
(2022) 12 DEL CK 0099
In the Delhi High Court
Case No : Criminal Appeal No. 1307 Of 2019

Ram Niwas

APPELLANT

Vs

State Of Nct Of Delhi

RESPONDENT

Date of Decision : 16-12-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 162, 313
Indian Penal Code, 1860 — Section 302
Evidence Act, 1872 — Section 9, 27

Citation : (2022) 12 DEL CK 0099

Hon'ble Judges : Mukta Gupta, J; Poonam A. Bamba, J

Bench : Division Bench

Advocate : Siddharth Aggarwal, Harsh Prabhakar, Prithu Garg

Final Decision : Disposed Of

Judgement

Mukta Gupta, J

1. By way of the present appeal, the appellant challenges the impugned judgment of the Trial Court dated 28th August, 2019, by which the appellant was convicted for murder of one Munna Kumar (deceased); and also the order on sentence dated 04th September, 2019 directing the appellant to undergo rigorous imprisonment for life as also fine of ₹25,000/-, in default whereof, to undergo simple imprisonment for three months for offence punishable under Section 302 of the Indian Penal Code, 1860 (IPC). The learned Trial Court directed the fine to be given to the family of the deceased, if deposited.

2. In a nutshell, the facts of the case are that on 28th February, 2012, at about 11.52 am, one Bhikhu Sada came to PS Sarai Rohilla with a heavy plastic bag (katta) left by the appellant on his rickshaw. He informed the police that around 9 am, the appellant had boarded his rickshaw from Main Road of Kishanganj Market for Azad Market, and near the Iron Bridge, the appellant got down from the rickshaw and started running away, on which Bhikhu asked the appellant to take his katta, but the appellant told Bhikhu that he was going to urinate and

would come back. Bhikhu waited with his rickshaw along with the said plastic bag belonging to the appellant for about two hours, but appellant did not return. Thereafter, Bhikhu reached PS Sarai Rohilla with the said katta. The police officials unloaded the katta from his rickshaw which was found to contain a cardboard box and there was another plastic katta inside the box, on opening which, a dead body of a male aged 23-24 years was found, with a plastic rope tied around his throat. Thereafter, crime team was called at the spot and photographs of the dead body were taken. On investigation, it was found that the description of the dead body matched with the description of a missing person vide DD No. 15A. Complainant of DD No.15A i.e. Mithilesh Prasad was called to identify the body, and he identified the deceased as his nephew. Accordingly, rukka was prepared and FIR was registered, and the body was sent for post mortem examination.

3. Dr. Asitesh Bajwa (PW-2) conducted the post mortem examination on the dead body of the deceased on 01st March 2012 at 1.10 pm. He submitted his report Ex.PW-2/A and opined:

EXTERNAL INJURIES

1. Depressed groove in the form of abrasion 33.2 cm and length with contused margin was encircling the neck sparing area at front of neck at midline. It was placed at the level of thyroid cartilage, directing upward and backward, 5 cm below chin, 2.5 cm below right angle of mandible and 2.3 cm below left angle of mandible.

2. Linear abrasion three in number size varying from 1.2 X 0.8 X 0.1 cm was present at both side of neck below the ligature mark.

3. Radish brown abrasion 1.5 X 1.2 cm was present at back of left elbow joint.

INTERNAL INJURIES

Brain Matter Meninges and Cerebral Vessels; were congested with engorged vessels.

Neck, Soft Tissues; Soft tissues underneath the ligature mark was avascular, glistening with parchment like consistency. Infiltration of blood was present at soft tissues above and below the mark. Hyoid bone was found fractured at left side. Lymph nodes were congested and engorged with laceration of left carotid artery.

All the organs were found congested. Stomach contained about 80 cc of partially digested food.

OPINION

The cause of death in this case in my opinion was traumatic asphyxia as a result of ante-mortem strangulation (ligature) which was sufficient to cause death in an ordinary course of nature. Time since death was about 3-4 days.

