

(2012) 01 DEL CK 0585

In the Delhi High Court

Case No : Criminal Appeal No's. 852, 813 and 891 of 2009

Jamal Mirza and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 27-01-2012

Acts Referred:

Arms Act, 1959 — Section 25
Constitution of India, 1950 — Article 21, 36(1), 51
Criminal Procedure Code, 1973 (CrPC) — Section 313
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 1
Penal Code, 1860 (IPC) — Section 302, 307, 395, 396, 397

Citation : (2012) 2 AD 366 : (2012) 2 ILR Delhi 711

Hon'ble Judges : S.P. Garg, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Avninder Singh in Criminal A. 813/2009, Ms. Purnima Sethi in Criminal A. 852/2009 and Ms. Anu Narula, in Criminal A. 891/2009, for the Appellant; Richa Kapoor, APP on behalf of State, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Garg, J.—The Appellants Jamal Mirza (A-1), Mohd. Faruq @ Mohd. Raju (A-2) (since released), Alam @ Mamoon (A-3) and Nizam @ Mijam @ Titoo (A-4) (hereafter referred to by their names) have preferred the present appeals against the judgment and order on sentence dated 15.04.2009 and 25.04.2009 respectively passed by learned Additional Sessions Judge whereby they were held guilty for the commission of offences punishable u/s 396 read with Section 397 IPC and were sentenced to undergo imprisonment for life with fine of Rs. 2,000/- each. The prosecution case, in short, may be delineated as follows:

2. The present case was registered by the Police of PS Punjabi Bagh by FIR No. 346/2000. Complainant-Ms. Megha Nijhara aged 16 years in her statement to the Police disclosed that on the night intervening 6/7th May 2000 at about 4:30 A.M. she and her sister, Radhika, and brother Raghav were sleeping in her room. Upon hearing some noise, she got up and saw that six young boys in the age

group of 18 to 22 years were standing near her bed. Four of them were armed with pistols and two of them had daggers in their hands. They threatened to kill all of them if they made any noise. They tied their hands and inquired as to where the cash was kept. Thereafter, at gun point, they took her (the complainant) to her parents' room and threatened to kill her if they raised an alarm, and also tied their hands.

3. The complainant further stated that from the said room, the assailants took out articles lying in the almirah. They inquired from her father where the cash was kept. When he said that it was in his mother's room, the two assailants, at gun point took him to his mother's room. The other assailants searched the almirah. In the meantime, her mother opened the passage door, woke up her uncles Ravinder @ Ravi and Kaushlender. They reached the said room; on seeing them, the two assailants got perplexed and grappled with them (Ravinder and Kaushlender). The two intruders present on the ground floor also went upstairs and started firing at her uncle and father. Her mother and uncle Rajiv Nijhara started raising noise of "chor-chor" from his room. At that, the assailants went up-stairs and fired at them. The assailants fled from the spot after robbing several articles.

4. The complainant further stated that her uncle Ravinder died due to gunshot injuries; her father and uncle Kaushlender sustained serious injuries. While fleeing the attackers took away cash in a rexene bag. They also removed her aunt's gold bangles as well as those of her grand-mother. She further stated that she could identify the assailants.

5. On hearing sound of gun fire at the spot, some neighbours rushed to the spot and informed the police who went the place of occurrence and recorded complainant's statement. The injured were removed to Maharaja Agarsen Hospital where Ravinder @ Ravi was declared "brought dead". The injured Kaushlender was shifted to AIIMS for treatment.

6. On reaching the spot, the police from PS Punjabi Bagh conducted necessary proceedings. Inspector Ram Singh Chauhan got the FIR registered through constable Satbir. He collected the MLCs of the injured. The crime team was summoned; a fingerprint expert lifted six chance prints and a private photographer was called in who took photographs of place of occurrence. The IO prepared site plans of the place of crime; two bullets were seized from the first floor of Jitender Nijhara's portion of premises and sealed. The Police also found two sports shoes, in the adjoining room at the first floor which were taken into possession. The dead body of the deceased Ravinder @ Ravi was collected and post-mortem was conducted.

7. During investigation, A-1 was arrested on 11.05.2008 in a case registered as FIR No. 297/2000 PS Saraswati Vihar by Anti Robbery Section, Crime Branch, New Delhi and one loaded pistol was recovered from his pocket. He was interrogated and his disclosure statement was recorded in that case in which he

revealed his involvement in the present case. The PS Saraswati Vihar informed Inspector Ram Singh Chauhan, PS Punjabi Bagh about this disclosure statement, by A-1. Subsequently A-1 was arrested in this case and the IO moved an application for conducting his test identification parade (TIP). A-1 refused to participate in the proceedings. On 22.05.2000, on interrogation, his disclosure statement was recorded. Pursuant to the disclosure statement, A-1 led to recover a dagger which was used in commission of this offence from a vacant plot which was situated at a distance of about three plots away from the place of incident. Investigating officer prepared a sketch of the dagger and the same was seized by him.

