

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 7th January, 2010*
Judgment Delivered on: 12th January, 2010

+ **CRL.APPEAL NO.971/2008**

DHEERAJAppellant
Through: Mr.Ajay Verma, Advocate
Mr.Gaurav Bhattachraya, Advocate

Versus

STATERespondent
Through: Mr.M.N.Dudeja, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 03.07.2008, the appellant stands convicted for the offence of having murdered Sampada (hereinafter referred to as the "Deceased") as also for the offence of having committed robbery in the house of the deceased.

2. The case of the prosecution was that on 05.08.2004 Alisher PW-5, an acquaintance of the husband of the deceased, employed the appellant as a labourer on a temporary basis. On the same day i.e. 05.08.2004 Alisher PW-5, accompanied by the appellant went to the house of the deceased and both Alisher and the appellant stayed there in the night. In the afternoon of 09.08.2004 the deceased was found dead in her house. Soon before the death of the deceased, SI Ranbir Singh PW-3, a neighbour of the deceased, had seen the appellant coming out from the house of the deceased. The presence of the appellant in the house of the deceased soon before the death of the deceased is further confirmed from the fact that in the morning hours of 09.08.2004 the deceased had telephonic conversations with her husband and brother HC Savinder Singh PW-3 and Mukesh Rana PW-7, respectively wherein she informed them that the boy who had come with Alisher to her house on 05.08.2004 had again come to her house and is waiting there for Alisher. On being apprehended, the appellant made a disclosure statement in the presence of a public person namely Ramesh Kumar PW-7, wherein he stated that he can get recovered the things he had stolen from

the house of the deceased. Pursuant thereto, the appellant led the police and Ramesh Kumar to a room which was let out by Shanti PW-11, to the appellant and got recovered certain things he had stolen from the house of the deceased including a licensed revolver belonging to Savinder Singh and the jewellery articles of the deceased. The said jewellery articles except the toe rings were duly identified in court by HC Savinder Singh PW-2, the husband of the deceased.

3. To put it in a nutshell to sustain the case of the prosecution, the incriminating evidence would be:

I The deceased was present in the company of the appellant around the time of her death.

II Recovery of the articles belonging to the deceased and her husband from the possession of the appellant.

4. Vide impugned judgment and order dated 03.07.2008, convicting the appellant, the learned Trial Judge has held that the testimony of Alisher PW-5, HC Savinder Singh PW-2, SI Ranbir Singh PW-3 and Mukesh Rana PW-6, establishes that the deceased was present in the company of the appellant around the time of the her death; that the testimony of

Ramesh Kumar PW-7, HC Savinder Singh PW-2 and Savitri PW-11, establishes that the fruits of the crime were recovered at the instance of the appellant and that aforesaid two circumstances when linked together lead to an inference that the appellant is the perpetrator of the crime (s) with which he is charged.

5. As per the prosecution, the events which led to the filing of the charge sheet against the appellant in the present case was that on 09.08.2004 HC Savinder Singh PW-2, the husband of the deceased, was present on his duty when at around 12.45 P.M. the teacher of his son informed him over phone that the deceased had not come to the school to pick up his son. Fearing that something untoward has happened to the deceased, HC Savinder Singh called up his neighbour and told him to visit his house. Pursuant thereto, Babu Ram PW-4, visited the house of the deceased where he found that the house was ransacked and that the deceased was lying dead. HC Babu Ram PW-4, immediately informed the police about the incident. Const. Pushpa PW-1, prepared DD entry Ex.PW-1/A recording therein the information given by HC Babu Ram.

6. On receiving the information about the incident, Inspector K.C. Negi PW-24, SI Sudhir Kumar PW-22 and Const. Ram Pal PW-23, reached the house in question. Inspector K.C. Negi PW-24, made an endorsement Ex.PW-24/A on the DD entry Ex.PW-1/A and sent the same to the police station through Const.Ram Pal PW-23, for the purposes of registration of an FIR. Relevant would it be to note that the endorsement Ex.PW-24/A records that two almirahs kept in the house were found open and that goods were lying scattered in the house.

7. Crime team reached the house in question; on being summoned. HC Sajjan Kumar PW-14, took 16 photographs Ex.PW-14/A1 to Ex.PW-14/A16 of the house in question; negatives whereof are Ex.PW-14/B1 to Ex.PW-14/B16.

