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

+ CRL.L.P. 599/2019 & CRL. M.A. 39852-39853/2019

STATE

..... Petitioner

Through Mr. Amit Gupta, APP for the State
with SI Ram Kishan, P.S.: Maurya
Enclave.

versus

MOHD. ASLAM

..... Respondent

Through None.

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Date of Decision: 07th November, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

J U D G M E N T

MANMOHAN, J: (Oral)

Crl. M.A. 39853/2019 (exemption)

Allowed, subject to just exceptions.

Accordingly, present application stand disposed of.

Crl. M.A. 39852/2019 (condonation of delay)

Keeping in view the averments in the application, the same is allowed and delay in filing the appeal is condoned.

Accordingly, present application stands disposed of.

CRL.L.P. 599/2019

1. Present criminal leave petition has been filed on behalf of the State challenging the judgment and order of acquittal dated 6th July, 2019 passed by Additional Sessions Judge (FTC), North-West District, Rohini Courts, Delhi, whereby the respondent-accused No. 2 has been acquitted of all charges arising out of FIR No. 144/2012 registered with Police Station Maurya Enclave. The relevant portion of the impugned judgment is reproduced hereinbelow:-

“58. Significantly, tower details of mobile of the accused no. 2 are available. CDR has been proved as Ex PW9/C. As per details, the accused no. 2 was rather in Ghaziabad and Shahdara during the intervening night. Tower Details of other mobiles have not been properly presented and projected by the prosecution. Thus, the prosecution cannot dig out anything substantial from said call detail record either.

59. In view of the foregoing discussions, it can be held that the prosecution has not led the convincing and trustworthy evidence which may clearly and conclusively hold that the accused no. 2 was part of the robbery-team. The manner in which the incident had taken place at dead hour of the night and the manner in which the incident was over in a flash could not have given enough of time to PW10 and PW22 to clearly identify the accused no.2, more so, when only Arif and Vahid had alighted down. It was virtually impossible for those two guards to have seen clearly the remaining robbers who did not even alight down from their vehicle. More so, at that time, both these guards were busy in exchange of fire while taking safe position and, therefore, they do not seem to be in any definite position to identify them including those who kept sitting in accused's vehicle all along. Thus identification, in itself, does not inspire much confidence. CDRs also do not take the prosecution anywhere near to the proof of their complicity. Therefore, this court grants benefit of doubt to accused no. 2.

60. Accordingly, the accused no. 2 is acquitted of all the charges.”

2. Learned counsel for the State submits that the Trial Court failed to appreciate that two witnesses namely Lalit Kumar (PW-10) and Krishan Kumar (PW- 22) had identified the accused No. 2/respondent as the last person who was sitting on the driver seat of the Bolero car.

3. The Trial Court in its impugned judgment with regard to the identification has held as under:

“38. Interestingly, though the accused no. 4 was identified during trial, fact remains that as per the deposition of said two guards, one such robber too was not visible to them. Thus one of the two persons, who had alighted down, was, later on, found dead and the other was not fully visible to guards. In such a situation, it is indeed mystifying and bewildering as to how they have been able to identify all the robbers.

39. Indubitably, the police has power to record supplementary statement. Such supplementary statement can always be made during the investigation but then it should be in complete harmony with the previous statement. There should be synchronization between the two statements. Here, in the first statement, both the guards had claimed that 3-4 robbers had come in one Bolero type vehicle. PW22 made supplementary statement on 27.06.2012 i.e. after more than 23 days of the incident and in such statement, he came-up with improvement and claimed that instead of 3-4 robbers, there were more robbers and when they all were fleeing away, 4-5 other robbers, while threatening, boarded that vehicle of robbers and sped away towards Ashiana Chowk. He claimed that he could identify them as well. No specific description of those 4-5 robbers has either been given and PW22 simply claimed that he could identify them. To the similar extent is the supplementary statement of PW10 who made virtually similar statement on 07.07.2012. He has also not made clear as to why he did not reveal such fact at the earliest opportunity. This is not believable that since they both were under shock, they could not reveal said aspect to the police in their previous statements. Thus, this court has strong reservation and reluctance to believe about the authenticity and creditability of these supplementary statements.