4. Thereafter, on 04th March, 2012, secret information was received that the deceased of the present case was murdered by one Ram Niwas who was a resident of B-1409, Shastri Nagar, having a factory at E-2, Shastri Nagar. The investigating officer, Insp. Vishwajeet Kumar (PW-26) along with his team went to the house of the appellant, from where he was arrested, his disclosure statement was recorded and recoveries were effected at the instance of the appellant. Upon completion of investigation, chargesheet was filed and the appellant was charged for the offence of commission of murder of Munna Kumar punishable under Section 302 IPC. To establish its case, the prosecution examined 26 witnesses, and learned Trial Court vide the impugned judgment based its decision of conviction on the ground that the identity of the accused, the manner of offence, place of commission, and other circumstances were duly proved by the prosecution witnesses and medical and scientific evidence. The evidence was found to be natural and trustworthy which formed a continuous link

5. Learned senior counsel for the appellant assails the impugned judgment on the ground that even taking the prosecution case as proved there was no evidence pointing towards the guilt of appellant in committing the murder of the deceased and at best the evidence points towards the involvement of the appellant in disposing of the body of the deceased. It was contended that the secret information received by the IO was never reduced in to writing. PW-1 is not a reliable witness and pointed out to the various improvements made by PW-1 in his statement before the Trial Court. It was contended that for a period of seven days, PW-1 remained in one room at the ground floor of the police station. PW-1 admitted that whenever he had to depose before the court, the police officials used to show him the file and instructed him, what to say and what not to say. These facts emerging from the deposition of PW-1 demonstrate that undue pressure was exerted upon a vulnerable rickshaw-puller and he was tutored, which adversely affects his credibility as a witness. It was further pointed out that as per DD No.46B dated 28th February, 2012, no description of the person who had boarded the rickshaw of PW-1 was given. Version as narrated by PW-1 appears to be improbable as it is unknown as to how the appellant reached Kishan Ganj Market which is away from his residence and factory, with a heavy dead body and hired a rickshaw exposing himself unmuffled to the rickshaw puller, on whose rickshaw he apparently intended to abandon the dead body. It was further contended that as per the prosecution, blood-stained clothes of the appellant were recovered from the house of appellant but there was no whisper about the clothes of appellant being stained with blood by PW-1. Furthermore, it was contended that the appellant rightly refused TIP as he was already identified by PW-1, when PW-1 went to get his rickshaw released on superdari as stated by PW-26. Further, as per the prosecution story, the deceased was having an illicit relationship with PW-10, because of which the appellant had eliminated the deceased. However, as per the testimony of PW-10 herself, her husband PW-6 and her landlady PW-8, 'S' had no illicit affair with the appellant or the deceased and thus, motive was not proved by the prosecution.

Reliance in this regard was placed on the decision cited as 1994 Supp. (3) SCC 367 Tarseem Kumar v. Delhi Administration.

6. It was further contended on behalf of the appellant that the Trial Court grossly erred in holding as admissible the disclosure statement of the appellant to the extent it related to the discovery of fact relating to confirmatory character of person i.e. PW-10 with whom appellant and deceased allegedly had an illicit relation. It was submitted that the said fact was already in the knowledge of the IO as it was told to the IO by the secret informer on 04th March, 2012 and further, discovery of purely intangible and mental facts is not encompassed within the fold of Section 27 of the Indian Evidence Act, 1872. Reliance was placed on the decision reported as (2005) 11 SCC 600 State (NCT of Delhi) v. Navjot Sandhu. Furthermore, it was contended that in the decision reported as 2010 SCC OnLine Del 2675 Mohd. Rizwan v. State, it was observed that the normal course of human conduct of a murder accused would be to either wash his blood-stained clothes or to destroy them at the very first opportunity; but in the present case, the blood stained clothes of the appellant were recovered from his house, five days after the incident. Another contention raised on behalf of the appellant was that as per the testimony of Mithilesh Kumar (PW-4), at the time of arrest of the appellant, the police had searched his house and nothing was recovered from the house, and thereafter the appellant took the police to the factory, however as per the version of IO, the appellant took the police party to the factory and then came back to his house and the blood-stained clothes were recovered. Reliance was placed on the decision reported as (2009) 17 SCC 273 Mani v. State of Tamil Nadu, wherein it was held that recovery in terms of Section 27 of the Evidence Act from the spot already in knowledge of the police is farcical. Further, the recovery of blood-stained clothes is neither recorded in the disclosure statement, nor in the supplementary disclosure statement.

