

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

Date of Decision: 22.04.2014

+ CRL.A. 1254/2013
ISRAEL @ AJAY

..... Appellant

Through: Mr. Ajit Sharma, Adv.
versus

STATE OF THE NCT OF DELHI

..... Respondent

Through: Ms. Ritu Gauba, APP for State

+ CRL.A. 1149/2013
OM SHIV @ KALLU

..... Appellant

Through: Mr. Chetan Lokur, Adv.
versus

STATE OF THE NCT OF DELHI

..... Respondent

Through: Ms. Ritu Gauba, APP for State

+ CRL.A. 1151/2013
ZAKIR @ NASIR

..... Appellant

Through: Mr. Habibur Rahman, Adv.
versus

STATE OF THE NCT OF DELHI

..... Respondent

Through: Ms. Ritu Gauba, APP for State

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

JUDGEMENT

V.K. JAIN, J. (Oral)

On 12.07.2008, on receipt of information regarding firing at Mahila Mandal, SI Hukum Singh reached Shop No.E-I/1, Madangir, New Delhi, where a crowd was found having gathered. On enquiry, it came to be known

that some persons, who had come on two motorcycles, had shot Pawan Kumar and Naresh Kumar, who had been taken to Batra Hospital in injured condition. Two bullet marks were found on the glass of the counter of Shop No. E-I/1, Madangir. Some blood drops were also found on the floor of the shop. Four empty cartridges of 7.15 bore and three empties of 7.62x25 bore were found on the counter. The Investigating Officer Inspector Hukam Singh then went to Batra Hospital where Pawan Kumar Garg and Naresh Kumar were found admitted having suffered gun-shot injuries. An FIR under Section 307/34 of IPC and 25/27 of Arms Act was registered, on the basis of inspection of the spot and the investigation was handed over to Inspector Deshraj Yadav, who collected the empty cartridges from the shop and also lifted blood stains from there.

2. On 31.07.2008, accused Nasir @ Zakir was arrested by the special staff in the case registered vide FIR No.407/2008 of Police Station Sangam Vihar and during interrogation he disclosed his involvement in the aforesaid robbery along with his associates – Om Prakash @ Banty, Rajesh @ Pinni, Israel and Om Shiva. Israel was then arrested on 29.08.2008. Accused Om Prakash @ Banty and Rajesh died in an encounter. The charge-sheet was initially filed against two persons namely Nasir and Isreal @ Ajay Vidhuri.

Later a supplementary charge-sheet was filed against accused Om Shiva @ Kallu.

3. All the three accused were charged under Sections 393/398/34, 307/34 and 392/397/34 of IPC. They having pleaded not guilty to the charges, as many as 25 witnesses were examined by the prosecution. No witness was examined in defence.

4. The injured Naresh Kumar came in the witness box as PW-4 and *inter alia* stated that on 12.07.2008, at about 7.30 PM, some shop keeper told him that robbery was being committed in the shop of his elder brother Tirath Raj and firing was going on. He picked a *danda* from his shop and ran towards the shop of his brother. On reaching there, he saw one person starting motorcycle and another person sitting on the pillion seat of the motorcycle. He gave a *danda* blow to the person sitting on the pillion seat of the motorcycle. Another *danda* blow was given by him which hit on his head. Yet another boy was there on another motorcycle. That boy fired three gun shots on him, as a result of which he fell down on road. Thereafter, all the three boys ran away on their motorcycles, while firing gun shots in the air. The witness identified accused Zakir as the person who was sitting on the pillion seat of the motorcycle and to whom *danda* blow was given. He

could not identify the other accused.

PW-5 Pawan Kumar, S/o Tirath Raj Garg, inter alia, stated that on 12.07.2008 when he was present at his shop E-1/1, Madangir, two persons came there on a motorcycle, entered his shop, showed a revolver to him and demanded cash from him. He picked a chair and threw it on them. One of them fired a gun shot on him, as a result of which, he sustained injury on his neck and on his right hand. Since he (the witness) possessed a licenced revolver, he took out his revolver. He claimed that total 4-5 persons were there who had come on two motorcycles and had run away from his shop after firing in the air. He identified the accused Israel as the person who had fired on him and accused Om Shiva as the person, who was present outside the shop and had run away from the spot, after firing gun shots. He also claimed that on 13.09.2008, accused Israel came to his shop with police officials and was identified by him.

