

CASE NO.:
Appeal (crl.) 416 of 1998
Appeal (crl.) 773 of 1998

PETITIONER:
DAYA SINGH

Vs.

RESPONDENT:
STATE OF HARYANA

DATE OF JUDGMENT: 20/02/2001

BENCH:
M.B. SHAHK. G. BALAKRISHNAN

JUDGMENT:

Shah, J.

In Sessions Case No.44 of 1989, 14-accused were tried for various offences including Sections 3 and 5 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the TADA Act) by the Additional Judge, Designated Court, Karnal at Ambala. The Additional Judge by his judgment and order dated 19th February, 1998 convicted the appellant Daya Singh for committing the offence of murder of Gurdeep Singh and attempting to commit murder of PWs Dr. Harnam Singh and Smt. Jaswant Kaur. The appellant is also convicted under Section 302 read with Section 34 IPC for committing murder of Khushdev Singh, Gurpreet Kaur and his co-accused Gurjant Singh and sentenced to suffer imprisonment for life and to pay a fine of Rs.10000/- in default of payment of fine to undergo further RI for a period of one year. He is also convicted for the offence punishable under Section 307 read with Section 34 IPC for attempting to cause death of Ram Singh, Somnath and Hira Singh by fire-arms and is sentenced to undergo RI for a period of ten years and to pay a fine of Rs.5000/-, in default of payment of fine to undergo RI for a period of six months. In addition, he is convicted for the offence punishable under Section 5 of TADA Act for possessing one AK 47 rifle with cartridges and is sentenced to undergo RI for seven years and to pay a fine of Rs.3000/-, in default of payment of fine to undergo RI for three months. All the sentences were ordered to run concurrently. The Designated Court acquitted rest of the accused.

Against the order of conviction passed by the learned Judge, accused Daya Singh has preferred Criminal Appeal No.416 of 1998. In this appeal, learned senior counsel Mr. U.R. Lalit appearing for the appellant has confined his submissions mainly with regard to reliability of evidence of PW37 Jaswant Kaur and PW38 Dr. Harnam Singh qua the identification of the appellant.

The State has filed Criminal Appeal No.773 of 1998 against the acquittal order and also for enhancement of sentence. With regard to the appeal filed by the State, after going through the evidence on record, it is apparent that the order passed by the Additional Judge does not call for any

interference. Confessional statements are found to be not voluntary and are held to be unreliable. There is no other evidence to connect the acquitted accused with the crime.