8. On 23.08.2000 A-2 was arrested by the Anti Robbery Cell, Crime Branch, Janak Puri in a case FIR No. 161/2000 PS Janak Puri. In his disclosure statement (made in that case), he confessed to his involvement in this case. He was also arrested in this case on 28.08.2000. An application was moved before the learned Metropolitan Magistrate for TIP of A-2 but he too refused to participate in TIP proceedings.

9. On 12.12.2000 A-3 and A-4 were arrested by the police, in Faridabad, in FIR No. 767/2000 u/s 395/397 IPC. In their disclosure statements both also revealed about their involvement in the present case. This information was relayed to PS Punjabi Bagh, A-3 and A-4 were arrested in the present case on 19.01.2001. Application for conducting TIP of A-3 and A-4 was moved before the concerned court. A-3 agreed to participate in the TIP proceedings. The TIP was subsequently conducted by the learned Metropolitan Magistrate where Kaushlender correctly identified A-3 as one of the assailants who had committed the offence. A-4 declined to participate in the TIP proceedings alleging that he had already been shown to the witnesses in the police station.

10. The IO sent all the sealed parcels to FSL, Malviya Nagar and subsequently collected the reports. He recorded statements of concerned witnesses at different stages during investigation. After completion of investigation Police of PS Punjabi Bagh filed challan against A-1 to A-4 for the commission of offences under Sections 396/397/302/307 IPC and 25/54/59 Arms Act in the court of learned Metropolitan Magistrate. The case was later committed to the Court of Sessions. To prove charges against the Appellants, the prosecution examined 47 witnesses. Statements of the Appellants were recorded u/s 313 Cr.P.C. They denied their involvement in the commission of the offence and pleaded innocence and that they were falsely implicated in this case. They, however, did not prefer to lead any evidence in defence.

11. After consideration of submissions of the parties, and after considering the evidence on record, the Trial Court convicted all the Appellants in the manner described earlier, and passed the sentencing order.

12. During pendency of these appeals, on 17.03.2011 this Court noted that A-2 had claimed that he was juvenile on the date of incident i.e. 07.05.2000. An

Ossification test of the A-2 was directed; according to the opinion given, his age was stated to be between 14 years to 17 years on the date of the offence. By order dated 18.04.2011 A-2 was released as he had already remained in custody for over three years. A-2 was set at liberty after giving him benefit of Section 1(a) of the Juvenile Justice (Care and Protection of Children) Act, 2000 on account of the fact that he had already been in custody for the maximum period prescribed under the said Act.

13. Learned counsel for the Appellants have vehemently argued that the prosecution failed to prove its case against them beyond reasonable doubt. There are material contradictions, inconsistencies and improvements in the statements of prosecution witnesses which make it unsafe to record any conviction. The Appellants were falsely implicated in this case because they were Bangladeshi nationals. Nothing was recovered from their possession. No robbed jewellery or cash was recovered from the possession of any of the Appellants or at their instance. All of them were arrested by the police in various other cases and on recording their disclosure statements they were falsely implicated in this case. The anxiety of the police was to solve the case one way or the other. No weapon of offence was recovered from the possession of the Appellants. No efforts were made by the police to get their blood samples or finger-prints matched with the blood and finger-prints detected at the spot. The Appellants were justified in declining to participate in TIP proceedings as they were shown to the material prosecution witnesses in the police station.

14. Learned counsel further urged identification of the Appellants in Court by the witnesses cannot be believed. PW-7 (Renu) failed to identify A-3 in TIP proceedings. The witnesses examined by the prosecution before the learned Trial Court gave different versions regarding the role played by each Appellant at the time of the incident. They gave differing versions regarding the total number of assailants. The details of the jewellery robbed were not furnished. The dagger allegedly recovered at the instance of A-1 was never shown to the material witnesses at the time of their examination before the Court. Recovery of the dagger itself is doubtful. No independent public witness was joined at the time of arrest of the Appellants and at the time of recording their disclosure statements.

15. The material witnesses have testified that Appellants had covered their faces with handkerchief and thus it was not possible for the inmates of the house to identify all the attackers. They identified the assailants in Court only at the instance of police officers. It was argued, in respect of one of the Appellants, i.e. in CrI. Appeal No. 813/2009, that upon the said accused refusing the TIP, they were not assisted by the Consular Officers of their country, i.e., Bangladesh, contrary to provisions of the Vienna Convention on Consular Relations, 1963 which India has ratified. He argued that it was the prosecution's case that the Appellants were Bangladeshi nationals, and so they should have been accorded the rights assigned to them under this treaty. The relevant article-Article 36(1) (b). This, according, to counsel, resulted in an unfair trial, rendering the

impugned judgment liable to be set aside.

16. The learned APP for the State refuted these arguments and sought to support the findings recorded by the learned Trial Court convicting the Appellants. It is argued that mere non-recovery of the robbed articles does not demolish case of the prosecution. The inmates of the house had no ulterior motive to falsely identify the Appellants. Recovery of the dagger was pursuant to A-1's disclosure statement in the presence of an independent public witness i.e. PW-11 (Ajay Mahajan). Minor contradictions and improvements should be ignored as the testimonies of prosecution witnesses, was recorded after about five years of the incident.

