Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 438 OF 2009

Deepak @ Wireless ....Appellant

VERSUS

State of Maharashtra ....Respondent

J U D G M E N T

Fakkir Mohamed Ibrahim Kalifulla, J.

1. This appeal is directed against the judgment of the High Court of Bombay Bench at Aurangabad dated 25.04.2007 by which the High Court dismissed the Criminal Appeal No.403 of 2005 and confirmed the conviction and sentence imposed on the appellant for offences under Sections 395, 396 and 397 of IPC. The appellant was imposed with punishment of rigorous imprisonment of five years and a fine of Rs.500/- in default to undergo

further three years rigorous imprisonment for offence under Section 395 of IPC, rigorous imprisonment for life and fine of Rs.500/- for offence under Section 396 of IPC and further rigorous imprisonment for three years and fine of Rs.500/- in default to undergo one year rigorous imprisonment for the offence under Section 397 of IPC.

2. The genesis of the case was that on the date of occurrence, namely, 13/14.06.2004, P.W.10 A.P.I., attached to police station Pachod received a wireless message from P.S.I. Dhakne, who was on patrol duty, that some thieves had entered in that area. P.W.10, therefore, proceeded to the police station and on the way he met P.S.I. Dhakne and others and in the enquiry it came to light that the thieves had gone to the adjoining area. They started combing operation in that area and while they were going towards Aurangabad they noticed three persons fleeing on a motorcycle in high speed. The team led by P.W.10 followed those persons and that after a distance of chase those persons abandoned the motorcycle in the place called Jamkhed crossroad and

started running in the open field. The police party chased them and could apprehend two out of the three persons. Out of the two persons who were apprehended, one was the appellant. The suspects were brought to the police station and in the meantime, P.W.10 received a telephone call that a theft had taken place in the house of one Vasanta Bhumre. On reaching the house of Vasanta Bhumre, P.W.10, noticed the wife of Vasanta Bhumre lying in the middle room in a pool of blood and his brother Sharad was found dead in the adjacent passage. P.W.10 arranged for sending the injured wife of P.W.2-Vasanta Bhumre to the hospital in the police vehicle and while going to the hospital P.W.9-Mirabai informed P.W.10 that about four to five assailants wearing pant and shirt caused injuries to her as well as the deceased Sharad and fled away from the scene of occurrence in a motorcycle. After admitting P.W.9 in the hospital, P.W.10 said to have returned back to the scene of occurrence and sent the dead body for postmortem after holding the inquest. P.W.10, based on the investigation stated to have learnt that the appellant and his accomplices, namely,

Rahul Bhosle, Ravi Shinde, one Balaji and another unknown person (the last two were absconding) indulged in the dacoity in the house of P.W.2 on the night of 13/14.06.2004. The appellant alone was proceeded for the offences under Sections 395, 396 and 397 of IPC, since the other two were juvenile, they were dealt with separately. The prosecution examined as many as 10 witnesses on its side apart from the material objects and chemical analysis report in support of the case. The Trial Court by its judgment dated 09.05.2005 convicted the appellant and imposed the punishment, as above, and the same was confirmed by the High Court, aggrieved by the same the appellant has come before this Court.

3. Assailing the judgment of the Courts below, Mr. Rajiv Nanda, learned counsel for the appellant in his submissions contended that the offence of dacoity *per se* was not made out in as much as the basic ingredient of five persons conjointly committing the offence of robbery and murder was not made out. The learned counsel also argued that no recoveries either from the appellant or any

other person were made as regards the alleged articles looted in the occurrence and, therefore, neither the charge of robbery nor that of dacoity was made out. In support of the said submission learned counsel also contended that though from the chemical analysis report the blood sample found in the clothes of the appellant was found to be of 'Group B', no comparison of the blood group of the appellant with that of the deceased was ever carried out and, therefore, merely based on the blood stains, found on the clothes of the appellant, there was no scope to connect the appellant to the offence of dacoity and murder falling under Section 396 of IPC. According to learned counsel, the police foisted a false case against the appellant by arresting him from his residence and that the appellant was not involved in the crime. The learned counsel contended that P.W.9, the so called eye-witness, never deposed that any jewels or other properties were stolen on that day and that identification of the appellant in the Court, without holding proper test identification parade cannot form the basis for convicting the appellant for the serious offence of dacoity and murder. The learned