5. PW-3 Shri Ashok Kumar stated that on 12.07.2008, when he was present outside this shop of his elder brother Pawan Kumar, two persons entered the said shop, whereas two remained outside and one was sitting on motorcycle. When his brother Pawan Kumar objected, they fired gun shot on him, as a result of which his brother sustained injuries. When he entered the

shop, the boys, who were inside the shop, pushed him and came outside the shop. They ran away from the spot, after firing the gun shots. When his uncle Naresh Kumar Garg tried to stop them and gave *danda* blow on the last motorcyclist, the persons who were sitting on the motorcycle also fired gun shots on his uncle, as a result of which, he sustained bullet injuries in his stomach. He identified the accused Israel as the person who had fired on his brother Pawan. He claimed that Israel was also the person who had pushed him when he entered the shop. This witness also identified the accused Om Shiva and Zakir claiming that they were outside the shop on motorcycle and had run away with Israel and one Bunty. In reply to the Court query, the witness stated that the accused Om Shiva and Zakir had gone to the shop of his uncle Mahavir Prasad from there. They had committed a robbery of 10-12 thousand.

6. PW-7 Om Prakash is the last eye-witness in this case. He *inter alia* stated that on the day of this incident, he was present in the shop of Pawan in Madangir having brought certain articles, after parking his vehicle at some distance. Three persons came there, out of whom two entered the shop having something in their hand which look like some weapon. When he (the witness) saw the pistol, he ran away from the shop, but was caught by the

third person, who took him inside, caught him by his shirt and put the pistol on his chest. These persons asked Pawan Kumar to open his cash box. The witness claimed that he had hidden himself in the shop and those persons fired in the air as well as on Pawan Kumar, before they ran away from the shop. This witness also identified the accused Israel @ Ajay as one of the persons who had entered the shop of Pawn though he could not identify the remaining accused. During cross-examination by the learned Additional PP, he stated that four persons had come to the shop, out of whom, two had entered the shop; one had caught him and the fourth one had gone to another shop.

7. PW-11 Dr. Amit Buttan proved the MLC of Pawan Kumar Ex.PW-11/A and the MLC of Naresh Ex.PW-11/B. He stated that Pawan had got a shot injury measuring 1.5X1 centimetre on the left side on his neck, whereas Naresh had two gunshot injuries over the left side of his chest and the at 7th inter coastal space in mid axillary line with bleeding.

PW-21 Shri Kuldeep Narayan is the Judicial Officer before whom the witness Om Prakash failed to identify the accused Israel on 04.09.2008. The accused Zakir refused to join TIP before him on 18.08.2008.

8. In their statement under Section 313 Cr.P.C., the appellants denied the

allegations against them and claimed to be innocent.

9. Vide impugned judgment dated 20.12.2012, the appellants were held guilty under Section 393/398/34 as well as 307/34 of IPC. Vide Order on Sentence dated 31.01.2013, they were sentenced to undergo RI for seven years each under Section 393/398/34 of IPC and to pay fine of Rs 20,000/- each or to undergo SI for one year each in default. They were further sentenced to undergo RI for 10 years each and to pay fine of Rs 10,000/- each under Section 307/34 of IPC or to undergo SI for one year each in default. Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of these appeals.

10. The learned counsel for the appellants have assailed the impugned judgment primarily on the following grounds:-

- i. the number of persons involved in the robbery as well as the sequence of events which took place on that date is not clear though as many as five eye-witnesses were examined by the prosecution;
- ii. no medical examination of the accused Zakir was conducted, despite PW-4 Naresh having claimed that he had given a *danda* blow to him which hit on his head;
- iii. though there was a police picket nearby, no police official has been

examined to prove the incident of robbery;

iv. the police had published the photograph of as many as five persons before the accused persons were arrested, thereby concluding that it were they who had attempted the robbery;

v. though a disclosure statement admitting involvement in the robbery is alleged to have been made by the appellant Om Shiva on 26.10.2008, he came to be arrested in this case on 24.12.2008, after about 2 months and there is no explanation for not arresting him for such a long period.

11. As far as appellant – Om Shiv is concerned, he was identified by two eye-witnesses, namely, PW3 – Ashok Kumar and PW5 – Pawan Kumar. Admittedly, appellant – Om Shiv was not previously known to either of these two witnesses. Admittedly, no attempt was made by the Investigating Officer to get him identified in a judicial TIP. The aforesaid appellant came to be identified by the witnesses for the first time, during the course of trial. Though identification for the first time in the Court is legally admissible in evidence, in the absence of special facts and circumstances of a case, the courts insist upon corroboration of identification for the first time when the accused is in the dock. Such corroboration can be in the form of recovery of some article which would connect the accused with the commission of the

offence or some special mark of identification on the person of the accused seeing which the witness would immediately be able to recall and confirm that he was the person whom he had seen at the time of the incident. In a given case, the witness may have spent so much time with the accused as would enable him to retain in his mind, such features of the accused as would enable him to later identify him during the course of trial. However, in an incident of an armed robbery, which lasts only a few minutes and, therefore, the witness is able to only have a glimpse of the accused, it would not be safe to rely upon the identification for the first time in the court, without any corroborative evidence such as identification in a judicial TIP or recovery of some article which would connect the accused with the crime. The appellant – Om Shiv, therefore, needs to be given benefit of doubt.

