

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

+ Cr1.A.No.348/2005

% Reserved on: 17th March, 2010
Date of Decision: 18th March, 2010

MOHD.NASEEM Appellant
! Through: Mr.R.S.Mishra, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr.Jaideep Malik, APP

+ Cr1.A.No.186/2005

JAVED AHMED Appellant
! Through: Mr.R.S.Mishra, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr.Jaideep Malik, APP

+ Cr1.A.No.266/2005

MOHD.FAIM Appellant
! Through: Mr.R.S.Mishra, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr.Jaideep Malik, APP

+ Cr1.A.No.381/2005

MOHD.RASHEED Appellant
! Through: Mr.R.S.Mishra, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr.Jaideep Malik, APP

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the 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 the Digest? No

: **V.K. JAIN, J.**

1. By this Order, I shall dispose of all the four appeals referred to above, which are directed against a common judgment dated 22.2.2005 and order of sentence dated 25.2.2005, whereby the appellant Mohd.Naseem was convicted under Section 392 and Section 397 of IPC as well as under Section 25 of Arms Act, whereas the other appellants were convicted under Section 392 of IPC read with Section 34 thereof. The appellant Mohd. Naseem was sentenced to undergo RI for seven years and to pay fine of Rs.1,000/- or to undergo RI for six months in default under Section 392/397 of IPC and was further sentenced to undergo RI for one year and to pay fine of Rs.500/- or to undergo RI for three months in default under Section 25 of

Arms Act, whereas the remaining appellants were sentenced to undergo RI for four years each and to pay fine of Rs.1,000/- each or to undergo RI for six months each in default of payment of fine.

2. In the night of 19th August, 2000, on receipt of copy of DD No.73-B, IO of this case, SI Balbir Singh, went to Jawaharlal Nehru Marg, near Emergency Gate of JPN Hospital, where HC Balbir Singh of PCR Van, bus owner Ram Singh and conductor Raj Kumar met him. The conductor produced the appellant Naseem along with a country made pistol. In his statement to the IO Raj Kumar stated that he was driver of bus No.DL 1 P-A 3821 plying on Bus Route No.39 from Jheel to Kanhaiya Nagar. He further stated that at about 10.05 p.m. on that day when the bus reached the bus stand opposite JPN Hospital, four boys got the bus stopped and one of them boarded the bus. He took out a country made pistol from the pant which he was wearing and asked him as to who the owner of the bus was. Thereupon, Ram Singh, who was sitting in the bus got up. He was made to get down from the bus. The country-made pistol was kept on the temple of the complainant Raj Kumar and he also was

made to get down from the bus. Two of the three companions of the person wielding countrymade pistol searched Ram Singh and removed Rs.3,000/- from his pocket, whereas the third person accompanying him removed Rs.1,200/- from the possession of the complainant. Thereafter, all of them ran towards Delhi Gate. The complainant and his employer Ram Singh raised an alarm and chased them. One PCR Van was standing near Emergency Gate of JPN Hospital. One of the boys was apprehended by PCR officials. His name later came to be known as Mohod.Naseem and one country-made pistol was seized from his right hand.

3. During the course of trial, the prosecution examined ten witnesses in support of its case. One witness was examined in defence.

4. Raj Kumar came in the witness box as PW-1 but did not support the prosecution case. He stated that when they reached near Pant Hospital, three boys gave signal to stop the bus, but, thereafter nothing was done by them and no money was snatched. He was cross-examined by the APP, but he denied the case of the prosecution as set-up in the FIR lodged by him.

5. The bus owner Ram Singh came in the witness box as PW-9 and stated that on 20th August, 2000 he was travelling in his bus No.DL 1 P 1728 and that when the bus reached in front of Pant Hospital, four boys got the bus stopped and boarded it. He identified all the four appellants as the boys who had boarded the bus and stated that the appellant Naseem took out a Katta, put it on the temple of the conductor and forcibly snatched Rs.1,200/- from him. Thereafter, Naseem came to him and asked in a loud voice as to the owner of the bus was. When he claimed that he was the bus owner, Naseem forcibly made him get down from the bus. The other three boys were also standing there Naseem snatched a sum of Rs.3,000/- from him and then they started running towards Delhi Gate. He and conductor raised alarm and chased the appellants. When they reached the Emergency Gate of Hospital, one PCR Van was parked there. They narrated the incident to the PCR officials and Naseem was apprehended by them along with a country-made pistol, which was seized. Thereafter, the appellant Naseem was taken to the Dariya Ganj Police Station, where he was interrogated and at his instance other accused were

also arrested from Chhatta Lal Mia.

