SUPREME COURT OF INDIA

Kunjumon @ Unni

Vs.

State of Kerala

Crl.No.38of2009

(Swatanter Kumar and Madan B. Lokur,JJ.)

21.11.2012

JUDGMENT

Madan B. Lokur, J.

1. The question before us is whether, in the absence of a Test Identification Parade (TIP for short), the evidence of a child witness should have been accepted for convicting the appellant. In our opinion, on the facts of this case both the Trial Court and the High Court were right in convicting the appellant for offences punishable under Section 397 (robbery or dacoity, with attempt to cause death or grievous hurt) and Section 302 (punishment for murder) of the Indian Penal Code. However, no case has been made out for convicting the appellant for an offence punishable Section 449 (house trespass in order to commit offence punishable with death) of the IPC.

The facts:

2. On 20th October 1997, the appellant and Jose Joseph came to the residential premises of PW-1 Jose son of Anthony at about 4.30 p.m. with the common intention of committing robbery. While Jose Joseph stood guard near the house, the appellant made an entry and came upon PW-2 Lidiya daughter of PW-1 Jose son of Anthony, who was then aged about 11 years. Thereupon he caught hold of her neck, threatened to kill her and then robbed her of her gold chain and two gold ear studs.

3.Thereafter, he entered one bed room in the house and attempted to rob Lidiyas grandmother Annamma, aged about 90 years of her ornaments. When Annamma raised an alarm the appellant pulled her down from the cot on which she was lying and beat her on the head with a wall clock. He then robbed her of her gold chain weighing about 5.500 grams by breaking it

from her neck and also took two imitation bangles from a bag kept inside the almirah in the room. The appellant then went away from the house.

4.Upon the departure of the appellant and Jose Joseph from the scene of crime, Lidiya went to the school where she learnt dancing from her father and informed him of the incident. They both rushed

back to the house along with some friends and on discovering Annammas condition, she was first taken to Kanjirappally Government Hospital and then to the Kottayam Medical College Hospital for treatment. Unfortunately she passed away on 29th October 1997.

5. On a complaint having been lodged of the robbery, the police investigated the case and during the investigations, on 24th October 1997, the Investigating Officer PW-13 T.A. Salim recovered the stolen articles at the instance of the appellant.

6. On conclusion of investigations, a challan was filed and the appellant was charged with offences punishable under Section 449 of the IPC, Section 397 of the IPC and Section 302 of the IPC. Jose Joseph was also similarly charged but the Trial Judge found him guilty of an offence punishable under Section 411 of the IPC.

7.Both the convicts filed appeals in the High Court. While the appeal filed by Jose Joseph was accepted by the High Court, the appeal of the appellant was rejected and his conviction and sentence upheld.

8. We are, therefore, concerned only with the appeal filed by the appellant.

Decision of the Trial Court:

9. The Trial Judge found from the medical evidence given by PW-10 Dr. V.P. Rajan, Civil Surgeon in the Kanjirappally Government Hospital that Annamma was aged about 90 years. She had an injury on her forehead above the left eyebrow with suspicion of a fracture, edema of both eyelids and lacerated injury on right side of the forehead. According to him, the injuries could have been caused by a wall clock as alleged by the prosecution. The Trial Judge also considered the medical evidence of PW-11 Dr. Babu, Assistant Professor of Forensic Medicine, Kottayam Medical College that Annamma died on 29th October 1997 as a result of the head injuries sustained by her. The Trial Court found that the evidence of both the doctors was not challenged and proved that Annamma died due to the violence inflicted on her including being hit with a wall clock.

10. The Trial Judge also found no reason to disbelieve the consistent testimony of Jose son of Antony and Lidiya who was an eye witness to the incident.

11. In addition, the Trial Court relied on the testimony of PW-3 Leelamma, a neighbour of Jose son of Antony. Although this witness had turned hostile, she admitted having seen the appellant on the fateful day about 100 meters away from the house of Jose son of Antony. She had seen the appellant earlier also and could, therefore, recognize him. The Trial Judge also relied on the evidence on PW-5 Thankuppam, who was residing close by and had also seen the appellant in the vicinity of the house of Jose son of Antony. This witness had also turned hostile, but confirmed seeing the appellant and that he knew the appellant. It appears that this witness had turned hostile on the issue of having seen both the appellant and Jose Joseph together.Kunjumon @ Unni vs State Of Kerala on 21 November, 2012

12. The Trial Judge also saw no reason to disbelieve the Investigating Officer who confirmed the recovery of the gold ornaments at the instance of the appellant on 24th October 1997.

