

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: May 1, 2014

Decision on: May 7, 2014

CRL.A. No. 75 of 2014 & Crl.M.(B) No. 152 of 2014

CHANDAN @ BABAR Appellant
Through: Mr. Vijay Kinger, Advocate.

versus

STATE GOVT. OF NCT OF DELHI Respondent
Through: Ms. Isha Khanna, APP.

WITH

CRL.A. No. 139 of 2014 & Crl.M.(B) No. 266 of 2014

MUKESH Appellant
Through: Mr. Vijay Kinger, Advocate.

versus

THE STATE Respondent
Through: Ms. Aashaa Tiwari, APP

AND

CRL.A. No. 76 of 2014 & Crl.M.(B) No. 153 of 2014

AFZAL Appellant
Through: Mr. Vijay Kinger, Advocate.

versus

STATE Respondent
Through: Ms. Isha Khanna, APP.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

07.05.2014

1. These appeals are directed against the judgment dated 22nd November 2013 passed by the learned Additional Sessions Judge ('ASJ') in SC No. 123 of 2013 convicting the three Appellants and co-accused Karan and Akash (who have not filed appeals) for the offences under Sections 365 and 395 IPC. Akash and Chandan were additionally held guilty of the offence under Section 397 IPC while Afzal was acquitted of that offence. Chandan was convicted under Section 25/54/59 of the Arms Act. The three Appellants and Akash and Chandan were convicted for the offence under Section 391 IPC. One co-accused Nasir was acquitted.

2. The appeals are also directed against the order on sentence dated 9th December 2013 whereby Chandan was convicted to 7 years rigorous imprisonment ('RI') with a fine of Rs.2,000 and in default to undergo simple imprisonment ('SI') for 15 days for each of the offences under Sections 365, 395 and 397 IPC. He was sentenced to RI for 3 years with a fine of Rs.2,000 and in default to undergo SI for 15 days for the offence under Sections 25/54/59 of the Arms Act. Appellant Karan was sentenced to 5 years RI with a fine of Rs.2,000 and in default to undergo SI for 15 days for the offence under Section 365 IPC and 7 years RI with a fine of Rs.2,000 and in default to undergo SI for 15 days for the offence under Section 395 IPC. Appellant Akash was sentenced to 7 years RI with a fine of Rs.2,000 and in default to undergo SI for 15 days for each of the offences under Sections 365, 395 and 397 IPC. Afzal was sentenced to RI for 5 years with a fine of Rs.2,000 and in default to undergo SI for 15 days for the offences

under Section 365 IPC and 7 years RI with a fine of Rs.2,000 and in default to undergo SI for 15 days under Section 395 IPC. Identical sentence was awarded to Appellant Mukesh as well. While it was directed that the sentences would run concurrently, it was further clarified that if the convicts were already undergoing sentence in some other case, the sentence imposed in the present case would run consecutively i.e. after the completion of sentence which they were already undergoing in other case.

3. The case of the prosecution is that Prashant Pandey (PW-2) came to police station ('PS') Adarsh Nagar on 14th March 2010 alleging that he had been robbed of his laptop and two mobile phones (one Motorola and one Nokia) by certain assailants on the intervening night of 27th/28th February 2010. In his complaint, PW-2 stated that he had reached Karnal Bypass between 12.30 and 12.45 am. At the pre-paid booth slip, he hired a three-wheeler scooter rickshaw ('TSR') No. 8224 being driven by Bhagirath Lal (PW-7) in order to go West Patel Nagar. PW-2 stated that when the TSR reached Adarsh Nagar flyover at about 1.15 am, a Maruti Alto car came from behind, stopped in front of the TSR and 3 or 4 boys got down from it. One of them pointed a *Katta*/pistol at PW-2. The boys then pulled PW-2 from the TSR and also beat up the TSR driver. PW-2 was made to sit in the car. His laptop (HCL) and purse were snatched. His mobile phones as well as an HDFC ATM card were taken. According to PW-2, he was forced to disclose the ATM password under threat.