17. We have carefully considered the respective submissions of learned counsels on either side, perused the impugned judgment and other material on record. Each aspect, relating to the prosecution allegations regarding involvement of the Appellants, and the contentions made by the parties, is discussed hereafter.

(A) Involvement of A-3

18. The material testimony regarding the presence of A-3 is that of PW-13 (Jitender Nijara), injured in the incident. In his deposition before the Court, he testified having been taken to ground floor at gun point when he disclosed that the cash was kept in his mother's room, in the ground floor. Thereafter two accused persons asked him at gun point to lead them to his mother's room, threatening to kill his children if he refused to co-operate. He, thereafter, rang the bell of room on the ground floor and his sister Renu responded, switched on the lights and opened the main entrance gate. He instructed his sister to keep quiet since guns were pointed at his head. The Accused persons threatened his mother to hand over the keys of the almirah or see him die. The accused snatched keys from his mother and he was made to sit on a chair. Gold bangles were removed from the hands of his mother and sister; the accused kept threatening to kill all of them. He (PW-13) further testified that one accused tried to misbehave with his sister and when he tried to resist, his legs were tied. One more person came down from the first floor and inquired about more cash. In the meantime, the accused were unable to search more valuables. One of them shot him at point blank range on the chest and he fell down. He heard more sounds of bullets; firing. Within 5/7 minutes after receiving injury, he became unconscious. PW-13 Jitender identified A-3 present before the court to be the assailant who had fired at him from point blank range on his chest.

19. No material contradictions have been elicited by the learned defence counsel for A-3 in cross-examination to discard the testimony of this injured witness. No suggestion was put that A-3 had not sustained fire injuries at the hands of A-3. No suggestion was put if A-3 was not armed with pistol/revolver at that time. The suggestion given was that the assailants had covered their faces with handkerchief and the accused persons were not the assailants.

20. The overall testimony of this witness reveals that he categorically identified

A-3 as the individual actively involved in the incident and had shot him with a fire arm in the room in which his sister and mother used to stay, on the ground floor. This injured witness had no ulterior motive to falsely implicate A-3. The testimony of PW-13 (Jitender Nijara) has been corroborated on material particulars by PW-7 (Renu). In Court, she deposed that when she was sleeping in her room with her mother, the house bell rang several times. She woke up and switched on the light and saw that it was 4.50 AM. She went to the lobby and reached the main door. She saw from the peep-hole, her brother Jitender's face. She also noticed that two men were standing on either side of Jitender and were pointing revolvers at him. She opened the door and her brother asked her to keep quiet. Thereafter both intruders, armed with revolvers took her brother into the room where she used to sleep. Her mother was also in that room. Those men demanded that they should be given cash. Her two gold bangles were removed by those men. Her mother handed over keys of an almirah to them and they also removed eight gold-bangles which she was wearing. The Almirah was opened and articles kept inside were thrown out. Those men continued abusing them and misbehaving with them. She heard noise of firing from the first floor and in the meantime a third man, who was outside came into the room and inquired from his companions whether they had got cash. She further testified that the third person fired in the air. Her brother Jitender was made to sit on a chair and that man shot him on his shoulder. On hearing noise from upstairs, the accused persons got perplexed and ran out.

21. PW-7 (Renu) also identified A-3 by pointing towards him and stated that he had fired at her brother Jitender in her room. Cross-examination of this witness also failed to reveal any discrepancy regarding the role attributed to A-3 in the incident. She denied the assertion that she had identified the accused as he was shown to her by the police. She denied that she was unable to identify the accused persons as the assailants were muffled and the lights in the house were switched off and thus she was unable to see and identify the assailants.

22. The entire testimony of this natural witness whose presence at the spot has not been challenged inspires confidence. She had no ulterior motive to falsely identify A-3. She has fully corroborated the version given by PW-13 (Jitender) that the firing incident in which he sustained injuries had taken place in her room. Merely because this witness failed to identify A-3 during test identification parade proceedings is not a factor to dislodge the entire testimony of this witness regarding the role played by A-3 in the commission of the offence.

23. PW-12 (Kauschelender) is another important witness connecting A-3 in the commission of the offence. This witness also deposed that after her sister-in-law Manju knocked at the door of his room, he got up and went inside the room of Jitender. He saw two persons standing and pointing guns towards Megha, Raghav and Radika. When he entered in the room of Jitender, his brother Ravi apprehended both the assailants present there. The accused fired from a desi katta which they were carrying. In the meantime three persons also came there;

one of them had a revolver, the other had a desi katta and the third one was armed with a chura. They fired indiscriminately. Consequently he sustained injuries on the left side of his belly. He was further attacked with the knife (chura). His brother Jitender received bullet injuries. He was hit with the revolver butt on his head. He further testified that his brother Jitender also received several injuries and he came to know about that when he came down. A-3 present in the Court was having desi Katta. This witness identified A-3 as the person involved in the dacoity committed at his house during TIP proceedings conducted on 09.02.2001.

24. In the cross-examination this witness denied the suggestion that the assailants were other persons and had covered their faces at the time of incident. He denied the suggestion that he had identified the accused at the instance of police. He further denied that he was called by the police at Faridabad lock-up and the accused persons were shown to him there or that the accused was shown to him prior to his TIP conducted at Tihar Jail.