7. It was further contended that as per the testimony of PW-4 and the photographs of the dead body, no rope was tied on the neck of the dead body. Further, no identification mark was found on the recovered pieces of rope. Recovery of ordinary objects even though stained with deceased's blood is a weak evidence and insufficient to fasten liability on the accused. Reliance was placed on the decision cited as (2018) 252 DLT 585 Naveen Kumar Verma v. State. Furthermore, as per the FSL report, the piece of nylon rope was having dark brown stains, but it was never sent for DNA or serological examination. Further, Rajinder Goel PW-5 deposed that no recovery was effected from the factory. The motorcycle recovered at the instance of the appellant was also of no avail to the prosecution as the same could not be connected with the crime. As per DD No. 15A (Ex.PW-9/A), the deceased was carrying a mobile phone no. 8586911140. No location analysis of the said mobile phone was conducted by the police. Reliance was placed on the decision cited as (2015) 7 SCC 178 Tomaso Bruno & Anr. v. State of Uttar Pradesh. It was contended that the appellant himself was running a business of cardboard which was also deposed by PW-5 and noted in the crime team report (Ex.PW-11/B), therefore it would be against

natural course of human conduct, that appellant would go out to purchase cardboard after committing murder as alleged by the prosecution, especially when he himself manufactured cardboard boxes. It was also contended that it was not safe to rely upon the FSL report dated 12th December, 2014 (Ex.PW-22/A) prepared by L. Babyto Devi and reliance was placed on the decision reported as 2018 SCC OnLine Del 10347 State of NCT of Delhi v. Khursheed, wherein in view of the irregularities which surfaced in respect of the reports prepared by Babyto Devi, this Hon'ble Court had directed CBI enquiry against this expert. Lastly, it was contended that the trial court erred in holding that the subsequent conduct of the appellant of getting nervous on seeing the police, as deposed by Mithlesh Kumar, was a pointer towards his guilt, as even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime. Reliance was placed on the decision cited as 1971 (2) SCC 75 Matru @ Girish Chandra v. State of Uttar Pradesh.

8. On the other hand, learned APP for the State submitted that the chain of evidence is consistent with the hypothesis of guilt of the appellant and leaves no ground for conclusion consistent with appellant's innocence and thus, the appeal is liable to be dismissed, and the conviction and sentence awarded to the appellant is liable to be upheld. To establish its case, learned APP relied upon the following facts:

a. Bhiku Sada (PW-1) has supported the prosecution case and is a reliable witness. He correctly identified the appellant, two white plastic sacks and blood-stained cardboard box in the court. There is no motive for PW-1 to falsely implicate the appellant and there is no suggestion of any previous enmity between PW-1 and the appellant. Qua the argument on behalf of the appellant that PW-1 admitted to have remained in police station for seven days and hence was tutored and not reliable, it was submitted by learned APP that the same shows that PW-1 is not a tutored witness and had rather deposed freely and without any pressure. PW-1 remained consistent in all his statement made to police and before the court.

b. Appellant refused to participate in the TIP (Ex.PW-14/C). He was arrested on 04th March, 2012 and was sent to judicial custody on 5th March, 2012. His TIP was sought to be conducted on the 6th March 2012, when he was produced by the Jail Superintendent and therefore, there was no possibility of showing the appellant to the witness. Further, even if the appellant's version of photographs being shown to PW-1 is accepted, the same does not affect the credibility of identification by PW-1 in court. Reliance was placed on the decisions reported as (1988) 3 SCC 319 Laxmi Raj Shetty v. State of T.N., (2000) 1 SCC 138 Umar Abdul Sakoor Sorathia v. Intelligence Officer, NCB, (2003) 5 SCC 746 Malkhansingh v. State of M.P. and (2012) 7 SCC 646 Shyamal Ghosh v. State of W.B.

c. One black purse with a photo of the deceased, Soly Elisom mobile phone of the deceased, piece of nylon rope, blood-stained clothes of the appellant were

recovered at the instance of the appellant. As per the FSL report (Ex.PW-23/A & B), blood of deceased was found on the cardboard box and plastic bag recovered at the instance of the appellant as also on the pant of the appellant. Further, the nylon rope which was found tied around the neck of the deceased and the one recovered from the appellant were found similar in color, texture, type of twist, number of strands, length of lay, thickness and appearance under UV light and microscopic appearance (Ex.PW-24/A). No poison was found in the viscera and the blood sample of the deceased.

d. Post mortem report clearly opines the cause of death to be ante mortem strangulation which was sufficient to cause death (Ex.PW-2/A).

