

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

+ **Crl. Appeal No. 1139/2012**

Reserved on: 17th January, 2013
Date of Decision: 18th February, 2013

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RAJIV @ DIWANJI Appellant
Through Mr. Mukesh Kalia with Mr. Vikram Singh
Saini and Mr. Mohit Popli, Advocates.

Versus

STATE NCT OF DELHI ...Respondent
Through Mr. Sanjay Lao, APP.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

SANJIV KHANNA, J.

Rajiv @ Diwanji, in this appeal, challenges his conviction under Section 302 and 364 of the Indian Penal Code, 1860 (IPC, for short). The impugned judgment dated 25th August, 2012, holds that the appellant had committed murder of Dalip Kumar Sajwani on 13th December, 2003, after abducting him. By order of sentence dated 27th August, 2012, for the offence under Section 302 IPC, the appellant has been sentenced to imprisonment for life and a fine of Rs.1000/-, in default of which he has to undergo simple imprisonment for 15 days. For the offence under Section 364 IPC, the appellant has been sentenced to rigorous imprisonment for a period of seven years and a fine of Rs.1000/- in default of which, he has to undergo SI for 15 days.

2. At the outset, we record that the appellant does not question the homicidal death of Dalip Kumar Sajwani on 13th December,

2003, but disputes the appellant's involvement and the manner and mode in which the crime was committed.

3. Dr. Anil Aggrawal, Professor of Forensic Medicines, Maulana Azad Medical College (PW-14), who had conducted the post mortem on Dalip Kumar Shajwani, the deceased, on 14th December, 2003 proved that it was a homicidal death. The Post Mortem Report and the opinion report were proved by him as Ex. PW14/A and PW14/B. As per the Post Mortem Report, the deceased had the following injuries:-

“1. Firearm entry wound 0.9X0.9 cms with an abrasion collar around in an area of 1.6X1 cms with the bigger lip upwards – present on left side front of chest, 10 cms below and slightly inner to left nipple, 11.8 cms to the left of mid line and 20.5cms above and to the left of navel. Bruising around the wound present in an area of 4.5X4 cms. There were no signs of blackening or tattooing.

2. Firearm entry wound 0.6X0.6 cms with an abrasion collar around in an area of 1.4X0.7cms with the bigger lip upwards – present on left side of chest along with the mid axillary line, 13.5 cms outer to injury no.1, and 31 cms above to the left of navel. No signs of blackening and tattooing were present.

3. Multiple scratch abrasions without scab 5.3cms over left mid clavicular region(which is middle of the collar bone).

4. Superficial incised wound(cut) 0.2X0.1 cms over right palm along the tip of mid palmar crease.”

Injuries were ante-mortem.

4. On internal examination, he opined:-

“On internal examination, I found that the abdominal cavity contained about 1.5 ltrs of clotted and unclotted blood. Mesentery which is a membrane holding the intestines was torn at places. The stomach was full of semi digested fluid materials. The walls were normal. In the hip bone, the right iliac bone showed a circular fracture 2.5 cm in diameter. I made a labeled diagram of this fracture in the postmortem report. There was a

fracture of left 7th rib at its lower border 1.2X1 cms in size, 11.3 cms to the left of mid line. This fracture was caused via injury no.1. I have made a labeled diagram of this fracture in the postmortem report. 8th intercostals space which is the space between 8th and 9th rib on the left side showed a defect 0.6X0.6 cms, 25 cms to the left of mid line.”

PW-14 further opined that injuries No. 1 and 2 were caused by ammunition fired at close range from a firearm. Injuries No. 3 and 4 were caused by a sharp object or weapon. Cause of death was a result of excessive bleeding and shock consequent to injuries No. 1 and 2. Dr. A. Rehman (PW-15) proved MLC (Ex. PW15/A) of Dalip Kumar Sajwani, which was in the handwriting of Dr. Naveen who had since left the hospital. The MLC (Ex. PW15/A) has been signed by Dr. A. Rehman and records that the patient was brought dead.

5. The prosecution case is based upon testimony of Puran Chand Baghel (PW-3) the claimed eye-witness who had seen the abduction of Dalip Kumar Sajwani and had identified the appellant in court. The prosecution relies upon statements of several police officers who, it is claimed, corroborate the statement of Puran Chand Bhagel (PW-3). Additionally, the prosecution case further rests on the Finger Print Report dated 25th August, 2004 (Ex. PW36/A), prepared by SI Avdesh Kumar (PW-36), the Finger Print Expert.

