

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

+ Crl. A. No. 203/2008

Judgment reserved on: 06.08.2008
 Judgment delivered on: 09.02.2009

Mohd. Harun Faraji & Anr. Appellants
Through: Mr. Bharat Bhushan, Adv.

versus

State of NCT of Delhi Respondent
Through: Mr. Pawan Sharma, APP

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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

KAILASH GAMBHIR, J.

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1 . The present appeal has been preferred by the appellants under Section 374 of the Criminal Procedure Code challenging the conviction and sentence order

passed vide order dated 22/09/2007 and 27/09/2007, by the Court of Sh. S.P. Garg, Additional Sessions Judge, Patiala House, in FIR No. 962/2006 of Police Station Sangam Vihar U/Ss. 458/395/380/34 of the Indian Penal Code, 1860.

2 . Before delving on the contentions of the parties it would be relevant to refer to the brief conspectus of the instant case as per the prosecution.

3 . That on 21.12.2004, FIR No. 962/04 was registered by PS Sangam Vihar on the statement of complainant Chander Bhan Sharma who disclosed that on the intervening night of 20-21.12.04 at about 3 AM, he saw 4-5 boys had entered inside his house and were searching it. They were armed with knives and country made pistols. On seeing them he raised an alarm. On that, the said 4-5 boys jumped the rear wall of the courtyard and fled away. On search of his house, he found that the articles were lying scattered and gold ornaments and cash of Rs. 19,000/-

was found stolen from his house. Gold ornaments and cash worth Rs.3100/- was also found missing from the house of his tenant Sh. Amresh Pathak. Cash of Rs.9,000/- was found stolen from the room of his another tenant Sh. Chain Singh. Statements of concerned witnesses were recorded by the police. On 19.2.2005, IO of this case received information that accused Nos. A1 to A4 namely Iliyas, Rubel, Mohd. Harun Faraji and Mohd Appan, along with one Mohd. Munir (since discharged) were arrested in case FIR No. 67/2005 u/s 399/402 IPC PS Bhajanpura and in their disclosure statements disclosed their involvement in the present case. I.O. of this case got production warrants issued against the accused persons and moved application for TIP. Complainant Chander Bhan Sharma in the TIP proceedings identified A-2, A-3 and A-4. A-1 refused to participate in the TIP proceedings. PW Amresh also did not participate in the TIP proceedings. After further investigation and recording further statements of the concerned witnesses, the IO filed Challan against the

accused persons in the court of Ld MM who committed the case to the court of Sessions under Section 207/208 Cr.P.C. The prosecution examined some 12 witnesses whereafter the statements of accused persons were recorded under Sec. 313 CrPC who denied the charges and claimed that they were innocent. The Ld. Trial court however, held the appellants guilty of the said offences and convicted the appellants and sentenced them to undergo RI of four years with fine of Rs.1000/- failing which to undergo further imprisonment of three months.

4 . Feeling aggrieved with the said conviction and sentence, the appellants, herein, preferred the instant appeal.

5 . Mr. Bharat Bhushan, counsel for the appellants contended that the trial judge did not appreciate that the basic allegations made by the complainant were at random. The counsel submitted that the ocular evidence was completely manipulated on the face of it while no evidence

came on record which would connect appellants to the crime. The prosecution story that the accused persons at the time of commission of offence were wearing masks clearly destroys the outcome of TIP proceedings. Further, the story that the accused persons removed masks before giving directions at the crime scene clearly shows that the witness was trying to falsely implicate them as it cannot be expected that all the accused removed masks mechanically when they knew that they could be caught. The counsel urged that nothing could be culled out by joining all the accused persons for justifying identifications and rather the witness was tutored before hand by the police to implicate the appellants. The counsel submitted that even if the witness was to be believed then the concocted story of mechanically removing the masks would come in the way and thus, benefit of doubt should be given to the appellants. The counsel further contended that the prosecution version is like a cock and bull story as the evidence of the complainant could be confined to

burglary/decoity in his house and the subsequent aspect of identifying them on the basis of their arrest in other cases because had there been any disclosure to connect them to the crime then some stolen items at least would have been recovered. Since nothing was recovered, therefore the prosecution story is baseless and devoid of any merits, the counsel contended. Stretching the said argument, the counsel submitted that the story of the Police that the accused themselves admitted the crime cannot be given much weightage because if they had admitted the commission of the crime then they would have also disclosed about the stolen articles. The counsel maintained that since no role was assigned to the accused persons including the present appellants thus the crime cannot be attributed to them. The counsel also urged that no evidence came on record to prove that the accused person had common intention to commit the alleged crime. The counsel also contended that the trial court erred in holding that non-examination of another witness Sh. Chain Singh

was not fatal to the prosecution case on the ground that the efforts were made to serve the said witness and the decision of the trial court is per se bad in holding that the burden to examine the said witness shifted on the appellants.

6 . Per contra, Mr. Pawan Sharma, APP refuted the contentions raised by the counsel for the appellant and contended that the conviction and sentence in order dated 22/09/2007 and 27/09/2007, does not suffer from any illegality, infirmity or perversity warranting any interference by this court. The counsel contended that the present appeal is an abuse of the process of the court and deserves to be dismissed.

7 . I have heard learned counsel for the parties and perused the record.

8 . On perusal of the record it is manifest that on 19/02/2005 the I.O. of the FIR No. 962/2004 registered at PS Sangam Vihar u/Ss. 458/395/380/34 IPC, which is the

instant case, received information from Special Staff North-East District that all the four accused in the said FIR along with one Mohd. Munir (since discharged) were arrested in the case FIR 67/2005 U/s. 399/402 IPC registered at PS Bhajan Pura and they had made disclosure statements regarding their involvement in the present case. On the said information the investigation in the instant case proceeded further.