The incident relates to attack by the terrorists on 9.4.1988 in the house of one Dr. Harnam Singh at Kurukshetra which has resulted in loss of his son Khushdev Singh, daughter-in-law Gurpreet Kaur, Gurdeep Singh son of his brother-in-law and one assailant Gurjant Singh and injuries to other persons. At the time of hearing of this appeal, prosecution version relating to the incident of the murder of four persons at the place of incident and injuries to the witnesses is not disputed. For considering the submissions and appreciating the evidence relating to the contentions raised by the learned counsel for the parties, we would refer to the evidence of Dr. Harnam Singh, PW38 and his wife Smt. Jaswant Kaur, PW37. It is the say of Dr. Harnam Singh that he is a worker of communist party and was elected as MLA in the year 1987 from Shahabad. On 9th April, 1988 at about 8.15 to 8.30 p.m. when he was present in his house, one person came in his courtyard and called upon him. In the courtyard two electric bulbs were on at that time. When he came out from his room, he saw one well-built Sikh gentleman aged about 26-27 years having small beard holding a revolver in his hand. He ran towards him and caught hold of him. On hearing the noise, his wife came out of the room. She also caught hold of that Sikh from his hairs. At that time, one other person came from outside holding stengun type arm. He was having a long beard and having eyes like that of a cat. That man started firing and a pellet hit his left arm. The shots also hit abdomen of his wife. At that time his son, Khushdev Singh, daughter-in-law Gurpreet Kaur and Gurdeep Singh son of his brother-in-law who were watching TV came outside. The man who was having eyes like a cat fired shots towards them and because of the injury sustained, Gurdeep Singh fell down on the main gate. His son Khushdev Singh caught hold of that man and tried to take away the stengun. It is his further say that when Khushdev Singh was holding the person, he fired shots from his fire-arm towards Khushdev Singh and Gurpreet Kaur. When Khushdev was grappling with him, he rushed to his room to make a telephone call and informed at police station that he was attacked and shots were being fired. He has further deposed that when he went outside the room, the third miscreant who was standing on the main door fired shots towards that room. During the grappling, one blanket, one shoe, one turban, one Jutti had fallen down in the courtyard. The magazine of the stengun had also fallen down. When he came out of the room after telephonic call, the miscreants had fled and saw that Gurdeep Singh was lying dead at the entrance gate. Khushdev Singh and Gurpreet Kaur, who were dragged outside by Daya Singh and with whom they were grappling, were lying in the street on the right side of the main gate in an injured condition. The terrorist who was caught and dragged out by his wife was also lying dead. Khushdev and Gurpreet were removed to the civil hospital. They succumbed to their injuries within few minutes in the hospital. Thereafter, he alongwith his wife and Hira Singh were referred to PGI Hospital. He has also deposed with regard to the investigation carried out by the police including the recovery of certain articles from the scene of offence. It is his further say that on 7th May 1988, he and his wife were taken by the police to Civil Hospital, Rajpura as it was stated that two terrorists had been shot dead and they were to be identified by them. Out of the two dead bodies, they identified one as the person who had fired shots towards him while he was standing on the main gate. With regard to the identification of the accused he stated that he could identify and recognize the person who fired shots and has identified the appellant Daya Singh. The learned Judge has noted that at that time as there was no electricity in the Court room, the accused, witnesses, advocates and he himself went outside the court room where the accused was identified by Dr. Harnam Singh in second round which took 3 to 4 minutes. In cross-examination, he has stated that he was using spectacles since last more than 40 years and he could see up to a distance of 30 to 40 or 100 yards with the help of spectacles and could identify a person from a distance of 20 to 25 yards. He has also stated that during the time of identification as there was no electric light in the court room and was dark, he was required to go outside the court room and

there he had identified the accused. He has clarified what he understood by catty eyes and stated that eyes were like that of a cat and nothing more. The witness was asked whether he could say that the eye of other accused named Inderjeet Singh was like cat. To that, his reply was his eyes were normal and not like that of a cat. He has also stated that he has seen accused Daya Singh on the date of incident from a distance ranging from one yard to 3-4 yards and that Daya Singh had fired from a distance of 3 yards in the courtyard. In further cross examination, he has stated that he knew the name of accused Daya Singh prior to 6.2.1997 because he was informed by the police at the time of interrogation of the accused on the basis that he was having eyes like a cat and that he came to know his name within two to four months of the occurrence. He has also stated that he along with his wife visited Central Jail, Ambala for identification of the accused, but they were informed that accused Daya Singh had refused to participate in the identification parade. It was his say that he identified the accused Daya Singh after wearing and even after removing spectacles and that at the time of identification, he had removed the spectacles in order to satisfy himself that accused Daya Singh was the same person. He had denied the suggestion that he had wrongly identified the accused at the instance of the police. In view of the limited contention raised in the appeal, other part of the evidence is not required to be referred in this appeal.