6. The appellant contends that identification by PW-3 is vitiated for the reason that no Test Identification Parade (TIP, for short) was conducted, the appellant was shown to the said witness and there are major discrepancies in PW-3's statement which have been overlooked. It is alleged that PW-3 is a stock witness of the police. Regarding finger print report, the submission is that the chance prints and the specimen prints were manipulated. It is pointed out that the appellant was arrested on 10th September, 2004 in another

case, and on 25th September, 2004 for the present case whereas the FSL report (Ex. PW 36/A) is dated 25th August, 2004. Thus, the report is nearly one month prior to the date of arrest of the appellant in the present case. Further, the prosecution has not been able to establish that the specimen finger prints were that of the appellant. Another contention raised is regarding delay in recording of the FIR.

7. Puran Chand Waghel (PW-3), in his deposition has firmly stated that, at about 3.00 – 3.30 P.M. on 13th December, 2003, he had come out of his shop to leave for his house when he heard a bullet shot being fired in the market. He went inside the Subzi Mandi, Nehru Bazar, Pahar Ganj and saw two persons were beating another person, who was then pushed into a Maruti Zen Car. The car moved towards Subzi Mandi but was obstructed by a truck loaded with vegetables which had blocked the street. The car then turned the opposite side and persons tried to flee away. PW-3 had opportunity to see one of the two assailants and could identify him. He pointed out to the appellant who was present in the court and identified him as the said assailant. He could not see the faces of other assailants. The public which had gathered threw stones and brick-bats at the car which had a red and blue sticker on the front window/glass, similar to the stickers of the police. The scooter of the person who was abducted was lying on the spot. The police came there and conducted investigation. Later, he was informed that a Maruti Zen car had been located on the Press Road. PW-3 went there and identified the car as the one which he had seen the assailants flee. His statement (Ex. PW3/A) was recorded by the police. The said car was produced in the court and identified by him as Ex. P1. He categorically stated that the appellant had abducted the deceased in the said car.

8. In the cross-examination PW-3 has stated that he was in the business of selling kerosene oil in the free sale market. Several questions were put to him about the nature of his business, but these, according to us, have no bearing on the present case.

9. The question is whether the testimony of PW-3 is credible and whether his identification in the court should be believed. The answer is in affirmative. PW-3 is a natural witness in the case as the crime spot is proximate to his shop at the corner of Laddu Ghati. This is discernible in the site plan (Ex. PW34/B) and proved from statement of Constable Ashok (PW-19), HC Jaswinder Singh (PW-20) and Insp. Ramesh Chander Gaur (PW-34), who had visited the crime spot after DD No. 22A (Ex. PW-D) was recorded at 3.45 P.M. in P.S. Pahar Ganj. The DD entry records that some goons had shown revolver and then fled in a Maruti Zen Car number DL 9CJ 9626. Therefore, three police witnesses in seriatim have affirmed and corroborated the presences of PW-3 at the said spot.

10. Thereafter, at 4.10 P.M., there is DD entry 11/A (marked Ex. PW17/A) recorded at P.S. Kamla Market that C-54 operator had informed regarding one injured person lying in front of Press Road. DD entry (Ex. PW17/A) was marked to ACP Mangal Sen (PW-35). PW-35, along with Const. Charan Singh (PW-21), reached the spot i.e. Press Road, Kamla Market and found one Zen car there, with broken front glass. The injured had already been removed to the hospital. PW-35 had deposed that PW-3 was present at the spot and identified the Maruti Zen Car as the same vehicle in which some persons had abducted the deceased from Subzi Mandi, Pahar Ganj.

11. SI Satyaveer Singh (PW-22) has stated that at 4.10 PM on 13th December, 2003, he had received a call from wireless that one person was lying injured on Press Road and, on reaching, he saw one white colour Maruti Zen with broken glasses parked there. One

injured person, who was lying on the rear seat of the car, was shifted to JPN Hospital, where he was declared as brought dead. On examination of mobile phone and other belongings, the identity of the deceased was established. Similar statement has been made by HC Raj Kumar (PW-12) who stated that the injured person appeared to be dead. The crime team had also reached the spot.

