

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

Judgment reserved on : August 21, 2009
Judgment delivered on : August 31, 2009

+ **CRL. APPEAL NO.413/09**

JAMEEL @ KALWA @ NASEEM Appellant
Through:Mr.Vimal Puggal, Advocate

versus

STATE Respondent
Through:Mr.M.N.Dudeja, APP.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of local papers may be allowed to see the judgment? NO
2. To be referred to the Reporter or not ? NO
3. Whether the judgment should be reported in Digest ? NO

AJIT BHARIHOKE, J.

1. Briefly stated the facts giving rise to this appeal are that on 10th March 1996 at about 11.45 AM, complainant Ashok Kumar and his brother Subhash were robbed of Rs.34,800/- and some valuables, by four armed robbers at Pushta, Basti Moolchand. In the process Subhash was shot in his head and expired. One of the robbers fired at the arm pit of the complainant with a '*katta*' and another robber who was subsequently identified as Jameel is stated to have stabbed the driver of the car PW Ajmer Singh with a knife. Thereafter, those robbers escaped in the Maruti car of the complainant bearing No.DL-4C-B-4489. FIR pertaining to the

incident was registered at the Police Station Darya Ganj on the complaint of PW-1 Ashok Kumar.

2. The car was recovered abandoned on the next day. Accused Jaipal @ Kabootar was arrested on the basis of a secret information on 15th March 1996. On interrogation, he made a disclosure statement about his involvement in the crime and named Pappu @ Wahab and Gayur as his accomplices. Pursuant to the disclosure statement, accused Jaipal @ Kabootar led the police party to Bhajanpura and got his co-accused Pappu @ Wahab and Gayur arrested.
3. Accused Pappu @ Wahab and Gayur also made disclosures. Pappu @ Wahab in his disclosure statement named accused Furkan as one of their accomplices. Accused Furkan was later on arrested. On interrogation, he also made a disclosure statement wherein he disclosed the names of Nafeez, appellant Jameel and Meharban besides others as co-conspirators. It was at that stage, the name of appellant Jameel surfaced as one of the co-accused in the crime. Accused Furkan, however, in his disclosure statement did not disclose the parentage of his co-accused Jameel. He only stated that he was resident of Meerut without giving the complete address.

4. Accused Jameel, Nafeez and Meharban could not be traced and arrested as such they were declared proclaimed offenders. After the completion of the investigation, initial charge sheet was filed against accused Furkan, Jaipal @ Kabootar, Pappu @ Wahab and Gayur. In that charge sheet, the appellant, Meharban and Nafeez were shown in the column No.2 of the charge sheet as proclaimed offenders. Aforesaid case came to an end by judgment dated 5th November 2004 resulting in conviction of Furkan and Pappu @ Wahab and acquittal of Jaipal @ Kabootar and Gayur.
5. It is stated that on 4th November 2004 at about 4.40 PM on the basis of a secret information, ASI U.R.Khan of Special Staff Kamla Market arrested the appellant Jameel with a '*katta*' loaded with one cartridge and a case under Section 27 Arms Act was registered against him being FIR No.497/2004 Police Station Kamla Market. Further investigation of said case was taken over by ASI Mansab Ali. Appellant Jameel is stated to have made a disclosure statement during his interrogation disclosing about his involvement in one case of murder and four different cases of robbery including the case in hand. Said information was thus forwarded to Police Station Darya Ganj vide DD No.5B dated 4th November 2004.
6. Inspector Raghubir Prasad, Additional SHO, Police Station Darya Ganj is stated to have taken over investigation of this case. On 16th November 2004, he formally arrested the appellant Jameel in

the instant case. He applied for holding Test Identification Parade (for short `TIP') to fix the identity of the appellant as one of the culprits. TIP was conducted on 23rd November 2004 at Tihar Jail and in the TIP complainant Ashok PW-1 and Ajmer Singh PW-2 are stated to have identified the appellant Jameel.

