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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A.532/2012**

Judgment reserved on : 6th March, 2014

% Judgment pronounced on : 8th May, 2014

NAZIM KHAN alias GUDDU

..... Appellant

Through: Mr.Krishan Kumar, DHCLSC with
Ms.Sunita Arora, Advocate.

versus

STATE

..... Respondent

Through: Mr.O.P.Saxena, APP for the State
with SI Satya Prakash,
PS Burari.

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT:

1. In the present appeal, the judgment dated 23rd March, 2012 and order on sentence dated 26th March, 2012 passed by learned Additional Sessions Judge (North West Delhi) arising out of Sessions Case No. 124/2011 relating to FIR No. 20/2010, P.S. Burari convicting the appellant for offences punishable under Sections 392/397/411/34 IPC and sentencing to undergo simple imprisonment for seven years and a fine of Rs.5,000/- and in default simple imprisonment for a period of two months, has been assailed

by the appellant.

2. As per the prosecution case, on 30th January, 2010, at about 2.15pm, Asifa Alam/complainant/PW3 was robbed by seven/eight persons. At the time of incident, it is submitted that she was present in her house and was washing water filter in the kitchen at the first floor. She was running a clinic at the ground floor of her house and the doors of the house were open. Initially, five boys came upstairs. They asked her to hand over the jewellery she was wearing and she removed her gold earrings(bunde), gold chain with pendant, gold rings, and a pair of ear rings (bali). In her complaint to the police, she has further stated that at that time one of the boys mentioned that they had committed theft in her house earlier also and that they had returned to take the remaining items from her house. She further stated that thereafter, two more boys (emphasis supplied) having pistols came upstairs and started opening the almirah. From almirah, they removed gold jhumke, a pair of gold long bunde, a pair of another gold jhumkees and two pairs of silver pajeb and a cash of Rs. 25,000/-. They had locked the complainant inside the bathroom. She came out of bathroom with the help of neighbours.

3. As per prosecution, on 8th January, 2009, a theft had taken place in her

house and the matter was reported to the police but police could not solve the case and no recovery was effected at that time. On the basis of this FIR, the police started investigation. The Investigating Officer (PW12) SI Sanjay Kumar learned that the robbery was the handy work of one Manzoor gang and it was this gang who had committed the theft in the house of complainant/PW3 on 8.01.2009 also. He also learned that the appellant is the member of the said Manzoor Gang and so he arrested the appellant on 5th March, 2010 from his residence at Wazirabad vide arrest Memo Ex.PW4/B. The disclosure statement of appellant was recorded vide Memo Ex.PW4/A. While in police custody, the police got recovered a pair of gold earrings and a pair of silver pajeb kept in a paper beneath the mattress of the bed in his house. The articles were recovered vide Memo Ex.PW4/D. The test identification parade of articles were held on 7th April, 2010 which is Ex.PW13/F wherein, PW3 had correctly identified the recovered articles. On 6th March, 2010, an application was moved for test identification parade of the appellant. The appellant, however, refused to participate in the test identification parade and this fact was recorded by the learned Metropolitan Magistrate in his proceedings dated 12th March, 2010 vide Memo Ex.PW13/C at Tihar Jail. Police could arrest only the appellant in this case.

4. The prosecution had examined thirteen witnesses in support of its case. The statement of appellant was also recorded under Section 313 Cr.P.C., wherein, he had pleaded innocence contending that the case property has been planted upon him. He had also examined one witness in defence, Smt. Shakeela Begum. She has deposed that the appellant was arrested from his house and that she had told the police officials that the appellant was innocent.

5. After giving due consideration to the evidences on record, the learned Additional Sessions Judge gave the findings of guilty.

6. The sole contention of the appellant before this court and before the trial court has been that he is innocent and has not committed any offence and that he has been wrongly identified by complainant/PW3 as one of the assailants at the instance of the police and that he and his photographs were shown to complainant/PW3 before the scheduled date for test identification parade and that the case property was planted upon him.

7. Learned Additional Public Prosecutor has argued that complainant/PW3 had no reason to falsely implicate the appellant as the perpetrator of the crime and that the case property had been recovered at the

instance and from the possession of the appellant which clearly show that robbery had been committed by him.

8. I have given thoughtful consideration to the rival contentions of both the parties and have gone through the trial court record. The role assigned to the appellant by complainant/PW3 is that he was one of the two boys, (emphasis supplied) who came upstairs armed with pistols and opened the almirah and the appellant removed Rs.25,000/- from the Almirah.