Similar is the evidence of Jaswant Kaur PW37. It is her say that on 9.4.1988 at about 8.15 to 8.30 p.m. her husband Dr. Harnam Singh was working in his room and her son Khushdev Singh, daughter-in-law Gurpreet Kaur and Gurdeep Singh were watching T.V. programme. At that time, one person came from outside and called Doctor Sahib (her husband). In the courtyard, two bulbs of electricity were on at that time. On hearing the call of her husband, she went out and saw one Sikh gentleman, aged about 25-26 years-who was well built, having small beard and holding a pistol in his hand, was caught hold by her husband. She also caught hold of his hairs. Subsequently, one other Sikh who was also well built, having thick beard and eyes like cat holding firearms came towards them. He fired and the shots hit on the left arm of her husband and also on her abdomen. On hearing the sound of fire shots, Gurdeep Singh followed by her son Khushdev Singh and daughter-in-law Gurpreet Kaur came out. It is her say that again that Sikh fired shot towards Gurdeep Singh which hit his body and he died on the spot. Thereafter, Khushdev Singh and Gurpreet Kaur grappled with that Sikh who was firing shots. In the process of grappling, that Sikh, Gurpreet Kaur and Khushdev Singh went out in the street. Other Sikh who was held by her came out in the process of grappling and his pistol had fallen down in that process. One blanket, one turban and one of the shoes of that Sikh gentleman also fell in the courtyard of her house. It is her say that when they came out, they found another Sikh gentleman who was well built, tall, having whitish complexion and black and round eyes. That Sikh also fired shots from his fire-arm towards Khushdev Singh, Gurpreet Kaur and herself. Khushdev Singh and Gurpreet Kaur received injuries on various parts of their bodies. During that firing, the Sikh who was held by her also received injuries and he fell down. Khushdev Singh, Gurpreet Kaur and the Sikh who received fire shots died at the spot in the street. It is her further say that her brother Hira Singh, (PW40) also reached at the scene of occurrence on hearing noise. He received injuries by firearm. One Somnath PW47 also came there and he also received injuries. It is her say that she could identify the Sikh who had entered the courtyard of her house and had fired shots from his firearm upon her and her husband. She has admitted that her eye-sight was weak. After looking at the accused, she raised suspicion on one of the accused whose name on inquiry was revealed Daya Singh (appellant). She said that this accused is the same person who had fired shots on her and her husband. She again stated that she had recognized this accused, but as he was not opening his eyes, she has used the words that she was identifying on suspicion. The learned Judge has noted that the witness had taken nearly five minutes in identifying the accused out of all the accused present in the Court. In cross-examination, it was pointed out to her that she had identified the dead body of one person who was shot dead during the incident and that body was of the miscreant who was having

blackish and round shape eyes and whose height was between 5 ½ to 6 feet. She has further stated that at the time of incident her eye sight was normal, but subsequently one of her eyes was operated and nothing was visible from that eye and at present she could see an object from a distance of about one feet with the help of spectacle. She has also stated that accused Daya Singh has similar features which she remembered since the date of occurrence and, therefore, she was in a position to identify him even though he had not opened his eyes. She has denied the suggestion that she has wrongly identified Daya Singh at the instance of police. She has pointed out that during the incident, electric bulbs were fitted in the courtyard. She was asked with regard to the complexion of the accused and she replied that Daya Singh was having whitish complexion and that it was incorrect to suggest that Daya Singh was of fair complexion. To her, other accused namely Parshottam Singh and Jaspal Singh were shown and she was asked to differentiate between the complexion of the accused Daya Singh and those two persons. To that, she replied that she can not differentiate.

Further, PW39 Ram Singh was passing by near the house of Dr. Harnam Singh and near electric poll, he was injured by a shot but had not seen as to who fired the shot. He has stated that it was dark at the scene of occurrence. Similarly, Hira Singh PW40, brother-in-law and a neighbour of Dr. Harnam Singh had also received injury at the time of incident when he came out of the house and gave Lalkara. He was also removed to the hospital. He failed to identify the accused. Similarly, one Somnath (PW47) after hearing the noise and sound of fire came to know that terrorists have come. He was going from the house of his uncle towards his house. On the way two persons came running and struck against him. One was holding a small firearm which was perhaps a revolver and other was holding firearm like stengun. He tried to catch hold of one person and collided with him. At that time, there was firing from the opposite direction and one shot hit him on his right arm. It is his say that the person who was collided with him was not present in the Court room. It is the prosecution version that FIR was lodged by one Gagandeep Singh (PW29) who was returning to his house in the evening and after hearing sound of fire shots he rushed at the scene of occurrence and found that Khushdev Singh and Gurpreet Kaur were grappling with 3 to 4 Sikhs. He raised a noise addressing to those persons and one of them ran towards him with a stengun and so being frightened he came back and hid himself. He again went at the house of Harnam Singh after 4 to 5 minutes and found that terrorists had already left. He found that Gurpreet Kaur and Khushdev Singh were seriously injured and his elder brother Gurdeep Singh was lying dead at the spot. He rushed to the police station but on the way the police met him and his statement was recorded.