counsel summed-up his submissions by stating that there was no test identification parade, that there was no recovery of pant or stolen goods and the basic ingredient of conjoint effort of five persons in the involvement of the offence proved fatal to the case of the prosecution. Learned counsel also relied upon the decisions of this Court in **Suraj Pal** v. **State of Haryana** - reported in (1995) 2 SCC 64 and **Mohd. Abdul Hafeez** v. **State of Andhra Pradesh** – reported in (1983) 1 SCC 143 in support of his submission.

4. The learned counsel for the State in his submissions by retracing the sequence of events, which ultimately resulted in the arrest of accused persons, contended that P.W.9 was an eye-witness to the occurrence who after hearing the cries of her brother-in-law, namely, the deceased Sharad in the early hours of 13/14.06.2004 at about 2 to 2.30 a.m. noticed that the appellant and the other accused were brutally beating the deceased with knife, iron rod and wooden club and when she started shouting for help, the accused persons ran towards her

and caused injuries by knife as well as by other weapons on her face and other parts of her body. The learned counsel, therefore, contended that since P.W.9 before the infliction of injuries upon her was able to view the brutal attack on her brother-in-law by the accused and, thereafter, such persons attacked the witness herself, she was able to identify the appellant without any hesitation in the Court. As far as the number of persons who participated in the crime is concerned, here again learned counsel would draw support from the version of P.W.9 herself in her cross-examination where she stated in uncontroverted terms that five individuals were involved in the crime at that point of time. As far as stealing of articles is concerned, the learned counsel by referring to the evidence of P.W.2 contended that he was able to specify the articles stolen while committing the dacoity in his house by way of cash as well as jewels removed from the body of P.W.9. As far as the non-production of weapons and the stolen articles are concerned, the Trial Court has noted that due to inability of the police to arrest the two absconding accused, recoveries of those

items were not placed before the Court. The learned counsel for the State by relying upon the said conclusion of the Trial Court contended that the said conclusion was well justified and, therefore, on that ground the conviction cannot be interfered with. The learned counsel also pointed out that the evidence of P.W.8 whose motorcycle was stolen in the early hours of 14.06.2004, which was recovered and handed over to him, supported the case of the prosecution in finding the appellant guilty of the offence. Learned counsel placed reliance upon the recent decision of this Court where one of us (Hon'ble Mr. Justice Swatanter Kumar) was a party-**Rafiq Ahmad alias Rafi** v. **State of Uttar Pradesh** - reported in (2011) 8 SCC 300 in support of his submissions.

5. In the above said background of the case pleaded by both the parties, when we examine the case on hand, the appellant was convicted and imposed with sentences for offences falling under Sections 395, 396 and 397 of IPC. When we examine the said offences alleged and found proved against the appellant, it will have to be stated that

when a person is involved in an offence of theft of higher magnitude, then it becomes dacoity and when dacoity is committed with murder and also results in causing grievous hurt to others, it becomes robbery punishable under Sections 395, 396 and 397 of IPC. In other words, when the offence of theft is committed conjointly by five or more persons, it becomes dacoity and such dacoity by those persons also results in commission of murder as well as causing of grievous hurt to the victims, it results in an offence of robbery. A reading of Sections 395, 396 and 397 of IPC makes the position clear that by virtue of the conjoint effort of the accused while indulging in the said offence makes every one of them deemed to have committed the offence of dacoity and robbery. In the result, when such offences of dacoity and robbery are committed, the same result in the death of a person or hurt or wrongful restrain or creating fear of instant death or instant hurt or instant wrongful restraint. In substance, in order to find a person guilty of offences committed under Sections 395, 396 and 397 of IPC, his participation along with a group of five or more persons

indulging in robbery and in that process commits murder and also attempts to cause death or grievous hurt with deadly weapons would be sufficient. Use of a knife in the course of commission of such a crime has always been held to be use of a deadly weapon.

