

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

DATE OF RESERVE: February 26, 2010
DATE OF DECISION: May 12, 2010

+ **Crl.Rev. No.731/2003**

STATE Petitioner
Through: Mr.Manoj Ohri, APP for the State.

versus

KIRAN Respondent
Through: Mr. Nageshwar Pandey with Mr. A.K. Sinha, Advocates.

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

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

: **REVA KHETRAPAL, J.**

1. The impugned order dated 24th May, 2003 passed by the learned Additional Sessions Judge framing charges against the two of the accused persons, in case FIR No.207/2000, P.S. Vikaspuri, namely, Yogita and Meeta while discharging the third accused Kiran, is assailed by the State on the ground that the accused Kiran has been wrongly discharged by the learned Additional Sessions Judge.
2. The backgrounds facts leading to the impugned order are as follows. The three accused, namely, Yogita, Meeta and Kiran were sent

up for trial for the offences punishable under Section 363/364/34 IPC. The allegation against these three accused was that they had conspired for the kidnapping of the minor child Amit, aged about 3 years, for the purpose of wreaking vengeance upon the maternal grandfather of the kidnapped child, against whom one of the accused persons, namely, Yogita had a grouse. The case against the accused was registered on the statement of the father of the kidnapped child, Sh. Laxmi Narain, who had been informed by his elder son, Ankit aged about 6 years, that a woman had taken away his brother, Amit from Butela Market. Ankit pointed out to Laxmi Narain the specific place wherefrom the woman had taken away the child. Ankit also told Laxmi Narain that the said woman who had taken away the child had done so on the pretext of wanting to serve nine children with food as she had recently taken on rent a house bearing no. DG-II/125.

3. Initially, the case was registered for the offence punishable under Section 363 of the IPC but subsequently, the offence under Section 364 IPC was also added on the basis of the statements made by the witnesses and the disclosure statements made by the accused persons. In the course of the investigation, a suspicion was raised against the accused Yogita, who was a relative of Laxmi Narain and whose act of remarrying within 15 days of the death of her first husband had been condemned by the complainant Laxmi Narain and his other relatives, particularly Sunehri Lal, the maternal grandfather of the kidnapped child. It was disclosed by Yogita that she wanted to take revenge for such condemnation and with this motive, she had kidnapped the son of the

complainant, who was the grandson of Sunehri Lal. The accused Yogita was arrested; on the disclosure statement of the accused Yogita, accused Kiran was arrested. On the basis of the disclosure statements made by the accused Yogita and Kiran, the kidnapped child was recovered from the possession and the house of the accused Meeta on the following day, i.e. the day after the occurrence of kidnapping. Further investigation disclosed that the child was kidnapped for being murdered by the three accused persons.

4. At the time of the passing of the orders on charge, the learned Additional Sessions Judge proceeded and framed charges against the accused Yogita and Meeta under Sections 363 and 364IPC with the aid of Section 120B of the IPC. He, however, held that no *prima facie* case was made out against the accused Kiran, so the accused Kiran was discharged. The said order of discharge was passed principally on two grounds. It was held by the learned Additional Sessions Judge, relying upon the judgment of this Court in the case reported as **Sulekh Chand Jain vs. State 43 (1991) Delhi Law Times 135,** that after her arrest the accused Kiran was not put to TIP and that this circumstance was sufficient to exonerate her. The prosecution witnesses, namely, Ankit, Indresh and Jawahar Lal, who saw the woman who had taken away the child, should have been joined in the Test Identification Parade to identify that woman who, according to the prosecution, was the accused Kiran. It was only later on, after her arrest, that she was shown to the witnesses and thus such type of the TIP in the custody of police was not admissible in law.

5. The other reason given by the learned Additional Sessions Judge for discharge of the accused Kiran was that there was no other legally admissible evidence left with the prosecution against Kiran to connect her with the alleged offence. According to the prosecution, it was Yogita, who first made the disclosure statement leading to the arrest of Kiran. In the said disclosure statement of the accused Yogita, the whereabouts of the kidnapped child were disclosed and thus, in point of time, the first disclosure was made by Yogita. It is subsequent thereto that the disclosure statement of the accused Kiran was recorded. It is not possible that both the accused gave the same statement in *verbatim* simultaneously and thus, it is the disclosure statement of the accused Yogita which is first in point of time that carries value in the eye of law. The subsequent disclosure statement made by the accused Kiran, which led to the recovery of the child, would be inadmissible as the recovery had already been made in pursuance of the first disclosure statement of the accused Yogita.

