions and has thumb impression of Krishna Devi, i.e., mother of accused Shambhu Nath (Shyam). The alleged disclosure statement of Shambhu Nath (Exhibit PW-16/C) was recorded on the day of his arrest itself. In the said disclosure statement, it is alleged that he had revealed the name of his associates as Aditya, Dharmender and Babu Hasan. To this extent, the disclosure statement would be inadmissible. However, on examination of the police diary, we find that on the date of occurrence, i.e., 16th April, 2008 itself the police had carried out investigation to find out the address of Shambhu Nath and they had been apprised of the fact that Dharmender was working and residing with Shambhu Nath. They had tried to locate the residential house number of Shambhu Nath but they could not locate it, though they had come to know that appellant Shambhu Nath was close to the three other accused and several other persons, whose names were mentioned. The police diary does not record that they had visited the residential house of Shambhu @ Shyam or he was absconding. On the other hand, it is recorded that the two police parties had gone to the village of Shambhu Nath in Bihar. The relevant portion of the disclosure statement Ex.PW-16/C by Shyam, relied upon by the prosecution, admissible in evidence under Section 27 thereof, reads as under: ..After that we four went to my house and divided the looted money and jewellery among us. One gold bangle and one chain was taken by Babu. One ear ring and silver coins were taken by Bablu and balance jewellery was kept by me and Dharmender in my room. It was agreed that we shall sell the jewellery and divide the proceeds.

21. As per the prosecution version, the actual recovery made at the instance of Shyam was Kada, two silver coins, Rs.3,500/-, gold necklace and one pair of ear tops. On the same day itself, as per the police version, Dharmender was arrested from RZB-59, Bindapur Extension and had made a disclosure statement, that he

had kept one silver murti, one necklace (artificial) and one pajeb. On this basis, from premises No. RZB-38, Bindapur Extension one necklace (artificial), one top, silver like metal-idol of Durga, silver coin, Rs.2,000/- were recovered below the clothes from a rexine attache. Thus, the place of recovery in the case of Shyam and Dharmender is the same room RZB-38, Bindapur Extension. The relevant portion of the disclosure statement of Shyam (Exhibit PW-16/C) has been quoted above. In his disclosure statement, he has stated that the stolen articles retained by them, i.e., Shyam and Dharmender had been kept in the same place. He did not talk of any bifurcation or division between him and Dharmender.

22. Aditya Gupta is alleged to have also made disclosure statement on 25th April, 2008 vide Exhibit PW-16/J and on the basis of the disclosure statement one pair of gold tops, three silver coins and Rs.9,000/- in cash were recovered. Learned counsel for the State has drawn our attention to the fact that the articles, in question, were put to test identification and were recognized by PW-1. This is correct but surprisingly PW-1 also recognized in the court the currency notes of Rs.9,000/-, Rs.2,000/-, CRL.A. No. 478/2011 + connected matters Rs.3,500/-, which were in different Page 22 of 28 denominations of Rs.500/-, Rs.100/- and Rs.10/-. There were no special marks on the currency notes and it is not indicated that there was any identification mark put on these currency notes, to distinguish them from others. The said TIP proceedings did not relate to the currency notes. The TIP with regard to articles will show that the recovered article belong to or were stolen from the house. However, the pertinent question is slightly different, as to whether the recoveries made by the police were pursuant to the disclosure statements and from the custody of Dharmender and Aditya Gupta. Having carefully examined the said aspect, there is a strong element of doubt whether the aforesaid recoveries were in fact made from the accused Dharmender and Aditya Gupta, as alleged by the prosecution. Our reasons are as under: (i) The first disclosure statement (Exhibit PW-16/C) is that of Shyam, which must be after 2 P.M. on 25th April, 2008. (ii) As per the said disclosure statement, he has not stated that there was any division of articles between him and Dharmender. (iii) On the basis of disclosure statement made by Shyam (Exhibit PW-16/C), articles were recovered from premises RZB-38, Bindapur Extension, which is a one-room house. These recoveries have been attributed to the disclosure made by Shyam.

From the same room and on the same day itself, later on recoveries were attributed to Dharmender on the basis of subsequent disclosure statement made by Dharmender marked Exhibit PW16/K. Dharmender was not found at RZB-38, Bindapur Extension but in a nearby property RZB-59, Bindapur Extension with Aditya Gupta on 25th April, 2008. Aditya Gupta also made a disclosure statement vide Exhibit PW16/J, and from the same premises recoveries were again made. (iv) No public witnesses were joined in the said recovery proceedings. (v) Interestingly, Raj Kumar, owner of RZB-34, Bindapur Extension was examined as PW-14. He has stated that Shyam Sharma along with his father, mother and brother was residing on the second floor, which is given on rent to them. He did not know the name of any other person residing with the family of Shyam Sharma. He denied that Dharmender was residing with Shyam Sharma and stated that he had seen appellant-Dharmender visiting the family of Shyam Sharma but he was not residing with them.