25. The overall testimony of this witness also reveals that he has supported the case of the prosecution in its entirety. The presence of this witness at the spot is not in controversy. This witness has no axe to grind to falsely implicate A-3 in the commission of the offence as he himself had sustained injuries in the incident. No suggestion was put to this witness in the cross-examination that his brother Jitender had not sustained injuries in the incident on the ground floor in the room of PW-7 (Renu). The testimony of this witness inspires confidence as he had participated in TIP proceedings of A-3 and had identified A-3 correctly to be one of the assailants who had committed dacoity in their house. There is nothing on record to show if A-3 was ever shown to this witness prior to the TIP by PW-39, Dr. Shababuddin, the learned MM. This witness had sustained injuries and his brother met with death would be interested in bringing home the guilt of the real offenders, and would not falsely implicate an innocent individual. None of the accused including A-3 was known to the witness prior to the occurrence; he bore no ill will or animosity with any of the accused. The cross-examination has not brought any material inconsistencies to doubt his testimony. This witness not only identified A-3 during TIP proceedings but also identified him on his appearance before the Court.

26. A-3 and A-4 were arrested by the police at PS City Faridabad, in case FIR No. 767/2000 u/s 395/397 IPC. PW-43 (Inspector Krishan Kumar) proved arrest of both A-3 and A-4 in the said case. He recorded the disclosure statements of A-3 and A-4 in which they revealed commission of the offences in the present case. He passed on that information to the duty officer PS Punjabi Bagh and thereafter the IO of this case came to the police station; he handed over the photocopies of the disclosure statements marked X and Y to him. PW-42 (HC Jagmer Singh) deposed on similar lines and stated that disclosure statements were made by A-3 and A-4 in his presence and Mark X and Mark Y contained his signatures. PW-31 also identified both A-3 and A-4 to be the persons who had made disclosure

statements Mark X and Mark Y. PW-35 (WSI Umesh Bala) recorded the formal FIR No. 767/2000 EX. PW35/A in this regard.

27. In the cross-examination of all these witnesses nothing was suggested if at any time if A-3 and A-4 were shown by the police to the public witnesses. There was no explanation how, and under what circumstances A-3 and A-4 were present at PS City Faridabad which led the Faridabad police to arrest them in FIR No. 767/2000 u/s 395/397 IPC.

28. PW-25 (SI Satish Kumar) arrested A-3 and A-4 on 19.01.2001 after getting information from the police of Haryana. A-3 refused to participate in TIP proceedings. A-4 agreed to participate in TIP proceedings in which PW-12 (Kaushelender) identified him. In the TIP proceedings conducted by PW-39 (Dr. Shababuddin, MM) no suggestion was given to the witness that he had any acquaintance with the Faridabad police to falsely implicate A-3 and A-4 in this case. No specific date was suggested to this witness as to when A-3 and A-4 were shown to the witnesses and if so to whom. If A-4 was sure that public witness had already seen him at the lock up at Faridabad or in Delhi, there was no occasion for him to participate in TIP proceedings.

29. PW-39 (Dr. Shababuddin) learned MM proved the TIP proceedings (Ex. PW-39/A), where PW-12 identified A-3. Remand papers on the record show that on 22.01.2001 the application was moved by the concerned IO before Sh. Rajender Kumar, learned MM for issuance of production warrants in respect of A-3 and A-4. It mentioned that both, i.e. A-3 and A-4 had been arrested in case FIR No. 767/2000 u/s 395 and 397 by the City Police, Faridabad, Haryana and there they had made disclosure statements for the commission of the offence in this case. Both A-3 and A-4 were present in judicial custody in Rohtak Central Jail. The Learned MM issued production warrants for A-3 and A-4 for 31.01.2001. On 31.01.2001 again production warrants were issued for 05.02.2001. On 05.02.2001 both the said accused were produced before Court and the IO moved an application for interrogation of A-3 for 30 minutes, which was allowed. Thereafter the IO moved an application to conduct TIP proceedings. The order-sheet reveals that A-3 was taken to the court, with his face muffled when the TIP application was moved. Thereafter TIP proceedings were conducted by PW-39. All these proceedings demonstrate that after moving the application for issuance of production warrants, A-3 was in judicial custody and there was no occasion for the police to show him to the prosecution witnesses, so that they could identify him in this case.

30. PW-16 (Manju Nijhara) also supported the prosecution. She too testified that her husband was taken to the ground floor at pistol point by four assailants. She heard the sound of a bullet shot in the ground floor but she did not know what happened there since she was in Ravinder's room on the first floor, at that time. This witness pointed towards A-3 as the person who had taken her husband Jitender on the ground floor. Nothing material emerged from the cross-examination of this witness to discard his testimony. Minor contradictions about

the number of assailants is not fatal to the prosecution case since the presence of A-3 at the spot was described by this witness and had attributed a specific role to him. Learned defence counsel has tried to encash the statement of the witness in the cross-examination where she admitted that the assailants had covered their faces with handkerchief on the day of the alleged incident. The assertion of this witness is to be taken into consideration in the overall context of her deposition. She categorically identified A-3 as the person who had taken her husband on the ground floor. There is nothing in the cross-examination to suggest that at that time that A-3 had covered his face with handkerchief. The testimony of this witness was recorded on 21.09.2005 after about five years. Some discrepancies are bound to occur when a witness is examined after lapse of so much time.