4. In his deposition, PW-2 stated that the accused Chandan pointed the *Katta* towards him whereas accused Akash had shown him the knife. He stated that Afzal also alighted from the car. Karan was identified as a person who was sitting in the car. No role was attributed to Mukesh. PW-2 stated that they took him to Pahar Ganj and Darya Ganj where they tried unsuccessfully to withdraw monies from the ATMs there. However, from the ATMs at Punjab National Bank, Mauzpur and State Bank of India, Durga Puri they withdrew Rs.10,000 each using his ATM card. They then took him to Usman Pur, Seema Puri and pushed him outside the car at the red light signal. PW-2 stated that he then reached the PS Usman Pur and there he was told that the case was to be registered at PS Adarsh Nagar. He stated that he was dropped outside PS Adarsh Nagar but “as I was in a hurry and have to reach home due to Holi festival, I did not enter PS Adarsh Nagar and went to my home”.

5. When, during his deposition, PW-2 did not identify Mukesh, the learned Additional Public Prosecutor (‘APP’) pointed accused Mukesh to PW-2 and asked him if he was one of the accused, to which PW-2 answered in the affirmative.

6. On 15th March 2010, Inspector Brij Pal Singh (PW-11) who was posted at PS Adarsh Nagar along with ASI Kuldeep (PW-13), SI Pawan Dahiya, HC Pritam Chand (PW-8), Constable Rahul, Constable Zakir Hussain and Constable Mukund started from PS

Adarsh Nagar to PS Nand Nagari since ASI Kuldeep had to meet a secret informer who could reveal some clues regarding the present case. Near the T-point at Gagan Cinema near Nand Nagari, PW-13 met the secret informer who told him that accused Akash and Karan would come there between 11.00 am and 12 noon for taking a TSR and would go towards Trilok Puri for disposing of the case property. PW-13 is stated to have requested three or four persons to join the investigation but none of the said persons joined and they left the spot without disclosing their identity. PW-13 then deployed police staff in the radius of 20 to 25 meters opposite Gagan Cinema. At 11.30 am, three persons came from the side of Sunder Nagari. The informer is stated to have pointed out Karan and Akash. Along with them was Chandan. The three accused were then arrested. From the search of Chandan, a country made pistol/*katta* was recovered. The said *katta* and live cartridge were packed into a cloth parcel, sealed with the seal of KSM and seized under seizure memo (Ex.PW-8/B). From the jute bag being carried by Karan, one black laptop (HCL P-38 make) was recovered. It was seized under seizure memo (Ex.PW-8/C). From the orange colour polythene being carried by Akash, one gold *kada*, two gold chains, three gold rings and one Nokia mobile phone without sim was recovered. These were seized under seizure memo (Ex.PW-8/D).

7. Pursuant to the disclosure statements made by the above three accused, the police party reached Harsh Vihar in search of accused Nasir. During his interrogation, he is stated to have admitted his involvement. He is stated to have confessed that a motorcycle used in

one of the robberies had been parked in the DLF parking lot. Upon his pointing out, one Bajaj Discoverer motorcycle was recovered from the parking lot.

8. On 17th March 2010, the police team along with Karan, Akash, Nasir and Chandan reached House No. 115, Gali No.3, Jwala Puri where, at the instance of Karan, one Compaq laptop was recovered. Thereafter, at the instance of Nasir, they reached Gagan Vihar and one car key was recovered. Thereafter, at the instance of Nasir, the police party reached Sunder Nagari where a Maruti Alto car was recovered and seized.

9. On 18th March 2010, the police party along with Akash reached Sunder Nagari to arrest another accused Afzal who is stated to have been residing there. Akash is also stated to have pointed out to the PNB ATM where the ATM card of PW-2 was used for withdrawing Rs.10,000. Akash also pointed out to the Durga Puri ATM of SBI from where another Rs.10,000 had been withdrawn.

10. On 22nd March 2010, the test identification parade ('TIP') proceedings of Akash, Karan, Chandan and Nasir (Ex. PWs-13/D, 13/E, 13/F and 13/G respectively) were conducted. PW-2 is stated to have correctly identified Akash and Karan but not Chandan and Nasir.

11. On 7th April 2010, the TIP of Chandan, Akash and Karan by PW-7 was fixed. The three were stated to have been correctly identified by PW-7. The proceedings were Ex.PWs-13/H, 13/I and 13/J respectively.