12. We do not feel that there are inherent inconsistencies and contradictions which materially affect PW-3's deposition. This is a cavil objection since we do not find any material discrepancies on the core facts as deposed. The factum that some other person had made a call to the police is inconsequential and cannot be the reason to disbelieve PW-3. The call pursuant to which DD entry No. 19/A Ex. PW4/D dated 13th December, 2003 at 3.46 PM, P.S. Pahar Ganj, was recorded, was made by Raju Kohli, who had appeared as PW-26. He has deposed that he was running a vegetable shop at Ratan Market but could not remember whether he had informed the PCR at 100 about any quarrel. When cross-examined by the Public Prosecutor, he had deposed that he had heard some altercation and a Maruti Zen car was there at about 3.30 P.M., but he had neither seen the Maruti car nor the altercation. PW-26 is illiterate and could not recollect whether his statement was recorded by the police. Merely because the DD entry was made by third person and not by PW-3, it cannot be a ground to disbelieve his testimony.

13. The contention of the appellant that the shop-keepers and passers-by were not cited and did not appear as witnesses has to be rejected. Unfortunately, it is a reality that members of public do not want to depose and appear as witnesses in criminal matters, specially a matter of this nature wherein the deceased was kidnapped and was abducted in the manner as indicated. In spite of protests and attempt of the public to protect/save the victim the assailants had succeeded.

Statement of HC Satish Kumar PW13, in the cross-examination, is to the said effect. Similar anguish that the shop-keepers and passers-by had refused to make statement and appear as witnesses, has been made by Jasvinder Singh (PW20).

14. It is wrong to state that PW-3 has taken inconsistent stand. PW3, in his cross-examination, has stated in clear terms that he had gone to Press Road, near Kamla Market at about 4.30/4.45 PM and had identified the car. He has averred that his statement (Ex. PW3/A) was recorded and thereafter he returned home. It is not possible to accept the contention that the statement of PW-3 was recorded at about 4.30/4.45 PM. No such suggestion was given to the said witness.

15. It was submitted that PW-3, in his cross-examination, has stated that he did not know Insp. Ramesh Gaur (PW-34) before 27th September, 2004, when PW-34 came and took him to the Police Station. The said statement in the cross-examination is being projected out of context. PW-3 has clearly identified his statement i.e. rukka (Ex. PW3/A) which was signed by him. The said statement was recorded by Insp. Ramesh Chander Gaur (PW-34) who has also signed tehrir. It reflects that the said witness did not have any personal equation or relationship with the said witness. The date 27th September, 2004 as reflected was mentioned in the question.

16. Primary contention raised is that PW-3 could not have seen the appellant at the time of occurrence. It was argued that the car had black glasses, as is clearly visible in the photographs, taken by the crime team. We do not find any merit in the said contentions. The PW-3 in his statement (Ex. PW3/A) had elaborately mentioned the entire occurrence and that he saw one man in the rear seat of the fleeing car and had identified him to be about 30-33 years old, heavily built and of shallow complexion with full round face. He

had stated that he could identify the assailant, if he was produced before him. He truthfully averred that he had not seen the remaining two abductors. In the court PW-3 identified the appellant as the person who was sitting in car. He did not identify two other accused who have been acquitted (We are not commenting on their acquittal as we are concerned only with the conviction of the appellant). PW-3, in his examination in chief, has narrated the entire occurrence and how he saw two persons beating another person. He has stated that the person abducted was made to sit in the car and that he saw the said person in the back seat. There could be various reasons why he did not see the two persons on the front seat of the car but had a clear view of the person on the back seat. The contention that PW-3 did not identify the other two persons is not a ground to hold that he could not have seen the third person also. PW-3 is an independent witnesses who is not connected with the deceased and has no animosity or ill will towards the appellant. The deceased was not related to PW-3. As a public spirit citizen, he has come forward and deposed truthfully what he had actually seen and has identified the appellant as one of the three culprits who was involved in the crime. We do not think that the appellant is entitled to acquittal or the statement of PW-3 should be disbelieved because he had stated that the man sitting on the rear seat of the car was about 32-33 years old, whereas the appellant, it appears was younger. Physical appearance can be deceptive and may not reflect the exact age of a person.