8. The body of the deceased was seized and sent to the mortuary of BJRM hospital for post-mortem. On 09.08.2004 at about 04.00 P.M. Dr.Anil Shandil PW-12, conducted the post-mortem of the deceased and prepared the report Ex.PW-12/A. The post-mortem report Ex.PW-12/A of the deceased records that 13 bullet entry wounds were found on the person of the deceased; that the death of the deceased was caused due to projectile firearm injuries and that the death of the deceased

had taken place about 6 hours before the conduct of the post-mortem.

9. On 16.08.2004 Inspector K.C. Negi PW-24 and SI Sudhir Kumar PW-22, arrested the appellant in the presence of a public person Ramesh Kumar PW-7. On being interrogated by Inspector K.C. Negi PW-24, in the presence of SI Sudhir Kumar PW-22 and Ramesh Kumar PW-7, the appellant made a disclosure statement Ex.PW-7/A wherein he stated that he can get recover the articles stolen by him from the house of the deceased and a knife used by him in the commission of the crime. Pursuant thereto, the appellant led the aforesaid police officers and Ramesh Kumar to village Kherha and got recovered two gold rings, one gold chain, five pairs of silver anklets, two artificial necklaces, one artificial chain, five pairs of toe rings, three passbooks, one credit card, one cheque book, one suitcase, one ladies purse, one handbag, cash of Rs.500/-, one licensed revolver, fourteen live cartridges of .22 bore, seven empty cartridges of .22 bore, 13 empty cartridges of .32 bore, 5 five live cartridges of .32 bore and one scout knife from a suitcase lying in a room.

10. Inspector K.C. Negi moved an application before Metropolitan Magistrate for conduct of test identification proceedings of the appellant. On 15.09.2004 Archana Sinha PW-18, Metropolitan Magistrate, conducted TIP of the appellant and prepared the record Ex.PW-18/C in said regard. The record Ex.PW-18/C notes that the appellant refused to participate in the TIP on the ground that he was already shown to the witnesses.

11. On 03.11.2004 Vinod Yadav PW-15, Metropolitan Magistrate, conducted test identification proceedings of the jewellery articles recovered at the instance of the appellant and prepared the record Ex.PW-15/B in said regard. The record Ex.PW-15/B notes that save and except one pair of anklet and five pairs of toe rings HC Savinder Singh PW-2, the husband of the deceased, identified the jewellery articles recovered at the instance of the appellant as that of the deceased.

12. Needless to state, the appellant was sent for trial. Charges were framed against the appellant for having committed offence punishable under Section 302 IPC and Section 394 IPC read with Section 397 IPC.

13. At the trial, the prosecution examined 24 witnesses. We eschew reference to all and sundry evidence for the reason the learned Trial Judge has convicted the appellant on the basis of the testimony of HC Savinder Singh PW-2, SI Ranbir Singh PW-3, Alisher PW-5, Mukesh Rana PW-6, Ramesh Kumar PW-7 and Shanti PW-11.

14. HC Savinder Singh PW-2, the husband of the deceased, deposed that one Alisher was known to him since last 10-12 years. In the evening of 05.08.2004 Alisher accompanied by the appellant came to his house and that Alisher and the appellant stayed in his house in the night. On 06.08.2004 at about 07.30 A.M. Alisher and the appellant left his house with him. On 09.08.2004 he was present in his house when at around 11.30 A.M. he received a telephonic call from the deceased. The deceased told him that the boy who had come with Alisher to their house on 05.08.2004 had again come to their house. The deceased further told him that the said boy had told her that Alisher would come to their house shortly and that he wanted to wait for Alisher in their house. He told the deceased that she should allow the said boy to sit outside their house and that she should call him when Alisher would come

to their house. At about 12.45 P.M. the teacher of his son informed him over phone that the deceased had not come to the school to pick up his son. Thereafter he rang up at his house but no one answered the call. Fearing that something untoward has happened to the deceased, he called his neighbour and told him to visit his house. Sometime thereafter HC Babu Ram informed him that a robbery had been committed at his house whereupon he proceeded to his house. On reaching there he saw that the deceased was lying dead and that his house was ransacked. On searching the house he found that his licensed revolver and some jewellery articles of the deceased were missing. Save and except scout knife, all the articles recovered at the instance of the appellant belonged to him and the deceased. It may be noted here that no suggestions were given to the witness in his cross-examination that he did not receive a telephonic call from the deceased on 09.08.2004. It may be noted that in Court, Savinder Singh identified the revolver got recovered by the appellant pursuant to his disclosure statement as also the jewellery belonging to his wife which was recovered pursuant to the disclosure statement of the appellant.