6. PW-3, Constable Satish Kumar, who was posted in Police Control Room on 19th August, 2000 from 8.00 p.m. to 8.00 a.m., has stated that at about 10.15 p.m. they saw some persons running from G.B.Pant Hospital towards Delhi Gate and some other persons chasing them. He saw one boy amongst those who were running, carrying a pistol like arms in his hand. They apprehended one boy named Naseem and recovered the country-made pistol from him. The remaining boys, however, managed to run away.

7. PW-8, HC Balbir, is the another police official who was on duty in PCR Van parked at the get of LNJP Hospital. He stated that they found 3/4 boys running towards Delhi Gate and a crowd chasing all those boys. They apprehended one of the boys whose name later came to be known as Naseem. That boy was having a country-made pistol in his hand.

8. PW-4, Constable Gaj Raj Singh, is the police official who sent to the spot with IO. He has stated that when they reached the spot, they found the appellant Naseem having been already apprehended by PCR officials. Naseem was handed over to them. Ram Singh also met them on the spot.

In search of the appellant Naseem, one country-made pistol was recovered from his possession and was seized vide Memo Ex.PW-1/C. He further stated that thereafter Naseem was interrogated and he went to Chhatta Lal Mia along with the accused and IO. Three persons were found inside a shop in Chhatta Lal Mia and were arrested. The appellants Javed Ahmed, Mohd.Rasheed and Mohd.Fahim, according to the witness, were those persons. Some cash, according to him, was also recovered from the possession of Javed and Fahim, whereas one dagger was recovered from the possession of Rasheed. In cross-examination, he also stated that Rs.600/- were recovered from the appellant Rasheed.

9. PW-10 SI Balbir Singh is the IO of this case. He stated that on 19th August, 2000, he along with Constable Gaj Raj Singh went to the spot where the officials of Police Control Room, bus owner Ram Singh and conductor Raju Kumar produced accused Naseem along with a country-made pistol. After seizing the pistol, he interrogated the appellant Naseem and left in search of other accused persons. On the pointing out of Naseem, the appellants Javed Ahmed, Mohd.Fahim and Mohd.Rasheed were arrested. One dagger was recovered

from Rashid. Cash amounting to Rs.600/- and Rs.500/- respectively was recovered from the possession of appellants Javed and Fahim. In cross-examination, he stated that the appellant Naseem was handed over to him by PCR officials and Raju Kumar, conductor of the bus.

10. In their statements under Section 313 Cr.P.C., the appellants denied the allegations against them and claimed that they have been falsely implicated in this case.

11. DW-1 Mohd.Asalam, who is the uncle of the appellant Naseem, stated that Naseem was lifted by the police from his shop on 20th August, 2000.

12. The first question which arises in this case is as to whether there was a robbery from the possession of the conductor and owner of the bus, in the night of 19th August, 2000. PW-1, Raju Kuamr and PW-9 Ram Singh are the only persons produced by the prosecution to prove the alleged robbery. Raju Kumar has not supported the prosecution and has specifically stated that after the bus was stopped, the boys who had got the bus stopped, did not do nothing and did not snatch any money. In his cross-examination by the learned Additional Public Prosecutor, he denied having told

the police that he was robbed of Rs.1,200/- whereas Ram Singh was robbed of Rs.3,000/-. Thus, the testimony of this witness instead of supporting the case set up by the prosecution, rather contradicts it.

13. Though PW-9 Ram Singh has claimed that he as well as conductor of his bus were robbed of money, the presence of this witness in the bus is highly doubtful. According to this witness, the appellant Naseem after boarding the bus and snatching Rs.1,200/- from the conductor, asked, in loud voice, as to who the owner of the bus was and in response thereto he told Naseem that he was the owner of the bus. I fail to appreciate how the appellant Naseem could have assumed that the owner of the bus was also travelling in the bus. Normally, it is only the conductor who is present in the bus. Ordinarily, there would be no reason for a robber to presume that the owner of the bus was also present inside the bus.

14. The case of the prosecution, as set up in FIR, is that the appellant Naseem, after boarding the bus, made the bus conductor as well as owner of the bus get down from the bus and thereafter both of them were robbed of the money which

they were carrying with them. In his deposition in the Court, Ram Singh stated that it was in the bus that Naseem put the pistol on the temporal region of the conductor and snatched Rs.1,200/- which the conductor was carrying with him. Thus, the version given by them is contrary to the version given in the FIR.

15. The case of the prosecution in the FIR is that only the appellant Naseem had boarded the bus, though it was got stopped by four persons. But, in his deposition in the Court, Ram Singh has stated that all the four boys had boarded the bus. This is yet another circumstance which creates doubt on the presence of Ram Singh inside the bus.