17. A perusal of the initial statement made by PW3, Ex.PW3/A itself, indicates and a clear pointer, that the said witness had given a graphic account of the entire incident and had a good look at one of the assailants. The statement is vivid and substantially detailed.

For the sake of convenience, the relevant portion of the said statement is reproduced below:-

“I reside at the above mentioned address along with my family members. Today at about 3.30 O’Clock after having my lunch at my home while I was standing at my shop in front of Mahavir Mandir that in the meantime uproar rose from the Subzi Market and a bullet was fired. When I ran to the Subzi Market and saw I have found that two persons were beating a man and they forcibly made him sit in a car and they too hopped in the car. The driver of that white-coloured Maruti Zen drove his car towards Krishna Market. There was a truck loaded with vegetables parked ahead on the road. While seeing the truck blocking the road, the driver immediately started turning back his car then and there. On seeing the driver fleeing towards Nehru Bazar, I threw a two-wheeler scooter parked there on the road and asked the vendors selling vegetables and fruits on carts to stop the car. While turning back, the driver bumped his car many times in the back and as soon as the driver of the Maruti Zen car came towards Nehru Bazar Road driving very fast, the crowd standing there threw stones and iron weights (Battas) on the car. I too hit the front glass of the car with a stone where there was a blue and red coloured sticker in the left side. But the driver of the Maruti Zen, without bothering about anyone, drove his car towards Panchkuian Road from Nehru Bazar Road. I clearly saw the man sitting on the rear seat of the fleeing car, who was about 32-33 years old, heavy built and was of swarthy complexion and round and full face. I can identify him on confrontation. I could not see clearly the remaining two persons. In the meantime you arrived along with your staff. And on receiving some information on the Wireless, you brought me in front of Government Press near Deen Dayal Upadhyay Marg where I told you that Maruti Zen parked there was the same one in which three people had forcibly made a person sit and had kidnapped him and in order to stop the car I had hit a stone in the left side of the front glass and other people had thrown stones and iron weights. The glasses of the car had got broken.”

18. It is discernible from the photographs of the car (Ex. PW 10/A1 to PW10/A35) that weighing weights were found in the car. Similar statements were also made by Jasvinder Singh (PW20), Ramesh Chander Gaur (PW34) and Retd. ACP Mangal Sen (PW35). They have stated that a brick piece (P-24) and weighing weights (P-

23 Colly.) were found in the car. This was only possible in case one or more windows of the car were open.

19. The contention of the appellant that TIP was not conducted has to be rejected in the present case. The reason is the statement made by PW-3, the manner in which the appellant got arrested and the police investigation leading to his arrest. One Rajiv Dahiya, a co-accused who has been acquitted, was arrested on 16th December, 2003, in FIR No. 390/2003 and country made fire arms and katta was recovered from him. He made a disclosure statement (Ex. 33/A) relating to his involvement in the present case along with Vijay Pal and the appellant herein. The said disclosure statement is not admissible against the appellant. However, the said disclosure statement gave clues to the police and they started investigation regarding possible involvement of the appellant. PW-3 has deposed that on 17th August, 2004, he had read a news item published in the newspaper that the assailant in the present case had been arrested by the police. On 17th August, 2004, he went to the office of Special Cell of Police, Lodhi Road and was informed that the assailant had been sent to the court and, on the said date, photographs of two persons were shown to him. He identified photograph of one of the assailants i.e. appellant herein as a person who was involved and was seen by him. Thereafter on 27th September, 2004, he went to the Police Station, Pahar Ganj, in connection with some work and outside the room of SHO, he identified the present appellant who was standing there. He informed the constable who was present there that the said person was one of the assailants. He came to know the name of the said person was Rajiv Diwan. The exact statement made by PW3 in his examination-in-chief is as under:-

“.....On 17.8.04 I went to Lodhi Road, Special Cell of the Police for enquiring about the assailants and the police had told me that the assailants had been sent to

the Jail and the police had shown me the photographs of two persons and I had identified one the assailants through photograph and the photograph which I had identified is of the same person to whom I had identified today in the Court. On 27.9.04, I went to P.S. Paharganj with some work where one person was standing in the room of the SHO beside his seat and I had identified that person as the same who was one of the assailants. I told this fact to one Ct. of the Police and that person is the same accused present in the Court to whom I had identified in the Court today.”

