

Judgment reserved on: February 16, 2010
Judgment pronounced on: February 24, 2010

% Neeraj
s/o Kulwant Singh ... Appellant
Through: Mr. Rakesh Kumar & Mr. Suwarn
Rajan, Advocates

versus

**CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR**

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

1. In the evening of 23rd July, 2002, an armed robbery took place at the Branch of Super Bazar in DESU Colony, Shalimar Bagh, Delhi. Appellant along with his co-accused was tried in FIR caseNo. 447/2002 under Sections 392/ 397/ 452/ 34 of the Indian

Penal Code and also for the offence under Section 25 of the Arms Act.

2. In brief, case of the prosecution was that Asha Sharma (PW-1) was the Incharge of the aforesaid Super Bazar Branch and she along with other employee Ganesh Shankar (PW-3) was present there, when appellant along with his co-accused came inside the said Super Bazar Store and had asked for Colgate toothpaste and as soon as Ganesh Shankar (PW-3) proceeded to fetch the said tooth paste, co-accused of the appellant had pulled down the shutter of the said Super Bazar Store and appellant had put knife on the person of Asha Sharma (PW-1) and his co-accused had searched the almirah but nothing valuable was found there. However, appellant had purportedly robbed Asha Sharma (PW-1) on the point of knife of her gold chain, gold ring, wrist watch and Rupees six-seven hundred from her purse. In the meanwhile, another employee Virender Sharma (PW-2) opened the shutter of the said Super Bazar Store and thereafter, the appellant and his co-accused had purportedly run away from there.

3. This incident was reported to the police. In the investigation conducted, appellant and his co-accused were

arrested and one gold chain was recovered from the co-accused, whereas one button actuated knife was recovered at the instance of the appellant. With the completion of the investigation of this case, Charge-Sheet was filed and the court concerned had put the appellant and his co-accused on trial for the offences under Sections 452, 392/34, 397 of the IPC and appellant had also claimed trial for the offence under Section 25 of the Arms Act. The evidence of thirteen witnesses was led at the trial and the material evidence consists of the deposition of the first-informant Asha Sharma (PW-1) and her co-employees Virender (PW-2), Ganesh (PW-3) and of the Investigating Officers (PW-6) & (PW-11), which was referred to during the hearing of this appeal.

4. As usual, appellant had baldly denied the prosecution case in his statement under Section 313 of the Cr.P.C. before the trial court and had got two witnesses examined in his defence and all that was said by those two witnesses was that appellant was lifted from his house but they do not specify when. The defence witnesses had certified that the appellant has a good character and is a Mechanic by profession. The trial of this case came to a close with the conviction of the appellant for the offences under

Sections 452/392/397/34 of the IPC as well as for the offence under Section 25 of the Arms Act. Impugned order of 30th October, 2003, sentences the appellant for the offence under Section 397 of the IPC to rigorous imprisonment of seven years and for the remaining offences, he has been sentenced to varying lesser terms.

5. The challenge in this appeal is to the impugned judgment and order of the trial court, on various grounds. The foremost ground taken is of identity of the appellant, followed by discrepancy in the prosecution case regarding the date of arrest and pertaining to the discrepancy regarding appellant carrying the weapon of offence. To elaborate the first ground of attack on the prosecution case, it was stressed on behalf of the appellant that refusal of the appellant to participate in the Test Identification Parade was justified as the appellant had been already shown to the witnesses prior to putting him up for Test Identification Parade. It is pointed out that appellant was shown to the two material witnesses- PW1 & PW-3 at the bus stop of DESU Colony, Shalimar Bagh, Delhi, as deposed by Constable Manoj (PW-12). According to learned Counsel for the appellant

this witness had tried to cover this up, by putting a lame excuse of aforesaid witnesses being present there by chance.

