

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

+ Cr1.A.No.446/2005

% Reserved on: 18th March, 2010
Date of Decision: 25th March, 2010

SUNIL KUMAR @ SONU Appellant
! Through: Mr.K.B.Andley, Sr.Adv. with
Mr.J.L.Singh, Advocate.

versus

\$ STATE N.C.T. OF DELHI Respondent
^ Through: Mr.Jaideep Malik, APP

+ Cr1.A.No.452/2005

LAL SINGH Appellant
! Through: Mr.R.S.Soni, Advocate.

versus

\$ STATE N.C.T. OF DELHI Respondent
^ Through: Mr.Jaideep Malik, APP

+ Cr1.A.No.463/2005

MANOJ KUMAR Appellant
! Through: Mr.K.B.Andley, Sr.Adv. with
Mr.J.L.Singh, Advocate.

versus

\$ STATE N.C.T. OF DELHI Respondent
^ Through: Mr.Jaideep Malik, APP

+ Cr1.A.No.478/2005

VIKAS MALIK @ VICKY Appellant
! Through: Mr.K.B.Andley, Sr.Adv. with

Mr.J.L.Singh, Advocate.

versus

\$ STATE N.C.T. OF DELHI 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? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: V.K. JAIN, J.

1. By this common judgment, I shall dispose of all the four appeals referred to above, which are directed against a common judgment and order on sentence dated 28.4.2005, whereby the appellants were convicted under Section 392 of IPC read with Section 34 thereof and were sentenced to undergo rigorous imprisonment for three years each and to pay fine of Rs.2,500/- each or to undergo rigorous imprisonment for one months each, in default.

2. On 21st December, 2000, an information was received at Police Control Room that three persons travelling

in Maruti Car No.DL 2C 4116, had committed robbery of Rs.1,30,000/-. On receipt of this information, the Investigation Officer of this case SI R.S.Naruka went to the spot, where the complainant Manoj Kumar was present along with his Scooter No.DL 3SL 6998. The complainant alleged that on that day he was carrying Rs.1,30,000/- with him in his scooter. When he reached NH-8 at about 3.15 p.m., one Maruti Car of blue colour hit the left side of his scooter. When he took the scooter to the left side of the road, it left the metalled road and he fell on unmetalled(KUCHCHA) portion of the road. Before he could get up, two young boys came out of the car, took out the envelope in which he had kept the money in the dickey of his scooter after opening it from the key of the scooter and ran away in the car. The number of the car was noted by him as DL 2CA 4116. He went to the police booth on NH-8 and informed the police about the incident.

3. The prosecution examined 13 witnesses in support of its case. One witness was examined in defence.

4. The complainant came in the witness box as PW-6 and stated that on 21st December, 2000 he was carrying

Rs.1,30,000/- from his Office to Kapashera. The cash had been kept by him in the dickey of the scooter. When he reached near Airport landing point, one Maruti Car of blue colour bearing No.DL 2CA 4116 came from his back side and hit the side of his scooter, as a result of which he fell down. Three person got down from the car. One of them opened the dickey of his scooter using its key and took out the cash which had been kept in the dickey of the scooter. The other persons caught hold of him and threatened him. Thereafter, all of them ran away in the same car. He went to the nearby police booth and informed them. After seeing the accused persons in the court, he stated that none of the culprits was present in the court. He further stated that there must be one more person in the car who was driving the car, but he could not see his face since the car had black glasses. In cross-examination, he stated that he knew the appellant Sunil, who was working in his Company but had not seen him at the time of occurrence of crime.

5. PW-1 Sushil Kumar, Finger Print Expert, has stated that on 21st December, 2000, on receipt of call from PS Delhi Cantt., he reached the road between Sector 8 and 9 Vasant

Kunj and found one Maruti Car No.DL 2C A 4116. He inspected the car and lifted prints from it. He prepared a report in this regard, which is Ex.PW-1/A.