31. PW-1 Dr. Chander Mohan Bansal, Maharaja Aggarsain Hospital, Punjabi Bagh proved the MLC Ex. PW1/D prepared by him when he medically examined PW-13 (Jitender Nijara) who was taken to the hospital with the history of assault with a fire arm. PW-1 found three injuries on his person; one of them a punctured wound on the upper arm, one on the lateral side and the another in the armpit and the last, a second puncture wound on the right side of the chest near axilla. This witness was not cross-examined by the accused. The medical evidence on the record by the witness supplemented the ocular version given by PW-13 (Jitender) regarding injuries sustained by him when he was fired at point blank range on the chest.

32. Testimony of all the witnesses referred above, thus establishes beyond doubt presence of A-3 at the spot at the time of occurrence and his participation in the commission of offence.

(B) Involvement of A-I

33. A-1 was arrested on 11.05.2000 by PW-25 (SI Satish Kumar) and Inspector Suresh Kaushak when they were posted in the Anti Robbery Section, of the Crime Branch. A-1, with his three associates was apprehended at about 09.00 PM. and on his personal search, one loaded country made pistol was recovered from his pocket. A case, FIR 297/2000, PS Saraswati Vihar was registered against A-1. PW-3, Head Constable Balbir Singh, of PS Punjabi Bagh recorded a DD/Ex. PW-3/A on receipt of information on telephone from ASI Bhrahm Parkash of Crime Branch while working as duty officer on 12.05.2000. On receipt of DD No. 11/A dated 12.05.2000 EX. PW3/C, PW-46 (Ram Singh) came to know that A-1 was sent to judicial custody for a day by the Court of Sh. M.C. Gupta, learned MM. On 13.05.2000 PW-46 (Ram Singh) moved an application for conducting TIP of A-1 which was assigned to PW-29, Sh. L.K. Gaur, the learned MM where A-1 was produced with his face in a muffled condition. He expressed willingness to participate in TIP proceedings. Accordingly (PW-29), Sh. L.K. Gaur, the learned MM fixed the date for holding TIP as 16.05.2000. That day Sh. R.S. Chauhan moved an application for postponing the date of the TIP. On that application (EX. PW29/B), PW 29 fixed the date -for holding TIP- as 20.05.2000.

On 20.05.2000 PW-29 reached Jail No. 5 Tihar for conducting TIP proceedings. A-1, however, refused to participate in the TIP proceedings. His statement was recorded by the learned Metropolitan Magistrate; A-1 stated that he did not want to take part in the TIP because after he was caught he was kept in custody for three days; during that period, his photographs were taken and a video recording was made. On the way to Court, when he had to be produced, his face was shown to two persons and on the same day when he was in the lock-up, he was also shown to two women. PW-29 (Sh. L.K. Gaur) proved TIP proceedings Ex. PW29/C and the certificate Ex. PW29/E regarding correctness of the proceedings.

34. The above discussion shows that A-1 opted to participate in the TIP proceedings, when for the first time he was produced before the concerned Metropolitan Magistrate in a muffled condition and when the application for TIP was assigned to PW-29 (Sh. L.K. Gaur). At that time, A-1 did not disclose if the police had shown him to the prosecution witnesses. He was in judicial custody for the period between 16.05.2000 and 20.05.2000. When PW-29 reached on 20.05.2000 Tihar Jail to conduct TIP proceedings, A-1 refused to participate in the TIP saying that he had been shown to the police witnesses and was not interested in participating in the TIP proceedings. It seems that the plea, taken by A-1 was an afterthought. He did not elaborate how and when he was shown to the prosecution witnesses. This plea cannot be believed as he had earlier consented to participate in the TIP proceedings.

35. PW-12 is a material witness to prove involvement of A-1 in the incident. In his deposition before the Court this witness specifically identified A-1 as one amongst those present, amongst the assailants. He attributed a specific role to A-1 in the incident. This witness had sustained bullet injury on the left side of his stomach. He further deposed to having been attacked with a knife (chura). He identified A-1 as the person with a chura and named A-1 as the person responsible for inflicting the knife injury on him.

36. PW-40 (Dr. Amit Gupta) who medically examined PW-12 (Kaushelender) proved the MLC Ex. PW40/A. He deposed that the injuries found on the witness were dangerous and caused by fire arms and a sharp object with blunt force. This witness was not cross-examined by the accused. Thus, the deposition of PW-12 has been corroborated by medical evidence. PW-7 (Renu) in her deposition before the Court identified A-1 and stated that he had a knife. In the cross-examination she stated that the knife was a quite long and its blade had "dante" like that of "Ari" (serrated edges like in a saw). She volunteered to add that the assailants had tried to tear her clothes with that knife, and therefore, she could not forget that knife.