20. In the cross-examination, no questions to challenge the aforesaid statement of PW-3 regarding identification made by him on the basis of photograph on 17th August, 2004, were put forth. To this extent, deposition of PW-3 went unchallenged. In fact, in the cross-examination PW-3 had deposed that on 17th August, 2004, there was news or flash on the TV that some accused in Pahar Ganj murder case have been arrested by P.S. Lodhi Road and after one or two days, he went to P.S. Lodhi Road, and identified the photograph of the appellant but he did not meet the appellant in the Special Cell. On identification of the appellant in the Police Station, Pahar Ganj on 27th September, 2004, PW3- was cross-examined. PW-3 has averred that on the said date no supplementary statement was recorded but he remained there for about 25-30 minutes and identification was made orally. He has stated that he had visited the said P.S. Pahar Ganj on 27th September, 2004 at 12 – 12.30 PM as construction of a temple was going on and some other persons had made a call at number 100. The appellant was present and was sitting in the room of Addl. S.H.O. Insp. Anil Sharma. He was taken to the room of SHO and he identified the appellant. The appellant was arrested in the present case on 25th September, 2004. However, he was arrested in another case with Vijay Pal on 10th September, 2004. It may be relevant here to reproduce the statement of the appellant, under Section 313 Cr. P.C., on the

question of identification of PW-3 in the court. The appellant in response to Question No. 66, had stated as under:-

“A. I have been falsely implicated in the present case by police officials as they wanted to fulfill the requirements of their own investigation by making a scape goat out of me. That in order to trace out an untraced case and due to the pressure of senior police officials I was implicated in the above noted case as one of the accused but in fact I have nothing to do with the present case. I was illegally detained by the officials of the Special Cell at the Lodhi Colony office and shown to the stock witness so that he can falsely identify me in the court.”

21. The appellant has admitted that he was shown to PW-3. Thus, to that extent, the appellant does not dispute the statement of PW-3. Surprisingly, the appellant had moved an application dated 8th October, 2004, stating that TIP should be conducted by parading the appellant in front of the witnesses. This application was opposed by the prosecution on the ground that the complainant had identified the appellant from the dossier of the photographs prior to his arrest in this case. It appears that no final order was passed in the application.

22. Learned counsel for the appellant has relied upon *State (Delhi Administration) Vs. V.C. Shukla*, (1980) 2 SCC 665 in support of the contention that failure to hold TIP was a serious lacunae and, therefore, the evidence of eye witness identifying an unknown accused should be treated as valueless. It is not possible to accept the said broad proposition. The decision in V.C. Shukla's case was examined and elucidated in *Ramanbhai Naranbhai Vs. State of Gujarat*, (2000) 1 SCC 358, wherein it has been held as under:-

“20. It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in

turn, relied upon an earlier decision of this Court in the case of *State (Delhi Admn.) v. V.C. Shukla* [(1980) 2 SCC 665 : 1980 SCC (Cri) 849] wherein also Fazal Ali, J., speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eyewitnesses. It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned counsel for the appellants that the later decisions of this Court in the case of *Rajesh Govind Jagesha v. State of Maharashtra* [(1999) 8 SCC 428 : 1999 SCC (Cri) 1452] and *State of H.P. v. Lekh Raj* [(2000) 1 SCC 247 : 2000 SCC (Cri) 147] had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned counsel for the appellants that the evidence of these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them.”

23. In nutshell, it has been held that much evidentiary value cannot be attached to identification of an accused in the Court where the identifying witness is a totally stranger, who had just a fleeting glimpses of the person identified and who had no particular reason to remember the person concerned. However, where identification

in the Court is corroborated by the other circumstantial evidence, it should be accepted as in the case of *Harbhajan Singh Vs. State of J & K*, (1975) 4 SCC 480 where the accused was found to be absent at the time of roll-call and when arrested, his rifle and rifle of other person smelt of fresh gunpowder. The empty cartridge had distinct marking showing that the bullet was fired from the rifle belonging to the accused.

24. In State of *U.P. Vs. Boota Singh*, (1979) 1 SCC 31, the Supreme Court observed that identification in the Court becomes strong if the witness had an opportunity of seeing the accused not for a few minutes but for some length of time in broad daylight. In such cases, he would have noted the features of the accused more carefully, in comparison to cases where the witness had opportunity to see the accused in a dark night for few minutes.