16. The case of the prosecution, as evidenced from the arrest Memos Ex.PW-1/D-1 to PW-1/D-4, the seizure Memos of cash Ex.PW-1/F and PW-1/G and seizure Memo of dagger (Chhura) Ex.PW-1/K, is that the appellants Javed, Fahim and Rasheed, were arrested in the presence of Ram Singh when the appellant Naseem took them to Chhatta Lal Mia. But, PW-4, Constable Gaj Raj Singh in his examination specifically stated that after interrogation of the appellant Naseem, he along with the accused and IO went to Chhatta Lal Mia. He

does not say that Ram Singh also accompanied them to Chhatta Lal Mia. When the IO came in the witness box as PW-10, he also did not say that PW-9 Ram Singh had accompanied them to Chhatta Lal Mia. He specifically stated that on the pointing out of Naseem, Javed Faim and Rasheed were arrested. If Ram Singh was present with the police officials at the time of arrest of Javed, Faim and Rasheed, there was no reason for PW-4 and PW-10 not referring to this fact during their deposition in the Court. In his cross-examination, Ram Singh stated that on reaching Chhatta Lal Mia, he remained outside whereas the police entered the place where the appellants Javed, Fahim and Rasheed were arrested. Thus, according to him, neither he pointed out the appellants Javed, Faim and Rasheed, nor were they pointed out by Naseem in his presence. This is contrary to the case of the prosecution that the appellants Javed, Faim and Rasheed were arrested in the presence of Ram Singh.

17. PW-3, Constable Satish Kumar, who was on duty in PCR Van and was amongst the police officials who apprehended the appellant Mohd.Naseem, does not refer to presence of Ram Singh anywhere in his deposition in the

Court. PW-8 HC Balbir Singh, who was the other police official present in PCR Van, also does not say a word about presence of the bus owner Ram Singh on the spot.

18. The case of the prosecution in the FIR is that after the bus conductor and bus owner were made to get down from the bus, the cash from the possession of conductor and bus owner was removed by two of the three companions of appellant Naseem, whereas the cash from the possession of the conductor was removed by the third companion of Naseem, when Ram Singh came in the witness box, he claimed that it was the appellant Naseem who had snatched money from him as well as from the conductor. This is yet another discrepancy which creates serious doubt on the presence of Ram Singh in the bus at the time of commission of robbery. In view of circumstances, there is a strong possibility of the bus owner Ram Singh having been called to the police station after the robbery had taken place.

19. For the reasons discussed in the preceding paragraphs, I am of the considered view that the presence of Ram Singh at the time of the alleged robbery does not stand established beyond reasonable doubt.

20. The complainant Raju Kumar has not supported the prosecution case as regards commission of the alleged robbery and the presence of the bus owner Ram Singh, who is the only other witness to prove the alleged robbery, is highly doubtful. It would be pertinent to note here that according to Ram Singh, the bus driver had also got down from the bus when it was got stopped. But the driver of the bus has not been produced in the witness box.

21. Since the alleged robbery does not stand proved beyond reasonable doubt, the conviction of the appellants for robbery cannot be maintained.

22. Presuming that PW-1 Raju Kumar and PW-9 Ram Singh were robbed, as claimed by Ram Singh, and the appellant Naseem was the person who had snatched money from them, the identity of the other three appellants as the boys who accompanied Naseem at the time of commission of robbery does not stand established. Admittedly, none of these three appellants was previously known to Ram Singh. Admittedly, none of them was arrested by the police at the pointing out of Ram Singh. As noted earlier, according to Ram Singh, at the time of arrest of appellants Javed, Faim

and Rasheed by the police he was waiting outside. Thus, not only Ram Singh did not point out these three appellants as persons involved in the robbery, even the appellant Naseem did not point them out in his presence. Admittedly, none of these three appellants was apprehended on the spot.

23. Admittedly, no attempt was made by the IO to get these three appellants Javed, Faim and Rasheed, identified by judicial test identification parade. If these three appellants Javed, Faim and Rasheed were arrested at the pointing out of Naseem and not at the pointing out of PW-9 Ram Singh and at the time of their arrest PW-9 Ram Singh was present outside the shop from which they were arrested, they ought to have been brought to the shop in muffled face so that Ram Singh was not in a position to see and thereafter they should have been subjected to judicial test identification parade whereas the witness who had seen them should have been asked to identify them.

24. It is settled proposition of law that when the accused is not previously known to the witness, and is not apprehended on the spot, there is no evidence to corroborate identification during trial, and there are no special features in the

testimony of a witness, which persuade the court to accept identification in the court, even without any corroborative evidence, it is obligatory for the prosecution to get his identity verified in a Test Identification Parade.

