

HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL NO. 1400/2010

ROHIT @ RAHUL @ MINTO Appellant
Through: Mr. Rajender Kumar, Adv.

Versus

THE STATE (GOVT. of NCT of DELHI) Respondent
Through: Mr. Arvind Gupta, APP for
the State

% Judgment reserved on: 7th April, 2011
Judgment delivered on: 19th April, 2011

Coram:
HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J.

1. This appeal is directed against the judgment dated 15th November, 2010 and order on sentence dated 18th November, 2010 passed by the Additional Sessions Judge, New Delhi (hereinafter referred to as "Trial Court") whereby appellant has been convicted under Section 392 IPC read with Section 397 IPC and sentenced to undergo rigorous imprisonment for seven years with fine of ₹10,000/-; in default of payment of fine to undergo simple imprisonment for one year. Benefit of Section 428 Cr.P.C. has also been given to him.

2. Prosecution case as unfolded is that on 4th April, 2000, at about 7.30 -8.00 pm, complainant Krishan Seth was returning home from his office in his Mercedes car bearing registration no. DL-2CH-4471 and when he reached near Jawaharlal Nehru Stadium at Lodhi Road, he noticed one Esteem car trailing his car. Occupant of the said car signaled him to stop his car while overtaking his car. He stopped his car. One person got down from the Esteem car and tried to open the door of his car. On complainant asking “kya baat hai”, the other person sitting in the car said “Aise Nahi Manta to Gola Dikha”. The person standing near his car showed him a revolver and threatened him to get down from the car lest he would be shot. Complainant stepped out of his car. The said person snatched his mobile phone and drove away with his Mercedes car. One green colored Samsonite make bag containing ₹ 7 lakhs cash, lunch box, golden lighter, goggles and the papers of the car were lying in boot of the car. Complainant went to nearby CGO Complex and enquired from a guard standing there as to whether there was any police station nearby. The guard posted there replied in negative. Complainant then went to his house and informed the police.

3. On receipt of information, Additional Station House Officer S.S. Gill of Police Station Lodhi Colony reached at the spot and recorded complainant's statement wherein he

narrated the incident in the manner as described above. Complainant also gave description of the person, who drove away with his car by saying that he was aged between 30 to 40 years, height 5'8", well built, stout body, sallow complexion, flat broad face and slightly bald from the forehead. Description of the person who remained seated in the Esteem car was not given.

4. On the basis of statement of the complainant, FIR No. 108/2000 under Sections 392/397 IPC was registered at Police Station Lodhi Colony. Keeping in mind gravity of offence Special Cell (South), Delhi Police was also intimated about the incident. In the night intervening 4th and 5th April, 2000 itself Inspector Rajinder Singh of Special Cell came to know that Mercedes car was parked in Mayur Vihar, Phase I residential area. He mounted surveillance in that area in order to nab the culprits in the hope that they would come to take the car. Inspector Rajender Singh constituted raiding party wherein police officials from the Police Stations Okhla, Nehru Place, Sunlight colony, Madan Gir and Sukhdev Vihar were also joined. On 5th April 2000, at about 4 pm, appellant along with his co-accused came in Maruti Esteem Car DL 3CH 3296. Appellant got down from the car and opened the door of Mercedes car with the key and tried to start the same. Immediately, police party started moving towards him. On seeing the police officials, appellant came out of the car and

ran towards the Esteem car in order to escape. Appellant also fired towards the police party. In retaliation police also fired at appellant. However, he managed to board the esteem car. Thereafter, appellant and his co-accused sped away in the car but were chased by the police party. Appellant and his co-accused had to get down from the Maruti car as they had reached at the dead end of the road as there was a wall. Co-accused was apprehended while he was jumping the wall, however, appellant succeeded in jumping the wall. He climbed on the roof of flat nos. 412 and 413 of Mayur Vihar-I from where he was apprehended. Appellant and his co-accused had suffered injuries in their legs in the cross firing. Thereafter, appellant and his co-accused were taken to Police Station Mayur Vihar. FIR No. 71/2000 under Sections 307/332/353/187/34 IPC was registered on the statement of one of the members of raiding party, namely, SI Brijender Singh and appellant and his co-accused were arrested. Their disclosure statements were recorded wherein they admitted to had robbed Mercedes car from complainant on 4th April, 2000. Appellant and his co-accused were produced in Karkardooma Court in the said case on 6th April, 2000. Investigating Officer of this case arrested appellant and his co-accused with the permission of court. He moved application for TIP of appellant and his co-accused before the concerned Metropolitan Magistrate but they refused to