25. In *Malkhan Singh and Others v. State of M.P.* (2003) 3 SCC 746, three Judges of the Supreme Court have observed:-

“ 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 Admn.* [AIR 1958 SC 350 : 1958 Cri LJ 698] , *Vaikuntam Chandrappa v. State of A.P.* [AIR 1960 SC 1340 : 1960 Cri LJ 1681] , *Budhsen v. State of U.P.* [(1970) 2 SCC 128 : 1970 SCC (Cri) 343 : AIR 1970 SC 1321] and *Rameshwar Singh v. State of J&K*[(1971) 2 SCC 715 : 1971 SCC (Cri) 638] .)”

26. Recently again in ***Ravi Kapur v. State of Rajasthan*** (2012) 9 SCC 284 reliance was placed on ***Shyamal Ghosh v. State of W.B.*** (2012) 7 SCC 646 and it has been held:

36. We may refer to a judgment of this Court in *Shyamal Ghosh v. State of W.B.*[(2012) 7 SCC 646 : (2012) 3 SCC (Cri) 685] wherein this Court has held that the Code of Criminal Procedure, 1973 (for short “CrPC”) does not oblige the investigating agency to necessarily hold the test identification parade without exception. The Court held as under: (SCC pp. 675-76, paras 78-81)

“78. On behalf of accused Shyamal, it was also contended that despite the identification parade being held, he was not identified by the witnesses and also that the identification parade had been held after undue delay and even when details about the incident had already been telecasted on the television. Thus, the court should not rely upon the identification of the accused persons as the persons involved in the commission of the crime and they should be given the benefit of doubt.

79. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

80. It is equally correct that CrPC does not oblige the investigating agency to necessarily hold the test identification parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the test identification parade 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 the 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 is, however subjected to exceptions. Reference can be made to *Munshi Singh Gautam v. State of M.P.* [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269] and *Sheo Shankar Singh v. State of Jharkhand* [(2011) 3 SCC 654 : (2011) 2 SCC (Cri) 25] .

81. Identification parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named as the accused in the case are actually the culprits. The identification parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case.”

27. In the present case, PW-3 right from the beginning i.e. rukka (Ex. PW3/A) was clear and categorical that he had a good and clear look at one of the assailants and not other two. His deposition in the Court is to the same effect. He only identified the appellant and not others. The offence in question had taken place in broad day light in a crowded market. PW-3 was present at the place in question and

had seen the occurrence in front of his eyes. As a law abiding and socially conscious citizen, he participated in the investigation and even went to Kamla Market. He had no affinity with the deceased and entertained no animosity towards the appellant. He was not interested and did not gain by wrong or false identification. He truthfully deposed how he was shown the photographs and indentified the appellant in one of the photographs and then on a subsequent date when he visited the police station, he identified the appellant, who was present there. The appellant himself in his statement under Section 313 accepted the position that he was shown to the “stock witness” which can only refer to PW-3. Moreover, as noticed below, we find that PW-3’s statement gets corroborated from the FSL report (Ex. PW36/D), which has been referred to in the subsequent paragraphs.

28. The appellant, in his 313 Cr.P.C. statement, has deposed is that PW-3 is a stock witness of the police. The contention that the PW-3 is a stock witness is based upon the information furnished under the Right to Information Act, 2005 but is misconceived and without any basis. PW-3 is mentioned as a witness in the FIR No. 318/2008 Ex. DW3/A, P.S. Pahar Ganj, registered under Section 20 of N.D.P.S. Act. This FIR was recorded almost 5 years after the present case and the information, received under RTI Act, by itself does not indicate that the PW3 was a stock witness. Reliance placed on the list of Special Police Officers (Ex. DW-1/A) which mentions the name of Puran Chand, 3807 Shah Ganj Chowk, date of birth as 5th June, 1947, is not relevant. Parentage, address, age of PW-3 is different. It would have been impossible for the police to have prompted or propelled PW-3 to make the statement (Ex. PW3/A) i.e. rukka within three hours of the occurrence, including tutoring him to tell facts. The facts elucidated and stated in Ex. PW3/A reflect

statement of a person who had seen the incident occur in front of him. The elaborate virtual description of the occurrence was otherwise impossible.