Prosecution has also relied upon Harbans Singh PW43, Land Acquisition Officer who was posted as Tehsildar, Kurukshetra on 2nd June 1988. He had gone for conducting identification parade in Central Jail, Ambala at the instance of S.P. Kurukshetra. It is his say that he reached Central Jail at 5.00 p.m. and Daya Singh was produced before him by the jail authorities. He informed Daya Singh that he had come for conducting identification parade, but Daya Singh refused to participate on the ground that he had already been shown by the police to the expected witnesses. His statement was accordingly recorded by him and the said statement alongwith his report was sent to the S.P. Kurukshetra. In cross-examination, he has stated that he was not knowing accused Daya Singh personally, but was identified by the jail authorities. He further stated that he could not identify the accused Daya Singh out of the accused persons present in the court. He has also stated that he was not knowing Jaswant Kaur PW37 personally and could not say whether she was present outside the jail premises on that day or not. He denied the suggestion that accused Daya Singh never refused for such an identification parade and that he was deposing falsely.

PW45 Roshan Singh, DIG, CISF, New Delhi has deposed that on 5.5.1988, 22.5.1988, 2.6.1988 and 14.6.1988, he had recorded the confessional statements of number of accused. It is his say that on 29.6.1988, he visited CIA, Kurukshetra and recorded the confessional

statement of Daya Singh, which was produced as Ex. PW45/W. It is his say that the accused made the statement voluntarily which was read over to him and his signatures were taken. He also appended the certificate Ex. PW45/W-1 below the confessional statement and the said confessional statement was sent to the C.J.M., Kurukshetra on the same day in a sealed envelope. He has stated that he could not identify the persons including Daya Singh whose confessional statements were recorded by him on various dates mentioned above. In cross-examination, he has admitted that many police officers were present in the police station when confessional statements were recorded. Further as discussed by the learned Judge, he has not followed the necessary procedure of recording confessional statement and that the same is not voluntary. Therefore, the said confessional statement is rightly not relied upon by the trial court. Further almost all the confessional statements of the accused persons except that of Parshottam Singh were recorded by the Reader of the S.P., who is not examined. Other part of the prosecution evidence is not required to be reiterated as the controversy in the appeal is in a narrow-compass.

