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

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Judgment reserved on : 30.9.2014
Judgment delivered on : 10.10.2014

+ CRL.A.391/2006

ARJUN

..... Appellant

Through Mr. Nitin K. Gupta, Adv.

versus

STATE

..... Respondent

Through Mr. Navin K. Jha, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 24.4.2006 and 26.4.2006 respectively wherein the appellant stood convicted under Section 308 of the Indian Penal Code, 1860 (IPC). He had been sentenced to undergo RI for 3 years and to pay a fine of Rs.1000/-, in default, to undergo RI for a period of 1 month.

2 Nominal roll of the appellant reflects that as an undertrial he had

undergone incarceration of 1 month; after his conviction and before he had been granted suspension of sentence he had suffered incarceration of about 3 months meaning thereby that he has suffered incarceration for a total period of more than 4 months.

3 Record shows that on 18.8.2004 DD No.11A was received in Police Station Sarai Rohilla. This was to the effect that an incident had taken place at Kalidas Marg, Nand Lal Piau, Shastri Nagar. Chuttan Singh (PW-2) had received injuries. At that time he was accompanied by his brother-in-law Vinod Singh (PW-1). The injuries sustained by PW-2 were grievous; he had sustained a fracture. No eye-witness could be found at the spot but later on Darshan Lal (PW-4) claimed to have witnessed the incident. His statement was recorded. Investigation had been marked to ASI Brijeshwar Kumar (PW-13) who, along with constable Devender Kumar (PW-12), reached the spot. Appellant and co-accused persons were arrested on 27.8.2004 i.e. almost 10 days after the incident. Two persons had been charge-sheeted of whom the co-accused Ranjeet was acquitted. Arjun, the present appellant, had been convicted.

4 On behalf of the appellant arguments have been addressed in
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detail. It is pointed out that the identity of the appellant is in great doubt and unless and until identity of the culprit is established, criminal jurisprudence does not permit the Court to nail a person. Benefit of doubt must accrue to the appellant. Attention has been drawn to the versions of PW-1 as also PW-4; neither of them supported the version of the prosecution qua the identity of the appellant. It is pointed out that although PW-2 identified the appellant, his identification is of no value as the entire version of the prosecution was based upon a photograph/sketch of accused persons having been prepared by the police from the police dossier at the instance of PW-4 and PW-4 himself being hostile on the identity of the appellant, version of PW-2 falls flat. Even otherwise, there are inherent discrepancies in the versions of PW-1, PW-2 and PW-4. PW-4 had been set up as an eye-witness when he had not really witnessed the incident.

5 Arguments have been refuted. Learned APP for the State points out that PW-2 had identified the appellant even in his statement under Section 161 Cr.P.C. i.e. during the course of investigation; he stuck to his stand again in Court and as such his version cannot be ignored. PW-1 and PW-4 also recited the incident in the manner in which it had

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occurred and corroborated the version of PW-2 on all scores except the identity. The question of identity has been answered in the version of PW-2. Learned APP for the State has placed reliance upon JT 2013(8) SC 591 Md. Ishaque and Others Vs. State of West Bengal and Others. to support his submission that the version of the prosecution stands proved and time as well as place of occurrence has been established, the motive for the crime is also emanating from the version of the witnesses. Version of PW-2 that the appellant was trying to run away with the mobile phone of PW-2 when he was trying to get down along with the said boy at the bus stand is established. On all grounds the conviction of the appellant is not liable to be disturbed.

6 Arguments have been heard and record perused.

7 PW-2 was the complainant. It was on his statement (PW-2/A) that the rukka was dispatched and the present FIR was registered. He had deposed that on 18.8.2004 at about 12 noon when he along with his brother-in-law Vinod Singh (PW-1) was going to his office in a bus, a boy tried to put his hand into his shirt to take out his mobile phone; that boy was pushed aside by PW-2. On the next stop PW-2 got down along with that boy. That boy gave a stone blow on the head of PW-2. He

sustained injuries and blood started oozing out from his face, head and other wounds. He became unconscious and when he regained consciousness he found himself in the hospital. His statement Ex.PW2/A does not spell out any further details of the person who had attacked him or the person who had caused injury to him. There was also no description given of the culprit; except that if he is brought before him he could identify him.

8 PW-1 was the brother-in-law of PW-2. He detailed the incident in the manner as described by PW-2. He deposed that on the fateful day while he was travelling in the bus along with his brother-in-law, 4-5 boys also boarded the bus. One boy was standing in the said bus near the rear window of the bus, and when PW-2 got down from the bus that boy was also de-boarded by his brother. PW-1 had also got down from the bus. That boy raised an alarm. PW-2 was making enquiries from that boy about his mobile phone. The other associate of that boy then started pelting stones on PW-1 and PW-2. One stone hit PW-2 pursuant to which he was wounded and blood started oozing out. All the boys managed to flee. PW-1 took his brother-in-law (PW-2) to the nearby hospital. PW-1 was hostile on the identification of the appellant and

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even in cross-examination he stuck to his stand, stating that he could not identify the appellant present in the Court as the culprit of the incident.