9. Having heard learned counsel for the parties at length and perusing the record, the following evidence led by the prosecution emerges on record.

10. Bhiku Shada (PW-1) deposed that on 28th February, 2012, at about 9 am he was searching for a passenger, when the appellant who was standing at the Bus Stop Kishan Ganj Market called him and told him to take him to Azad Market, upon which the appellant loaded his goods. When he had reached near the iron bridge, there was a slope he started pushing his rickshaw with force, when the appellant got down and started running. He called the appellant back and asked the appellant to unload goods and free him, on which, the appellant told him that the appellant would be coming after urinating and asked him to wait. Accordingly, he waited for the appellant near the urinal ahead of Shiv Mandir for about two hours. He then went to the place from where appellant had boarded his rickshaw and made enquiries there and from there he went to his garage from where he had taken his rickshaw on rent and on touching the goods, the same was found to be soft upon which, he took the goods to PS Sarai Rohilla. The police officials unloaded the goods. On opening the plastic bag, a cardboard box was found, inside which there was another plastic katta and inside that katta a dead body was found. The hands and feet of the body were tied and a green color rope was also found tied around the neck of the dead body. In his cross examination, he stated that one wallet was recovered from the pocket of the dead body and that appellant was shown to him in the police station. He further stated that he remained in the police station for about a week after the incident.

11. Mithlesh Kumar (PW-4) deposed that the deceased was his real nephew and was residing with him. As the deceased did not return till late night on 27th February, 2012, he lodged a missing report on 28th February, 2012 at about 9 am at PS Sarai Rohilla. On the same day, he was called to the police station, where he identified the body of his nephew. On 04th March, 2012, he joined investigation and with the police team, went to the house of the appellant at Shastri Nagar. Police searched the house of the appellant but nothing was recovered and thereafter, the appellant took the police team to his factory of dye cutting and got recovered one purse belonging to the deceased, one plastic rope of one foot approx. Thereafter, appellant took to a stall from where he had purchased the carton and a box was given by the stall owner as sample to the

police. Thereafter, they went to the shop from where he had purchased the plastic sac and the police also took a sample plastic sac from the shop owner. Thereafter, from the house of the appellant, one pant, one shirt and one jersey were seized, and from the gali outside the house, a bike was also got recovered. In his cross examination, he stated that he knew the appellant and his residence prior to the incident.

12. Charanjeet (PW-3) stated that the appellant had purchased a white color plastic bag from his shop on 27th February, 2012. He also handed over a white sack to the police. In his cross examination, he stated that the plastic bag does not bear any identification or other mark of his shop. Aslam (PW-20) identified the appellant as the person who had purchased one cardboard carton box from him upon which Gujnyl Nylon Filament Yarn Gujarat State Fertilizer and Chemicals Ltd. was printed which was taken into possession by the police and he identified the carton box shown to him by the police.

13. 'S' (PW-10) deposed that she was living in the same locality as that of the deceased and being neighbor, the deceased used to visit her house. She stated to have seen the appellant for the first time at PS Sarai Rohilla when she was called for inquiry in the present case. She turned hostile. However, her husband PW-6 during his examination stated that he knew the appellant for the last ten to fifteen years, and that the appellant and the deceased both used to visit his house.

14. As per the FSL report Ex.PW-22/A, the DNA generated from the pant of the appellant matched with the DNA generated of the deceased. Further, the nylon rope recovered from the neck of the deceased and the nylon rope seized at the instance of the appellant were found to be similar in respect of colour, texture, type of twist, number of strands, length of lay, thickness, appearance under UV light and microscopic appearance vide the FSL report Ex.PW-24/A. As per the viscera (Ex.PW-25/A) no poison or alcohol was detected in the body of the deceased. And as per the serology report (Ex.PW-26/B), blood of deceased was found on the cardboard box and plastic bag.