37. PW-8 (Rajiv Nijhara) also supplemented PW-7's version and deposed that A-1 was the individual with a knife, besides the person who had fired at him. This witness identified the knife/dagger Ex. P-1 which was in possession of A-1 at the time of occurrence.

38. PW-13 (Jitender Nijhara) identified A-1 who had a dagger in his hand and was first amongst those standing behind his daughter with daggers and who participated in the dacoity incident.

39. PW-15 (Megha Nijhara) also identified A-1 though she stated that he had a pistol in his hand when he entered her room. PW-15 pointed towards A-1 as the person with a dagger and a pistol in his hand and who had threatened her with a dagger and pistol.

40. Testimonies of above witness undoubtedly establish presence of A-1 at the spot at the time of incident. All the material prosecution witnesses identified A-1 during their deposition before Court. They assigned a specific role to A-1 in the commission of the offence. PW-12 (Kausheelender) is an injured witness and A-1 had inflicted injuries with a knife. No ill-will or ulterior motive was imputed to these witnesses in their cross-examination to make for deposing falsely against A-1. Nothing was suggested to the prosecution witnesses where else A-1 was on the day of incident. Despite lengthy cross-examination of these witnesses, nothing material was elicited to disbelieve the facts deposed by them. A-1 failed to disclose as to how, from where and under what circumstances he was arrested by the police of the Anti Robbery Section, Crime Branch, New Delhi. He did not examine any of his family members in defence to prove his presence at any place other than the place of incident on that day.

41. The Prosecution further relied upon the circumstance of recovery of the dagger Ex. P-1 at the instance of A-1 pursuant to his disclosure statement. PW-46 deposed that when A-1 refused to participate in the TIP proceedings on 20.05.2000, he moved an application for his police custody remand for five days on 22.05.2000. On 23.05.2000 in the presence of PW-24 (HC Sunder Singh), A-1 was interrogated and his disclosure statement Ex. PW24/A was recorded. Thereafter A-1 led the police party to the spot of incident and pointing out memo Ex. PW8/C was prepared. Thereafter A-1 led the police party, consisting of PW-46, HC Sunder and members of the public Ajay Mahajan and Rajeev Nijhara to a vacant plot located four plots away from the place of incident. A-1's statement led to recovery of a dagger from the grass in the plot. A sketch of the dagger Ex. PW8/A was prepared, it was sealed and seized by seizure memo Ex. PW8/B. A site map of the place of recovery of dagger Ex. PW46/H was also prepared. The dagger Ex. P-1 with cover was recovered at the instance of A-1.

42. PW-11 (Ajay Mahajan) supported PW-46's deposition and testified that on 23.05.2000 at about 7.00 PM. the police had taken A-1 to the spot. There he was identified by family members of the deceased as one present amongst the assailants on 07.05.2000. He further deposed that in his presence A-1 led to recovery of the dagger Ex. P-1 from the vacant plot and that it was seized by the police. The testimonies of PW-8 (Rajiv Nijhara) and PW-24 (Janak) are on similar lines.

43. On a consideration of the statements of these witnesses, what the

prosecution was able to prove that A-1 led the police team to the spot and at his instance in pursuance of his disclosure statement the dagger P-1 was recovered from a vacant plot situated near the place of incident. The testimony of PW-11 (Ajay Mahajan), an independent public witness, on this aspect cannot be disbelieved. No enmity has been alleged against A-1 to force PW-11 (Ajay Mahajan) to make a statement against him. All the witnesses to the recovery have supported each other and no material discrepancies can be seen from a comparison of these

44. The recovery of the dagger Ex. P-1 lends credence to the prosecution case regarding presence of A-1 at the spot as all prosecution witnesses testified that A-1 was armed with a dagger/knife at the time of incident and had inflicted injury on the person of PW-12 (Kausheleender). All the prosecution witnesses, therefore, identified A-1 as one of those present at the spot during the time of the incident. PW-15 (Megha Nijhara) even deposed that the assailants had talked to her for about ten minutes and therefore she was able to identify the accused. The evidence on record points to the accused having been at the spot for sufficiently long to enable the prosecution witnesses to identify them.

(C) Involvement of Nizam @ Titoo (A-4)

45. A-4 was arrested with A-3 by the Faridabad police in FIR No. 767/2.000 u/s 395/397 IPC. As discussed above, his disclosure statement mark "Y" was recorded and he disclosed about commission of the present offence. Subsequently he was arrested by the police of PS Punjabi Bagh.

46. After A-4 was produced before the Court pursuant to the production warrants issued, an application was moved by PW-25 for conducting his TIP proceedings. PW-39 (Dr. Shababuddin), learned MM conducted TIP proceedings 24.02.2001 when A-4 was produced before him in muffled face. A-4 refused to participate in the TIP proceedings stating that he had been shown to the witnesses in the police station. He was warned by PW-39 (Dr. Shababuddin) that refusal to take part in the TIP proceedings would draw adverse inference against him. Despite that, he refused to take part in TIP proceedings. PW-39 (Dr. Shababuddin) recorded his statement and proved the TIP proceedings (Ex. PW-39/A). This witness was not cross-examined. Since A-4 remained in judicial custody prior to 24.02.2001, there hardly any possibility for the police to show him to the prosecution witnesses.

