

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

+ **CRL.REV. P.401/2011**

% *Judgment delivered on:13th September, 2011*

LAXMAN

..... Petitioner
Through: Mr.Aagney Sail &
Mr.Subash Chandra, Advs.

versus

STATE OF NCT OF DELHI

..... Respondent
Through:Ms.Rajdipa Behura,
APP for State

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

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

SURESH KAIT, J. (Oral)

Crl.M.A.10773/2011

Exemption is allowed subject to just exceptions.

Criminal M.A. stands disposed of.

CRL.REV.P. 401/2011

1. Issue notice. Ms.Rajdipa Behura, learned APP for respondent/State accepts notice.

2. With the consent of both the parties this matter is taken up for disposal.

3. Petitioner was held guilty vide judgment dated 28.01.2011 and sentence order dated 29.01.2011. Being aggrieved, petitioner had filed the appeal before the Sessions Court. Vide judgment dated 26.08.2011 the appeal of the petitioner has been dismissed.

4. Ld. counsel for the petitioner submits and has raised a legal issue that the Id. ASJ has wrongly applied Section 106 of Evidence Act in the facts and circumstances of the instant case.

5. In the instant case PW3 who is injured/complainant, has deposed in Court as an eyewitness of the occurrence. He could not identify the petitioner in the Court, therefore, Id. ASJ relied upon Section 106 of the Evidence Act and came to the conclusion that the accused was the only person who had knowledge about the incident.

6. It is further submitted that Section 106 of the Evidence Act would be applied only in the case when the accused only had information about the committing of offence, noneelse,

whereas, in the present case PW3, who was the injured and an eyewitness had knowledge that who had committed the offence. Moreso, the prosecution had preferred to examine PW3.

7. Ld.counsel for the petitioner has also argued that, the illustrations given with Section 106 of the Evidence Act is not applicable and the court cannot rely on the illustrations while adjudicating the case. He submits that as per the illustrations, if a person is travelling without ticket, the burden of proving that he had a ticket is on the accused.

8. Ld. counsel for the petitioner submits that in such a situation there is entry in the record even at other places where the department makes the entry. Therefore, this illustration cannot be relied upon while applying under Section 106 of the Evidence Act. To support this argument he has relied upon a case of Hon'ble Supreme Court ***Shambhu Nath Mehra Vs. State of Ajmer*** (1956 SCR 199) and submits that the Supreme Court has held that *"Section 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very*

exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and section 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases, where, it is impossible, or a proportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available to the prosecution if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply."

9. Ld. counsel for the petitioner submits that the prosecution had examined PW3, therefore, the prosecution has exercised due diligence. If PW3 could not identify the accused or could not ascertain who has committed the occurrence, in that case prosecution cannot shift the burden on the accused.

10. Ms.Rajdipa Behura, Ld.APP for State submits that PW7 Vijay Singh, who was the owner of the truck, who has

deposed that on the day of the occurrence the truck was handed over to the petitioner. However, in the cross-examination he has stated that he did not know who was driving the truck at the time of committing the offence.

11. Further submits that if the truck was handed over to the petitioner, it was his duty to come forward and state who was in possession of the truck at that particular time.

12. It is further submits that no defence has been taken by the accused under Section 313 that at that particular time someone else was driving the truck.

13. Ld. counsel for the petitioner has argued the case on legal issue only, since the petitioner has come in the revision, wherein, evidence is not to be appreciated. The legal question raised by the petitioner is only on Section 106 of the Evidence Act, as this Section is wrongly applied by Id.ASJ.

14. It is submitted; PW3 failed to recognize the accused at once and it was only after the accused was pointed out by the Id.APP for the State, that he was able to recognize him.

The first court has justified on the ground that the present

case pertains to the year 1997. In the long span of 13 years, a person cannot be expected to remember the exact looks of the accused, unless, his memory is refreshed.

15. Ld.counsel for the petitioner further submits to this effect that this judgment, however, came up after 13 years but the deposition of PW3 was recorded on 14.02.2001 i.e. after 3½ years of the incident. Thus, the Trial Court has also wrongly decided against the petitioner on the wrong proposition. It is the case of the prosecution that PW3 has identified the accused and thereafter the police wrongly arrested the petitioner from the hospital. He further submits that, if this is the actual position then why PW3 could not identify the petitioner.

16. Section 106 of the Evidence Act is reproduced as under:-

“106. Burden of proving fact especially within knowledge – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

17. This Section is applicable in a case where the

prosecution has no clue about the occurrence of the offence and only the accused has knowledge about the offence.

18. In the present case there was an injured eyewitness who has been examined as PW3 by the prosecution and who could not identify the petitioner in the court.

19. In my view Id. ASJ has wrongly applied Section 106 of Evidence Act and the burden of the prosecution has been shifted on the petitioners, while deciding the appeal against the petitioner. As this issue has already been decided in the case of ***Shambhu Nath (supra)*** when knowledge of such facts is equally available to the prosecution, if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused. In these circumstances Section 106 of Evidence Act cannot be applied.

20. In view of above, Criminal Revision Petition No.401/2011 is allowed. Consequently, judgment dated 28.01.2011 and sentence order dated 29.01.2011 passed by the first court and judgment dated 26.08.2011 passed by the appellate court are set aside. The petitioner is acquitted from all charges in the present case.

21. Since the petitioner is in custody, the jail authorities are directed to release the petitioner forthwith. Copy of this order be sent to jail authorities for compliance.

22. Dasti.

CRL.M.B.1590/2011

In view of the order passed in Criminal Revision Petition No.401/2011, this application has become infructuous and disposed of accordingly.

SURESH KAIT, J

September 13, 2011

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