participate in TIP. Appellant and his co-accused were taken to Darjeeling for recovery of robbed money as appellant in his disclosure had stated that robbed money was taken by Suraj to Darjeeling. However, neither Suraj could be traced nor money could be recovered. On 13th April, 2000 appellant made a disclosure statement that he can get recovered Samsonite make briefcase from his house situated at Gurgaon. Accordingly, police team returned to Delhi. On 15th April, 2000, appellant led the police party to his home and got recovered briefcase from the bed box. He opened the briefcase. Photocopy of RC, insurance paper, invoice of car was there in the briefcase. However, no money was found in the briefcase. Briefcase and documents were seized. Later, this briefcase was identified by the complainant in the TIP held by Metropolitan Magistrate.

5. Complainant Kishan Seth has been examined as PW1. He has supported the prosecution story. He has also identified the appellant as the same person who was sitting inside the Esteem car while co-accused had driven away with his Mercedes car after showing him revolver. PW15 Inspector Yoginder Kumar, IO of this case, has deposed that he had received information that appellant and his co-accused had been apprehended in FIR No. 71/2000 registered at Police Station Mayur Vihar and had confessed about their involvement in the present case. He reached there and

obtained photocopies of relevant papers. He filed an application before Metropolitan Magistrate, Karkardooma Courts seeking permission for interrogation of accused persons. After interrogation, he arrested the accused persons and thereafter, moved an application for transfer of the accused persons to Patiala House Courts, which was allowed. Accused persons were produced by him before the duty Magistrate at her residence at about 6.30 pm. Thereafter, he moved an application for Test Identification Parade (TIP) of the accused persons. Police custody of accused persons till 7th April, 2000 was granted, however, application for TIP was kept pending for next day. On 7th April, 2000, he produced accused persons before the concerned Metropolitan Magistrate for TIP. However, accused refused to participate in TIP. He moved an application for ten days police remand which was permitted. On 9th April, 2000 complainant Krishan Seth came in the Police Station and identified the appellant and his co-accused as the persons who had robbed him. On 11th April, 2000, he took accused persons to Siliguri but they could not find out the house of their co-accused. On 13th April, 2000 appellant made a disclosure statement that he had kept the Samsonite briefcase at his house no. U-42/8, DLF, Phase III, Gurgaon. On 15th April, 2000 they returned to Delhi. Thereafter, appellant took him and members of the recovery team PW14 SI Suraj Mal and PW7 HC Mahipal to his

house and got recovered a green coloured Samsonite briefcase. He opened the bag from which photocopy of R.C., photocopy of insurance and invoice of Mercedes car along with some other papers were recovered. These papers were seized. On 26th May, 2000, TIP of briefcase and mobile phone was got conducted. Complainant PW1 identified the same to be his. Trial Court has held that appellant was identified by the complainant PW1, inasmuch as, recovery of briefcase at his instance corroborated the complainant's version that it is the appellant who along with his accomplice, had robbed Mercedes car near Jawaharlal Nehru Stadium in which Samsonite briefcase containing ₹7 lakhs was also lying. In absence of any previous enmity, Trial court found no reason to disbelieve the identification of the appellant in court by PW1, inasmuch as, testimony of PW1 was found credible, trustworthy, reliable and sufficient enough for convicting the appellant under the aforesaid provisions.

6. It may be noted here that co-accused Pradeep had jumped the bail during trial and was declared proclaimed offender and no finding has been returned regarding his complicity in the crime.

