

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

+ **CRL.A.1377/2012**

Judgment reserved on : 26th February, 2014

% Judgment pronounced on : 11th March, 2014

SADAAB @ SHAMSHAD Appellant

Through: Ms. Neeraj Bhardwaj, Adv.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through: Mr.O.P. Saxena, APP for the State.
SI Ombir Singh, PS Farsh Bazar.

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT:

1. On 04.05.2011 at about 10.35 p.m. one Dharmender son of Sh.Jagdish admitted injured Rahul (PW3) in Dr.Hedgewar Arogya Sansthan, Karkardooma, Delhi in injured condition. Constable Mukesh Kumar posted at that hospital informed PS Farsh Bazar about the admission of injured Rahul in the hospital. SI Omvir Singh (PW8) reached the hospital, collected the MLC of the injured Rahul (PW3). PW3 was referred to Guru Tegh Bahadur hospital where he was again declared unfit for statement. An endorsement was made on DD No.34A Ex.PW8/B. On the basis of which an FIR No.116/2011 was registered for offence under Section 307 IPC.

2. On 11.5.2011, the injured was declared fit for statement and his statement was recorded by SI Omvir Singh (PW8). On the same day, Omvir Singh (PW8) received information that two juveniles namely Sonu and Sadaab had been arrested in case FIR no.139/2011 for offence under Section 392/34 IPC, PS Anand Vihar and had made disclosure statement regarding this case. With the permission of Juvenile Justice Board, they were interrogated and arrested in this case. PW3 had disclosed the names of all his assailants in his statement recorded by PW8 on 11.5.2011 and pursuant to that appellant was apprehended and arrested vide memo Ex.PW4/A and his personal search was conducted vide memo Ex.PW4/B. His disclosure statement Ex.PW4/C was recorded. Pursuant to his disclosure statement the appellant got recovered a knife lying below old clothes on the roof of the public latrine at D Block, NSA Colony. The length of the knife was found to be 28 cm. which included the handle of 16 cm and blade of 12 cm of length. Sketch of the knife Ex.PW4/D was prepared and it was sealed into a pulanda with a seal of CDS and was seized vide memo Ex.PW4/E. The seal was handed over to Constable Adesh. Pulandas which were seized from the hospital were sent to CFSL and the result was obtained and after completing the investigation the prosecution filed the challan in the court against the appellant being major and his co-accused were sent for trial to Juvenile

Court.

3. Charge for the offence under Section 307 IPC was given to accused. He pleaded not guilty and claimed trial. The prosecution had produced nine witnesses. Statement of the appellant under Section 313 Cr.PC was also recorded. After hearing both the parties, learned trial court had reached to the conclusion that the prosecution has successfully proved its case against the appellant and had given the findings of guilty for the offence under Section 307/34 IPC against the appellant.

4. The appellant has challenged the said order. His first argument is that the prosecution has failed to examine a material witness namely Dharmender. It is argued that he is the eye witness in this case, as he was the first person who had reached the spot and removed the injured to the hospital, and an adverse inference should be taken against the prosecution and benefit be given to the appellant. Reliance has been placed on **AIR 1973 S.C.501 Thulia Kali vs. The State of Tamil Nadu** wherein the Apex Court has observed as under:

“13. As regards the alleged recovery of knife and ornaments at the instance of the accused, we find that the evidence consists of statements of Inspector Rajagopal (PW13), Kali Goundar (PW6) and Chkravarthi (PW9). According to Chakravarthi (PW9), the accused handed over the ornaments in question to the witness when the accused came to the house of witness on the evening of March 12,

1970 and passed the night at the house. The witness also found knife in the bed of the accused after he had left on the following day. According however, to kill Goundar (PW6) the accused on interrogation by the Inspector of Police, stated that he had entrusted the ornaments to Thangam, wife of Charavarthi (PW9). Apart from the discrepancy on the point as to who was the person with whom the accused had kept the ornaments we find that Thangam with whom the accused according to Kali Goundar PW had kept the ornaments has not been examined as a witness. In view of the above statement of Kali Goundar, it was, in our opinion, essential for the prosecution to examine Thangam as a witness and its failure to do so would make the Court draw an inference against the prosecution.”

5. Learned APP has argued that the prosecution has made all sincere efforts to produce the witness Dharmender in the court but on the several processes sent by the court it is reported that he had left the given address and his whereabouts were not known and in these circumstances, the prosecution could not examine the witness and it was not that prosecution had withhold the material witness.

6. I have carefully gone through the trial court record. From the perusal of the TCR it is apparent that several processes/summons were sent to prosecution witness Dharmender. He was, however, found untraceable and the court closed the evidence and decided not to send further processes in his name. The prosecution therefore has made all its sincere efforts to trace the witness Dharmender and it cannot be said to have faulted in not producing

the witness Dharmender before the court. No adverse inference therefore can be taken against the prosecution and no benefit can be given to the appellant on this count.

7. Next argument of learned counsel for the appellant is that the witness has identified the appellant in the court and that there was no test identification parade held in this case. It is submitted that there is no corroborative evidence to connect the appellant with the commission of the offence and the appellant cannot be convicted on the sole testimony of the injured.