47. PW-13 (Jitender Nijara) in his deposition identified A-4 as the one who pointed a gun at his daughter and forced her to sit in the room. PW-15 (Megha Nijhara) also recognised A-4 and testified that he was armed with a dagger in his hand when he entered her room along with other accused person. PW-16 (Manju Nijhara) assigned a specific role to A-4 while identifying him and deposed that all the four accused present in Court were the same assailants who had robbed and looted them. She pointed at A-4 and deposed that he was present, with A-3 and went down stairs along with him. A-4 was standing in the balcony in the dark at

that time. PW-12 (Kaushelender) deposed to being sure that besides Jamal Mirza (A-1) and Mohd. Faruq @ Mohd.Raju (A-2) the other two accused were also involved in the dacoity committed at his house.

48. The statements of these witnesses, identifying A-4 as one amongst the assailants, cannot be doubted. They withstood searching cross-examination and nothing material could be elicited to disbelieve them.

49. These witnesses had no prior acquaintance with the accused. A-4 did not also claim that he was somewhere else, on the date of occurrence. We, consequently, see no reason to disbelieve the prosecution witnesses regarding identification of A-4.

(D) Involvement of Mohd. Faruq @ Mohd.Raju A-2

50. As noticed earlier, A-2 had also filed appeal against the impugned judgment. He was, however, directed to be released as he was a juvenile on the date of occurrence i.e. 07.05.2000. By order dated 18.04.2011, A-2 was ordered to be released as he had already remained in custody for over three years. No further discussion is thus required regarding the role played by A-2 in the commission of the offence.

(E) Incident

51. The dacoity has not been disputed by the Appellants. It is also not in controversy that during the incident one of the inmates Ravinder @ Ravi was shot dead. PW-6 (Dr. Komal Singh) proved the post-mortem report Ex. PW-6/A where in her opinion the cause of death was hemorrhagic shock due to fire arm injury to the lung. All injuries were ante-mortem and were of the same duration. PW-1 (Dr. Chander Mohan Bansal) proved the MLC of injured Rajiv and Kaushal Ex. PW1/A and Ex. PW1/B respectively. They had also sustained injuries in that incident. PW-40 (Dr. Amit Gupta) opined that the injuries sustained by PW-12 (Kaushelender) were dangerous and caused by fire arm plus sharp object with blunt force. We are also of the view that incident cannot be fabricated by the prosecution witnesses.

52. The plea of the Counsel for the Appellants is that they were not the perpetrators of the crime and were falsely implicated by the police just to solve the case. We do not subscribe to this view as the Appellants were apprehended on different dates, by the police personnel of different police stations for commission of different offences. A-3 and A-4 were even arrested by the police of Faridabad police. It cannot be assumed that the police were engaged in an inter-state conspiracy, to falsely implicate the Appellants.. Similarly, the argument that the Appellants were falsely implicated because they were Bangladeshi nationals, is unconvincing. Their arrest, on different dates, long after the incident shows that the police did not have any such ulterior motive to implicate them merely because they were Bangladeshis. The material on record shows that at the time of arrest of A-3 in case FIR No. 299/2000 PS Saraswati

Vihar one Ibrahim, s/o Abdul Raseed resident of Bangladesh was also arrested. However, he was not involved in this case. This fact too belies the Appellants' contention.

(F) Discrepancies, TIP proceedings etc

53. The Appellants had sought to highlight contradictions, improvements and inconsistencies in the statements of prosecution witnesses; they were dealt with by the Trial Court in the impugned judgment. We find no reasons to interfere in the findings on that aspect. Minor contradictions or discrepancies in the statements of prosecution witnesses are bound to occur when they are recorded after lapse of a long time.

54. In the present case, six strangers had sneaked inside a residential house at the dead of night. They were armed with deadly weapons. They had threatened to kill the inmates including minor children. Not only did they ransack the house, they used deadly weapons in causing dangerous injuries. One of the residents was shot dead. The Court can well understand the mental trauma/stress of inmates on witnessing such a horrible scene. It is not always easy for an eyewitness in such a situation to a ghastly murder to register the precise details regarding number of the assailants; the minute role played by each of them and the assailant who inflicted the injuries and on which part of the body of the injured. An incident of dacoity cum murder is often a heart rending spectacle in which even a witness wholly unconnected to the assailant or the victim may be traumatized by the violence, involving the killing of a human being in cold blood. To expect from witnesses who go through such a night-marish experience, meticulous narration and recall of events, detailing who hit whom at what precise part of the body etc. is a tall order. The Courts have to be realistic in their expectations from witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory, the power to register events and recall the details. A witness who is terrorised by the brutality of the attack cannot be disbelieved merely because he is imprecise in his description of who hit the deceased on what part of the body or the nature of arms or weapons that a particular assailant had. There is some mix-up or confusion. It is the totality of evidence on record and its credibility that would eventually determine whether the prosecution has proved the charge against the Appellants. Slight discrepancies which do not shake the basic version of the witnesses cannot be given undue weightage or importance to dislodge the prosecution's case. Such variations creep in because there are always natural differences in the faculties of different individuals in the matter of observation, perception and memorization of details.