13. The principal contention of the appellant before the Trial Judge was that since he was a total stranger to Lidiya, she could not have recognized him in the Court and in the absence of a TIP, reliance on her identification of the appellant could not be considered safe. The Trial Judge rejected this contention on the ground that there was sufficient other evidence to show the presence of the appellant in the vicinity of the house of Jose son of Antony and in view of the corroboration from other witnesses, there was no reason to doubt Lidiya.

14.Accordingly, the Trial Court convicted the appellant and sentenced him to 10 years imprisonment and fine for an offence punishable under Section 449 of the IPC, imprisonment for 7 years and fine for an offence punishable under Section 397 of the IPC and for life for an offence punishable under Section 302 of the IPC. It was directed that the sentences would run concurrently.Decision of the High Court:

15.Feeling aggrieved, the appellant preferred Criminal Appeal No. 835 of 2004 in the High Court of Kerala. By its Judgment and Order dated 30th October 2007, the High Court rejected the appeal and upheld the conviction of the appellant. The High Court relied upon the evidence of the witnesses mentioned above to uphold the conviction.

16. Before the High Court also the contention urged by the appellant was that since a TIP was not conducted, it would not be safe to rely upon the testimony of Lidiya. However, the High Court rejected this contention by holding that there was clear evidence against the appellant, who had been identified by Lidiya and the witnesses in Court, and in view of the decisions of this Court in Sk. Hasib v. State of Bihar, AIR 1972 SC 283, Bikau Pandey v. State of Bihar, AIR 2004 SC 997 and State of Rajasthan v. Kishore, AIR 1996 SC 3035 there

was no reason to interfere with the conviction and sentence. Accordingly, Criminal Appeal No. 835 of 2004 was dismissed.Discussion and conclusions:

17. Before us the facts as found by both the Courts below have not been contested by learned counsel for the appellant and rightly so. However, it was submitted that since a TIP was not conducted, the evidence of Lidiya could not be relied upon. Additionally, it was contended that since Lidiya was about 11 years of age at the time of the incident, the evidence of the child witness should be carefully scrutinized. Finally, it was contended that the appellant had no intention to murder Annamma and therefore the conviction for an offence punishable under Section 302 of the IPC was improper.

18. We are unable to agree with the submissions made by learned counsel for the appellant.

(i) Not holding a TIP:

19. We have gone through the decisions referred to by the High Court and find that only Sk. Hasib is of any relevance. In that case, this Court explained the purpose of a TIP. It was observed that an identification parade is held at the investigation stage by the investigating officer for a two-fold purpose: to identify the property subject matter of the alleged offence or the person concerned in the alleged offence and to assure the investigating authority that the investigation is proceeding along the right lines. For this reason, the identification parade should be held at the earliest, so that memory does not fade in the meanwhile. More importantly, however, to ensure that the identification parade inspires confidence and is fair and effective, certain precautions need to be taken.

20. In spite of this, it was held, relying on Vaikuntam Chandrappa v. State of Andhra Pradesh, AIR 1960 SC 1340 that, the substantive evidence is the statement of a witness in court and 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. Consequently, if there is no substantive evidence against an accused, a TIP will not assist the prosecution.

21.The advisability of holding a TIP (particularly with reference to avoidable or unreasonable delay) has been emphasized in Rameshwar Singh v. State of J & K, (1971) 2 SCC 715 by tethering it to proper administration of justice. In Budhsen v. State of Madhya Pradesh, (1970) 2 SCC 128 it has been pitched to the life and liberty of an accused. However, in Budhsen an exception has been noted when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration.

22. A more useful and elaborate discussion on the subject is to be found in Malkhansingh v. State of Madhya Pradesh, (2003) 5 SCC 746 where the TIP is linked to the requirement of Section 9 of the Evidence Act, 1872 and coupled with the caution that in the absence of a TIP, the weight to be attached to the identification of the accused in Court is a matter for the courts of fact to decide.