6. PW-12 Shri Chet Ram is the Finger Print Expert from Finger Print Bureau, Malviya Nagar, New Delhi. He is a qualified finger prints expert working since 1991 and claims to have examined hundreds of cases as a Finger Print Expert. He stated that on 26th February, 2001, this case was marked to him by the Director, Finger Print Bureau, for comparing the chance prints with the specimen finger prints of Sunil @ Sonu S/o Dharam Pal, Lal Singh S/o Om Parkash, Manoj Sharma S/o Dharam Pal and Vikas Malik @ Vicky s/o Mahender Singh. He compared the chance prints which were lifted from the scene of crime with specimen finger prints of the above referred persons and found that chance prints marked Q3 to Q6 were identical with right ring middle, right index and left thumb marked S1, S2, S3 and S6 respectively, on the finger impression of Sunil @ Sonu S/o Dharam Pal. He also found that the chance prints marked QA was identical with left middle finger print marked S7 on the finger impression slip of Manoj Sharma S/o Dharam Pal. He

also found that chance print marked Q15 was identical with left thumb marked S-4 on the finger impression slip of Vikas Malik @ Vicky S/o Mahender Singh and chance print marked 216 was identical with right thumb marked S-5 on the finger print slip of Lal Singh S/o Om Prakash. He also prepared enlarged photograph of chance print and specimen print, which are Ex.PW-12/A to Ex.PW-12/D. His detailed report of comparison of chance prints with specimen prints is Ex.PW-12/E, which bears his signatures at point 'A' and the signatures of Director, Finger Print Bureau, at point 'B'.

7. PW-3 Constable Ram Singh has stated that the appellant Vicky was apprehended by them on 30th December, 2000. He has also proved the arrest Memo of the appellants Ex.PW-3/D to Ex.PW-3/F. PW-7 HC Mohar Singh has stated that in the night intervening 29/30 December, 2000 accused Vikas was arrested by them and one knife was recovered from him. He further stated that at the pointing out of Vikas, other accused persons were also arrested from Ladu Sarai and their personal search Memos are Ex.PW-3/D to Ex.PW-3/F.

8. PW-11 SI R.S.Naruka is the IO of this case. He has stated that on 21st December, 2000 on receipt of copy of DD

No.11-A Ex.PW-6/A, he went to the spot and after registration of FIR he went in search of Maruti Car NO.DL 2C A 4116. The car was found abandoned in the area between Sector 8 & 9 of Vasant Kunj. Crime Team was called by him which thoroughly inspected the car and lifted chance prints. He further stated that the accused Vikas Malik was arrested in a case under Arms Act and during interrogation, he disclosed about involvement of accused persons in this case. He, thereupon arrested Vikas Malik and at his instance the remaining accused were arrested.

9. PW-13 Ms.Poonam Chaudhary, who was working as Metropolitan Magistrate on 4th June, 2001 has stated that on that day, the appellant Vikas Malik refused to join TIP before her.

10. In their statements under Section 313 Cr.P.C. all the appellants denied the allegations against them. As regards finger print, the appellant Vikas Malik claimed that his finger prints were forcibly taken by the police at different surfaces. The appellant Sunil @ Sonu claimed that his finger prints were taken in police station and that the alleged chance prints were found only on mirror. He claimed that no chance

prints were found on steering, gear leather, door and seat cover. The appellant Lal Singh Claimed that certain signatures, prints of finger, etc. were taken in the police station.

11. DW-1 S.P.Satsangi is Senior Architect(Director) of DDA and he has claimed that the sectors in Vasant Kunj are divided alphabetically and each sector has different pockets. He has further stated that there is Masudpur Dairy Farm Complex between Pockets 8 & 9 of Sector B of Vasant Kunj. In cross-examination, however, he admitted that there are road surrounding Masudpur Dairy Farm Complex and a person can go from Pocket 8 to Pocket 9.

12. Since the complainant, who is the only eye-witness of the robbery, has not identified any of the appellants, and there is no mark of identity on the currency notes alleged to be recovered from the appellant Manoj, the only evidence which connects the appellants with commission of robbery is that their specimen finger prints tally with the chance finger prints found on the car in which the robbery was committed.