12. It has come in evidence that two persons namely PW1 – Sachin and PW2 were taken to the police headquarters on 12.07.2008 and some portraits were prepared there on the basis of description given by the aforesaid witnesses. However, the sketches are alleged to have been prepared at the instance of the aforesaid witnesses have not been produced during the course of trial. When Sachin came in the witness box, he did not identify any of the accused persons present in the dock. He rather claimed that the person

whose portraits were prepared by him had died in the encounter, meaning thereby that appellant – Om Shiv was not one of the persons whose portrait was prepared at the instance of PW1. As far as PW2 is concerned, he expressed his inability to identify any of the persons whose portraits were prepared, on the basis of description given by him. PW-13 SI Jitender stated that on 15.07.2008, he was sent by the IO, to PHQ for getting prepared the sketches of the culprits and he had taken Sachin and three other witnesses to PHQ and got prepared the sketches of two suspects. Thus, according to this witness, only two sketches and not five sketches were got prepared in the police headquarters. Since the two persons whose sketches were got prepared from the witnesses have admittedly died in an encounter, if we go by the deposition of this witness, the appellant – Om Shiv cannot be one of the persons whose sketch was prepared in police headquarters at the instance of the witnesses.

More importantly unless the sketches which were got prepared on the description given by the witnesses are produced in the court and the faces of the accused in the dock are compared with those portraits, it cannot be known whether the sketches were of the accused persons or not. Since the aforesaid sketches/portraits have not been produced by the prosecution, there is

no evidence to show that the sketches got prepared on the basis of description given by PW1 and PW2, included the sketch of the appellant – Om Shiv.

13. I have seen Ex. PW10/DA which is the information published by the police seeking information in respect of five person. The pictures which appear in this document are photographs and not sketches of five persons namely Om Shiv, Israel, Rajesh, Zakir and Om Prakash. There is no evidence that on the basis of sketches prepared in the police headquarters, the Investigating Officer collected the photographs of the aforesaid persons including the appellant – Om Shiv @ Kalu. In the absence of production of the sketches, it cannot be confirmed that one of them matches with the photograph of appellant – Om Shiv @ Kalu printed in the document Ex.PW10/DA. The Appellant – Om Shiv, therefore, needs to be given benefit of doubt, and acquitted.

14. The appellant – Zakir was identified by two witnesses, namely, PW4 – Naresh and PW3 – Ashok Kumar. He was identified as one of the persons who were present outside the shop which the robbers had entered and Naresh Kumar has also identified him as the person to whom danda blow was given by him.

As far as Ashok Kumar is concerned, his presence at the time of the incident is highly doubtful. His statement under Section 161 of Cr.P.C. was recorded only on 07.08.2008. Had this witness actually witnessed the incident, he would certainly have narrated the same to the Investigating Officer,

particularly when the robbery was sought to be committed in his shop and it was his brother Pawan Kumar who had got injured at the hands of the intruders. The learned Additional PP submits that this witness was busy in connection with the treatment of his brother Pawan Kumar who was discharged only on 06.08.2010 and the statement of the witness was recorded on the very next day. In my opinion, the explanation given by the learned Additional PP is not convincing. If the witness remained only in the hospital in connection with the treatment of his brother Pawan Kumar, which is not likely to have happened, the Investigating Officer could easily have examined him in the hospital, when the hospital was visited by him in connection with the investigation of the case. If he was not in the hospital, obviously, he was not busy in connection with the treatment of his brother and in that case he ought to have gone to the police officer to give his statement. In any case, nothing prevented him from contacting the police officer on telephone and requesting him to come to the hospital and record his statement there. Another material aspect to this regard is that both the injured, namely, Pawan Kumar and Naresh Kumar, were brought to the hospital by one Prahlad Kumar Malviya, as would be evident from their MLCs. Had this person witnessed the incident, he, and not Prahlad Kumar

Malviya, would have taken the injured persons to hospital considering that one of them was his real brother and one of them was his cousin brother.

15. As far as the witness Naresh Kumar is concerned, he having been injured in the incident, from the shot fired by one of the culprits, his presence during the incident cannot be doubted. Though he hit the appellant Zakir from behind, he clearly stated that he had seen the face of aforesaid accused at that time. Considering that Zakir was on a motorcycle, which is open to view from all the sides and the accident took place at about 7:15 PM to 7.30 PM in summer days when the sun has not fully set in by 7.30 PM, it was very much possible for him to see the face of the accused Zakir.