15. IO Insp. Vishwajeet Kumar (PW-26) deposed that on 28th February, 2012 he met Bhiku Sada (PW-1) who brought his rickshaw carrying a plastic katta to the police station upon which he informed crime team and the plastic katta was inspected. The said katta was found containing one cardboard carton box in which one more plastic katta was kept upon opening which, a dead body of one male person was found with a plastic rope of green colour tied around his neck. Thereafter, on perusal of the missing report (DD No.15A), the description of the dead body matched with the missing person and accordingly, the complainant of DD No. 15A Mithlesh Prasad (PW-4) was called to the police station. Mithlesh identified the dead body as that of his nephew Munna Kumar. IO then prepared the rukka (Ex.PW-26/A) and got the FIR registered. He seized the plastic katta, the cardboard carton box and the rickshaw of Bhiku Sada and the dead body was sent to the Subzi Mandi Mortuary where the post-mortem was conducted.

Thereafter on 4th March, 2012, a secret informer met him at about 1.00 pm at Shastri Nagar Metro Station who informed him that the deceased was murdered by one Ram Niwas resident of B-1409, Shastri Nagar who is also running a factory at E-2, Shastri Nagar due to illicit relations with one lady named 'S'. Thereafter, he called Mithlesh Prasad (PW-4) at the spot and along with his team went to the house of the appellant at about 2.05 pm where the appellant was found with his wife and daughter at the ground floor. He arrested the appellant (Ex.PW-19/A) and recorded his disclosure statement (Ex.PW-4/D). Thereafter, the appellant led him to his factory, the place of alleged offence and got recovered one black colour purse and one mobile phone of red colour make Soly Elisom belonging to the deceased kept under the wooden dyes in the corner of the room. One green colour piece of rope was also recovered from the slab in the room. Crime team was called at the spot and photographs were taken. Thereafter, the appellant led the IO to his house from where bloodstained pant, one jersey and one shirt got recovered from the headrest of the bed. The appellant also got recovered one motorcycle bearing no. DL8SAC9542 which was allegedly used by the appellant for bringing the deceased to the factory. Thereafter, the appellant led him to M Block, Shastri Nagar where one squatter named Aslam was found sitting from whom the appellant stated to have purchased one carton box, and one sample carton box was also taken from Aslam. The appellant then led the IO to shop no. B-1252, Shastri Nagar from where the appellant purchased one plastic katta and the shopkeeper Charanjeet handed over a sample plastic katta. The appellant was sent to judicial custody on 5th March, 2012 and an application for TIP was moved on 6th March, 2012 in which the appellant refused to participate before the learned MM (Ex.PW-14/C). Thereafter, the sealed exhibits were sent to FSL, Rohini and upon completion of investigation, charge-sheet was filed before the Trial Court.

16. In his statement recorded under Section 313 Cr.P.C. appellant Ram Niwas stated that he did not make any disclosure statement, nothing was recovered at his instance and all the recoveries were planted on him. He stated that he refused to participate in the TIP as he and his photos were shown to the witness in the police station on an earlier instance. He also stated that he has been falsely implicated in the present case in order to solve a blind case.

17. It was the case of the prosecution that on 27th February, 2012, the deceased left his house and did not return home, upon which a missing report was lodged by his uncle Mithlesh Kumar (PW-4) on 28th February, 2012 at about 9 am. On the same day, at about 9 am, the appellant had boarded the rickshaw of Bhiku Sada (PW-1) from Bus Stop at Kishanganj Market to go to Azad Market, carrying with him a white plastic sack. The appellant got down of the rickshaw and asked PW-1 to wait as he was going to the urinal and after waiting for about 1.5-2 hours, PW-1 first went to the garage from where he had taken his rickshaw on rent and thereafter went to the police station, where the plastic bag was taken down from the rickshaw and on opening, a dead body was found. The said body was identified by Mithlesh Kumar to be that of his nephew, Munna Kumar.