12. It appears that Mukesh and Afzal were already in custody in relation to some other case. They were interrogated on 12th July 2010 with the permission of the Court. They too are stated to have made disclosure statements. The TIP of both Mukesh and Afzal were conducted and in the proceedings (Ex. PW-13/R and 13/S) PW-2 is stated to have correctly identified them.

13. On 1st October 2010, charges were framed against the accused. They pleaded not guilty and claimed trial. The prosecution examined 13 witnesses. In their statements under Section 313 Cr PC, the accused maintained that each of them had been falsely implicated. Chandan stated that he had been lifted by the police from his house and nothing was recovered from his possession. The *katta* had been planted on him. He stated that his photographs were taken by the police and shown to PW-2. He was also shown to PW-2 in the PS. Accused Karan also stated that nothing was recovered from his possession; that he was arrested from his house; that his signatures and thumb impressions were taken on blank and printed proformas and that his photographs was taken in the PS and was shown already to the witnesses. Akash too stated that the recovery had been planted

upon him; and that his photograph was taken in the PS and shown to the witnesses in the PS. Afzal, likewise, stated that he was arrested from his house; his signatures and thumb impressions were taken on blank and printed proformas, his photograph was taken in the PS and shown to the witnesses. Nasir and Mukesh pleaded likewise.

14. One of the first issues considered by the trial Court was regarding the delay in the registration of the FIR. The trial Court accepted the plea of the prosecution that the delay was properly explained. It was noted that PW-2 was a resident of Varanasi; that he had been subjected to harassment by the police officials of PS Usman Pur who refused to register a case “and rather pushed him to PS Adarsh Nagar”. The trial Court observed as under:

“I can imagine the state in which this young person an outsider who had been subjected to a shocking incident of armed robbery would have been. Having faced the incident, his first priority would have been to reach at a safe place with his near and dear ones i.e. his house at Varanasi as early as possible and it is only thereafter on 14th March 2010 that he returned back to Delhi that he made a complaint to the police in respect of robbery which explanation is probable and convincing.”

15. As rightly pointed out by Mr. Vijay Kinger, learned counsel for the Appellants, the above observations of the trial Court are not supported by the record. PW-2 is a 27 year old man with an MBA degree. He claimed to have been working with Bajaj Auto Finance at

the time when he was robbed. He had joined that job in June 2008. However, he could not produce the identity card of that job as he had left it in April 2010. While at the time of his deposition he gave his address as Varanasi in U.P., in his cross-examination he stated that “on 27th February 2010 I was residing in Karnal, Haryana”. The question of his going to Varanasi, therefore, could not arise. Nowhere in his examination-in-chief does he state that he was harassed at PS Usman Pur. He in fact states “they told him that a case is to be registered in PS Adarsh Nagar and they took me to PS Adarsh Nagar”. It is, therefore, not understood as to how the trial Court came to the conclusion that the officials of PS Usman Pur “pushed him to PS Adarsh Nagar”. The impression that the trial Court has about PW-2’s alleged harassment at the hands of the officials of PS Usman Pur appears to be a surmise at best and not based on the record. Why would PW-2, after being dropped outside PS Adarsh Nagar, suddenly decide that “he was in a hurry” and had “to reach home due to Holi festival”? There was nothing preventing him from reporting to PS Adarsh Nagar about the alleged robbery at that very time. The above explanation for the delay in lodging the FIR is not convincing. This conduct of PW-2 also raises doubts on the credibility of his evidence.

16. The trial Court also appears to have overlooked the weakness of the prosecution evidence as regards fixing the identity of the accused. The TIPs were held on two occasions - one for identification of four of the accused (Akash, Karan, Chandan and Nasir) by PW-2 and the

other for the identification by PW-7 of three of them (Chandan, Akash and Karan). PW-7, the TSR driver, stated in his cross-examination that he was shown photographs of the three accused persons (Chandan, Akash and Karan) by the IO before the TIP proceedings. This has been noticed in para 20 of the impugned judgment and yet the trial Court appears to have totally overlooked this fact when discussing his evidence in para 85 of the judgment. The TIP conducted for establishing the identity of the accused by PW-7 did not support the case of the prosecution at all. Further, the trial Court also overlooked that PW-2 identified only Akash and Karan and not Chandan and Nasir in the TIP proceedings. No doubt, the TIP proceedings are only to lend assurance to the Court about the identity of the accused and are in the nature of corroborative evidence. However, in this case, considering the fact that the accused were total strangers to both PWs-2 and 7, and each of the accused has taken a specific plea in their respective statements under Section 313 Cr PC that they were already shown to the witnesses prior to their identification, the fact that PW-7 was admittedly shown the photographs of the three accused before the TIP proceedings and the fact that PW-2 identified only two of them raises serious doubts on whether the prosecution was able to fix their identity correctly. It was unsafe for the trial Court to have proceeded only on the basis of their identification in Court by PW-2.

