

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

+ **Crl.App. 656/2007**

Date of Reserve: 13.10.2009

Date of Decision: 23.10.2009

ANIL LUSANA @ ANIL RATHI Appellant
Through: Mr. R.N. Sharma, advocate

versus

STATE (NCT of DELHI) Respondent
Through: Mr. Navin Sharma, APP for state

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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 was summoned in this case on the basis of production warrant issued to the Jail Superintendent, Deoband by the Trial Court vide order dated 02.12.2004 on the statement made by a co-convict Anil Sisoli that the appellant was confined at Deoband, U.P. jail in some other case. After his production in Court he was asked to face the trial in this case on the basis of a supplementary charge-sheet filed against him relying upon the statement of certain police officials recorded under Section 161 Cr.P.C. that those police officers had identified the appellant.

2. Brief facts of the case are that on 08.10.2004, SI Satender Vashisht along with Inspector Jaibir Singh, ASI Rakesh and Constable Ravish were present in a private Santro Car near Gagan Cinema and at

about 6.30 PM, SI Satender received secret information from a secret informer. The secret information was that one Anil Sisoli, a bad character of U.P., would come in a robbed Alto Car near the red light of Gagan Cinema. SI Satender informed ACP Hemant Chopra about the secret information and requested him to send more staff. He thereafter, on the instructions of the ACP, organized a raiding party near the red light of Gagan Cinema and asked 4/5 public persons to join the investigation but none agreed and left the spot. Thereafter, the position was taken near the red light of Gagan Cinema and at about 7.10 PM, one Alto Car of grey colour having red light and number HR 10 F 6471 was seen coming from the Wazirabad side. SI Satender gave a signal to the car to stop, but the driver increased the speed of car. He thereafter with his staff followed that car in his private car and managed to stop it at a distance of 200 meters from the red light of Gagan Cinema by overtaking it and positioning his car in front of the Alto Car. Two persons were found sitting in that car. Anil Sisoli was sitting on the driver seat and was found wearing uniform of U.P. Police. He started firing upon the police party after getting down from the car. The other person also got down from the car and while firing at the police party, ran away towards Sunder Nagri. When Anil Sisoli was firing at the police party, SI Satender took out his service revolver and fired two rounds in the air and issued warnings to the accused. Constable Ravish managed to catch the hand of Anil Sisoli in which he was holding his pistol and thereafter, he was overpowered and the pistol was snatched from his hand. ASI Rakesh followed the other person when he was running away from the spot and also fire two rounds from his service revolver. However, he could not be

apprehended. CFSL form was also filled and the accused Anil Sisoli was interrogated who disclosed the name of his accomplice who was sitting in the car as Anil Lusana, the appellant herein, and also revealed that the Alto car had been robbed from Manglore. Alto Car was also seized. The person of the accused was searched and an identity card having photograph of Anil Sisoli was recovered. In that identity card Anil Sisoli had been named as Rajiv Kumar and had been shown as constable in the U.P. Police. Identity card was also sealed into a parcel and seal after use was handed over to Inspector Jaibir Singh.

3. A rukka was prepared and FIR was registered and after that the investigation was handed over to ASI Nemi Chand who prepared the site plan and arrested the accused Anil Sisoli and also recorded his disclosure statement and seized the uniform of U.P. Police which the accused Anil Sisoli was wearing and sealed it into a parcel. Accused Anil Lusana @ Anil Rathi was arrested on 06.06.2006 in the court of Shri S C Rajan Ld. ASJ, Delhi, and his discloser statement was also recorded. Seized pistols along with cartridges were sent to CFSL and report was collected. After completing the investigation, the challan was filed in the court.

4. As stated above, the appellant was arrested in this case after he was produced from Deoband jail on the statement made by his co-accused informing his whereabouts and then on the basis of supplementary challan, charges were framed against the appellant under Section 186/34, 353/34 and 307/34 IPC to which the appellant pleaded not guilty. The appellant was then tried with co-accused Anil

Sisoli. The prosecution examined 11 PWs and thereafter, the statement of the appellant was recorded under Section 313 Cr.P.C. The appellant denied all the allegations but no defence evidence was led by him.