6. Keeping the above basic prescription of the offence described in the above provisions in mind, we examined the case on hand. In the first instance, what is to be examined is whether the basic ingredient of the offence falling under Sections 395, 396 and 397 of IPC, namely, participation of five or more persons was made out. In the case on hand, as has been stated by the Courts below, the appellant alone was proceeded, though three out of five persons said to have been taken into custody. As per the judgment of the High Court three persons were arrested and since two accused persons other than the appellant were juveniles, they were stated to have been proceeded separately. It is the case of the prosecution that two other accused, namely, one Balaji and another unknown person were absconding through-out the stage

of trial. In order to prove the participation of five persons, the sole reliance was placed upon the deposition of P.W.9, the victim who suffered severe injuries at the hands of the accused. In her evidence in the chief examination she stated that on the date of occurrence four to five thieves entered their house, that on hearing the shouts of her brother-in-law she went to the adjacent room and saw those persons assaulting her brother-in-law with the aid of knives, rods and wooden club. She also described the features of those persons as belonging to the age group of 18 to 25 years, that they were wearing trousers and shirts, that they were of medium height and dark in complexion. According to her, after witnessing the attack on the person of her brother-in-law Sharad, when she started shouting, the accused persons turned towards her and started assaulting her by inflicting injuries on her eyes, head, back etc. On the morning of 14.06.2004, after the police party arrived and when she was being taken to the hospital in the police vehicle by P.W.10, she stated to have informed him that four to five persons indulged in the said offence. In the cross-examination, however, she

came out with a definite answer that the number of persons involved in the offence was five. As far as the appellant was concerned, P.W.9 identified him unhesitatingly in the Court and declared that he was one of the assailants. P.W.10, the investigating officer in his evidence stated that after apprehending two out of the three accused persons who were fleeing on the motorcycle, they were brought to the police station who disclosed their names as Deepak and Rahul Bhosale and that third person who fled away was Ravi Shinde by name. The Rahul Bhosale and Ravi Shinde were stated to be juveniles and, therefore, they were proceeded separately.

7. P.W.4 the Panch witness confirmed the seizure of the full pant and shirt worn by the appellant, a motorcycle key, a knife and cash of Rs.150/- from the person of the appellant which were marked as Exhibit 19. It was pointed out by the said witness that the act of seizure from the accused was made in his presence between 9 a.m. and 10 a.m. in the morning of 14.06.2004. He,

however, stated that police did not take into custody the wooden articles from the accused in his presence and it was, therefore, contended that his version cannot be believed. After holding the investigation P.W.10 filed chargesheet before the Court wherein it was alleged that the appellant along with juveniles Rahul son of Rambhau and Ravi son of Laxman and two others, namely, one Balaji and another unknown person (the last two were stated to be absconding) indulged in the offence on the night of 13/14.06.2004. The question for consideration is whether with the above evidence available on record, the conclusion of the Courts below in having held the appellant guilty of the offences under Sections 395, 396 and 397 of IPC merits acceptance.

8. Primarily the version of P.W.9 who was a victim has stated that on the night of 14.06.2004 four to five thieves entered their house and indulged in the crime. In the cross-examination, however, she asserted that the number of persons were five. There is no reason why the version of P.W.9 should not be believed. She had the first