13. The testimony of the complainant, which remains absolutely uncontroverted as regards registration number of

the car in which robbery was committed, would show that the persons who committed robbery of Rs.1,30,000/- from his possession were travelling in Maruty Car DL 2C A 4116. The robbery took place on 21st December, 2000 and Car No.DL 2C A 4116 was seized by the police on the same day vide memo Ex.PW-6/B.

14. The deposition of PW-1 Sushil Kumar from Finger Print Bureau coupled with his report Ex.PW-1/A, shows that on 21st December, 2000 itself, he went to the place where the car was found and lifted chance prints from it applying the powdering method and using grey powder for the purpose. The specimen finger print impressions of the appellants were sent to Finger Print Bureau for the purpose of comparison of the chance finger prints with the specimen finger print impressions.

15. The opinion of PW-12 Shri Chet Ram, expert from Finger Print Bureau, shows that some of the chance prints lifted by PW-1 from Car No.DL 2C A 4116 were identical with the specimen finger print impressions of the appellants Sunil, Manoj, Vikas Malik @ Vicky and Lal Singh. This is not the case of the appellant Sunil that specimen print impressions,

thumb marks/finger print impressions S-1,S-2,S-3 & S-6 are not his specimen finger print impressions. Similarly, this is not the case of the appellant Manoj Sharma that the middle finger specimen, left middle finger impression mark S-7 is of some person other than him. This is not the case of the appellant Vikas Malik that left thumb mark S-4 is not his specimen thumb mark. This is not the case of the appellant Lal Singh that specimen right thumb mark S-5 is not his specimen thumb mark. It can, thus, be safely concluded that the chance prints lifted from the car in which the robbers were travelling, are of the appellants, Sunil @ Sonu, Manoj Sharma, Vikas Malik @ Vicky and Lal Singh.

16. Though the appellant Vikas Malik has claimed that his finger prints were forcibly taken by police at different surfaces, I find that there was no reasonable possibility of the chance prints found by PW-1 Sushil Kumar on Car No.DL 2C A 4116 having been forcibly taken at a later date. The robbery took place on 21st December, 2000. The Maruti Car from which chance prints were lifted by PW-1, was seized on the same date. The report of PW-1 Sushil Kumar, Ex.PW-1/A shows that he inspected the place where the car was found

on 21st December, 2000 and lifted the chance prints on that very day. This is not the case of any of the appellants that he was already in police custody before chance prints from the car were lifted by PW-1 on 21st December, 2000. The appellant Vikas Malik, who was first accused to be arrested in this case, was arrested on 29th December, 2000. The other accused were arrested thereafter, at his instance. This is not the case of Vikas Malik that police had arrested him on or before 21st December, 2000. In fact, the suggestion given by Vikas Malik to PW-3 Constable Ram Singh was that the police went to his house on 27th December, 2000 and asked his mother to send him to police station next day and accordingly, he went to the police station on 28th December, 2000 where a knife was planted on him on 30th December, 2000. Since none of the appellants was in police custody on or before 21st December, 2000, there was no possibility of the police making any one of them touch any part of Car No.DL 2C A 4116 before chance prints from it were lifted by PW-1 on 21st December, 2000. In fact, it has come in the deposition of the Investigating Officer that the car was released to the registered owner by the police. Hence, it was not possible for

the IO, to compel any accused to put his fingers on the car in which robbery was committed. I, therefore, have no hesitation in accepting that the appellants had travelled in Car No.DL 2C A 4116 at a time prior to chance prints from that car were lifted by PW-1 on 21st December, 2000.

17. A perusal of the report of Finger Print Bureau Ex.PW-11/BA shows that the chance prints Q-1 to Q-16 were photographs by police photographers and the expert had received the photographs from him along with the negatives, for the purpose of examination. Since the photographs were with the police photographer and not with the IO, there was no possibility of the chance prints lifted by PW-1 Sushil Kumar being replaced by the photographs of some other finger prints. In any case, no suggestion was given to the Investigating Officer that the photographs of the chance prints lifted by PW-1 Sushil Kumar on 21st December, 2000 were replaced by him by photographs of some other finger print impressions.