6. Aforesaid argument is hardly of any significance, for the reason that the appellant was shown the aforesaid witnesses PW-1 & PW-3 on 21st August, 2002, as per the deposition of Constable Manoj (PW-12), whereas appellant had refused to participate in the Test Identification Parade on 17th August, 2002, as per the evidence of concerned Magistrate (PW-10). However, in all fairness to the appellant and his Counsel, it cannot be ignored that Ganesh (PW-3) in his cross-examination by the defence does state that appellant-accused was shown to him in the Police Station three-four days after this incident. This is a factually incorrect assertion which needs to be negated because it is neither the case of the appellant nor his witnesses DW-1 & DW-2 that he was lifted from his house after three or four days of this incident. It is a matter of record that the apprehension of the appellant-accused was after a fortnight or so, of this incident. To be precise, as per the deposition of Constable Mukesh (PW-4), appellant and his co-accused were apprehended from the Railway Station at Azadpur, Delhi, on 8th August, 2002.

7. There can be no denying of the fact that Asha (PW-1) has deposed that she had seen appellant in the Police Station on the day he was apprehended i.e. on 8th August, 2002. She explains her presence in the Police Station when appellant was brought there on that day by stating that she used to frequently visit the Police Station in connection with this case. Even if it is assumed that appellant was justified to refuse in the Test Identification Parade still his identification by the complainant/ first-informant (PW-1) and the eye witness (PW-3) before the trial court, does not get diluted, for the reason that both these material witnesses had sufficient time to notice the physical features of the appellant, whose vivid description finds mention in the FIR in question.

8. It stands reiterated by the Apex Court in "*Amit Singh Bhikamsing Thakur vs. State of Maharashtra.*" **2007 (1) SCALE 62** that the evidence of identification becomes stronger if the witness has opportunity of seeing the accused for some time in broad day light, when it is possible to note the features of the accused more carefully

9. When these two crucial witnesses (PW-1 & PW-3) have categorically identified the appellant to be one of the assailants

before the trial court, then it has to be seen as to why they would falsely implicate him in this case. Appellant gives no reason as to why he has been falsely implicated in this case. All that has been suggested to these two material witnesses (PW-1 & PW-3) is that they have identified the appellant as the accused/assailants at the instance of the police. Investigating Officers (PW-6) & (PW-11) have not been cross-examined by the defence as to why they would falsely implicate the appellant-accused in this case. Without any rhyme or reason, neither the complainant (PW-1), eye-witness (PW-3) nor the Investigating Officers (PW-6) and (PW-11) would falsely implicate the appellant for a serious offence like the present one..

10. In this regard, what has been said by the Apex Court in *“Ramanbhai Naranbhai Patel and Others vs. State of Gujarat”* **(2000) 1 SCC 358** is that identity of the assailant would well remain imprinted in the minds of the victims when the incident takes place in a broad day light and the victims would not be interested in roping in innocent persons by shielding the real accused.

11. The discrepancy in the prosecution case regarding the appellant being armed with a knife or a pistol would fade away

into insignificance because the presence of the appellant at the spot at the time and place of the incident is established from the evidence on record, beyond any reasonable doubt. It is so said because at the instance of the appellant the weapon of the offence, i.e. knife (EX. P-2) has been recovered in this case.

12. Not only graphic description of the appellant and his co-accused is given in the FIR in question, but even careful reading of the deposition of the material witnesses including complainant (PW-1) and eye witness (PW-3) as a whole, reveals that these two witnesses had ample opportunity to notice the physical features of the appellant as the incident in question had taken place during the day time and in the Super Bazar Store of the complainant (PW-1), therefore, identification of the appellant before the trial court by the complainant (PW-1) and eye witness (PW-3) cannot be lightly brushed aside.

13. In view of the foregoing narration, this court finds that the conviction of the appellant is well merited and the impugned judgment does not suffer from any infirmity. The sentence imposed upon the appellant is also the minimum under the law and is well justified in the face of the evidence on record. This appeal lacks merit and is accordingly rejected. Bail bonds of the

appellant are forfeited. He is directed to surrender forthwith, failing which trial court to ensure that the appellant is taken into custody to serve out the sentence, as awarded to him.

14. The appeal and pending application, if any, are accordingly disposed of.

Sunil Gaur, J.

February 24, 2010
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