17. As regards the evidence of PW-2, it is seen that he did not identify

accused Mukesh in the first instance during his examination-in-chief. The trial Court permitted the APP to point out accused Mukesh to PW-2 in the Court and thereafter ask him to identify Mukesh. The trial Court noticed in para 9 of the impugned judgment that this was a leading question put by the APP and yet failed to hold that this was contrary to Section 142 of the Evidence Act, 1872. Sections 141 and 142 thereof read as under:

“141. **Leading questions.**-Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

142. **When they must not be asked.**-Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.”

18. The question put by the APP in the trial Court to PW-2 about the identity of accused Mukesh was indeed a leading question. It appears that no permission was sought of the trial Court for asking such a leading question. Further, even if such permission was sought, the trial Court could not have granted it since it was not about a matter which was either “introductory or undisputed or which have, in its opinion been already sufficiently proved”. At that stage of the proceedings, the identity of Mukesh was far from being proved. Also, no opinion was expressed by the trial Court on this aspect. Therefore, in the considered view of the Court, the entire proceedings concerning

identification of Mukesh by PW-2 in the Court was in violation of the mandates of Section 142 of the Evidence Act 1872 and thereby stood vitiated.

19. What the trial Court also failed to notice was that the TIP proceedings were not proved by examining the Judicial Magistrate who conducted them. The TIP proceedings were proved by the IO. In the circumstances, the Court is persuaded to conclude that the defence of the accused that their identity was already disclosed to PW-2 even prior to the TIP proceedings stood probablised.

20. The trial Court also failed to notice that no specific role was attributed to Mukesh or Afzal by PW-2 other than stating that they were also present. No recoveries were made from either of them. Nasir too was named by PW-2 and yet ultimately it was found that there was no convincing evidence to prove his involvement. All these factors throw considerable doubts on the credibility of the evidence of PW-2.

21. Yet another factor that has been completely missed by the trial Court is that, if indeed, the ATM card of PW-2 was used on two occasions to withdraw Rs.10,000 each then the ATM card ought to have been seized. Further, even if the cash stolen was not recovered, the relevant details concerning such withdrawals ought to have been collected from his bank to confirm the withdrawals of the aforementioned sums from the ATMs at the time and date as stated by

PW-2. There is no valid explanation in the evidence of the IO for his failure to undertake this exercise. Therefore, the entire part of the prosecution case concerning the withdrawal of cash from the ATMs remained unproved.

22. It appears that the accused were also suspects in other cases and recoveries were generally made in certain other FIRs which were shown as recoveries in the present FIR. The evidence on record points to recovery of two laptops when, in fact, only one laptop was stated to have been stolen from the possession of PW-2. The Court is also not satisfied about fixing the identity of the two laptops. A perusal of invoice (Ex.PW-2/C) of the laptop produced by PW-2 shows that it was in the name of his friend Amarpreet Singh who was not examined by the prosecution. The story of PW-2 carrying his friend's laptop has, therefore, not been adequately proved. In the absence of this evidence, it cannot be said that the prosecution has connected PW-2 with the laptop that was stolen. A second aspect is that, according to PW-2, he was carrying two mobile phones i.e. one Motorola phone and one Nokia phone. What was deposited in the *malkhana* appears to be only the Nokia mobile phone. Again the connection of PW-2 with this mobile phone has not been sufficiently proved.

23. A closer scrutiny of the evidence of PW-2 reveals that according to him there was no money in his purse when it was snatched by the accused. He is stated to have hired the TSR at the pre-paid booth on the Karnal Bypass. It is strange that he could have done so without

having any money in his purse. The police could have easily checked the records of the pre-paid booth to ascertain if indeed he had hired the TSR from there. However, that was not done. It is significant, however, that no mobile phones or cash were recovered from any of the accused. The mobile as well as the Alto car were not recovered in the present case but in another FIR.