18. This is not the case of any of the appellants that he had a bonafide occasion to travel in Car No.DL 2C A 4116 before it was seized by the police and chance prints were

lifted from it by PW-1 Sushil Kumar. Their case is that they did not travel at all in this car. Since the appellants have not offered any explanation for their finger prints being found in Car No.DL 2C A 4116, in which robbers were travelling at the time of commission of robbery, the inevitable inference is that they are the person who had robbed the complainant of Rs.1,30,000/- in furtherance of common intention which they shared with each other. In fact, admittedly, the appellant Sunil was working with the same firm with which the complainant was working, though the complainant did not see him amongst the persons who robbed him of the money. Obviously, either Sunil remained in the car which had black glasses, or the complainant was consciously not identifying him in court. Being a person working with the same employer, the appellant Sunil was in a position to know that the complainant was carrying cash in his scooter on that day.

19. In “***State of Bombay Vs. Kathi Kalu Oghad***”, 1961 (2) Cri.L.J. 856, an Eleven Judges Bench of the Supreme Court examined the question as to whether giving of thumb impression or handwriting by an accused constitutes breach of Article 20(3) of the Constitution. After reviewing case law

on subject, the Apex Court, inter alia, held as under:

“To be a witness” may be equivalent to “furnishing evidence” in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. “Furnishing evidence” in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that – though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject – they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution makers were aware of the existing law, for example, S.73 of the Evidence Act or Ss. 5 and 6 of the Identification of Prisoners Act (XXXIII of 1920). Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken, if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do so: ‘Measurements’ include finger impressions and foot-print impressions. If any such person who is

directed by a Magistrate, under S.5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs, it has been declared lawful by S.6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly S.73 of the Evidence Act authorizes the Court to permit the taking of finger impression or a specimen handwriting or signature of a person present in Court, if necessary for the purpose of comparison.

The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not “to be a witness.” “To be a witness” means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said ‘to be a witness’ to a certain state of facts which has to be determined by a court or authority authorized to come to a decision by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy.....

..... When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a ‘personal

testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness.'

....A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of testimony."

20. In "***Murarilal Vs. State of M.P.***", AIR 1980 SC 531, the Apex Court, inter alia, noted as under:

"... The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent....." (emphasis supplied)

Even regarding opinion of handwriting expert, the Apex Court was of the view that there was neither a rule of law nor of prudence which had crystallised into a rule of law that the opinion of expert must never be acted upon, unless substantially corroborated. Observing that science of identification of handwriting being of imperfect nature, the approach should be one of caution, the Court was of the view that in cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, uncorroborated testimony of a handwriting expert can be accepted.

21. In “**Jaspal Singh Vs. State of Punjab**”, AIR 1979 SC 1708, the Apex Court reiterated that the science of identification thumb impression is an exact science and does not admit of any mistake or doubt.

22. In “**Mohan Lal & Another Vs. Ajit Singh & Another**”, 1978 Cri.L.J. 1107(1), the Apex Court accepted the finger prints expert’s opinion as an important piece of evidence.

23. The science of identification of finger prints being

absolutely reliable and almost perfect as compared to imperfect nature of the science of the identification of handwriting and signatures, it cannot be disputed that it is permissible for the court to base conviction solely upon the opinion of an experienced finger print expert.

24. The learned counsel for the appellants has relied upon the decision of the Supreme Court in “**Sukhvinder Singh & Others Vs. State of Punjab**”, (1994) 5 SCC 152 and a decision of this Court in “**Mukimuddin Vs. The State**”, 1991 Cri.L.J. 2903. In the case of Sukhvinder Singh(supra), the Apex Court was of the view that under Section 73 of Evidence Act it is the court which has to make comparison and it may either confirm opinion by comparing the disputed and admitted writings or seek the assistance of an expert to put before the court all the material together with reasons which induce the expert to come to the conclusion that the disputed and the admitted writings are of one and the same, so that the court may confirm its own opinion on its own assessment of the report of the expert based on the data furnished by the expert. It was further held that since directions under Section 73 of the Evidence