29. The statement of PW-3, identifying the appellant and his involvement in the crime is corroborated by the FSL report on the finger prints marked Ex. PW36/D. Chance finger prints from the car were lifted by the crime team. Avdesh Kumar, Finger Print Expert, appeared as PW36 and had deposed that he had developed chance prints Q1, Q5 and Q6 and found that chance print Q1 was identical to the thumb mark S4 of the appellant Rajiv Kumar @ Diwanji. However, chance prints Q5 and Q6 were not identical with the finger/thumb print of the appellant. His report dated 25th August, 2004, is marked Ex. PW36/A. This report refers to letter dated 19th August, 2004 from SHO, Pahar Ganj, received vide Finger Print Bureau diary No. 419/CW/FPB. The said letter is on record but has not been given exhibit number and states that the specimen finger print and the palm bring impressions had been procured from the Special Cell, Delhi. However, there is another finger print report dated 25th October, 2004, Ex. PW36/D. The said report is also by Avdesh Kumar (PW36) and was signed by him on 25th October, 2004. It was counter-signed by Director, Finger Print Bureau on 27th October, 2004. This report is detailed and the identical rich characteristic of chance print Q1 and the specimen right thumb of the appellant marked S4, have been elucidated and specifically stated under point Nos. 1 to 8. The photograph of the specimen thumb impression S-4 marked as Ex. PW36/C is dated 25th October, 2004/27th October, 2004. The photograph of the chance print Q1 is marked Ex. PW36/B. Thus, it is apparent that there were two finger print reports and the finger print report Ex. PW36/D was signed by PW36 on 25th October, 2004 i.e. after the arrest of the appellant on

25th September, 2004, whereas finger print report Ex. PW36/A is dated 25th August, 2004 i.e. before the appellant was arrested in the present case. In this context, now it is important to refer to the cross-examination of PW36. It was suggested to the said witness that the specimen prints and questioned prints were mismatched to create evidence. Appropriate to note that in the Section 313 Cr.P.C. statement, the appellant had stated as under:-

“A. It is incorrect since the procedure by which the chance prints and finger prints were matched was not in accordance with the process as defined under the relevant law and further the chance prints and specimen finger prints are manipulated at the behest of the IO just to falsely implicate me.”

30. Decision of the Division Bench of this Court in *Mehmood Ali vs. State* 2010 Cri.L.J. 3985, relied upon in the impugned judgment to discard finger print expert report, Ex. PW36/D, has been overruled by the Full Bench decision in *Bhupinder Singh v. State* Cri.Appeal No. 1005/2008 decided on 30th Sep, 2011. The Full Bench has relied upon the provisions of Identification of Prisoners Act, 1920 to come to said conclusion.

31. Chance finger prints from the car were lifted by the crime team. HC Jasvinder Singh (PW-20) had deposed that from the Maruti Car, 37 articles including cartridges were recovered. This included one file of Tata Finance. However, in the cross-examination, he stated that he was not in a position to tell from which portion of the car the 11 chance prints were lifted. The lifting of chance prints was proved by HC Ravinder (PW-31), who was a member of the crime team which had inspected the car. He has stated that he had lifted 11 chance prints from the car and these were taken from the outer body vide report Ex. PW11/A. SI Ashok Kumar (PW-11), who was also a member of the crime team which had taken chance prints, has deposed on the similar lines and

testified that, after lifting chance print, he had returned to the Police Station. Ct. Vinod Kumar (PW10) has also deposed in affirmative about lifting of 11 chance prints from the car.

32. The specimen finger prints of Vijay Pal and the chance prints were examined by SI Chet Ram (PW-18), Finger Print Bureau, Malviya Nagar, New Delhi. On 15th December, 2003, the chance finger prints and specimen finger prints of Vijay Pal and Rajiv Dahiya (who have been acquitted) were sent for examination. The chance prints were developed and photographs (Ex. PW18/D) were taken. The report of PW-18 (Ex. PW18/A) is not relevant for the present appeal. What is, however, relevant is that 35 negative of chance prints, marked as Ex. PW18/D were retained. In these circumstances, we do not think that there is any merit in the contention that chance prints were tempered with and, as a result of the said tampering, one chance print Q1 matched with the thumb impression of the appellant. The chance prints were developed and photographs were taken much before the arrest of the appellant in September, 2004. Thus, it is implausible that there was tampering with the chance finger prints i.e. finger print Q1 Ex. PW36/B.