5. Vide impugned judgment dated 03.10.2007 the Trial Court has convicted the appellant under Section 186/34 IPC, 353/34 IPC and under Section 307/34 IPC and vide separate order of sentence dated 10.10.2007 sentenced the appellant to undergo R.I. for a period of 3 months under Section 186/34 IPC and R.I. for a period of 1 year under Section 353/34 IPC and R.I. for a period of 5 years and fine of Rs.20,000/- and in default of payment of fine to undergo S.I. for 1 year for the offence punishable under Section 307/34 IPC. All the sentences were ordered to run concurrently. Benefit of Section 428 Cr.P.C. was also given to the appellant.

6. According to the appellant he has been falsely implicated in this case inasmuch as there is no admissible evidence available against him on record and the reasoning given by the Trial Court in para 9 of the judgment to the effect that he was identified by the witnesses is not sustainable inasmuch as neither the appellant was named in the FIR nor he was arrested on the spot. His whereabouts/description or particulars were also not mentioned in the FIR which was registered on the basis of a rukka prepared by the Investigating Officer who was also a member of the raiding party which according to the prosecution was constituted for apprehending the criminals who were to arrive from U.P. on 08.10.2004.

7. The appellant has also relied upon the following judgments:

- i. state Vs. Shankar @ Raju 1988 CrLJ. 780 Delhi HC
- ii. Kirori Mal@ Kalwa & Anr. Vs. The State (Delhi) 1990(1) CCC 190 190 Delhi
- iii. Subhash @ Shiv Shankar Vs. State of U.P. AIR 1987 Supreme Court 1222
- iv Budh Sen Vs. State of U.P. AIR 1970 564
- v. Tahir Mohd. Vs. State of M.P. AIR 1993 SC 931
- vi State (Delhi Admin) Vs. V.C. Shukla AIR 1980 SC 1382
- vii. Shaikh Umar Ahmed Shaikh Vs. State of Maharashtra *AIR 1998 SC 1922*
- viii. Mahabir Vs. The State of Delhi, 2008 (2) JCC 1244
- ix. Ravi @ Ravichandran Vs. State Rep. By Inspector of Police 2007 (2) JCC 1458
- x. Dasari Siva Prasad Reddy Vs. Public Prosecutor, High Court of A.P. *AIR 2004 SC 4383*

8. On the other hand the Learned APP submitted that the evidence produced by the prosecution in the form of statements made by the police officers who are part of the raiding party which has been constituted for arrest of the culprits on the basis of secret information fully corroborates the case of the prosecution and as such the judgment delivered by the Addl. Sessions Judge against the appellant is fully justified and suffers from no infirmity.

9. I have heard the submission from both sides. There is no dispute that the appellant was known to the raiding party, including the witnesses who has appeared in the witness box on the basis of supplementary challan filed against him and identified in the Court.

10. It would be appropriate to take note of some portion of the evidence which has come on record. PW1 Constable Ravish Kumar stated:

"I had seen the accused Anil Rathī @ Anil Lusana when he was running from the spot but I did not disclose his description in my statement to the I.O. I did not disclose his identity and description at any point of time during the course of investigation. I was not called to identify the accused Anil Rathī @ Anil Lusana in Judicial TIP."

Similarly, PW2 ASI Rakesh Kumar has deposed

"I had not given the description of the person who had absconded from the scene after firing at the police party in my statement under Section 161 Cr.P.C. I had also not stated in my statement under Section 161 Cr.P.C. that I can identify the said person on being produced before me. I did not know accused Anil Lusana prior to the occurrence. I cannot assign any reasons as to why I had not given the description of accused Anil Lusana in my statement under Section 161 Cr.P.C. I knew that accused Anil Lusana is to be produced before the Court on 06.06.2006 in the Court of Sh. S.C. Rajan, Ld. ASJ, Delhi".

PW7 Inspector Jaiveer Singh has deposed as follows:

"In my statement under Section 161 Cr.P.C. to the I.O., I had not given any description of the accused Anil Lusana who had run away from the spot nor I stated that I can identify the person who had run away from the spot while firing at the police party. I did not state so in my statement under Section 161 Cr.P.C. as I could not have identified the person who ran away due to darkness".

PW10 SI Satender Vashisht (I.O.) also deposed as follows:

"It is correct that there is no street light shown in the site plan. I had not mentioned the description of the person who ran away from the spot in my case diary in any DD or any statement or in the ruqqa nor I had mentioned that I can identify him if produced before me. I had not moved any application for TIP of accused Anil Lusana. I knew that accused Anil Lusana was being produced in the Court of Sh. S.C. Rajan, Ld. ASJ, Delhi on 06.06.2006 on Production Warrants. I did not move any application before the Court of Sh. S.C. Rajan, Ld. ASJ, Delhi, requesting for conducting the TIP of accused Anil Lusana by myself as well as members of the raiding party nor I requested to the Court to keep the accused Anil Lusana in muffled face."