7. The learned Additional Sessions Judge, on consideration of evidence, has found the appellant guilty of offences punishable under Sections 302, 307 and 394 IPC read with 34 IPC and also for the offence punishable under Section 392 IPC read with 34 IPC and Section 397 IPC and sentenced him accordingly. Feeling aggrieved by the impugned judgment of conviction and order on sentence, appellant Jameel has preferred the instant appeal.
8. Learned counsel for the appellant has submitted that the impugned judgment of conviction is not sustainable under law because the learned trial Judge has accepted the testimony of PW-1 Ashok Kumar complainant and PW-2 Ajmer Singh against the appellant without testing it in the backdrop of the factual matrix of the case. He has submitted that there are circumstances which lead to the inference that the investigation resulting in supplementary charge sheet against the appellant is tainted since very inception. Therefore, learned trial court ought to have considered the possibility of the appellant having been shown to the witnesses before the TIP or his photographs having been shown to the witnesses during the period intervening his arrest in the Arms Act case of Police Station Kamla Market on 4th

November 2004 and 23rd November 2004 when the TIP was conducted and extended the benefit of doubt to the appellant.

9. On the other hand, learned counsel for the State has submitted that the learned trial court has rightly relied upon the testimony of PW-1 Ashok Kumar complainant and PW-2 Ajmer Singh driver who were victims of the crime and who have identified the appellant not only during the trial but also in the TIP conducted on 23rd November 2004 to fix the identity of the appellant as one of the robbers. He has submitted that contention of the appellant that he or his photographs were shown to the witnesses before the TIP is not acceptable because if that had been the case, the appellant definitely would have taken this plea before the concerned who conducted the TIP.
10. It is an admitted case of the prosecution that in the initial charge sheet, Pappu @ Wahab, Furkan @ Javed, Jaipal @ Kabootar and Gayur were sent for trial showing the appellant Jameel, Nafeez and Meharban as proclaimed offenders.
11. As per the prosecution version, the role assigned to the appellant Jameel is that he stabbed PW-2 Ajmer Singh with a knife. Perusal of the statement of the complainant recorded in *rukka* Ex.PW-2/C, which formed the basis of the registration of the case, show that in the said statement the complainant had not named the appellant Jameel and he described him as a person of normal height aged about 25-30 years. His name surfaced as a co-

conspirator after the arrest of co-accused Furkan who made a disclosure statement about his involvement. However, co-accused Furkan in the disclosure statement exhibited as PW-5/A during the trial of Furkan and others, while disclosing the name of the appellant Jameel as a co-accused did not give the name of his father or his complete address. It was only mentioned that he was a resident of Meerut.

12. It is further the case of the prosecution that on the basis of secret information, the appellant was arrested with a *katta* loaded with one live cartridge at G.B.Road and a case FIR No.497/2004 under Section 27 Arms Act was registered at P.S. Kamla Market. During investigation, appellant is stated to have made a disclosure statement about his involvement in five cases, one murder case and four pertaining to robbery including the case at hand. That information given by the appellant was conveyed to Police Station Darya Ganj vide DD No.58-B dated 5th November 2004 stating that the accused would be produced in the Court for remand on the same day.
13. Given the aforesaid factual matrix, the dishonesty on the part of the investigating agency is writ large. It is highly improbable that the appellant, who as per the prosecution was absconding for the last 8 ½ years, would on his arrest in an Arms Act case relating to a different police station would suddenly confess his involvement in the robbery-cum-murder case as if, he was suffering from the pangs of conscious. Further, perusal of DD No.58-B(Ex.PW-43/A)