hand information relating to the crime and who suffered extensively at the hands of the accused persons. Her statement before the Court did not appear to be vacillating. It is true that initially in her chief examination she stated that four or five persons were involved in the crime but the said doubt, if any, as regards the involvement of number of persons was cleared thankfully at the instance of the appellant himself by getting a definite answer from the witness in the cross-examination that the number of persons were five in all. Such a definite answer in the cross-examination should bind the appellant and, therefore, there is no reason to discard the said version of P.W.9. It was argued that when the police could apprehend three of the accused and also ascertained the name of fourth person as Balaji; its failure to even find out the name of fifth person creates serious dent in the case of the prosecution. In the first blush, such a submission though appears to be sound, having regard to the definite statement made by P.W.9 who suffered at the hands of the appellant and the other accused who was also able to witness the whole

occurrence, namely, the initial assault on her brother-in-law which cost his life and thereafter on herself in making a clear cut statement that the number of persons involved in the offence was five, we are of the view that the reliance placed upon her version by the Courts below was well justified for proceeding against the appellant for the offences falling under Sections 395, 396 and 397 of IPC.

9. We are, therefore, not able to countenance the contention of learned counsel for the appellant that the basic ingredient of involvement of minimum of five persons for the offences under Sections 395, 396 and 397 of IPC was lacking in this case. Once we get rid of the said hurdle and hold that the case of the prosecution as proceeded against the appellant for the said offences was maintainable, the next question for consideration is whether there was any robbery committed by the accused. In this respect, the evidence of P.W.2 the husband of P.W.9 assumes significance. P.W.2 in his evidence stated that the assailants had taken away a sum

of Rs.4,000/- to 5,000/- cash as well as the ornaments worn by P.W.9 on her neck and hands. It is true that P.W.9 has not referred about removal of either cash or ornaments from her body. P.W.2 was not present at the time when the occurrence took place. One relevant factor which is to be noted was that P.W.9 was seriously injured. In fact the judgment of the Trial Court disclose that Exhibit 28, which is spot-panchnama recorded in the presence of P.W.2, disclosed that there was blood everywhere and the cupboard of the room was open and curtains were thrown here and there and the household articles were lying all over and the window was forcibly opened and was found broken which was relied upon by the Court below to hold that the appellant and the other accused relieved the victim of cash and other jewels while committing the murder of deceased Sharad. P.W.9 was so very seriously injured that she was hospitalized for two to three months after the occurrence. In fact, at one stage having regard to the physical condition of P.W.9, a commission was appointed to record her evidence though later on the same was given up. Therefore, when such a

seriously injured witness at the hands of the appellant was examined and there was a slip in referring to removal of stolen articles and when there is definite evidence of P.W.2 who is none other than her husband who specifically stated the articles which were stolen by the appellant and the other accused, in the absence of anything brought out in the cross-examination of P.W.2 as regards the stolen articles, we hold that in the peculiar facts of this case, the said evidence was sufficient for the Court below to hold that there was really an act of theft committed by the appellant and other accused. The said commission of offence having regard to the involvement of number of persons and the murder of Sharad and the grievous injuries inflicted upon P.W.9 would definitely constitute the offence falling under Sections 395, 396 and 397 of IPC.

10. When we come to the question of death of the deceased and the grievous injuries suffered by P.W.9, the evidence of P.W.1, the postmortem doctor who also attended on P.W.9, in his evidence after referring to the 11 injuries

found on the body of the deceased made it clear that the cause of death was cardio respiratory arrest due to head injury associated with asphyxia due to aspiration of blood oozing from the compound fracture mandible and laceration of mucus membrane of the gum. P.W.1 also in his chief stated that injuries found on the body of P.W.9 which by the description themselves made it clear that they were of grievous in nature. In order to appreciate the nature of injuries sustained by P.W.9 the injuries themselves can be noted which were as under:

"1. Incised wound on right forehead, 3 x 2 x 2 cms. caused by sharp weapon.

2. Incised wound on the right side of right eye measuring 6 x 2 x 2 cm caused by sharp weapon.

3. Incised wound on cheek 3 x 1 x 1 cm, caused by a sharp weapon.

4. Contusion on right cheek and infra-orbital region 6 x 5 cm caused by hard and blunt object.

5. Evidence of fracture mandible at the middle region with loose teeth lower incisor nature of injury, grievous in nature, caused by hard and blunt object.