24. The investigation in the present case leaves much to be desired. The evidence of Naubat Singh (PW-6) showed that he could not identify Nasir as the person who had parked the motorcycle. The evidence of HC Pritam (PW-8) talks of a 'secret informer' having met them who then led them to arrest Akash, Karan and Chandan, just one day after the complaint was lodged by PW-2. The pistol that was taken into possession from the search of accused Chandan was not test fired by the IO. The manner of the arrests of the accused and the recoveries from them of a *katta* and laptops accused without associating any public witnesses does not inspire confidence. It is routinely deposed by IOs, as has been done in the instant case, that when they asked passers-by none came forward. However, when the investigation is otherwise deficient, and the arrests are stated to have been made at around noon in a busy area bustling with activity, this becomes an additional factor to doubt the veracity of the prosecution case.

25. It is unfortunate that in cases such as the present one, the prosecution makes no effort to undertake any scientific investigation.

For instance in the present case, the IO has not bothered to obtain finger prints from the car supposedly used in the commission of the crime. He sought to explain his failure to obtain the CCTV footage of the ATMs from where the monies were supposedly withdrawn on the ground that they were not very clear. Strangely, the trial Court observed in para 92 of the impugned judgment that the burden of proving that there were CCTV footages installed in the ATMs was on the defence. It also gives the benefit of doubt in this regard not to the accused but to the prosecution by taking 'judicial notice' of the fact that the delay in giving information to the police by PW-2 may have made it difficult for the CCTV footage to be retrieved. This is again a surmise by the trial Court.

26. In para 91 of the impugned judgment, the trial Court notes that "no doubt the Investigating Officer conducted the investigation in the most casual manner and not as per the expected standards" and yet proceeds to hold that "the evidence of the prosecution witnesses is natural and trustworthy and corroborated by medical evidence and the witnesses of the prosecution have been able to build up a continuous link". The impugned judgment in para 91 reflects the anxiety of the trial Court that "perpetrators of a ghastly crime cannot be allowed to go scot free" but in the bargain the basic requirement of the prosecution having to prove its case beyond reasonable doubt has been given short shrift.

27. This Court is unable to concur with the above approach of the trial Court in too easily overlooking the defects in the case of the prosecution. As already noticed, no specific role as regards the incident had been attributed to either Mukesh or Afzal. There are several lacunae in the prosecution case including the failure to convincingly fix the identity of the accused or to undertake scientific investigation. The unconvincing explanation offered by PW-2 for the delay in lodging the FIR makes it unsafe for the Court to rely on his sole testimony to hold the accused to be guilty of the offences with which they are charged.

28. Consequently, this Court grants the benefit of doubt to the Appellants and acquits them of the offences with which they are charged.

29. Although co-accused Karan and Akash have not preferred appeals, the Court is of the view that the benefit of this decision must be extended to them as well. This finds support from several decisions of the Supreme Court including *Dandu Lakshmi Reddy v. State of Andhra Pradesh JT 1999 (6) SC 166*, *Jai Pal v. State of Union Territory of Chandigarh AIR 1998 SC 2787*, *Rajaram v. State of M.P. 1994 Supp (2) SCC 153*, *Jashubha Bharatsingh Gohil v. The State of Gujarat JT 1994 (3) SC 250* and the decision of this Court in *Bahubali Gulab Chand v. Delhi Administration, Delhi 1983 CRIMES 264*.

30. Accordingly, co-accused Karan and Akash are also acquitted of the offences with which they were charged in the case arising out of FIR No. 62 of 2010.

31. The impugned judgment dated 22nd November 2013 and the order on sentence dated 9th December 2013 passed by the ASJ are accordingly set aside. The appeals are allowed. The pending applications are disposed of. The bail bonds furnished by the accused in FIR No. 62 of 2010 (i.e. the Appellants herein and co-accused Karan and Akash) stand discharged and, if not required in any other case, they shall be released forthwith. A copy of this judgment be delivered forthwith to the Appellants and to the co-accused Karan and Akash through the Superintendent, Tihar Jail, New Delhi.

MAY 7, 2014
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S. MURALIDHAR, J