The learned counsel Mr. Lalit submitted that conviction of the appellant is based solely on the identification of the accused in the Court by PW37 and PW38. He contended that the incident took place in April, 1988 and identification in the Court by Smt. Jaswant Kaur (PW37) is in November, 1996 i.e. after lapse of seven and half years. Similarly, identification by Dr. Harnam Singh (PW38) is after eight years. Therefore, on this sole ground of delay in identification, their evidence can not be relied upon for convicting the accused. He contended that it is difficult for the witnesses to identify the accused after long lapse, unless they are repeatedly seen. He pointed out that in this case there is possibility that accused could have been seen in the court before identification. He further contended that other injured witnesses namely PW29 Gagandeep Singh, who lodged FIR, PW40 Hira Singh and PW47 Somnath have not identified the accused. He pointed out that PW29 has not specifically stated about the light in the courtyard but has only stated that because of the street light he could see the accused and that Ram Singh admits that it was night time and dark at the scene of occurrence. Even Hira Singh has admitted that because of long lapse of time, he could not identify the assailants. Independent witness Tehsildar (PW43) who had gone for test identification parade has also failed to identify the accused. Similarly, the SP (PW45) who allegedly recorded the confessional statement has also failed to identify the accused. In such circumstances, it would not be safe to rely upon the evidence of the aforesaid two witnesses for convicting the accused. Lastly, he contended that even deposition of PW37 and PW38 qua identification is halting one and, therefore, also benefit of doubt is required to be given to the accused. In support of his contention he placed reliance on decision of this Court in Hari Nath and Another v. State of U.P. [AIR 1988 SC 345]. Learned counsel for the appellant has also relied upon the decisions of this Court in Mohd. Abdul Hafeez v. State of Andhra Pradesh [AIR 1983 SC 367], Wakil Singh and Others v. State of Bihar [AIR 1981 SC 1392] and Soni v. State of UP [(1982) 3 SCC 368] wherein the Court has observed that identification parade after some time lapse would be of no consequence and, therefore, on the basis of such identification, accused cannot be convicted.

As against this, learned counsel for the State submitted that the Designated Court has rightly convicted the accused on the basis of clinching evidence of PW37 and PW38 who apart from being injured witnesses have lost their son and daughter-in-law during the incident which had taken place in their house. It is submitted that accused were terrorists and in such cases, there is no question of having other independent witnesses. Even if independent witnesses were available, they would not dare to make any statement against the accused. He pointed out that as held by the learned Judge, investigation was sluggish but that is no ground for not relying upon the evidence of PW37 and PW38. It is his contention that it would be unreasonable to expect Superintendent of Police, who recorded the confessional statement of number of accused in the case in the year 1988, to identify the accused after lapse of seven to eight years. Similarly, the

Tehsildar who had gone to hold identification parade also is not expected to identify the accused. It is his contention that court has rightly relied upon the evidence of injured affected witnesses and for this purpose he referred to the observations made by the Designated Court to the effect that physical features of accused Daya Singh must have been embedded in the memory of Jaswant Kaur just like a gali stone because it was he who with his co-assailants committed the gruesome crime.

At this stage we would first refer to the decisions upon which reliance is placed. In the case of Soni (Supra), this Court observed that delay of 42 days in holding the identification parade throws a doubt on genuineness thereof apart from the fact that it is difficult that after lapse of such a long time the witnesses would be remembering facial expression of the appellant. In the case of Mohd. Abdul Hafeez (Supra), the Court while dealing with a robbery case observed that as no identification parade was held, no reliance can be placed on the identification of accused after lapse of four months in the court. In the case of Hari Nath (Supra), the Court observed that evidence of test identification is admissible under Section 9 of Evidence Act. But the value of test identification, apart from the other safeguards appropriate to a fair test of identification depends upon the promptitude in point of time with which the suspected persons are put up for test identification. If there is an unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test. The Court further referred to (Para 9) Prof. Borchards Convicting the Innocent on the basis of error in identification of the accused. The learned author has observed:

The emotional balance of the victim or eye-witness is so disturbed by his extra-ordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused....

In paragraphs 10 and 11, the Court has observed as under:-

10. The evidence of identification merely corroborates and strengthens the oral testimony in Court which alone is the primary and substantive evidence as to identity. In *Hasib v. State of Bihar* [AIR 1972 SC 283] this Court observed:

The purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding..

In *Rameshwar Singh v. State of J & K*, [AIR 1972 SC 102], this Court observed (at p.104):

It may be remembered that the substantive evidence of a witness is his evidence in court, but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency 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

11. It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. It is also rightly said that

Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material to promote order and not surrender it by excessive theorising or by magnifying what in practice is really unimportant.