7. Learned counsel for the appellant has vehemently contended that apprehension of appellant, in the manner as alleged by the prosecution, by the raiding party on 5th April,

2000 at 4 pm, suffers from inherent lacunae, inasmuch as, appellant had been acquitted in the said encounter case arising out of FIR No.71/2000, vide judgment dated 3rd August, 2010 passed by Additional Sessions Judge, Delhi. Whole story as propounded by the prosecution in the said case regarding apprehension of appellant and recovery of Mercedes car has been disbelieved on account of inherent discrepancies in the statements of witnesses recorded in the said case. Quite a few of those witnesses are common in this case. Thus, arrest of the appellant as well as recovery of Mercedes car from him falls flat on the ground. He has further contended that appellant was apprehended on 5th April, 2000 by the raiding team constituted by the Special Cell. Appellant remained in police custody in Police Station Mayur Vihar from 5th April, 2000 onwards till he was arrested in this case by PW15 Inspector Yoginder Kumar from the Karkardooma Courts on 6th April, 2000. On the same day he was produced before the Duty Magistrate at her residence at about 6:30 pm and an application for TIP was moved. Duty Magistrate ordered that appellant be taken in judicial custody till 7th April, 2010 and be produced in the concerned court at 10 am when application for TIP was to be considered by the concerned court on 7th April, 2000. But the fact remains that appellant was not lodged in jail and was kept in Police Station Lodhi Colony itself on the ground that jail authorities had

declined to accept the appellant since it was late in the evening. On 7th April, 2000 when appellant was produced before the court, he had categorically stated that he was shown to 4-5 persons while in police custody. Refusal of appellant to participate in TIP was, thus, for justifiable reason since he had been shown to the complainant. Thus, no adverse inference can be drawn on account of refusal of appellant to participate in TIP. Accordingly, identification of appellant by PW1, after about one year of incident, is valueless more so, when complainant has admitted in his deposition that whole incident took place after the sunset and was over within 40 seconds. It is highly improbable for the complainant to have vividly seen the appellant at about 8 pm, more so, the appellant had not even stepped out of the car and had remained seated on the driver's seat. In nutshell, his case is that identification of appellant by the complainant in court for the first time is not sufficient to fix the 'identity' of appellant. He has further contended that mere recovery of Samsonite briefcase at the instance of the appellant is suspicious and doubtful, inasmuch as, no public witness was joined at the time of recovery. Testimony of police witnesses was not sufficient to accept the recovery of briefcase in the peculiar facts of the case, more so, when the robbed money was not recovered from the briefcase. Briefcase was having coded lock and it could have been opened only by applying the combination of

numbers, which was within the knowledge of complainant alone, as has been admitted by him in the court, or by breaking the same. Briefcase was not found in broken condition. Since briefcase could not have been opened without breaking it or by applying combination of numbers, non-recovery of money assumes importance and makes the whole story of recovery of empty briefcase doubtful. Even otherwise, mere recovery of briefcase in absence of identification of appellant was not sufficient to conclude beyond shadow of doubt, in a serious offence of this nature, that appellant had robbed the complainant of his Mercedes car and ₹7 lacs. Reliance is placed on *Mohanlal Gangaram Gehani vs. State of Maharashtra* 1982 Cr.L.J. 630, *Anup Singh Vs. State IV* (1994) CCR 2317, *Ramcharan Bhudhiram Gupta vs. State of Maharashtra* 1995 Cr.L.J.4048, *Sukhdev Singh Anr. Vs. State (Delhi Admn.)* 1992 (2) CCC 303 and *Montu @ Bahadur vs. State (NCT of Delhi)* 2009 (4) JCC 3074.