9 Darshan Lal (PW-4) was the eye-witness. He saw the incident from his scooter repairing shop at Shastri Nagar Chowk. He deposed that on 19.8.2004 a police officer came to him and took him to the police station where he was shown a dossier. A sketch was prepared at his instance which was similar to those boys. However, he was also declared hostile as he stated that the accused persons present in the Court were not the same boys who were seen by him running from the incident.

10 MLC of PW-2, conducted by Dr.Jasvinder Singh (PW-6), was proved as Ex.PW-6/A. The victim had suffered grievous injuries. There was a fracture on his scalp.

11 The investigating officer ASI Brijeshwar Kumar (PW-13) had investigated the offence along with Constable Devender Kumar (PW-12). He arrested the accused persons nine days after the date of the incident i.e. on 27.8.2004. His version in this context was that on 27.8.2004 when he was returning to police station Sarai Rohilla after finishing his official duty, PW-2 met him at the gate inquiring about his

case; at that time two police officers brought the accused persons namely Ranjeet and appellant Arjun to the police station. After their medical examination and after seeing them PW-2 identified them as the culprits. Both the accused persons were arrested vide separate memos Ex.PW-2/B and Ex.PW-2/C respectively.

12 Record of the case reflects that the identity of the appellant is certainly doubtful. The incident was dated 18.8.2014. The accused were not apprehended at the spot. They were arrested subsequently i.e. on 27.8.2014 when they were brought to the police station by some policemen and coincidentally PW-2 also reached the police station at that point of time. He at that time identified the accused persons. This co-incidence becomes suspicious and very questionable. This is specially so noting the fact that PW-2 himself is a police officer; on the date of incident he was accompanied by his brother-in-law; his brother-in-law (PW-1) did not identify the accused; sketch of the accused was prepared at the instance of PW-4 by looking at the photographs in the police dossier; however, this witness on oath had stated that the accused present in the Court were not those persons who had committed the offence and reiterated the position that they were not those persons

whose descriptions he had given. This version of PW-4 in fact throws away the case of the prosecution.

13 PW-2 had admittedly seen the appellant only for a fleeting moment. He had seen him when he got down from the bus, at that point of time when stones were being pelted upon him and pursuant to which he sustained injuries and blood started oozing from his wounds. The other boys who had accompanied the appellant also started pelting stones. PW-2 had become unconscious and in fact he regained consciousness when he was in the hospital. In this scenario it would be difficult to imagine that PW-2 had recollected the features of the person so correctly as to identify him, and that too keeping in mind that in Ex.PW-2/A (his first complaint) he had not given any description of the accused. The submission of the learned counsel for the appellant that it was only at PW-2's behest (who was a police officer) that the accused persons had been implicated cannot be brushed away lightly.

14 Where the identity of an accused is not known to the witnesses, it is incumbent upon the investigating officer to get such a suspect identified in a Test Identification Parade (TIP) which ensures not only that the eye-witness recollecting the identity of the appellant is accurate

but also ensures that the investigating proceedings are on the right track and the person who has been arrested is in fact the real culprit. However, a TIP may not be necessary where the eye-witness had the occasion to see the appellant a number of times prior to the occurrence. However, where the witness did not know the accused prior to the incident as had happened in this case, the failure of the prosecution to get the appellant identified in a TIP considerably detracts from the value to be attached to the evidence of such a witness. This is especially so keeping in view the fact that PW-1 and PW-4 were hostile on the identity of the appellant. It was PW-2 alone who appeared to have identified the appellant. At the cost of repetition, this Court notes that the appellant had been arrested nine days after the incident. PW-1 had seen the appellant only for a fleeting moment. He had de-boarded the bus along with the appellant but thereafter the appellant along with his accomplices had attacked both PW-2 and PW-1. PW-2 had sustained grievous injuries in this incident. He was bleeding from his face, head and other wounds. He had lost consciousness. In these circumstances, there was little scope for PW-2 to have noted the facial features or other physical attributes of the appellant. It was in fact PW-4 who had given

the description of the accused pursuant to which, from the police dossier, the sketch of the appellant was prepared and he was then nabbed as the accused. PW-4 had however on oath stated that the accused person present in the Court was not the person who had committed the offence or whose sketch had been prepared at his instance.

15 The Apex Court in AIR 2010 SC 942 Mulla & Anr. Vs. State of Uttar Pradesh in this context observed as under:

22. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. 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. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to

ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

16 In this background, it would be wholly unsafe to rely upon the version of PW-2 to convict the appellant. Accordingly, giving benefit of doubt to the appellant, he is entitled to an acquittal. Appeal is disposed of. Bail bond cancelled. Surety discharged.

INDERMEET KAUR, J

OCTOBER 10, 2014

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