Thereafter, on 04th March, 2013, a secret informer met the IO and informed him that the deceased had been murdered by the appellant, and accordingly, a raid was conducted on the house of the appellant from where he was arrested and his disclosure statement was recorded. The appellant disclosed that he and deceased had illicit relations with 'S' (PW-10) and he murdered the deceased as did not like deceased's relation with 'S'. Further, the appellant led the police to his factory from where he got recovered a green nylon rope, wallet and phone of the deceased. Thereafter, the appellant led the police to his house from where he got recovered his own blood stained clothes which he was wearing on the day of the incident. The appellant then took the police to the squatter Aslam (PW-20) from whom the appellant had purchased the cardboard box and thereafter, the police was led to the shop of Charanjeet (PW-3) from where white plastic sack was purchased.

18. Learned counsel for the appellant has contended that no adverse inference for non-participation in the TIP can be raised against the appellant as the plea that the photographs of the appellant were taken in the TIP proceedings and the plea in the statement under Section 313 CrPC that his photographs were taken and he was shown to the witnesses, is fortified by the evidence of PW1, the star witness of the prosecution itself. It may be noted that PW1 in his cross examination admitted that he remained in the police station for about a week after this incident and was not sent to lock up but remained in the police station with all other suspects in one of the rooms at the ground floor of the police station. They were not locked by the police during this period and in the said period of seven days, he has not plied his rickshaw nor gone anywhere outside the police station. It is thus evident that PW1 was kept in police station from 28th February 2012 itself and continued there till 5th March 2012. As per the case of the prosecution itself, the appellant was apprehended on 4th March 2012 and thus, from 4th to 5th March 2012 till the appellant was sent to judicial custody, the appellant and PW1, the only witness were in the police station and there was every likelihood of PW1 having seen the appellant. Further, in his cross examination, PW1 stated that Ram Niwas was shown to him in the police station prior to the date when he moved an application for superdari in the Court and whenever he saw Ram Niwas, he was in an unmuffled face, even though he categorically denied the suggestions that Ram Niwas never hired the rickshaw or that he identified Ram Niwas at the instance of the police. Thus, no adverse inference can be drawn because the appellant did not join the TIP.

19. Be that as it may, it is well settled that test identification parade is only an aid in investigation and it is dock identification which has to be taken into consideration. However, if the TIP is suspect or has not been conducted properly or not conducted at all, the evidence of identification in the dock has to be viewed with caution. The three Judges' Bench of the Hon'ble Supreme Court in the decision reported as (2003) 5 SCC 746 Malkhansingh and Others Vs. State of M.P. held as under:-

"6. The principal submission urged before the courts below as also before us is whether the conviction of the appellants can be sustained on the basis of the identification of the appellants by the prosecutrix in court without holding a test identification parade in the course of investigation. While the appellants contend that the identification in court not preceded by a test identification parade is of no evidentiary value, the prosecution contends that the substantive evidence is the evidence of identification in court and, therefore, the value to be attached to such identification must depend on facts and circumstances of each case. No general rule could be laid that such identification in the court is of no value.

7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Admn.* [AIR 1958 SC 350 : 1958 Cri LJ 698] , *Vaikuntam Chandrappa v. State of A.P.* [AIR 1960 SC 1340 : 1960 Cri LJ 1681] , *Budhsen v. State of U.P.* [(1970) 2 SCC 128 : 1970 SCC (Cri) 343 : AIR 1970 SC 1321] and *Rameshwar Singh v. State of J&K* [(1971) 2 SCC 715 : 1971 SCC (Cri) 638] .)

8. In *Jadunath Singh v. State of U.P.* [(1970) 3 SCC 518 : 1971 SCC (Cri) 124] the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive consideration of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with the deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the

last 6-7 years as they had been frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in *Parkash Chand Sogani v. State of Rajasthan* [Crl. A. No. 92 of 1956 decided on 15-1-1957 (SC)] wherein it was observed: (SCC pp. 522-23, para 11)

"It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of PW 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person, who is well known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances."

