

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

% Reserved on : 12.02.2009
Date of decision : 03.03.2009

+ Crl.Appeal 573/2007

JAFAR MALIK Appellant
Through: Mr. Vikas Jain, adv.

Versus

THE STATE (NCT OF DELHI). Respondent
Through: Mr. Navin Sharma, APP

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 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 |

MOOL CHAND GARG, J.

1. The appellant has filed this appeal under Section 374 of the Code of Criminal Procedure (Cr.P.C.) for setting aside the judgment of the conviction and the order of sentence in Sessions Case no. 29/2006 passed by the learned ASJ, New Delhi in case FIR No.562/2005 registered at P.S. Hauz Khas under Sections 392/397/411/34 IPC against the appellant and three others on the basis of the statement vide exhibit PW-3/A made by P.W.-3, Sh. Bharat Singh whereby he stated to the police that:

“on 06.10.2005 the complainant along with his colleague Mahesh, accounts officer had come to ICICI Bank, Green Park Extension at about 1/1.15 pm to withdraw case. They had left the bank about 2 pm. They withdrew cash of Rs.1,90,000/- kept it in a bag of black colour.

They reached at Karnataka Restaurant, Yusuf Sarai and took lunch there. At about 3.15 pm when the TSR in which they were travelling reached near Laxman Public School, all of a sudden a motor cycle of red colour came there. Three persons without helmets were sitting on the said motor cycle. The said persons got stopped their TSR after putting their motorcycle in front of the TSR. Two boys alighted from the motor cycle and one of them who was sitting on the rear seat pointed a pistol like object at him and snatched his bag containing Rs.1,90,000/- and his identity card. Before they could react, the said persons fled away towards outer ring road. Soon after the incident he made telephone call to PCR at 100. He could identify those three assailants if produced before him.

2. The appellant and Mohd. Sharikh his co-accused were arrested by the police officials of P.S. Hauz Khas in case FIR No.626/2005 on 12.11.2005. In the course of interrogation they made a disclosure statement and admitted their involvement in the commission of offence in this case. However, nothing was recovered at their instance.
3. The other co-accused, namely, Sh. Satish Saini was apprehended before them in another FIR No.994/2005 which was registered under section 186/353/307/34 IPC on 12.11.2005 and on his interrogation he also made a disclosure statement and admitted his involvement in the commission of the offence of this case.
4. As per the prosecution story the appellant and Mohd. Sharikh were kept in muffled face and were sent for Test Identification Parade (T.I.P.) before PW6 Ms. Barkha Gupta, the learned MM who conducted the T.I.P. During T.I.P. the appellant and other co-accused persons were identified by both PW-3 Bharat Singh whereas PW-4, Sh. Mahesh Singh, the other eye witness who accompanied Bharat Singh on the

date of the incident to ICICI Bank turned hostile.

5. A challan was filed after completing the investigation against all the three accused persons including the appellant while they could not apprehend the fourth accused who was declared proclaimed offender. Charges were framed against them under Sections 392/34 read with Section 397 of the IPC vide order dated 15.02.2006.

6. The prosecution to prove the guilt of the accused persons including the appellant examined six witnesses, namely, PW1 Ct. Mahavir Singh, PW2 HC Hukam Singh, PW3 Bharat Singh, PW4 Mahesh, PW5 SI Ritu Raj, PW6 Ms. Barkha Gupta, PW7 Rajiv Bhatnagar, PW8 ASI Paramjeet Singh, PW9 SI Pankaj Singh and PW10 SI D.P. Singh. Statement of the accused persons were recorded under Section 313 Cr.P.C. wherein they denied their involvement in the case. They have not led any defense evidence.

7. Vide judgment dated 25.08.2007 learned ASJ held that the appellant and his co-accused persons guilty of charges under Section 392/394 IPC and sentenced them to undergo R.I. for four years and to pay fine of Rs.1,000/- and failing which to undergo S.I. for one month.

It is a matter of record that the appellant has already undergone more than three years of sentence.

8. By this appeal, the appellant has assailed the impugned judgment dated 25.08.2007 and the order of sentence of the same date and have submitted that neither the conviction nor the sentence is sustainable in view of the fact that except for the alleged disclosure statement which is inadmissible in evidence there is no other evidence produced by the prosecution against them which may prove their involvement in the aforesaid case.