25. In **Mohd. Abdul Hafeez v. State of Andhra Pradesh**, AIR 1983 SC 367, the victim did not give any description of the accused in the FIR No. TIP was held. The accused was held guilty on the identification in the court by the victim after four months of occurrence. It was held that the conviction was not sustainable.

26. In **Hari Nath Vs. State of U.P.**, 1988 Cr.L.J. 422, it was held by the Hon'ble Supreme Court that in a case where eye witnesses did not know the appellant before the occurrence, identification of the accused for the first time in the dock after a long lapse of time, would have been improper. The following passage from Halsbury's Law of England was recalled:

“It is undesirable that witnesses should be asked to identify a defendant for the first time in the dock at his trial; and as a general practice it is preferable that he should have been placed previously on a parade with other persons, so that

potential witness can be asked to pick him out.”

In **Vaikuntam Vs. State** of A.P., 1960, CrI. J. 1681, the Supreme Court, inter alia observed as under:

“it is true that when he came to give evidence in court, the witness did point out to the same three accused as having been seen by him at the time of the murder. It is also true that the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. There may be exception to this rule where the court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding.”

In **Budhsen and Another Vs. State of U.P.** 1970(2) SCC 128, the Supreme Court, inter-alia observed as under:-

”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 evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to

rest 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 proceeding. There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration.”

In **State Vs. V.C. Shukla**, AIR 1980 SC 1382, a three Judge Bench of the Supreme Court held that identification by the witness for the first time in the court, without being tested by a prior T.I.P., was valueless.

In **State of Maharashtra Vs. Sukhdeo Singh**, AIR 1992 SC 2100, the Supreme Court, inter-alia observed as under:-

“In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.”

It was held by the Supreme Court in **George Vs. State of Kerala** 1988 (2) JCC 1927 that though not fatal, absence of corroborative evidence of prior identification in a TIP makes

the substantive evidence of identification in court after a long lapse of time, a weak piece of evidence and no reliance can be placed upon it unless sufficiently and satisfactorily corroborated by other evidence.

In **Canon and Ors. Versus State of Kerala** AIR 1979 SC 1127 the accused was not previously known to the witness and nor know Test Identification Parade was held. It was held that it would not be safe to rely on identification for the first time in Court. Similar view was taken in **Mohan Lal Versus State of Maharashtra** AIR 1980 SC 839, which was a case under Section 326/323/34 of IPC.

27. The identification of these three appellants Javed, Fahim and Rasheed by Ram Singh during trial could have been acceptable to establish their identity had there been some corroborative evidence to connect them with the commission of the offence. Though cash is alleged to have been recovered from the possession of the appellants Javed and Faim, there being no mark of identity on the currency notes, it cannot be said that these were the same currency notes which are alleged to have been removed from the

possession of Ram Singh and the conductor of the bus Raju Kumar. The case of the prosecution is that one dagger was also recovered from the possession of appellant Faim. There is no evidence that any of the three boys accompanying the appellant Naseem was armed with a dagger at the time of commission of robbery. Therefore, as far as appellants Javed, Faim and Rasheed are concerned, even if the testimony of PW-9 Ram Singh is believed, they would be entitled to acquittal for the reason that their identity does not stand established beyond reasonable doubt.

28. However, the evidence produced by the prosecution, particularly the testimony of PCR officials PW-3 Constable Satish Kumar and PW-8 HC Balbir Singh of Police Control Room, proves that the appellant Mohd. Naseem was found in possession of a country-made pistol and that too at a public place. The testimony of PW-5 Puneet Pur, Sr.Scientific Asstt.(Ballistic), Forensic Science Laboratory shows that the weapon recovered from the possession of the appellant Naseem was a country-made pistol and was in working order. The appellant Mohd.Naseem has, therefore, rightly been convicted under Section 25 of Arms Act.

29. For the reasons given the preceding paragraphs, the appellants Javed Ahmed, Mohd. Fahim and Mohd.Rasheed are, hereby, given the benefit of doubt and are acquitted. The appellant Mohd. Naseem is also acquitted of charges under Sections 392/397 of IPC. The conviction of the appellant Mohd. Naseem under Section 25 of Arms Act, however, is maintained. The sentence awarded to him under Arms Act also does not call for any interference.

30. During the course of arguments, I was informed that the appellant Mohd. Naseem has already spent more than one year in custody. If the fine has not been paid by him, he will deposit the same with the trial court within two weeks, failing which he will undergo the sentence awarded to him by the trial court in default of payment of fine.

31. All the appeals stand disposed of.

32. The record of the trial court be sent back along with a copy of the judgment.

(V.K.JAIN)
JUDGE

MARCH 18, 2010
RS/