41. *It is quite evident that the accused no. 1 and 2 were arrested on 04.07.2012 and the accused no. 3 was arrested on 06.07.2012. They had refused to participate in TIP. But it needs to be assessed whether they were justified in refusing to join TIP or not.*

42. *It is evident from the record that application seeking TIP of the accused no. 1 to 3 FIR No. 144/12 PS Maurya Enclave (State Vs. Sunil Kumar & Ors) Page 13 of 20 was moved on 07.07.2012 and such TIP was fixed for 12.07.2012. Testimony of PW39 Inspector Bijender Chiller is important on this aspect. In his cross-examination, he admitted that PC remand was taken before holding of such TIP. He revealed that application moved by him for holding of TIP was withdrawn by him because of the non-availability of learned Presiding Officer. However, this is factually incorrect as TIP was re-scheduled not because of the non-availability of judicial officer but because of the non-availability of the witness. Curiously enough, TIP of the accused no. 1 and 3 was got postponed for non-availability of witnesses as per request dated 12.07.2012 but as regards the accused no. 2, his TIP proceedings were carried out on 13.07.2012 and concerned police official told TIP judge that witnesses had come to jail for TIP purpose. Thus investigating agency is trying to blow hot and cold. Be that as it may, when the TIP was already fixed, the police should not have ventured into seeking police custody remand.*

43. *Moreover, if at all, the period during which the police custody remand could have been taken, was expiring, the investigating officer should have said so instead of deposing falsely. PC can be taken during first 15 days of the arrest and since the accused no. 1 and 2 had been arrested on 04.07.2012, the police could have easily taken their PC remand even subsequent to 13.07.2012. There was no justification in seeking their PC on 12.07.2012 when the TIP had already been fixed on 13.07.2012. Such action on the part of investigating agency smacks of malafide.*

44. *As per the specific stand taken by these three accused, they had refused to participate in TIP as their photographs were taken at the PS and they were shown to the witnesses. In the afore-referred background coupled with the fact that both the*

eyewitnesses did not give any specific description regarding the physical appearance of the alleged robbers or dacoits, the refusal on the part of accused does contain some substance.

45. Showroom of M/s. Vijay Sales was also located very near to the showroom of M/s. Hira Jewellers. It had a separate guard. However, the prosecution has not been able to dig out any real advantage from his testimony..... His statement was recorded by the police on 30.08.2012 and the prosecution has also not elucidated as to why statement of such security guard was recorded so late. He, also, claimed that he was 70 years old and his eyesight was weak and, therefore, he could not see those persons properly and was in no position to identify them. Even as per his deposition, only two robbers had alighted down. PW32 has nowhere claimed that 4-5 robbers had alighted down.

46. In view of the foregoing discussions, it can be held that the prosecution has failed to prove the identity of the accused no. 2 beyond reasonable doubt.”

4. In the opinion of this Court, the view taken by the Trial Court is a plausible view. There is no substantial or compelling reason to take a different view.

5. Moreover, a Coordinate Division Bench of this Court in Criminal Leave Petition 493/2017 filed by the State challenging the acquittal of four other co-accused arising out of the same FIR has held that the dock identification by Krishan Kumar (PW-22) and Lalit Kumar (PW-10) does not inspire confidence. The relevant portion of the Division Bench order is reproduced hereinbelow:-

“8. The trial Court has, in the impugned judgment, carefully analysed the entire evidence and come to the conclusion that the accused were entitled to the benefit of doubt and accordingly acquitted them of all the charges. The trial Court, at the first instance, noticed that the mobile phone of the deceased robber

remained in the possession of the investigating officer for 5-6 days. This was held to be unjustified. Although PW-22 made a reference to the said mobile and it was identified as Ex.P-7, it was not exhibited in the trial Court. No effort appears to have been made to record the statements of the father of the deceased and other close relatives. The delay in depositing the seized articles in the malkhana was also not satisfactorily explained.

9. As regards the eye witness testimonies of the two guards, the trial Court found that the delay in informing the police of there being 8-9 robbers instead of 3-4 was fatal to their testimonies. Further, it was observed that it was highly unlikely for the guards to have been in a position where they could clearly identify all the 8/9 robbers when they had been involved in exchange of fire. Many of the accused continued sitting in the car. Therefore, the dock identification did not inspire much confidence. Further, PW-10 even failed to identify A-7 in the judicial TIP conducted on 14th December 2012. The trial Court, therefore, concluded that the two guards, i.e. PWs- 10 and 22, were not in a position to identify the robbers with precision. Even the CDRs did not provide a sufficient link in the chain of circumstances.

10. Having examined the trial Court record and the submissions of the learned counsel for the State, the Court is satisfied that no grounds have been made to grant leave to appeal. The petition is accordingly dismissed.”

6. The Apex Court has also dismissed the Special Leave Petition filed by the State vide order dated 26th July, 2019. The relevant portion of the said order is reproduced hereinbelow:-

“We are not inclined to interfere with the concurrent findings of acquittal apart from the fact that there is also delay in filing the appeal.

The Special Leave Petition is dismissed.

Pending applications stand disposed of.”

7. Accordingly, the present leave petition being bereft of merits is dismissed.

MANMOHAN, J

SANJEEV SACHDEVA, J

NOVEMBER 07, 2019

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