9 The only point arising for consideration is whether the conviction in this case can be based on dock identification of accused/appellant by the sole witness (PW3) and whether the refusal to participate in test identification parade can be used to corroborate the dock identification by PW3 and whether the recovery of stolen property from the appellant gives rise to a presumption that the accused/appellant was present at the spot and thus rightly identified by PW3 in court. To answer the first question, there is no doubt that the conviction can be based on the dock identification of accused/appellant without corroboration, however, the courts have been cautioned not to do so as a rule of prudence.

10. The Apex court in number of cases has held that the identification of

the accused who is a stranger to the victim for the first time in the court is a weak evidence and should not be relied upon without corroboration in the form of earlier identification proceedings. Few of them are mentioned as under:-

In Vaikuntam v. State of A.P. 1960, Cri. IJ. 1681, the Hon'ble SC, inter alia observed as under:-

“it is true that when he came to give evidence in court, the witness did point out to the same three accused as having been seen by him at the time of the murder. It is also true that the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. There may be exception to this rule where the court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding.

11. ***In State v. V.C. Shukla AIR 1980 SC 1382***, a three Judge Bench of the Hon'ble S held *that identification by the witness for the first time in the court, without being tested by a prior T.I.P., was valueless.*

12. It was held by the Hon'ble Supreme Court in ***George v. State of Kerala 1998 (2) JCC 1927*** that though not fatal, absence of corroborative

evidence of prior identification in a test identification parade makes the substantive evidence of identification in court after a long lapse of time a weak piece of evidence and no reliance can be placed upon it unless sufficiently and satisfactorily corroborated by other evidence.

13. The Apex Court in the case of ***Dana Yadav @ Dahu and others v. State of Bihar (2002) 7 SCC 295*** after discussing the several pronouncements concluded as under:-

“Para 37 (a) to (d).....(e) Failure to hold test identification parade does not make the evidence of identification in Court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in Court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in Court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in Court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.

14. Let us now examine the deposition of PW3 to assess if it is safe to convict the appellant on her testimony without corroboration. From the FIR, it is apparent that the description of the assailants given by the complainant/PW3 is that they were boys (emphasis supplied) including the one who removed Rs.25,000/- from the Almirah. Even in the court during her deposition as PW3 recorded on 10th November, 2010, the complainant has referred all the assailants including the two assailants who came armed with pistols as boys (emphasis supplied). As per the final report, the age of the appellant is 49 years. The FIR is dated 30th January, 2010, therefore, on that date, the age of the appellant was 49 years and he by no stretch of imagination can be referred as a boy. It, therefore, is clear that the appellant does not fit into the description of the assailants given by the complainant in the FIR and also in her deposition before the court. This part of the evidence becomes very crucial when taken together with the other evidences on record. The witness/complainant/PW3 has admitted before the court in her deposition dated 10th November, 2010 that during the investigation, she was

called to the Police Post Jharoda where she identified the appellant. She has also admitted in her cross examination that she was shown the photograph of the appellant in the police station and thereafter, she was taken to Tihar Jail for test identification parade. From her evidence, it, therefore, is amply clear that she had seen the appellant at Police Post Jharoda and was also shown the photograph of the appellant. It is admitted fact that assailants were not known to the complainant/PW3. It is also an admitted fact that the police had not been able to crack the theft taken place in the house of complainant/PW3 on 8th March, 2010 earlier to this incident. In the FIR, the complainant except describing the robbers as the boys (emphasis supplied) as not given any other description of the robbers.

15. It is also apparent from the testimony of PW3 that she is a confused witness. She has deposed that she had gone to Tihar Jail for the identification of the appellant, and she had identified the appellant in the presence of Judge. This part of her statement is contrary to the record. As per prosecution case, the accused/appellant refused to participate in test identification parade and so there was no occasion for PW3 to identify him in Tihar Jail before a Judge. It is also clear from the testimony of the Investigating Officer/PW12 that the accused was apprehended on the assumption that he belonged to one Manzoor Gang which was suspected to

be involved in the incident. It is also apparent that although the complainant had stated that about eight boys were involved in offence, none of them has been arrested. Thus, it is apparent that it is not safe to convict the appellant on the dock identification by PW3 without any corroboration.

16. In this case, Investigating Officer applied for test identification parade of the appellant but the appellant refused to participate in test identification parade. Thus, it is a case of refusal to participate in test identification by the accused/appellant. The Apex court elaborately discussed the relevance, requirement and value of test identification parade in the case of ***Dana Yadav (supra)***. The relevant para is reproduced as under:-

“9 Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce relevant facts. It says, inter alia, facts which establish the identity of any thing or person whose identity is relevant, in so far as they are necessary for the purpose, are relevant. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused at his trial. The identification of an accused by a witness in court is a substantive evidence

whereas evidence of identification in test identification parade is though primary evidence but not substantive one and the same can be used only to corroborate identification of the accused by a witness in a court.”