Act can be given for the purpose of enabling the court to compare and not for the purpose of enabling the investigating or prosecuting agency to obtain and produce as evidence in the case the specimen writings for their comparison with the disputed writings, the accused cannot be compelled to give his specimen signatures during the course of investigation. The Court was of the view that recourse to Section 73 of Evidence Act can be had only when the inquiry or trial is pending before the court and the court wanted the writing for the purpose of enabling it to compare the same. It was also held that the court, which can issue such a direction, would either be the court holding inquiry under the Code of Criminal Procedure or the court trying the accused. This judgment has absolutely no application to the present case since neither any comparison of handwriting was involved in this case nor any direction for giving specimen signature was given by the court during investigation. In fact, as far as finger print impressions are concerned, Section 5 of Identification of Prisoners Act specifically empowers the Magistrate to direct any person to allow his measurement or photograph to be taken, though in the present case no such

orders were obtained before taking of specimen finger print impressions of the appellants and the finger print impressions of the appellants were taken directly by the IO.

25. In the case of Mukimuddin(supra), it was noted by this Court that specimen signatures of the petitioner were taken while he was in custody and observed that the same are not admissible in evidence. The present case is not a case of specimen signatures having been taken by the police. In the present case finger print impressions of the appellants were taken while they were in police custody. In view of the decision of the Constitution Bench of the Apex Court in the case of Kathi Kalu Oghad(supra), there is no constitutional bar to finger print impressions of the accused being taken by the police while he is in their custody.

26. It is true that the specimen finger print impressions of the appellants were taken by the IO directly and not through the Magistrate as provided in Section 5 of Identification of Prisoners Act. But, that, to my mind was not necessary because Section 4 of Identification Prisoners Act specifically provides that any person who has been arrested in connection with an offence punishable with rigorous

imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner. In view of the independent powers conferred upon a police officer under Section 4 of the Act, it was not obligatory for him to approach the Magistrate under Section 5 of the Act. He would have approached the Magistrate, had the appellants refused to give Specimen Finger Print Impressions to him. Therefore, no illegality attaches to the specimen finger print impressions taken by the Investigating Officer. The court needs to appreciate that the very nature and characteristic of material such as finger prints renders it intrinsically and inherently impossible for anyone to fabricate them. If there is an attempt to fabricate finger prints, that can certainly be exposed by the accused by offering to allow his finger prints to be taken so that the same could be compared through the process of the court. None of the appellants has come forward to the court with a request to take his finger print impressions in the court and get them compared with the chance finger prints lifted by PW-1 from Car No.DL 2C A 4116 on 21st December, 2000.

27. In “***Shankaria Vs. State of Rajasthan***”, 1978

Cri.L.J. 1251, the specimen thumb impressions of the appellant were taken before the Superintendent of Police. It was contended before the Supreme Court that it was incumbent on the police to obtain the specimen thumb impression before a Magistrate and since this was not done, the opinion rendered by the expert by using those illegally obtained specimen finger impressions must be ruled out of evidence. The contention was rejected holding that the police were competent under Section 4 of Identification of Prisoners Act to take the specimen finger prints of accused and it was not necessary for them to obtain an order from the Magistrate for obtaining such specimen finger prints. Since the Act applies to Delhi without any modification and Section 4 specifically provides for measurements, which includes finger print impressions, to be taken by any police officer, the only condition being that the person who is asked to give finger print impressions should be in custody for an offence punishable with imprisonment for a term of one year or more, and the appellants were in custody for the offence punishable with imprisonment for more than one year, it was competent for the Investigating Officer to take their specimen finger print

impressions.

28. No other submission was made on behalf of the appellants.

29. For the reasons given in the preceding paragraphs, I see no reasonable ground to interfere with the conviction of the appellants and the same is accordingly maintained. The sentence awarded to the appellants cannot be said to be excessive or unreasonable. Hence, there is no justification for reducing the sentence awarded to them. The appeals being devoid of any merit are, hereby, dismissed. The appellants are directed to surrender forthwith before the trial court for undergoing the remaining part of the sentence. If they do not surrender forthwith, the trial court will take appropriate steps to procure their presence and commit them to prison to undergo the remaining part of the sentence. The Trial court record be sent back within three days along with a copy of this judgment.

(V.K.JAIN)
JUDGE

MARCH 25, 2010
RS/