9. As regard the identification on which the prosecution has solely relied for their involvement in this case, it is submitted that their identification by PW-3 in the T.I.P. held by PW-6 and their identification cannot be given any credence as PW-3 in his cross-examination has very categorically stated that the accused persons were shown to the aforesaid witness much before the TIP. In this regard he has referred to the statement made by PW-3 where PW-3 in his cross-examination which was recorded on the same day stated that:

“It is correct that I had seen all the three accused persons at the PS. It is correct that robbers who had come on the motor cycle had not muffled their faces at the time of incident. It is correct that police had disclosed to me names of all the three accused persons separately at the P.S. It is incorrect to suggest that none of the accused persons were present on the motor cycle on the day of incident or that none of them had snatched the bag. After incident I had seen the accused persons for the first time in the P.S.”

10. No doubt the PW-3 was declared hostile by the learned APP and was even cross-examined by APP but even during cross-examination he stood by his statement that the appellant was shown to the witness before holding of the T.I.P. The relevant extract of his cross-examination conducted by the learned APP is reproduced hereunder:.

“It is incorrect to suggest that I had not seen the accused persons at the PS prior to identifying them in TIP proceedings at Tihar after the incident. IT is incorrect to suggest that police did not get my signature on the blank papers. It is incorrect to suggest that I have not fully supported the prosecution after my examination after lunch hour as I have been won over by the accused.”

11. The learned ASJ while convicting the appellant has not appreciated the submission made by the appellant about having shown him to the witnesses before the T.I.P. and has brushed aside the aforesaid submissions by observing that:

27. In the cross examination, this witness stated that the accused persons were shown to him at the PS.

Contention of the Id. Addl. PP for the State is that this witness was cross examined after lunch hour and in the process, this witness might have been won over by the accused persons has merits. I do agree that in the cross-examination, the witness stated that the accused persons were shown to him in the P.S. However, nothing has come on record to substantiate this plea of the witness taken for the first time in the cross-examination. It was not elaborated as to when all these accused persons were shown to this witness. It has come on record that soon after the accused persons were got transferred in this case they were kept in muffled faces and were produced before the Court and from there they were sent to JC. The accused persons were already in custody in different cases at PS Malviya nagar and P.S. Hauz Khas. So there was no question of the accused persons to have been known in the P.S. PW10 SI D.P. Singh, I.O. of this Case stated that on 13.11.2005 he received an information from special staff about apprehension of the accused persons. He collected the disclosure statements and arrested the accused persons and prepared their arrest memos EX Pw10/C to Ext. PW10/E. All the accused persons took the police party to the spot and there pointing out memo Ex PW 10/I was prepared. They were kept in muffled faces. They were produced before Id. MM and sent to JC. TIP of the accused were conducted on 24.11.2005. In the cross examination no suggestion was put to this witness as to when and to whom all these accused persons were shown at the P.S. Nothing was suggested to him as to when PW3 Bharat Singh and PW4 Mahesh were called at the P.S. and the accused persons were shown to them."

12. However, the Apex Court has examined all these aspects in the following judgments:

- i) Shaikh Umar Ahmed Shaikh Vs. State of Maharashtra **AIR 1998 SC 1922**
- ii) Mahabir Vs. The State of Delhi, **2008 (2) JCC 1244**
- iii) Ravi @ Ravichandran Vs. State Rep. By Inspector of Police **2007 (2) JCC 1458**
- iv) Dasari Siva Prasad Reddy Vs. Public Prosecutor, High Court of A.P. **AIR 2004 SC 4383**

13. A perusal of the aforesaid judgment goes to show that whenever the accused is shown to the witnesses before conducting the T.I.P. their identification in the TIP or their subsequent identification has not been appreciated as a good evidence for their conviction by the Apex Court. Admittedly in the present case except for the disclosure statement made by the appellant and his co-accused persons one after

the other, i.e., the second accused on 12.11.2005 and the appellant and his other co-accused on 13.11.2009 which is nothing else but the repetition, there is no other evidence which may prove the guilt of the appellants except the identification made by PW-3 and PW-4 in the T.I.P. and the identification of the appellants by PW-3 in the Court.