9 . On perusal of the testimony of HC Jagveer, PW 5, it is manifest that the appellants along with other co-accused were apprehended in a case FIR No. 67/2005 registered at PS Bhajanpura and also that upon interrogation by SI Rohtash, the co-accused Rubel disclosed their involvement in FIR no.s 778/2004 and 962/2004 registered at PS Sangam Vihar and the said disclosure statement is Ex. PW-5/A.

10 . It is no more res integra that mere disclosure statement without recovery is of no evidentially value. The law regarding disclosure statement made to police is

enshrined in Section 27 of the Evidence Act. Section 27 is virtually borrowed from Taylor's treatise on the Law of Evidence as pointed out by the Full Bench of the Allahabad High Court in the vintage decision in Queen Empress v. Babu Lal⁶⁷. The passage in Taylor's Evidence (which is found in para 902 of Vol. 1 of 1931 Edn.) is as follows:

"902. (i) When, in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement about his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found, but it would not, in such a case of a confession improperly obtained, be competent to inquire whether he confessed that he had concealed it there. So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false."

11 . The entire prosecution case rests on the disclosure statement made in the FIR No. 962/2004

registered at PS Sangam Vihar u/Ss. 458/395/380/34 IPC. It is not in dispute that no recovery of stolen goods was made pursuant to the said disclosure statement. The prerequisite for operation of Section 27 of the Evidence Act is that there should be discovery of fact. In this regard the Apex court in **State (NCT of Delhi) v. Navjot Sandhu,(2005) 11 SCC 600** observed as under:

“121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates *distinctly to the fact thereby discovered* that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to

the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused."

12 . In the instant case, there is a mere disclosure statement made to the police but there is no discovery of fact or stolen goods, thus, the prosecution fails in proving the culpability of the accused persons.

13 . Furthermore, it is well settled that the prosecution case should stand on its own. The entire case of the prosecution is based on the disclosure statement of the accused Sh. Rubel in the FIR No. 962/2004 registered at PS Sangam Vihar, wherein the offences for which the accused were being tried in the said case were different from the instant case, being those u/Ss. 458/395/380/34 IPC.

14 . On perusal of the S.161 CrPC statement of the complainant Mr. Chander Bhan Sharma, Pw8 and also the complaint, certain doubts are raised. From the perusal of the aforesaid statements it is manifest that the complainant

did not even remember and could not even state with certainty as to whether there were 4 or 5 persons who entered in his house for theft. Further, neither did the complainant PW8 mentioned about the mask in his statement under S. 161 CrPC nor did he mention the same in his complaint, it was only during the cross-examination that he divulged that the accused were wearing masks and had simultaneously removed the same and due to light in the drawing room he could see the accused persons and was able to identify them in the TIP. Mere statements in themselves do not amount to substantive piece of evidence. The statement of the complainant without corroboration cannot be accepted.

15 . Furthermore, as per the testimony of PW8 complainant, theft took place in his house as well as in the house of his two tenants, Mr. Amresh Pathak and Mr. Chain Singh but no independent complaints were made by them regarding theft at there place. Also, non-examination of another witness Sh. Chain Singh is fatal to the prosecution case.

16 . No chance prints or fingerprints were picked from the site by the Police Officials. Also, it has come in the deposition of Pw8 complainant that nothing was recovered by the police from the site.

17 . The present appellants participated in the TIP proceedings and they were identified by the complainant Mr. Chander Bhan Sharma. After complying with the relevant provisions of the law a separate charge u/Ss. 395/458/34 IPC was ordered to be framed against the appellants in the supplementary challan S.C. No. 112/2006 vide order dated 14/7/2006. It is well settled that Test Identification Parade in itself is not a substantive piece of evidence and TIP coupled with other circumstances and evidence can be taken into consideration as substantive piece of evidence. The evidence of test identification is admissible under Section 9 of the Evidence Act; it is, at best, supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in Court regarding identification of the accused as the doer of the criminal act. The earlier identification made by the witnesses at the test identification parade, by itself, has no independent value. Nor is test identification the only type of evidence that can be tendered to confirm the evidence of a witness regarding identification of the accused, in Court, as the perpetrator of the crime. The identity of the culprit can be fixed by circumstantial evidence also. In this regard the Apex Court in *Munshi Singh Gautam Vs. State of M.P.*, (2005) 9 SCC 631, the

Hon'ble Apex Court discussed the object, purpose and importance of TIP in the following terms:-

16. As was observed by this Court in **Matru v. State of U.P.**¹¹ identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See *Santokh Singh v. Izhar Hussain*¹².) The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

18 . Thus, from the foregoing, it is manifest that the prosecution case suffers from various infirmities. It is a well settled principle of criminal jurisprudence that if the prosecution case fails to prove the culpability of the accused beyond reasonable doubt then the benefit of doubt must go to the accused. In this regard the Hon'ble Apex Court in Rang Bahadur Singh Vs. State of U.P. – (2000) 3 SCC 454 observed as under :-

22. The amount of doubt which the Court would entertain regarding the complicity of the appellants in this case is much more than the level of reasonable doubt. We are aware that acquitting the accused in a case of this nature is not a matter of satisfaction for all concerned. At the same time we remind ourselves of the time-tested rule that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits. We really entertain doubt about the involvement of the appellants in the crime.

19 . In view of the above discussion, the judgment and order dated 22/09/2007 and 27/09/2007, respectively, of

the Additional Sessions Judge, Sh. S.P. Garg, Patiala House, pertaining to a case in FIR No. 962/2006 of Police Station Sangam Vihar U/Ss. 458/395/380/34 of the Indian Penal Code, 1860 is set aside and consequently the appeal is allowed and the appellants are acquitted.

February 09, 2009

**KAILASH GAMBHIR
JUDGE**