16. Admittedly, the appellant Zakir refused to join TIP before a Metropolitan Magistrate on 18.08.2008. The plea taken by him for refusing to join the TIP was that he had been shown to the witnesses. However, there is no evidence of his having been shown to any of the witnesses at any point of time. PW-4 Naresh Kumar clearly stated that in his cross-examination that police officials had not shown Zakir to him before the day he was examined in the Court. Despite such emphatic deposition of the witnesses no suggestion was given to him that the accused Zakir was shown to him before 18.8.2008, when he refused to join TIP. It is, thus, evident that there

was no justification for the appellant Zakir to refuse the TIP. Consequently an adverse inference can be drawn against him that had he participated in the TIP he would have been identified by the witnesses and that precisely was the reason he refused to join TIP.

It has come in evidence that some photographs including the photograph of the appellant Zakir were published by Delhi Police. It has come in evidence that the photographs were published prior to 28.8.2008, but the exact date of publication of the photographs has not come on record. There is no evidence of the photographs having been published prior to 18.8.2008. Moreover there is no evidence of the eye-witnesses who identified the appellant Zakir having seen those photographs at any point of time before they were examined in the court. In fact, the court does not even know, what exactly was the mode adopted by the police to publish the photographs. As noted earlier, the appellant Zakir refused to join TIP on the ground that he had been shown to the witnesses in the police station and not on the ground that his photographs had been circulated to the members of the public.

Naresh must have come close to Nazir to give *danda* blow to him and at that time, he must have seen his face. The identification of the appellant

Zakir by the witness PW4 Naresh Kumar, who also gave a *danda* blow to him coupled with the refusal of the aforesaid appellant to join TIP without any justification is sufficient to establish his identity as the person who after the incident fled away from the spot on a motorcycle to whom a *danda* blow was given by the witness Naresh Kumar and that action on the part of the witness invited retaliation from one of his accomplices who fired a bullet shot at the witness Naresh Kumar. The bullet shot fired at Naresh Kumar is a clear indicator that the appellant Zakir was one of the persons involved in the incident and that is why on him having been hit with a *danda*, one of the accomplices fired a shot injuring the witness Naresh Kumar in the process. The conviction of the appellant Zakir under Section 393 of IPC read with Section 34 thereof cannot be faulted with.

However, since there is no evidence of his being armed with a deadly weapon, conviction under Section 398 of IPC cannot be justified. The conviction of the appellant Nazir under Section 307 of IPC also cannot be justified because he could not have anticipated that he would be hit by the witness Naresh Kumar with a *danda* and that would invite retaliation by one of his accomplices in the form of a bullet injury to the witness. There is no evidence of the appellant Zakir having exhorted the person who fired shot at

Naresh Kumar in any manner. Therefore, it cannot be said that he shared a common intention with that person to commit murder of the witness Naresh Kumar. Consequently he is liable to be acquitted of the charges under Section 307 and 398 of IPC.

17. As far as the appellant Israel is concerned, he has been identified by PW3 and PW7. Admittedly the witness Om Prakash had failed to identify Israel in a judicial TIP during the course of investigation. The TIP proceedings in respect of the appellant Israel are Ex.PW21/B. Considering the fact that Om Prakash had failed to identify the appellant Israel during TIP it would not be safe to rely upon the identification by him in the course of trial. Therefore, the identification of the appellant by the witness Om Prakash needs to be excluded from consideration.

As regards identification of the appellant Israel by the witness Pawan Kumar, I find that though the witness Pawan Kumar had been discharged from the hospital on 6.8.2008, no attempt was made to get him identified in the TIP held on 4.9.2008, when the witness Om Prakash failed to identify him. This is an indicator that the witness Pawan Kumar was not in a position to identify the culprits and that is why no attempt was made to get the appellant Israel identified through him in the judicial TIP. Therefore, identification by

Pawan Kumar, for the first time during trial, in the absence of any corroborative evidence, cannot be the sole basis of his conviction. In these circumstances, the appellant Israel deserves to be given benefit of doubt and needs to be acquitted.

18. For the reasons stated hereinabove, the appellant Israel and Om Shiva are acquitted, whereas the conviction of the appellant Zakir is maintained only under Section 393 of IPC for attempting to commit robbery. He is acquitted of rest of the charges. However, in the facts & circumstances of the case, reduction of the substantive sentence awarded to him is not called for. The amount of fine imposed on him, however, is reduced to Rs 5000/- and it is directed that in the event of failure to deposit fine, he shall undergo SI for one month.

The appeals stand disposed of.

One copy of this order be sent to the concerned Jail Superintendent for information and necessary action.

The LCR be sent back along with a copy of this order.

APRIL 22, 2014
rd/BG/b'nesh

V.K. JAIN, J.