8. Per contra, learned APP has contended that the substantive piece of evidence is identification of appellant in court by the complainant. No evidence has come on record that the appellant was shown to complainant before 7th April, 2000, when he had refused to participate in TIP. Appellant was kept in muffled face right after his arrest till 7th April, 2000. Complainant has stated that he had identified the appellant on 9th April, 2000 in the police station which itself shows that appellant was not shown to the complainant before 7th April, 2000, thus, an adverse inference has to be drawn that had he participated in TIP he would have been identified by the complainant. Thus, the identification of the

appellant by the complainant in the court was sufficient to fix the identity of appellant. Recovery of Samsonite briefcase, which was lying in the boot of Mercedes car, at the instance of appellant shows his complicity in the crime. Recovery witnesses have fully corroborated each other on the point of recovery of briefcase at the instance of appellant. Appellant had led the police party to his house and had got recovered the Samsonite briefcase. He also opened the briefcase from which photocopy of RC, insurance papers, invoice etc. relating to Mercedes car were recovered which shows that briefcase belonged to complainant, inasmuch as, complainant had identified the same to be his in the TIP of case property held by the Metropolitan Magistrate. Recovery of briefcase of the complainant, coupled with the fact that complainant had identified the appellant in court is sufficient to conclude that it is he who along with his accomplice had robbed the complainant of his Mercedes car along with the briefcase containing ₹7 lakhs.

9. I have considered the rival contentions of both the parties and perused the Trial Court record carefully and I find force in the contention of learned counsel for the appellant that prosecution had failed to prove beyond the shadow of reasonable doubt that appellant had robbed the complainant. Incident took place at about 8 pm. It was night time. Complainant has admitted that the whole incident took place within 40 seconds. He also admitted that appellant had not come out of his car. He had remained seated in the car. From his testimony it appears that appellant was driving Esteem car. In this scenario, identification of the

appellant by the complainant in the court for the first time after about one year of the incident becomes highly suspicious and valueless more so, when it has come on record that complainant had seen the appellant in the police station after his arrest. That apart, events suggest that there was possibility of complainant seeing the appellant between 5th April, 2000 and 7th April, 2000, while he was in police custody. Appellant has refused to participate in the TIP on the pretext that he had been shown to 4-5 persons during this period. Though it is claimed that appellant was kept in muffled face, but the order passed by Duty Magistrate on 6th April, 2000 does not indicate so. Metropolitan Magistrate has not mentioned in her order that appellant was produced before her in muffled face. Complainant has also admitted that he came to know about the arrest of appellant through the newspaper. He was aware that the persons who had robbed him had been arrested by the officials of special cell and were in police station Mayur Vihar. For this reason also there is every possibility of the complainant having seen the appellant in police custody between 5th April, 2000 and 7th April, 2000. In case an accused refuses to participate in TIP for justifiable grounds no adverse inference can be drawn against him that had he participated in TIP he would have been identified by the witness. In the facts of the present case there is every possibility of complainant having seen the appellant before his TIP. That apart, complainant has admitted that he had seen the appellant in police custody on 9th April, 2000. Therefore, identification of appellant in court by the complainant

after about one year of the incident loses its significance and is valueless.

10. Indubitably, evidence of Test Identification Parade only has corroborative value as substantive piece of evidence is the identification in court, however, in case accused had been shown to the witnesses before his identification in court, such identification becomes valueless and the accused cannot be convicted on the basis of such identification. In Mohanlal's case (supra), Supreme Court has held that if accused is a stranger to the victim prior to the occurrence and no Test Identification Parade was held to test his power of identification and he was also shown by the police before he identified the appellant in court, his evidence becomes absolutely valueless on the question of identification. In Anoop Singh's case (supra), a Single Judge of this Court has held that where accused had been shown to the witness before his identification parade no adverse inference could be drawn against him and subsequent identification in court was not sufficient to establish the identity of accused beyond the shadow of reasonable doubt. In Budhsen's case (supra), Supreme Court has held that the persons required to identify an accused should have had no opportunity of seeing him after the commission of the crime and before identification. In ***Lila Ram vs. State, 1990 (2) C.C. Cases 402***, a Division Bench of this court has held that a mere possibility that the accused was or could have been shown would be a sufficient justification for refusal to participate in identification proceedings or to reject identification evidence. In Ramcharan Bhudiram Gupta's case (supra), Bombay