6. Mr. Manoj Ohri, the learned Additional Public Prosecutor for the State has assailed the aforesaid findings of the learned Additional Sessions Judge, contending that the law is well settled that even though the disclosures made by each appellant lead to plurality of information, the disclosures made by each of the accused persons do not cease to be an information causing 'discovery' within the purview of Section 27 of the Evidence Act. Reliance in this regard was placed by Mr. Ohri upon the judgment of *Navjot Sandhu @ Afsan Guru, 2005 CrLJ 3950*

wherein dwelling on Section 27 of the Evidence Act with particular reference to joint disclosures, it was held as under: -

“... Joint disclosures, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. ‘A person accused’ need not necessarily be a single person, but it could be plurality of the accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27.

The legal position on joint disclosures as it emerges is that the same per se are not inadmissible under Section 27 of the Evidence Act. The plea against admissibility of disclosure statements Ex. PW-2/4 and PW 2/6 made by appellants Udaiveer Singh and Arvind Kumar respectively must therefore get answered in negative. Unlike in the case of appellants Vijay Kumar and Udaiver, who were last seen with Deepak, deceased immediately before commission of his murder, there being no such evidence against appellant Arvind Kumar, the

disclosure statement Ex. PW-2/6 regarding dead body of deceased would at the most lead to conclude that he had knowledge of the dead body of Deepak concealed in a gunny bag being kept in the room. Thus, even if his disclosure Ex. PW 2/6 is taken to have led to discovery of dead body of Deepak this circumstance alone cannot suffice to prove his complicity in commission of murder of Deepak.”

7. Mr.Ohri, the learned APP for the State also relied upon a Division Bench judgment rendered by this Court in the case reported as ***Vijay Kumar vs. The State (GNCT) of Delhi 2008 (101) DRJ 725***; and by a Single Judge of this Court in ***Narender Mann vs. State (NCT of Delhi), 154 (2008) DLT 387*** as well as upon the judgment of the Division Bench of the Allahabad High Court rendered in the case of ***Riyasat and Ors. vs. State of U.P., MANU/UP/0897/2007***. In the aforesaid cases the case of Navjot Sandhu (Supra) was referred to and relied upon.

8. It was next contended on behalf of the State that as held by a three-Judge Bench of the Supreme Court, in the case reported as ***Harbhajan Singh vs. State of Jammu & Kashmir AIR 1975 SC 1814: (1975) 4 SCC 480***, the absence of test identification parade is not necessarily fatal to the prosecution case. Reference was also made to yet another three-Judge Bench judgment of the Supreme Court in the case reported as ***Malkhan Singh and Ors. Vs. State of Madhya Pradesh AIR 2003 SC 2669***, to urge that there was no obligation on the investigating agency to hold, or any right on the accused to claim a test identification parade. The purpose of a prior test identification parade as held by the Supreme Court in the said cases is to re-enforce the

trustworthiness of the witnesses and to render credible the substantive evidence of the witnesses recorded in the Court.

9. Mr. Nageshwar Pandey, the learned counsel appearing on behalf of the respondent-accused, to rebut the aforesaid contentions, heavily relied upon the judgment of the Orissa High Court in the case reported as ***Mannu Nehera vs. State of Orissa, 1988 Crl.L.J. 1911*** and the judgment of the Madhya Pradesh High Court in the case reported as ***Rajaram Gupta and Ors. Vs. Dharamchand and Ors. 1983 Crl.L.J. 612***, to argue that while deciding a revision petition, the well settled principle of law which ought to be kept in mind by this Court is that the High Court in a revision petition is not to judge a case as if it is hearing an appeal. The jurisdiction of the High Court in revision is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error on a point of law which has consequently resulted in flagrant miscarriage of justice. Thus, an order passed by the trial court ought not be lightly set aside by the revising court where two views are possible, merely because the revising court takes a view other than the one adopted by the trial court.