Hence, in nutshell it can be said that the appellant herein could not have been legally convicted and sentenced based upon such, inadmissible evidence as the PWs were not in a position to identify the person who allegedly absconded from the spot while firing at the police party.

11. Thus, it is apparent that none of the witnesses produced by the prosecution were either acquainted with the appellant nor identified

the appellant in a TIP. Thus, his identification for the first time in Court does not inspire confidence more so when it is the case of the prosecution that the appellant was not apprehended from the spot and had went away from the spot taking benefit of the darkness. This case of the prosecution itself goes to show that there was no occasion for the witnesses to identify the appellant. Moreover, even otherwise the conviction of the appellant herein under Section 186/34 and 353/34 IPC is not sustainable in the eyes of law since the complaint under Section 195 Cr.P.C. filed on behalf of Sh. Ashok Chand, DCP, Special Cell, Delhi for prosecuting the appellant herein by taking cognizance of the case, was never proved during trial.

12. It is also a matter of record that according to the prosecution that the alleged incident took place at about 7.10 PM at the Red Light of Gagan Cinema, which according to admission made by PWs is a crowded place, however, no independent persons were joined to corroborate the alleged police version and no cogent reasons are forthcoming for this vital omission.

13. I have also gone through the judgments cited on behalf of the appellant. It would be appropriate to take note of observations made by the Apex Court in some of the judgments (supra).

14. 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."

15. 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..

In this case, 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 present case the identification of the appellant in the Court

is based upon the witnesses having seen him appearing in the Court and not in any TIP proceedings.

17. It would also be appropriate to take note of the judgment of this Court in *Nawal Kishore Vs. State, 1983 (23) DLT 178*, where the crucial issue about the quality of evidence was discussed. The relevant observations made in this case are reproduced hereunder:-

“The crucial question is always about the quality of the evidence. If it is poor the judge should acquit in the absence of supporting evidence. If there are circumstances or items or evidence capable of supporting it, it will be safe to convict. Otherwise the verdict will be unsafe and unsatisfactory. Much depends upon the quality of the evidence in each case. Quality is what matters in the end. (R.V. Turnbull, (1977) QB 224 (231). “A capable judiciary”, Wigmore has said, “and an effective jury system (both depending upon a conscientious citizenship and a sound condition of politics) are in the end the only real safeguards of an innocent man” (Wigmore on Evidence 3rd Ed. Volume VII para 2044 page 286). There is no description of the features, complexion, or likeness of the accused in the first information report except that some accused is described as tall and other short statured and all are described as young man. There was no identification parade because the accused refused to participate in the parade. It is established on the evidence of Jai Parkash and Talwar that the accused had been shown to the doctor and the compounder before hand. The doctor never picked out the accused nor did he say when he was shown “These are the men who robbed me”. Similarity of the appearance of the accused person to that of the culprits is not established beyond reasonable doubt. The quality of the identification evidence is not good.”

18. The observations made in the above-mentioned judgments squarely applied to the facts of this case as in the present case also no TIP was held in respect of the appellant. He was also not brought in a muffled face when he was brought from Deoband jail. It is an admitted case of the prosecution that the present appellant, who was allegedly sitting with Anil Sisoli, had ran away from the spot by taking benefit of dark. Neither his name nor any other particular was mentioned in the FIR. Thus, the identification of the appellant by the witnesses for the first time in Court, who had never seen the appellant, in the absence of

TIP becomes meaningless. Admittedly, there is no other evidence available on record against the appellant. The disclosure statement made by the present appellant without anything recovered at his instance is inadmissible in evidence. Thus, it has to be held that the prosecution has failed to prove its case beyond reasonable doubt. The appellant is thus entitled to be acquitted.

19. Accordingly, the appeal is allowed and the appellant is acquitted of the charges leveled against him. The appellant be released forthwith in case he is not wanted in any other case. Copy of the order be sent to the Jail Superintendent. Pending applications, if any, also stand disposed of.

20. A copy of this order be sent to the trial Court along with Trial Court Record.

MOOL CHAND GARG, J.

OCTOBER 23, 2009
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