15. Ranbir Singh PW-3, a neighbour of the deceased, deposed that on 09.08.2004 at about 11.30 A.M. or 11.45 A.M. he had seen the appellant leaving the house of the deceased and that the appellant was carrying a suitcase in his hand at that time. On 16.08.2004 the police had shown him the photograph of the appellant.

16. Alisher PW-5, deposed that he knows the husband of the deceased since childhood. On 05.08.2004 he employed the appellant as a labourer on a temporary basis. On the same day i.e. 05.08.2004 he along with the appellant went to the house of the deceased and that he and the appellant stayed there in the night. On the next morning the husband of the deceased dropped him and the appellant at ISBT. The appellant stayed with him till the night of 06.08.2004. In the night of 06.08.2004 he fired the appellant as he was not satisfied with his work.

17. Mukesh Rana PW-6, the brother of the deceased deposed that on 09.08.2004 at about 12.45 A.M. he rang up at the house of the deceased but no one answered his call. Sometime thereafter he again rang up at his house and the call was answered by an unknown person. In the meantime the deceased picked up the receiver of the phone from the parallel

line and chided the unknown person for answering the call. When he inquired from the deceased about the said unknown person the deceased told him that the said person is the boy who had come with Alisher to their house on 05.08.2004. The deceased further told him that the said boy had told her that Alisher would come to their house shortly.

18. Ramesh Kumar PW-7, deposed that the police had arrested the appellant in his presence. On being apprehended, the appellant led the police to the house of one Savitri Devi in his presence and got recovered jewellery and a revolver from a suitcase kept in a room. Shanti PW-11, deposed that the room from where the things were recovered at the instance of the appellant was let out by her to the appellant.

19. Relevant would it be to note that pertaining to the ransacking of the house in question witnesses, HC Babu Ram PW-4, SI Sudhir Kumar PW-22 and Inspector K.C. Negi PW-24, who had visited the house in question on the day of the incident, deposed that they had found the house in question ransacked on the day of the incident. It may also be noted here that pertaining to the articles found on the dead body of the deceased Inspector K.C. Negi PW-24, deposed that

(Quote): *'The dead body was wearing earring in her right ear, a gold chain around her neck, four gold bangles in her right hand and three glass bangles in her left hand.'*

20. In his examination under Section 313 Cr.P.C. the appellant denied everything and pleaded false implication.

21. As already noted hereinabove, the learned Trial Judge has convicted the appellant.

22. In support of the appellant, the counsel for the appellant advanced under-noted three submissions:-

A The first submission advanced by the learned counsel pertained to the identification of the appellant by the witness SI Ranbir Singh PW-3. Counsel urged that it is well settled that where a witness identifies an accused who is not known to him in the court for the first time, his evidence is absolutely valueless in the absence of conduct of a prior test identification parade. Counsel urged that the appellant was fully justified in refusing to participate in his test identification parade inasmuch as a close perusal of the testimony of HC Ranbir

Singh would go to show that he was shown the photograph of the appellant prior to the conduct of the test identification parade of the appellant and therefore in such circumstances, no reliance can be placed upon the identification of the appellant by SI Ranbir Singh in the court.

B The second submission advanced by the learned counsel was predicated upon the deposition of Inspector K.C. Negi PW-24, that a gold chain and four gold bangles were found on the dead body of the deceased. Counsel urged that the fact that valuable articles were found on the dead body of the deceased falsifies the case of the prosecution that the appellant had committed robbery for the reason had the appellant committed robbery he would have in all probability removed the gold chain and bangles from the body of the deceased.

C The third submission advanced by the learned counsel is predicated upon the test identification proceedings of the jewellery articles recovered at the instance of the appellant. Counsel urged that a

perusal of the record Ex.PW-15/B of the said test identification proceedings shows that HC Savinder Singh PW-2, the husband of the deceased, was not able to correctly identify one pair of anklet and five pairs of toe rings recovered at the instance of the appellant. As per the counsel, said discrepancy in the evidence of HC Savinder Singh strongly probablizes that the jewellery articles recovered at the instance of the appellant did not belong to the deceased and that the same were planted by the police upon the appellant to implicate him in the present case.