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High Court has held that the evidence of identification can only be relied upon if all the chances of the suspects being shown to the witnesses prior to their test identification are eliminated. To ensure that firstly, the prosecution has to adduce link evidence to the effect that right from the time of arrest till being lodged in jail, the faces of suspects were kept veiled and no one had the opportunity to see them. Secondly though direct evidence may not be available accused may discharge his burden by showing, for example that he and the witnesses were present in the police station at the same time. In Sukhdev Singh's case (supra), a Single Judge of this Court has held that witnesses having seen the accused persons in the court there could not have been any question of Test Identification Parade. In such circumstances, no adverse presumption could have been drawn if they refuse to join Test Identification proceeding. In Montu @ Bahadur's case (supra), a Single Judge of this Court has held that whenever an accused is shown to the witnesses before conducting the TIP their identification in TIP and their subsequent identification in court is not a good evidence for their conviction.

11. In ***Malkhan Singh & Ors. vs. State of M.P. VI (2003) SLT 313***, Supreme Court has held:-

“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.”

It was furthermore held:

“It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger 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.”

12. In the facts of this case, as narrated in the preceding paras hereinabove there is possibility of complainant's seeing the appellant while he was in custody, therefore, refusal of appellant to participate in TIP will not give rise to an adverse inference against him that had he participated in TIP he would have been identified by the complainant. As regards identification of appellant in court is concerned, it is valueless since complainant has admitted that he had seen the appellant in the police station on 9th April, 2000. It is otherwise improbable that complainant could have identified the appellant after about one year even though he had only glimpse of appellant sitting in the car hardly for 40 seconds at about 8.00

p.m. in the night. Thus, identification of appellant in court cannot be accepted as valid identification.

13. Similarly, the recovery of Samsonite briefcase pursuant to the disclosure statement of the appellant in absence of robbed amount of ₹7 lakhs, is also insignificant. Appellant was arrested within 24 hours of the incident, however, not even a dime was recovered even though appellant had been taken to Darjeeling for this purpose. As per the prosecution, appellant made a disclosure statement that he had kept the Samsonite briefcase in his house at Gurgaon, thereafter, the police party along with appellant went to his house at Gurgaon where he got recovered the briefcase from the bed box. As per PW15, appellant had opened the briefcase from which photocopy of R.C., insurance papers, invoice etc. of Mercedes car was got recovered. No money was found in the briefcase. It is improbable that an accused will retain the empty briefcase with him and keep it in his house safely, while pass on the money to somebody else, which amount, otherwise, could not be recovered. That apart, admittedly, the briefcase was having combination lock and could have been opened with combination of numbers only. The combination of numbers was within the exclusive knowledge of complainant and for this reason appellant could not have opened the same. Though, PW15 Yoginder Kumar has stated that complainant had disclosed the code during the investigation but no such statement of complainant had been placed on record. Briefcase was not found in broken condition. Thus, possibility of appellant taking out the money from the briefcase after opening it is also wiped out. The above facts make

the story of recovery of briefcase, at the instance of the appellant, suspicious and doubtful.

14. Even otherwise, it would not be safe to convict the appellant for the serious offence of this magnitude on the basis of recovery of briefcase alone. In ***Ramesh vs. State of Karnataka VI (2009) SLT 485***, Supreme Court in somewhat similar circumstances has held as under:-

“As identification of PW3 is highly doubtful, in our opinion, having regard to the nature of other evidences brought on record by the State, i.e., purported recovery of a tarpaulin by itself cannot be said to be sufficient to convict the appellant for a charge of such grave offence.”

15. For the foregoing reasons, I am of the view that the Trial Court was not right in convicting the appellant under Section 392 IPC read with Section 397 IPC. Accordingly, appeal is allowed. Appellant is acquitted. He be released forthwith if not wanted in any other case.

A.K. PATHAK, J

April 19, 2011

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