8. It is argued on behalf of the prosecution that at the time of recording of the FIR, the injured PW3 was found unfit for the statement and therefore on the basis of MLC, the FIR was recorded. The injured had received stab wounds in his stomach and his condition was such that doctors of Hedgewar hospital referred him to Guru Tegh Bahadur hospital wherein he underwent surgery. It is submitted that although the incident pertains to the date 4.5.2011, the injured was declared fit for statement only on 11.5.2011 and the statement of injured PW3 was recorded only on that day on which he had named all his assailants including the appellant. It is submitted that since the injured had named his assailants there was no requirement of any TIP.

9. It is settled law that where the witnesses know the accused persons before the date of incident. The Test Identification Parade is not a substantive evidence.

10. The Apex Court has elaborately discussed the relevancy, requirement and value of Test Identification Parade in the case reported in **(2002) 7 SCC 295** entitled ***Dana Yadav alias Dahu and Others vs. State of Bihar***, as under:

“5. 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, insofar 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 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 court.”

In ***Dana Yadav’s*** case (supra), the Apex Court after discussing its earlier various pronouncements on this subject, concluded as under:

“38. In view of the law analysed above, we conclude thus:

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.”

11. There is no hard and fast rule that the testimony of the injured requires corroboration before conviction. However, the rule of prudence has to be kept in mind. If the testimony of injured is trustworthy, categorical, free of bias and if there is nothing on record to suggest that the injured has any motive to falsely implicate the accused and allow his real assailants go scot free, the conviction can be based on the sole testimony of the injured. In the present case, injured PW3 has clearly stated in his statement to the police as well as before this court that he had already known the accused persons. The trial court has dealt with this aspect of the case and has held as under:

“8. It has come in the testimony of PW-3 that about 20-25 days prior the incident, accused and two JCLs asked him to take them to Subzi Mandi in rickshaw and on his refusal, they threatened to teach him a lesson. In cross examination, PW3 made following statement:

“Accused and both JCLs were not known to him prior to that incident and that they met him for the first time at the time of that incident. At that time, I was not aware of their names but as they were talking with each other, from that I came to know about their names.”

9. It becomes evident from the cross examination that although PW-3 did not know the accused prior to the first incident but he heard them talking and thus came to know of their names. Hence, he knew about the identity of accused and the other assailants by their names prior to the second incident of stabbing. In further cross examination, PW3 admits that on his visit to the police station, he was shown the accused. Since he had seen the accused twice and was aware about his name also, the accused being shown to him

at the police station shall not mean that identification of accused in court was at the behest of the police. In my view, there is no dispute with regard to the identity of the accused. It is not the defence of the accused that there was any previous enmity or ill-will between accused and PW3 for his false implication and therefore there is no reason to disbelieve the testimony of PW3.”

12. I find no infirmity in the finding of the trial court on this count. It has clearly come on record that the appellant was previously known to the injured PW3 and no fact is on record which can even by preponderance suggest that PW3 had any reason to implicate the appellant falsely in this case. It is a proved fact that an incident of stabbing had taken place on 4.5.2011 in the night in which injured PW3 had received grievous injuries on his stomach. Somebody must have stabbed him. No reason has been shown that the injured would allow his real culprit to go scot free and falsely implicate the appellant in this case. The argument of learned counsel for the appellant that the appellant has been falsely implicated in this case, therefore, has no merit.

13. Minor contradictions here and there in the testimony of witnesses do not debase the case of the prosecution on merit. Minor contradictions in the testimony of witnesses are natural and give more credence to its truthfulness. It is common knowledge that public witnesses although witnesses a crime, seldom come forward to depose. They do not generally

want to indulge themselves with Police or Courts. This apathy on the part of the public persons although is deprecatory but it is a fact. In these circumstances non-inclusion of public witness at the time of recovery of the knife is not fatal to the prosecution case. The prosecution has however failed to prove the knife recovered at the behest of the appellant is the knife which is used by him in the crime. The prosecution had sent the shirt of the injured and the knife to FSL for the opinion if the knife contained any fibre of the shirt of the injured and the FSL report has negated it. The injuries received by PW3 are dangerous in nature as is opined by the doctor. In the present case, it is apparent that the appellant along with co-accused had not reached at the spot with pre-meditated plan to kill. Appellant along with co-accused saw the injured and pounced on him because of some earlier incident and gave stab injuries on his person. Although injuries are grievous in nature but the attending circumstances and the number of blows do not suggest that it had been done with the intention to kill the appellant or under such circumstances that it would cause the death. I, therefore, convict the appellant for offence under Section 326 IPC.

14. The appellant has been sentenced with five years RI with fine of Rs.5000/- under Section 307/34 IPC in default of payment of fine SI for six months. It has been argued on behalf of the appellant that he has ailing

father, his mother has already expired and he has already undergone sufficient punishment, so a lenient view be taken.

15. Keeping in view all the facts and circumstances of the case, I sentence the appellant for a period of four years RI and fine of Rs.5000/-. In default of payment of fine SI for six months for offence under Section 326 IPC. Benefit of 428 Cr.PC be given to the appellant.

16. Trial court record be sent back along with copy of this order.

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

DEEPA SHARMA, J.

MARCH 11, 2014

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