The question, therefore, is whether the evidence of injured eyewitnesses PW37 and PW38 is sufficient to connect the appellant with the crime beyond reasonable doubt. For this purpose, it is to be borne in mind that purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the Court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion - what in present day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution. The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra v. Suresh* [(2000) 1 SCC 471] as under:

We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.

In the present case, there is no lapse on the part of the Investigating Officer in holding the test identification parade. The appellant was arrested on 28th May, 1988 and the identification parade was to be held on 2nd June, but on that day accused refused to take part in the parade. For his arrest, PW45 Resham Singh, DIG and PW46 Bishan Singh, CIA Inspector have specifically stated that the appellant was arrested on 27th May, 1988 by the Punjab Police and was brought at Kurukshetra on 28th May, 1988 and was sent in judicial custody as he was to be identified. Further, there is no reason to disbelieve the evidence of Tehsildar who had gone there for holding the test identification parade of accused. Learned Senior Counsel Mr. Lalit repeatedly submitted that investigating officer has not produced on record the statement of the accused recorded by Tehsildar and the report submitted by him and, therefore, no credence should be given to the evidence of Tehsildar. In our view, this submission is totally misconceived. It is true that if the investigating officer had produced on record the statement of accused and the report submitted by Tehsildar, it would have corroborated his say. But in our view the evidence of such disinterested, independent, official witness does not require any corroboration. In cross-examination, the Tehsildar has specifically stated that he did not know the accused Daya Singh personally but accused was identified by the jail authorities. He has also denied the suggestion that Daya Singh never refused for such identification parade and that he was deposing falsely. Tehsildar was least interested in the prosecution or falsely involving the accused. Further, he is not expected to know the accused personally nor to remember his face for

years. He was discharging his official functions and is not expected to memorise the identity of the persons whose statements he had recorded. There is no reason to hold that jail authorities have committed any mistake in producing Daya Singh before the Tehsildar for parade. Further, the evidence of Tehsildar that he had gone to Central Jail for identification parade gets corroboration from the evidence of PW38 who also went to the Central Jail, Ambala for identifying the accused, but they were informed that the accused had refused to participate in the test parade. It is to be stated that in such a situation, this Court in *Suraj Pal v. State of Haryana* [(1995) 2 SCC 64] held that substantive evidence identifying witness is his evidence made in the Court and if the accused in exercise of his own volition declined to submit for test parade without any reasonable cause, he did so on his own risk for which he cannot be heard to say that in the absence of test parade, dock identification was not proper and should not be accepted, if it was otherwise found to be reliable. The Court observed it is true that they could not have been compelled to line up for test parade but they did so on their own risk for which the prosecution could not be blamed for not holding the test parade. In that case also, the Court disbelieved the justification given by the accused for not participating in the identification parade on the ground that accused were shown by the police to the witnesses. Same is the position in the present case.