23. The facts, which establish the identity of an accused, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made by him in the Court. The evidence of identification of an accused for the first time in the Court 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. There is no provision in the Code of Criminal Procedure which requires the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. The identification made in a test identification parade do not constitute substantive evidence and can only be used as corroborative of the statement in court. (See the decision of Supreme Court reported as Santosh Devidas Behade v State of Maharashtra (2009) 3 SCALE 727)

24. In the decision reported as Jadunath Singh v State of UP 1971 CriLJ 305, the submission that absence of test identification parade is fatal in all cases, was repelled by Supreme Court after exhaustive consideration of the authorities on the point. It was held that absence of test identification is not necessarily fatal and it would be a waste of time to put up an accused for identification parade when is he is well-known to the witness.

25. In the decision reported as State of UP v Boota Singh (1979) 1 SCR 298 the Supreme Court observed that greater value should be attached to the evidence of identification of a witness who had an opportunity of seeing the accused not for few minutes but for some length of time, in broad daylight for the reason the witness would be able to note the features of the accused carefully.

26. In the decisions reported as Ramanbhai Naranbhai Patel v State of Gujarat 1999 CriLJ 5013, Malkhansingh v State of MP 2003 CriLJ 3535 and Munshi Ram Gautam v State of MP 2005 CriLJ 320 it was observed by Supreme Court that the failure of test identification parade would be of no consequence where the features of the case are such that the appearance and identity of an accused is imprinted in the mind of witness.

27. From the afore-noted judicial decisions, the legal norm which can be culled out is that:-

I Failure to hold test identification parade would be fatal where the witness is a total stranger or the witness had just a

fleeting glimpse of the accused or the witness had no particular reason to remember the accused.

II Failure to hold test identification parade would not be fatal where the accused was known to the witness or the identity of the accused was imprinted in the mind of the witness.

28. The first submission advanced by the counsel needs to be tested on the aforesaid anvil of law.

29. As noted above, SI Ranbir Singh PW-3, deposed that on 16.08.2004 the police had shown him the photograph of the appellant. A perusal of the record Ex.PW-18/C shows that the test identification parade of the appellant was conducted on 15.09.2004. It is thus clear that the photograph of the appellant was shown to SI Ranbir Singh before the conduct of test identification parade of the appellant. It is well settled that it is most improper to show photograph of the accused to the witness before the conduct of test identification parade.

30. A reading of the testimony of SI Ranbir Singh PW-3, shows that the appellant was total stranger to SI Ranbir Singh and that Ranbir Singh had no particular reason to remember

the appellant. In such circumstances, the failure to hold 'proper' test identification parade is fatal to the case of the prosecution and no reliance could be placed upon the identification of the appellant by SI Ranbir Singh in the court. But, that would be of no benefit to the appellant for the reason from the testimony of other witnesses which shall be discussed later, we have evidence on record that the appellant was present in the house around the time the deceased was murdered.

31. The second submission advanced by the learned counsel for the appellant needs to be dealt, with reference to the endorsement Ex.PW-24/A; the testimony of the witnesses namely HC Savinder Kumar PW-2, HC Babu Ram PW-4, SI Sudhir Kumar PW-22 and Inspector K.C. Negi PW-24 and the photographs of the scene of the crime.

32. As already noted hereinabove, the endorsement Ex.PW-24/A clearly records that two almirahs kept in the house in question were found to be open and that the goods were lying scattered in the house. The witnesses; HC Savinder Kumar PW-2, HC Babu Ram PW-4, SI Sudhir Kumar PW-22 and Inspector K.C. Negi PW-24 have clearly deposed that they had found the

house in question ransacked on the day of the incident. The aforesaid recording and the depositions stand corroborated from the photographs taken at the spot which show that the almirahs kept in the house were open and that the goods were lying scattered in the house. It is quite possible that the appellant panicked after committing the murder of the deceased and forgot to remove jewellery articles from the body of the deceased in his haste to flee from the place of occurrence. In that view of the matter, we find no force in the submission of the counsel that presence of jewellery articles rules out that the appellant had committed robbery.