The Court concluded: (SCC pp. 523-24, para 15)

"15. It seems to us that it has been clearly laid down by this Court in *Parkash Chand Sogani v. State of Rajasthan* [Crl. A. No. 92 of 1956 decided on 15-1-1957 (SC)] that the absence of test identification in all cases is not fatal and if the accused person is well known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case."

9. In *Harbajan Singh v. State of J&K* [(1975) 4 SCC 480 : 1975 SCC (Cri) 545] though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll-call and when they were arrested on the night of 16-12-1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held: (SCC p. 481, para 4)

"4. In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in *Jadunath Singh v. State of U.P.* [(1970) 3 SCC 518 : 1971 SCC (Cri) 124] absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers only shows that

the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant."

10. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

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12. In *Suresh Chandra Bahri v. State of Bihar* [1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60] this Court held that it is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. Thereafter this Court observed: (SCC p. 126, para 78)

"But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of TI parade."

13. In *State of U.P. v. Boota Singh* [(1979) 1 SCC 31 : 1979 SCC (Cri) 115] this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

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16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In the instant case the courts below have concurrently found the evidence of the

prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in court as she was found to be implicitly reliable. We find no error in the reasoning of the courts below....”.

20. The test identification parade in the present case being suspect, it has to be seen whether PW1 had sufficient time to identify the appellant and the dock identification can be thus relied upon.

21. As noted above, as per the testimony of PW1, at about 9 a.m., he was roaming in Kishan Ganj market for search of the passenger, when Ram Niwas, the appellant was standing at the bus stop Kishan Ganj market with goods. On the appellant calling PW1, he went near Ram Niwas. Ram Niwas asked PW1 that he has to go to Azad Market whereafter he loaded his goods in the rickshaw and sat.

22. Undoubtedly, when a rickshaw puller is sitting, he has his back towards the passenger but in the present case, while settling the fair, as also putting the luggage on the rickshaw, gave sufficient time to PW1 to see the appellant in broad day light and the same cannot be treated to be a case of fleeting glimpse.

23. As regards the next challenge of the appellant to the recoveries allegedly made, this Court finds merit in the same on some counts. It is the claim of the prosecution that after the appellant was arrested from his house, after search of his house was taken and on his disclosure statement recorded, he was taken to his factory from where vide the seizure memo Ex.PW5/B, on the pointing out of the appellant, a wallet, a mobile phone red colour make Soly Elisom and soft nylon rope of green colour length 33 cms long kept on the slab were recovered. The wallet recovered at the instance of the appellant had one colour passport size photo of the deceased, two receipts of Punjab National Bank in the name of Ramvriksh, father of Munna and a PNB document which had the name of Ramvriksh and Munna besides other papers which were recovered. The purse had also two notes of Rs.10/- each. This recovery of the wallet cannot be relied upon in view of the testimony of PW1 who stated in his examination-in-chief that after touching the goods and finding them to be soft, he took the goods on rickshaw to police station Sarai Rohilla where the police officials unloaded the goods from rickshaw. It was a white plastic bag (katta), with a cardboard box packed inside the said katta and a plastic katta inside the cardboard box. On opening the plastic katta, a dead body of a male with his hands and feet tied up, was found. On checking of the dead body, cash of ₹101/- was recovered from left side pocket of the pant. In his cross-examination, though PW1 stated that the cash of ₹101/- was recovered from the pocket of the deceased and not from any wallet, however, he also stated one wallet was recovered from the pocket of the pant of the dead body. He did not remember the colour of the wallet.

24. In view of the deposition of PW-1 in cross-examination that the wallet was recovered from the dead body, the recovery of the wallet from the factory is required to be disbelieved.

25. As regards the recovery of the mobile phone from the factory is concerned, vide the seizure memo, IMEI number and the SIM card of the mobile phone were noted. However, the call detail records of the said mobile phone though collected during the course of investigation, were not exhibited. Though Mithlesh Kumar is a witness to the seizure memo Ex.PW5/B, he neither spoke about the recovery of the mobile phone from the factory nor did he identify the mobile phone of the deceased in the Court. Even though he gave the mobile number of the deceased in the missing report, in the absence of identification by Mithlesh Kumar, the mobile phone allegedly recovered vide seizure memo Ex.PW5/B, cannot be connected to the deceased.