23. The aforesaid weaknesses and doubts about the recovery from the appellants Aditya Gupta and Dharmender are equally applicable to the recovery allegedly attributed to the two disclosure statements made by Babu Hasan vide Exhibits PW-22/A and PW-21/C made on 30th April, 2008 and 1st May, 2008. As per the disclosure statement, one gold chain, one nose pin, one silver idol and silver plate were lying at his residence house No. C-112, Pocket-4, JJ Colony, first floor room. We may note that Babu Hasan was not arrested. Babu Hasan had surrendered before the Court on 30th April, 2008 at 2.30 P.M. It is clear from the Court records that from the beginning itself the police had suspected involvement of Babu Hasan as the fourth person. In the application requesting for three days police custody of Shyam dated 26th April, 2008 it was stated that the one accused Babul, i.e., Babu Hasan was absconding and case property had to be recovered from him. The said police custody was allowed vide order dated 26 th April, 2008 for a period of three days after medical. It may be relevant to state here that Babu Hasan had filed an application dated 26 th June, 2008 and asked for conducting Test Identification Parade by the eye witness. This application was opposed by the prosecution/Investigating Officer on the ground that there were no eye witnesses. Accordingly, no TIP was conducted as the Investigating Officer did not want to get it conducted.

24. Sanjay Mishra v. State CrI.A.367/1999, decided on 22nd May, 2012, by the Delhi High Court, makes pertinent observation regarding scant recoveries:

40. Thus, there is a serious problem with reference to the gold ring, the two gold chains and the wrist watch being linked to the deceased.

41. Way back in the year 1943, Justice Muneer, in the decision reported as AIR 194.Null 5 Shera v. Emperor had cautioned Courts to be vigilant against the known practice of the police to plant ordinary objects on the accused persons to prove their guilt.

42. That apart, as held by the Supreme Court in the decision reported as JT 200.(1) SC 19.Mani v. State of Tamil Nadu, circumstance of recovery of ordinary articles at the instance of the accused person is wholly insufficient to sustain the charge of murder against the accused, in a case of circumstantial evidence.

43. Against appellants Kuldeep, Pramod, Sanjay and Dalip, the incriminating evidence sought to be produced is the stated recoveries, one article belonging to the deceased, and they having, in conjunction with accused Sachin and Prem Pal getting recovered the body of the deceased pursuant to disclosure statements made by them.

44. We have already commented upon the weak evidence pertaining to the recovery of one article each by them and it being linked to the deceased.

45. It is settled legal position that Section 27 of the Evidence Act, 1872 cannot be used to rediscover a discovered fact. (See the decisions of the Supreme Court CRL.A. 367/1999 Page 25 of 30 reported as (1994) 5 SCC 15.Sukhvinder Singh v State of Punjab and (1997) 6 SCC

171) Vijender v State of Delhi.

25. Presence of Shyam, however, has been clearly established by CW-1. No evidence has been put forth to establish that there was forceful entry in the house. Neither were questions put, on this aspect, to PW-1, PW- 2 and PW-7. The police officers, PW-8 and PW-21, who had visited the site of occurrence, were not cross-

examined and no question was put to them. Shyam Sharma, is a Carpenter, and there is evidence to show that he had worked at the residence of PW-1 and the deceased. Learned counsel, appearing for Shyam Sharma, has relied upon the report of the Crime Team that had visited the place of occurrence. In the said report (Ex. PW-6/A), in Col. No. 8., it was recorded that electricians involvement was suspected. We do not find any merit in the said contention. Rukka (Ex.PW-7/A) was sent to the police station for recording and the FIR was registered at 8.15 P.M. In the FIR itself, name of accused Shyam is mentioned. Learned counsel, appearing for Shyam Sharma, is correct that FIR consists of the statement made by PW-7. However, at the same time, one cannot ignore the immediate investigation conducted, between the time when police reached at the crime spot and when FIR was registered. It reflects that, right from the beginning itself, Shyam uncle was named and mentioned by Aastha (CW-1).

26. In view of the above findings, we uphold the conviction and sentence of Shambhu @ Shyam Sharma under Section 302 IPC, Section 307 IPC and Section 394 IPC. Other appellants, Aditya Gupta, Babu Hasan and Dharmender Kumar are, however, acquitted, giving them benefit of doubt. Appeals are accordingly disposed of. (SANJIV KHANNA) JUDGE (S. P. GARG) JUDGE November 22nd, 2012 NA/VKR

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