33. In dealing with third submission advanced by the learned counsel for the appellant, we deem it appropriate to quote following pertinent observations made by Lahore High Court in the decision reported as Shera v Emperor AIR 1934 NULL 5:-

“.....When the evidence of recovery of stolen property is attacked, the Court has to examine the evidence in the light of following alternative hypothesis: (1) The complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the police to be used in fabricating recoveries from the accused persons. This assumes a conspiracy between informant and the police from

the very start. (2) The police might have obtained property similar to the stolen property from the complainant or some one else and used it for the purpose of fabricating the recoveries. (3) The police might have suppressed some of the stolen property recovered from an accused person and utilized it in inventing a recovery from another person. (4) The property might have been recovered from a third party and used by the police in one of the impugned recoveries.”

“.....In considering the possibility of the second hypothesis, regard must necessarily be had to the nature and value of the property recovered. It should be borne in mind that when a person hands over to the police valuable property with a view to enable the police to fabricate a false recovery of this property from someone else, there is always a possibility of the accused being acquitted and the owner of the property being deprived of such property. In the present case the property recovered consists of valuable ornaments of gold and silver and I do not consider that the police procured this property from someone else with the object of inventing false recoveries from innocent persons.....”

34. The ground of attack taken in the instant case to assail the recovery of the jewellery articles of the deceased effected at the instance of the appellant is ground no. (ii) pointed out in Shera's case (supra) namely, that the police might have procured the jewellery articles similar to the jewellery articles possessed by the deceased and has planted the same upon

the appellant. The extent of jewellery articles; the nature thereof and the value thereof are of a magnitude where it would be difficult to believe that to fabricate evidence said quantity would be planted by the police. Indeed, if something had to be planted, there was no necessity of duplicating the jewellery items; a bangle or two; a ring or two would have been enough. Be that as it may, the licensed revolver of the husband of the deceased and that no suggestion was given to husband of the deceased in his cross-examination that he had handed over his licensed revolver to the police rules that the police had planted anything upon the appellant. Insofar as failure of the husband of the deceased to correctly identify certain jewellery articles recovered at the instance of the appellant during test identification proceedings suffice would be to state that a husband cannot be expected to be familiar with all the jewellery items possessed by his wife.

35. Having repelled the submissions advanced by the counsel for the appellant, we proceed to consider that whether the prosecution has been successful in establishing the guilt of the appellant.

36. The testimony of HC Savinder Singh PW-2, the husband of the deceased, and Mukesh Rana PW-6, the brother of the deceased, establishes that on 09.08.2004 the boy who had come with Alisher to the house of the deceased on 05.08.2004 was present in the house of the deceased between the hours 11.30 A.M. to about 12.45 P.M. The testimony of HC Savinder Singh PW-2 and Alisher establishes that the appellant was the boy who had come with Alisher to the house of the deceased on 05.08.2004. HC Savinder Singh PW-2, Alisher PW-5 and Mukesh Rana PW-6, had no axe to grind against the appellant. There is no reason for the said persons to give false evidence against the appellant. It is not in dispute that the deceased was murdered at her house. The post-mortem report Ex.PW-12/A establishes that the death of the deceased had taken place around the time the appellant was present in the house of the deceased. From the above conspectus of facts, it is established that the deceased was present in the company of the deceased around the time of her death. (It may be noted here that exclusion of the evidence of SI Ranbir Singh PW-3, from the arena of the evidence has made no difference to the

circumstance that the deceased was present in the company of the deceased around the time of her death)

37. We concur with the learned Trial Judge that the testimony of HC Savinder Singh PW-2, Ramesh Kumar PW-7 and Shanti PW-11, establishes that the articles belonging to the deceased and her husband were recovered at the instance of the appellant. The aforesaid witnesses were cross-examined at length but nothing could be elicited therefrom which could cast a doubt on the truthfulness of their testimony. In view of the facts that the articles belonging to the deceased and her husband were recovered from the possession of the appellant soon after the robbery of the said articles and murder of the deceased; that the appellants failed to explain his possession of the said articles and that the robbery of the said articles and the murder of the deceased form part of the same transaction, this court is fully entitled to raise a presumption against the appellant that it was he who murdered the deceased and committed robbery at her house in terms of illustration (a) of Section 114 of Evidence Act against the appellant.

38. The twin effect of the circumstances that the deceased was present in the company of the appellant soon before her

death and that the articles belonging to the deceased and her husband were recovered from the possession of the appellant is that the appellant and no one else murdered the deceased and committed robbery at her house.

39. For the reasons stated above, the appeal is dismissed.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**JANUARY 12, 2010
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