14. In Shaikh Umar Ahmed Shaikh Vs. State of Maharashtra (Supra) it has been held as under:

“The Designated Court after having rejected the evidence of identification parade on the ground that the suspects were possibly shown to the witnesses, relied upon the evidence of identification of the accused in the Court by the two witnesses and on that evidence recorded conviction against the appellants. No doubt, the evidence of identification parade is not a substantive evidence, but its utility is for purposes of corroboration. In other words, it is utilized for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. The real and substantive evidence of the identity of the accused comes when witnesses give statement in the Court, identifying the accused. It is true that in the present case, PW-2 and PW-11 identified the two accused who are the appellants before us in the Court. But, the question arises; what value could be attached to the evidence of identify of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made basis for recording conviction against the accused. The reliance of evidence of identification of the accused in the Court by PW-2 and PW-11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eye-witnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside. We accordingly set aside the judgment and order dated 14.01.1997 passed bny the Additional Judge, Desiganted Court

for Greater Bombay in TSC No.21 of 1994, convicting the appellants. The appellants are acquitted of charges. The appeal is allowed. The appellants are entitled to be released forthwith. We order accordingly.
Appeal Allowed.”

15. Similarly in the case of Mahabir Vs. The State of Delhi (Supra) also the accused persons were shown to the eye witnesses before their T.I.P., it has been held that:

“In view of the accepted position that the accused persons were brought to the hospital to be shown to PW4, grievance that the test identification parade was really of no consequence because they had already been shown to the witnesses has substance. That being only piece of material which was used for conviction of Mahabir, same cannot be sustained. The same is set aside. He be released forthwith.

16. In the case of *Ravi @ Ravichandran Vs. State (Supra)* where photographs of the accused persons were shown to the witnesses also not named in the FIR as is the case in hand, the Apex Court held that:

17. It is no doubt true that the substantive evidence of identification of an accused is the one made in the Court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a First information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not very sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the First Information Report. PW-1 for the first time before the court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.

18. In a case of this nature, it was incumbent upon the prosecution to arrange upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification

19. In *Suryamoorthi and Another Vs. Govindaswamy and Others* 1989 3 SCC 24, this Court held :

10. Two identification parades were held in the course of investigation. At the first identification parade PW1 identified all the seven accused persons whereas PW2 identified three of them, namely, accused 2,6 and 7 alone. It is, however, in evidence that before the identification parades were held the photographs of the accused persons had appeared in the local daily newspapers. Besides, the accused persons were in the lock-up for a few days before the identification parades were held and therefore the possibility of their having been shown to the witnesses cannot be ruled out altogether. We do not, therefore, attach much importance to the identification made at the identification parades."

17. It would be also relevant to take note of the Judgment delivered by the Supreme Court in Dasari Siva Prasad Reddy's Case (Supra) where despite strong suspicion against the accused which is also available in the present case, the Apex Court held:

25. A strong suspicion, no doubt, exists against the appellant but such suspicion cannot be the basis of conviction, going by the standard of proof required in a criminal case. The distance between may be true and must be true shall be fully covered by reliable evidence adduced by the prosecution. But, that has not been done in the instant case, if, coupled with the circumstances unfolded by the evidence of PW3, the evidence of PW4 had been believed, it would have gone a long way in substantiating the prosecution case. But, in the instant case, apart from the fact that the appellant was at his house on the morning of 20th April, 1996, there is no other circumstance whatsoever which connects the accused to the crime, though serious suspicion looms large about his involvement. The view taken by the trial Court that the prosecution could not establish the complete chain of circumstances incriminating the accused is a reasonably possible view that the High Court should not have disturbed the same. Having regard to the state of available evidence, the benefit of doubt given to the accused by the trial Court warranted no interference by the High Court.

18. In view of the legal position, as discussed above and their being no contrary judgment shown by the State to rebut the presumption which arises in favour of the appellant in view of the aforesaid legal position and a categorical admission of PW-3 who is the complainant and is author of the FIR in question that the accused persons were shown to him before the holding of the T.I.P. merely because he does not bring this fact to the notice of the learned MM who held the T.I.P.

would not help the prosecution to sustain the charges against the appellant beyond reasonable doubt.

19. Hence, the appeal is allowed. The appellant be released forthwith in case he is not wanted in any other case.

20. A copy of the order be sent Jail Superintendent for compliance.

21. The trial Court record be also sent back forthwith.

MOOL CHAND GARG,J

MARCH 03, 2009

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