26. As regards the recovery of the piece of rope from the factory of the appellant, as per the FSL report, on examination of the said rope, it tallied with the piece of rope which was found around the neck of the deceased. The FSL report Ex.PW24/A notes that the three pieces of nylon ropes having dark brown stains tied together with thread tallied with the piece of rope recovered from the factory on examining physically under magnification, using 'VISPEC' and other measuring tools and they were found to be similar in respect of the colour, texture, type of twist, number of strands, length of lay, thickness, appearance under UV light and microscopic appearance.

27. It is the case of the prosecution that after the arrest of the accused, on his disclosure, he was taken to the factory from where, purse, mobile phone and rope were recovered and thereafter he was again taken to his house from where he got his blood-stained pant and shirt recovered. PW4 in his testimony stated that on 4th March 2012, he joined the investigation as he was called by the police officials. He reached in front of Sonu Bartan Bhandar; whereafter they went to the house of Ram Niwas at about 2 p.m. House of Ram Niwas was situated in Shastri Nagar near their house. In the house of Ram Niwas, his wife and daughter met them. Ram Niwas became nervous on seeing the police and he also identified Ram Niwas. Police took search of the house of accused Ram Niwas but nothing was recovered. Thus, in the search of the house of Ram Niwas made at the time of his arrest nothing was recovered.

28. Further this Court has perused the disclosure statement of Ram Niwas Ex.PW4/D, where, there is no mention about the blood-stained clothes lying at the house and no second disclosure statement was recorded. The disclosure statement is in respect of a purse, mobile phone and nylon rope only. Thus, the recovery of blood-stained clothes at the instance of Ram Niwas from his house on again going back, is not pursuant to his disclosure statement and the entire house having been searched before Ram Niwas was taken to the factory, it is unfathomable that from the bedside of the appellant, one blood-stained full pant, one jersey black colour and one light orange shirt were not seen when the search in the first instance was taken.

29. The prosecution has heavily relied on the evidence of PW22 L.Babyto Devi to claim that on DNA analysis, blood on the pant of the appellant tallied with the

said blood of the deceased as collected in the gauze. However, as noted above, since the recovery of the blood-stained pant of the appellant from his house is suspect, the matching of the blood on the said pant with the deceased will have no bearing. In view of this link evidence not being satisfied, we do not wish to deal with the other contentions raised by the learned counsel for the appellant qua the DNA analysis.

30. It is the case of the prosecution that after arrest, the appellant led to the shop of Aslam from where, he bought cardboard. From Charanjeet, he brought the plastic sacks. Both these witnesses have supported the case of the prosecution and Aslam has also given one sample Carton to the police seized vide Ex.PW4/A with the impression 'Gujnyl Nylon Filament Yarn Gujarat State Fertilizer and Chemicals Ltd.' printed on it. However, what defies logic is that factory of the appellant was a cardboard factory which is evident from the photographs, the report of the crime team Ex.PW11/B that it was a gatta factory as also the statements of the witnesses. Though learned APP for the State has sought to contend that the factory was of plywood, however, the evidence on record shows to the contrary. In case the appellant committed the murder of the deceased in the factory wherein he was manufacturing cardboard, there was no reason, that the appellant would have gone outside and purchased the cardboard from a shop to pack the body.

31. In view of the discussion aforesaid it is evident that the recoveries at the instance of the appellant are suspect, thus leaving the prosecution with the evidence of identification of the appellant by the witness Bhikhu Sada (PW-1) who identified the appellant as the person who kept the dead body in a plastic bag in his rickshaw and got down from the rickshaw for going to urinal and thereafter disappeared. The identification in the dock required corroboration from other evidence proved by the prosecution. However, in the absence of any corroborative evidence merely on the dock identification of the appellant by PW-1, the conviction for an offence punishable under Section 302 IPC cannot be based safely. Consequently, the appellant is entitled to the benefit of doubt. The impugned judgment of conviction and order on sentence are set aside.

32. Appeal is disposed of.

33. Superintendent Tihar Jail is directed to release the appellant forthwith if not required in any other case.

34. Copy of this judgment be sent to the Superintendent Tihar Jail for updation of record and intimation to the appellant.