33. Similarly the contention of the appellant that the specimen finger prints of the appellant were never taken, though ostensibly an attractive argument has to fail as the appellant did not question or deny the fact that his specimen finger prints were taken but had claimed and stated that these were manipulated. The distinction between the two is apparent and important. As noticed above, there is no question of tampering of the questioned finger print. With regard to the specimen finger prints, the contention of tampering is implausible when we see the photograph Ex. PW36/C. The photograph is clear and does not show any sign of manipulation or tempering.

34. SI Sanjay Gupta (PW30) has deposed that he was posted in Anti Kidnapping Section Crime Branch, Delhi. One Jabbar Singh @ Chintu was arrested on 13th January, 2004 in FIR No. 15/04, Police Station, Mandir Marg, Delhi. The Investigating Officer of the present FIR interrogated Jabbar Singh who disclosed that the files/documents recovered from Zen car belonged to him and he had handed over the said documents to the appellant and Vijay Pal. Jabbar Singh identified the said documents shown to him by the Investigating Officer Mangal Singh (should be Mangal Sen). He had also deposed that he had sent a request to the Finger Print Expert for matching of finger prints of Jabbar Singh, Vijay Pal and the appellant Rajiv Diwanji, from the chance prints lifted in the present case. ACP Mangal Sen (Retd.) (PW35) in his cross-examination had stated that he had questioned Jabbar Singh @ Chintu at the Special Investigation Unit, Patel Nagar, pursuant to receiving DD27A, but did not record his statement. He did not obtain crime dossier from SI Sanjay Gupta, P.S. Mandir Marg. On a suggestion given by the counsel for the accused Rajiv Dhaiya and Vijay Pal, he accepted as correct that "SI Sanjay Gupta had sent the crime dossier to FSL for comparison in case No. 15/04 PS Mandir Marg U/s 25/54/59 Arms Act." This statement was made in the cross-examination on 26th March, 2011. Counsel for the appellant had cross-examined PW35 on 26th March, 2011, but did not ask any clarification with regard to the aforesaid statement. Insp. Ramesh Chander Gaur (PW34) was also cross-examined on the question of a specimen finger print of the appellant. He averred that he was not aware whether Investigating Officer had obtained permission from the court for obtaining specimen finger prints. In reply to the next question PW34 stated that he had no knowledge whether the permission of the court was attached by the Special Cell along with

specimen signature of the accused Rajiv Diwanjee i.e. the appellant. The said statement was made in the cross-examination by the counsel for the appellant, of the said witness on 17th August, 2010. Thus, it is clear that the specimen signatures of the appellant were taken from the dossier maintained by the Special Cell. Specimen signatures of the appellant along with the chance prints were sent for examination by the finger print expert as the police suspected involvement of the appellant.

35. The statements made by Jabbar Singh or by the co-accused Rajiv Dahiya who was arrested earlier, are not admissible in evidence but the prosecution is entitled to rely upon the statement made by the police officers under Section 8 of the Evidence Act, as to /on the leads given to them when they interrogated the said two persons. Leads proved correct as one chance finger prints on the car matched with the specimen finger print of the appellant.

36. Lastly, we do not find any unjustified delay in recording the FIR. The FIR was recorded on the statement made by PW-3 (Ex. PW3/A) at 7.00 PM vide DD entry No. 22/A marked Ex. PW4/A. The Rukka along with the diary was dispatched from the spot of occurrence i.e. Subzi Mandi, Pahar Ganj at about 6.30 PM on 13.12.2003. As noticed above, first information about the crime was received at 3.46 P.M. The police officers thereupon reached the spot and at about 4.10 P.M., they had received information that an injured person was lying at Press Road, near Kamla Market. Thereafter police officers, including Inspector R.C Gaur (PW-34), left for the said place. PW-34 has deposed that he went to the LNJP hospital, made enquiries and learnt that the deceased had expired. PW-34 then came back to the spot, after collecting the MLC, clothes etc. of the deceased, from the LNJP Hospital. The statement of PW-3 (Ex. PW3/A) was recorded at Press Road where he had reached and

identified the car. It is but natural that all this would have taken time.

37. In light of the above, present appeal is dismissed. Conviction and sentence are upheld and maintained.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(SIDDHARTH MRIDUL)
JUDGE

FEBRUARY 18th, 2013
kkb