reveals that in the DD report it is mentioned that “the accused Jameel who has been arrested in case FIR No.497/2004 under Section 27 Arms Act, Police Station Kamla Market has made a disclosure about his involvement in respect of case FIR No.108/1996 under Sections 302,307,392,394,397/34 IPC, concerned Investigating Officer may be informed that the accused would be produced in the Court of Shri S.K.Gautam, MM, Tis Hazari Courts on the same day”. It is beyond comprehension as to how the Special Staff, Kamla Market came to know the FIR number of the case regarding which the appellant Jameel had made a purported disclosure. There is no explanation forthcoming on record. This circumstance raise a strong suspicion that the arrest of the appellant Jameel in Arms Act case was stage managed as a prelude to involve him in this case by creating a story of a disclosure statement having been made by him about his involvement in the instant case. Aforesaid doubt against the correctness of prosecution case is further compounded by the fact that the statement under Section 161 Cr.P.C. of ASI U.R.Khan, the arresting officer in the Arms Act case of Police Station Kamla Market as per the version of Inspector Raghbir Prasad (PW-43), the I.O. of this case admittedly bears the date 4th November 2004, whereas the information about the disclosure made by the appellant reached Police Station Darya Ganj vide DD No.58-B(Ex.PW-43/A) dated 5th November 2004. This circumstance also leads to an inference that even before the recording of DD Entry No.58-B at the police station, Inspector Raghbir Prasad Investigating Officer was working in tandem

with ASI U.R.Khan with a view to fix appellant Jameel in this case on 4th November 2004 when he was shown to have been arrested in an Arms Act case relating to Special Staff Police Station Kamla Market.

14. Perusal of Ex.PW-43/A, DD No.58-B dated 5th November 2004 reveals that the information about purported disclosure made by the appellant Jameel regarding his involvement in the case at hand reached the Police Station Darya Ganj at 1.10 PM. It was made clear in the DD report that the Investigating Officer may be informed that the accused in the Arms Act case would be produced in the Court of Shri S.K.Gautam, MM, Tis Hazari Courts, Delhi on 5th November 2004 only. It is strange that despite of that, the Investigating Officer Inspector Raghubir Prasad did not approach the Court to seek permission to formally arrest the appellant Jameel. Instead of moving an application for conducting TIP of the appellant at the earliest, the Investigating Officer opted to wait till 16th November 2004 when he moved application for holding the TIP to fix the identity of the accused. Considering the fact that the investigation of this case is tainted because of aforementioned reasons, a possibility cannot be ruled out that the Investigating Officer might have arranged for the witnesses PW-1 Ashok Kumar and PW-2 Ajmer Singh to see the photographs of the appellant before the TIP during the period w.e.f. 4th November 2004 to 16th November 2004. We, therefore, do not find it safe to rely upon the testimony of aforesaid

witnesses regarding identification of the appellant as one of the robbers who stabbed PW-2 Ajmer Singh in the process of robbery, as the TIP was held around 8 ½ years after the occurrence.

15. Another circumstance going against the prosecution is that the case under Section 27 Arms Act of Police Station Kamla Market, which formed the foundation of this case, has admittedly resulted in acquittal. Not only this, ASI U.R.Khan, the arresting officer of the aforesaid case under Arms Act was also associated with the initial investigation of the case in hand which resulted in filing of the initial charge sheet against other four accused persons. Therefore, there is a strong possibility that ASI U.R. Khan and the Investigating Officer Raghubir Prasad might have joined hands to falsely involve the appellant in this case.
16. In view of the aforesaid, we find that the investigation of this case since very inception is tainted and a possibility of the Investigating Officer having shown the photographs of the appellant to the witnesses before the TIP or before their examination in Court cannot be ruled out. Thus, we do not deem it safe to sustain the impugned judgment of conviction.
17. The appeal is accordingly allowed. The impugned judgment of conviction and order on sentence against the appellant Jameel are, therefore, set aside. The appellant Jameel @ Kalwa @

Naseem is reported to be in custody. He be released forthwith, if not wanted in any other case.

AJIT BHARIHOKE, J.

August 31, 2009
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SANJAY KISHAN KAUL, J.