23. Similarly, in Vijay @ Chinee v. State of Madhya Pradesh, (2010) 8 SCC 191 after a discussion on the subject, it was concluded that, the test identification is a part of the investigation and is very useful in a case where the accused are not known beforehand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court. It was noted in Vijay with reference to State of Himachal Pradesh v. Lekh Raj, (2000) 1 SCC 247 that the holding of a TIP is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or complainant.

24. We have gone into some detail on this issue because of the unfortunately cursory manner in which the matter has been dealt with by the Trial Judge and the High Court.

25. The sum and substance of the various decisions referred to above and others on the same lines is that the failure to hold a TIP is not fatal to the case of the prosecution, but the Trial Judge will need to be circumspect in accepting the identification of an accused by a witness in Court if the accused is a stranger to the witness.

26. In the present case, we are not dealing with the evidence of any ordinary witness we are dealing with a victim of a crime, someone who was directly at the receiving end of the actions of the appellant and who came face to face with the threat and intimidation by the appellant. The evidence of such a victim of a crime must be placed, in our opinion, on a somewhat higher pedestal, in terms of the credibility attached to it, than the evidence of any other witness. We need to seriously consider a partial shift in focus in the proper administration of justice by including not only the life and liberty of an accused but issues of victimology and the treatment of victims. Theories concerning criminal law and the administration of criminal justice are fast developing and we need to keep up with these developments.

27. What does Lidiya say in her evidence? Firstly, she identifies the appellant but no question is put to her in this regard in her cross- examination. Then, she says of the appellant: He caught me on my neck and told that if I open my mouth I shall be killed. I was scared and kept mum. He told me to remove my earrings and chain. I being scared removed my earrings and chain and gave it to him. She reiterates this in her cross-examination and says that she saw the appellant for two minutes. The entire traumatic sequence of events would have been

clearly etched in Lidiyas memory, even though it may taken only two minutes. And so, the only question put to her in cross-examination in this regard is You are deposing falsely that you saw A1 [the appellant]? which of course she denied.

28. We have considered the delay of about 6 years in recording the evidence of Lidiya, but are of the opinion that on a reading of her testimony the episode did not (understandably) fade away from her memory.

29. It is quite clear from the evidence of Lidiya, the absence of any meaningful cross-examination, the evidence given by the other witnesses and the recovery of gold ornaments from the possession of the appellant that the absence of the TIP makes no difference to the case of the prosecution or the identification of the appellant.

(ii) Testimony of a child witness:

30. This issue need not detain us for any length of time. It is true that Lidiya was about 11 years of age when the incident took place. However, her testimony was recorded, unfortunately, after a lapse of 6 years. She was, by then, no longer a child witness. That apart, her evidence is clear and unambiguous and nothing adverse could be elicited during her cross- examination. We see no merit in this contention advanced on behalf of the appellant.

(iii) Murderous intent of the appellant:

31. Looking to the overall facts of the case, we see no reason to disagree with the concurrent view of the Trial Court and the High Court that the appellant is guilty of murder. If a frail old woman aged about 90 years is dragged down from her cot and beaten on the head with a wall clock, it is not difficult to imagine what the consequences would be and surely the appellant would not be oblivious of them. There is no merit in the submission of learned counsel for the appellant that his client did not intend the death of Annamma or even did not know that his actions would result in her death.

32. However, it seems quite clear, and this was also the case of the prosecution, that the appellant had gone to the house of Jose son of Anthony for the purpose of committing a robbery. He did not go for the purpose of or with the intention to kill anybody. That he killed Annamma is unfortunate, but the house trespass was for the purpose of committing a robbery and not for the purpose of committing an offence punishable with death. Under the circumstances, in our opinion, it would not be proper to convict the appellant for an offence punishable under Section 449 of the IPC. To this extent, therefore, his appeal must be allowed. Result:

33. There is no merit in this appeal to the extent of the appellants conviction and sentence for offences punishable under Section 397 and Section 302 of the IPC. Accordingly, it is dismissed in this regard. However, the appeal is allowed to the extent that no offence punishable under Section 449 of the IPC has been made out against the appellant.