All the injuries in my opinion were caused within 6 hours, patient was referred to Govt.

> Medical College Hospital, Aurangabad, for further management and treatment. The certificate issued bears my signature. Its contents are correct. It is at Exh.12."

11. In the cross-examination of P.W.1, it was suggested that the injuries found on the deceased and noted under exhibit 11 could have been caused in a fatal motor vehicle accident, which was duly denied by P.W.1. It also came out in the cross-examination of P.W.1 that when P.W.9 was brought before him she could not speak and was in a critical condition. Here again he denied a suggestion that the injuries on the person of P.W.9 could have been caused by a metal sheet striking her. Beyond that nothing else was elicited from P.W.1 by way of cross-examination. P.W.9 in the course of her examination before the Court showed the scar injury which was visible on her face which was duly noted by the Trial Court. In the said circumstance, in the absence of any other contra evidence, the murder of deceased Sharad as well as the grievous injuries caused on P.W.9 were beyond any controversy. In the said circumstances, the reliance placed upon the evidence of PW-2, the husband of PW-9

who gave the details about the loss of properties in the crime committed by the accused was well justified. Therefore, the conviction for the offences alleged against the appellant of his involvement with four others falling under Sections 395, 396 and 397 of IPC as found proved and as confirmed by the High Court does not call for any interference.

12. As far as the decision relied upon by learned counsel for the appellant in the case of **Mohd. Abdul Hafeez** (supra), it was held therein that the identification of the accused by the victim in the absence of a test identification parade cannot be believed. While holding so, this Court noted that though no fault can be found with the said witness in not mentioning the names as the accused were not known to him, the failure to give some description of the accused who said to have removed cash from his pocket coupled with the non-holding of the test identification parade was such that his evidence cannot be relied upon. The said decision was in the peculiar facts of that case. On the other hand, the decisions relied upon by the High

Court for accepting the statement of P.W.9 even in the absence of test identification parade fully supports the case on hand. Those decisions referred to by the High Court in **Dana Yadav alias Dahu and others** v. **State of Bihar** – (2002) 7 SCC 295, **Simon and others** v. **State of Karnataka** - (2004) 2 SCC 694 and **Daya Singh** v. **State of Haryana** - AIR 2001 SC 1188 are apposite on the point. Therefore, the said decision relied upon by the learned counsel is of no assistance to the appellant. In **Suraj Pal** (supra) at paragraph 14 of the said judgment while insisting on holding the test identification parade, it was held that the same would enable the identification of the accused at the earliest possible opportunity after the occurrence by such witnesses is of vital importance with a view to avoid the chance of his memory fading away by the time he is examined in the Court after some lapse of time. There can be no two opinion about the principle laid down in the said decision relating to the importance of holding of test identification parade.

13. In the case on hand, we have elaborately stated as to how P.W.9 who was a victim at the hands of the appellant and the other accused and who suffered grievous injuries which disabled her movements for quite a long time and who had the opportunity of witnessing the involvement of the appellant and the other accused in the gruesome act of killing her brother-in-law by beating him severely and after successfully beating him to death also assaulted her so severely which according to P.W.1 disabled her movements for quite sometime. In fact, the Presiding Officer of the Trial Court has observed descriptively as to how P.W.9 was placed in a situation where she was able to observe the conduct of the appellant and other accused so closely giving no scope for any doubt as to her unhesitant identification of the appellant made in his presence at the time of trial. P.W.9 also in her evidence gave the description of all the accused and the clothes worn by them as well as their physical features. Therefore, the decision relied upon by learned counsel for the appellant is of no assistance on this aspect while the

decision relied upon by the High Court fully supported the case of the prosecution.

14. Having regard to our above conclusion, we do not find any merit in this appeal, the appeal fails and the same is dismissed.

.....J
[Swatanter Kumar]

.....J.
[Fakkir Mohamed Ibrahim Kalifulla]

New Delhi;
September 04, 2012