55. In the present case, all material witnesses have fully narrated the sequence of incident minutely in graphic details; have categorically identified the Appellants to be among the assailants; assigned specific role in the participation of the occurrence. The Appellants had consciously refused to participate in the TIP proceedings. They cannot now contend that they were identified by the

prosecution's witnesses for the first time in the Court. There was no long time gap between the date of arrest of the Appellants and their production in the Court and the applications moved by the police for getting their TIPs conducted. Furthermore, no plausible reasons have been given by the Appellants for their alleged false implication. The Court is also conscious of the fact that the witnesses who deposed during the trial, and also participated in the TIP, were residents of the house; some of them were injured. They were also interested in ensuring that the real assailants instrumental in causing death of their close relatives in the incident, were brought to book.

56. It is also important to recollect that all prosecution witnesses had occasion to interact, or were in confrontation with the accused, during the attack and incident. The attackers had stayed inside the house for sufficiently long time and had moved freely from one place to another. The house lights had been switched on at that time. The assailants had conversed with the inmates of the house. The prosecution witnesses narrated details how the assailants accomplished their mission. All these circumstances clearly show that the witnesses got full opportunity to see and identify the Appellants. There is thus no reason discarding their testimonies.

57. The Learned Counsel for the Appellant in CrI. Appeal No. 813/2009, argued that upon the accused refusing the TIP, they were not assisted by the Consular Officers of their country, i.e., Bangladesh, as provided by the Vienna Convention on Consular Relations, 1963 which India has ratified. He argued that it was the prosecution's case itself that the Appellants were Bangladeshi nationals, and so they should have been accorded the rights assigned to them under this treaty. The relevant article-Article 36(1)(b)- relied on by the Counsel has been reproduced below:

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

58. According to counsel, this is a fatal irregularity in the trial of the Appellants, and a consequent subversion of the procedure established by law. Since he has relied on the fact of India's ratification of this treaty to make this contention, the position of law with respect to the enforceability of international treaties in India needs to be examined.

59. The Supreme Court's ruling in *Jolly George Varghese and Another Vs. The Bank of Cochin*, is that treaties entered into by the Union of India do not become enforceable in the courts and neither do they become part of the domestic law of India. Yet, they can be assimilated as aids to interpretation of the Constitution of

India, to the extent their provisions are not inconsistent with municipal law. Justice Krishna Iyer elucidated on this point thus:-

India is now a signatory to this Covenant and Art. 51(c) of the Constitution obligates the States to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another." Even so, until the municipal law is changed to accommodate the Government what binds the court is the former, not the latter.

60. In *People's Union for Civil Liberties Vs. Union of India and another*, , the Supreme Court had said that:

The main criticism against reading such conventions and covenants into national laws is one pointed out by Mason, G. Himself, viz., the ratification of these conventions and covenants is done, in most of the countries by the Executive acting alone and that the prerogative of making the law is that of the Parliament alone, unless the Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the covenant with the sanctity of a law made by Parliament. As pointed out by this Court in *S.R. Bommai and others Vs. Union of India and others etc. etc.*, , every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of the Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.

61. It can therefore be seen that there is no automatic acceptance of an international treaty, even post ratification, as domestic law in India. It only becomes binding as law once Parliament has indicated its acceptance of the ratified treaty through enabling legislation. Since no such legislation exists, this treaty is not binding, and therefore, non-compliance with its provisions does not result in a violation of the procedure established by law. The only rider is that if the standard postulated in the covenant or international treaty is consistent with Indian law, the same can be considered as an aid to interpretation of the relevant provision of municipal law.

62. The safeguard provided for in the Article of the Convention in the present case, is to ensure that the foreign national who has been arrested or detained is not denied his basic human rights and pertinently is afforded effective legal assistance in a criminal trial. The Right to Life as contained in Article 21 of the Constitution of India is available even to foreign nationals in India, and the right to legal representation has been read into this right in *Khatri and Others Vs.*

State of Bihar and Others, and Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, .

In Hussainara Khatoon the Supreme Court has held:

It is now well settled, as a result of the decision of this Court in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be "reasonable, fair and just". Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the courts process that he should have legal services available to him.

63. Since the Appellants in the present case were given legal representation, the object of Article 36(1)(b) is satisfied. The non compliance with a procedural safeguard, contained in the Convention, of notifying the consulate or embassy of the foreign national, that he is facing trial, does not in such an event lead to such prejudice as to vitiate the trial itself. At best the procedure can be viewed as directory; as long as the Court ensures legal assistance or legal aid, implicit in Article 21 of the Constitution, the non-compliance with Article 36(1)(b) at least in the present instance has not led to any miscarriage of justice. Therefore, the Counsel's argument that the trial of the Appellants was in contravention of the procedure established by law has no merit.

(G) Conclusion

64. We find unclenching evidence pointing un-mistakably to the guilt of all the appellants. We find no illegality or irregularity in the findings recorded by the Trial Court basing conviction of the Appellants. We see no reasons to interfere with the view taken by the Court below. The appeals are accordingly failed and are hereby dismissed.