10. The learned counsel for the accused further relied upon a single Bench judgment of the Kerala High Court in the case reported as ***R.A. Usmankutty vs. State and Anr. 1981 Crl.L.J. 1669***, wherein it is held that where appreciation of evidence and re-assessment of the same is involved, in absence of any illegality or irregularity committed by the trial court, it is not proper for the revisional court to enter into the region of evidence which found favour with the trial court.

11. On a consideration of the rival submissions of the parties and after perusing the precedents cited at the Bar and the statements of the prosecution witnesses recorded by the investigating agency, I am of the considered view that the facts of the instant case justify interference in revision by this Court. The reasons are two-fold. On a conspectus of the facts, it is more than apparent that the accused Kiran played a lead role in enticing the kidnapped child by offer of meals, sweets and new clothes. Kiran accused hung around the Butela Market for a number of days preceding the incident, possibly assessing the situation and working out the modus operandi of the actual kidnapping. The prosecution witnesses have in their statements before the police borne testimony to this. Prosecution witness Jawahar Lal has vividly described accused Kiran to the police and stated that for three days continuously before the kidnapping, he had seen the accused woman roaming around in the Butela Market and squatting there and that she was about 35 years of age and was fair complexioned and that he had even spoken to her. Prosecution witness Indresh also stated that on the day of the occurrence the accused Kiran had come to her home asking for Amit, the son of her elder sister. Thus, both these witnesses had a reasonably good opportunity to identify the accused to fix her appearance in their minds and the mere fact that the investigating agency neglected to hold a proper test identification parade, therefore, to my mind, is wholly irrelevant. As held by a three-Judge Bench of the Supreme Court in the case of *Malkhan Singh (supra)* : -

“7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Administration*, 1958 CriLJ 698; *Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh*, AIR 1960 SC 1340; *Budhsen and Anr. v. State of U.P.*, 1970 CriLJ 1149 and *Rameshwar Singh v. State of Jammu and Kashmir*, 1972 CriLJ 15.”

12. To arrive at the aforesaid conclusion, the Supreme Court in the case of *Malkhan Singh (supra)* reviewed the law laid down by it in a

number of judgments, including the decision in *Jadunath Singh and Anr. vs. State of U.P. 1971 Crl. L.J.305*.

13. In my view, therefore, given the facts of the instant case, the non-holding of the test identification parade by itself cannot be a ground for the discharge of the accused/respondent-Kiran.

14. Adverting to the next contention of the learned counsel for the respondent with regard to the plurality of the information received before discovery, in my view, even assuming that the disclosure made by Yogita leading to the recovery of the kidnapped child was first in point of time, the respondent Kiran having separately disclosed where the kidnapped child was kept **before discovery**, the information imparted by her did not cease to be the information leading to the “discovery”. As held by the Supreme Court in the case of *Navjot Sandhu* (supra), joint disclosures are not *per se* inadmissible under Section 27 of the Evidence Act. If an information is given by two or more accused persons one after the other, without any break, almost simultaneously, and if such information leads to the pointing out by both of them to the material thing, there is no good reason to discard such evidence from the regime of Section 27 of the Evidence Act. There is no denying the fact that in the instant case Kiran along with the co-accused Yogita led the police party to the house of the third accused Meeta, from whose custody the kidnapped child was recovered in the presence of the complainant Laxmi Narain and the other prosecution witnesses. Thus, the observations made by the learned Additional Sessions Judge that it is from the disclosure statement of the accused Yogita that the whereabouts of the

kidnapped child were disclosed and thus, in point of time the first disclosure statement was made by Yogita, and it is the said disclosure statement made by Yogita alone that carries value in the eye of the law, runs contrary to the law laid down by the Supreme Court in the case of *Navjot Sandhu (supra)* as interpreted by this Court in the case of *Vijay Kumar(supra)* and the case of *Narender Mann (Supra)*.

15. For all the aforesaid reasons, the order of discharge of the accused Kiran passed by the learned Additional Sessions Judge, cannot be sustained. The impugned order discharging the accused Kiran is, accordingly, set aside. Accused Kiran shall now face trial with the co-accused in accordance with law. The evidentiary value of her disclosure statement and the effect of the failure of the investigating agency to put her to test identification parade shall be considered and weighed by the trial court after evidence is adduced by both sides.

16. Crl.Revision No.731/2003 is allowed in the above terms.

**REVA KHETRAPAL
(JUDGE)**

May 12, 2010
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