Further, there is no reason to disbelieve the evidence of Dr. Harnam Singh and his wife Jaswant Kaur when they identified the accused out of 14 persons who were facing the trial. Their evidence is cogent and consistent with regard to the identification of appellant. The conduct of Dr. Harnam Singh was natural in the court premises. As there was no electricity in the court room, he identified the accused after going outside the court room in the second round which took 3-4 minutes. He had seen accused Daya Singh grappling with his son and daughter-in-law. The identification by this witness was tested in the cross-examination and in our view, he stood the test of cross-examination. He gave specific physiognomy of the accused by stating that he was having catty eyes meaning thereby the eyes like a cat. He has also stated that he had seen the accused from a distance ranging from 1 yard to 3-4 yards and that the appellant-accused had fired from 3-4 yards in the courtyard. This witness alongwith his wife has also identified the dead body of one other co-assailant Daljinder Singh alias Chandibaba on 7.5.88. In the cross-examination, he further stated that he could identify the appellant after wearing and removing the spectacles and has done so in the court room. Similarly, Jaswant Kaur also identified the appellant as the assailant. Her evidence is so natural that it is impossible to believe that she is falsely involving the accused-appellant. In the beginning, she raised suspicion on one of the accused who was not opening his eyes as the appellant and identified the said person as the person who had fired shots on her and her husband. This identification was done after taking five minutes. She deposed that Daya Singh was having similar features which she remembers since the date of occurrence and has denied the suggestion that she has wrongly identified the accused at the instance of police. PW38 Dr. Harnam Singh who was a Doctor and also an MLA would not involve the appellant falsely in such a heinous crime. There was no reason suggested to the witness for involving the appellant in the crime. Similarly, Jaswant Kaur was also not having any interest in the accused. However, the learned counsel for the appellant, Mr. Lalit referred the say as noted by Professor Borchard the emotional balance of the victim or eye-witness is so disturbed by his extra-ordinary experience that his powers of perception become distorted and his identification is untrustworthy... It is true that PWs 37 and 38 have lost their son, daughter-in-law and son of brother-in-law and that it was extraordinary experience for them to be assaulted by terrorists. But, it would be difficult to hold that at that time, they had lost their power of perception. Theoretically in some cases what has been noted by the learned author may be true. For that purpose, the evidence of the witness is required to be appreciated with extra care and caution. But, where evidence is cogent, consistent and without any motive, it is no use to imagine and magnify theoretical possibilities with regard to the state of mind of the witnesses and with regard to their power of memorizing the identity of

the assailants. Power of perception and memorising differs from man to man and also depends upon situation. It also depends upon capacity to recaptulate what has been seen earlier. But that would depend upon the strength or trustworthiness of the witnesses who have identified the accused in the Court earlier. Further in the present case, identification in the Court was out of 14 persons. That itself would lend credence to identification by the witnesses. For this purpose, learned Judge has rightly observed to the effect that physical features of accused must have been embedded in the memory of Jaswant Kaur. From the evidence and the cross-examination of these two witnesses, it is apparent that they gained enduring impression of the identity of the accused during the incident. Therefore, delay in trial by the Designated Judge for one reason or the other and thereafter identification of the accused in the Court after seven or eight years would not affect the evidence of these two witnesses. Similarly, if the prosecution was interested in falsely involving the accused, Gagandeep Singh PW29, Hira Singh PW40 and Somnath PW47 were having opportunity to identify the accused at the time of trial. However, the learned counsel for the appellant submitted that as they have not identified the accused, evidence of Jaswant Kaur PW37 and Dr. Harnam Singh PW38 becomes suspect. In our view, this reasoning is fallacious firstly on the ground that it is not expected that all the witnesses should be in a position to identify the accused nor their evidence can be compared in the way suggested by the learned counsel. Secondly, in the present case, the aforesaid witnesses got injuries when they were outside the premises of Dr. Harnam Singh. Learned counsel for the appellant further submitted that Tehsildar PW43 who had opportunity of recording the statement of the appellant and Resham Singh, DIG PW45 who had recorded the confessional statement which runs into more than 10 pages have not identified the accused in the Court. In our view, Tehsildar and DIG were discharging their official functions and were not at all affected by the incident so as to memorise the identity of the accused. At this stage, we would note one other submission made by learned counsel Mr. U.R. Lalit with regard to two electric bulbs in the courtyard. In our view, the submission on this count does not deserve much consideration. The incident took place at evening time between 8.00 to 8.30 p.m. (in the month of April) and not dead at night, where there may be difficulty of seeing the faces of the accused. Further, it is to be born in mind that terrorists entered the house which was situated in the city, that too, of an MLA and it would be difficult to hold that two electric bulbs in the courtyard were not on at the relevant time. Therefore, the learned Judge has rightly appreciated this aspect in his judgment.

We, therefore, broadly agree with the appreciation of evidence recorded by the learned Judge for convicting the accused Daya Singh and acquitting rest of the accused.

In the result, both the appeals are dismissed.

.....J. (M.B. SHAH)

J. (K.G. BALAKRISHNAN)

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JUDIS