17. It, therefore, is clear that the test identification parade report although is not a substantive evidence but can be used only for the purpose of corroboration. There can be two results of test identification parade. Firstly, the refusal to participate in the test identification parade by the appellant is without any justification. Such a refusal is a piece of evidence and the courts can take an adverse inference against the accused that if he would have participated in the test identification parade, he would have been identified by the witness and the refusal can be used to corroborate the dock identification by witness. Secondly, the accused has a justifiable reason to refuse to participate in the test identification parade. Where accused has justifiable reason, no adverse inference can be taken against him.

18. In the present case, the accused/appellant has refused to participate in the test identification parade on the ground that he was shown to the witness at the Police Post Jharoda as well as his photographs were shown to the witness. Now the question is whether showing of photographs to the witness before the test identification parade or showing him to witness before test

identification parade justifies the refusal to participate in test identification parade by the accused?

19. The witness PW3 has clearly stated that she was shown the photographs of the accused at the time when she was going to identify him in the Tihar Jail. She has also admitted that the accused was shown to her in Police Post Jharoda. In the light of this cogent evidence that accused as well as his photograph was shown to PW3, refusal to participate in test identification parade by accused is justified and this test identification parade cannot be used against the accused/appellant for any purpose.

20. In *AIR 2007 SC 2400 State of Madhya Pradesh v. Chamru @ hagwandas etc. etc.*, it has been held :-

“.....We also agree with the contention of the learned defence counsel that the identification proceedings held by S.D.M. Shri Patel (PW1) were only a farce. Both Bantu (PW7) and Indu (PW8) admitted in cross examination that the Police had shown them the photograph of Chamru. This would render the entire proceedings as useless. And conviction cannot be based on such evidence.....”

“10 We find that it is not merely a case of non-mention of the names. Undisputedly, the photographs

of accused Chamru were shown to two of the child witnesses before the Test Identification Parade. That took away the effect of the Test Identification Parade.....”

21. As discussed above, the accused/appellant has been able to justify his refusal to participate in TIP. There exist no other evidence on record to corroborate the dock identification of the appellant.

22. The next question is whether the recovery of robbed articles after 2 ½ months corroborates the testimony of PW3 and can it be said that since the accused/appellant is found in possession of the stolen articles so he is the one who had committed the robbery on 30th January, 2010. Although around twelve jewellery articles were robbed, including gold earrings(bunde), gold chain with pendant, the gold rings, and a pair of ear rings (bali), gold jhumke, a pair of gold long bunde, a pair of another gold jhumkees and two pairs of silver paajeb and cash of Rs. 25,000/- but only one pair of small gold bali which the complainant was allegedly wearing were got recovered from the accused/appellant along with a pair of silver pajeb. The amount of Rs.25,000/- which was allegedly removed by the accused/appellant from the complainant has not been recovered from him.

23. To reach to any conclusion, it is important to reproduce certain facts

which are already on record. The evidence on record confirms that the photographs of appellant were shown to PW3. Appellant was also shown to her in the police station as one of the robbers and it seems that she had identified the appellant on that basis in the court. Although, she did not identify the accused/appellant in the test identification parade, (test identification being refused) yet she said that she had identified him in test identification parade. The first case of robbery in her house was not solved. She described her assailants as boys yet she had identified the person of about 50 years as one of the robbers before court. In view of these aforementioned facts no presumption can be raised that since the stolen articles has been recovered from the possession of appellant, so he is the robber especially when the recovery was not immediate but after a gap of 2 ½ months.

24. As discussed above, in the facts and circumstances of this case, the conviction cannot be based on the dock identification of appellant by PW3 as her testimony is a weak evidence and contradicts the description of robbers given by her in the FIR. I, therefore, give the benefit of doubt to the accused/appellant and acquit him of the charges punishable under Section 392/397 IPC. Since however, the prosecution has successfully proved the

recovery of stolen articles, I uphold the conviction of the appellant under Section 411 IPC.

25. It is argued on behalf of the appellant that he is around 53 years of age having no prior conviction. He has a family to support and, therefore, a lenient view be taken against him.

26. Keeping in view all the facts and circumstances of the case and the fact that the accused is not a prior convict and has a family to support and also keeping in view that as per his Nominal Roll dated 4th November, 2013, he has already undergone sentence of about 2years 5months and 14 days, I sentence him for the period already undergone by him for the offence punishable under Section 411 IPC, while acquitting him for the charges punishable under Sections 392/397 IPC.

27. The appeal is disposed of in the above terms. The appellant be set free henceforth, if not required in any other case.

28. The Registry is directed to send a copy of the order to the Jail Superintendent, Central Jail, Tihar for compliance and to supply the same to the appellant.

29. A copy of this judgment be sent to the trial court.

DEEPA SHARMA, J.

MAY 08, 2014

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