

318

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRA-S No.399-SB of 2004
Date of Decision: 27.05.2015**

Madan @ Birju and others

.....Petitioners

Vs

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. G.S. Sandhu, Advocate
for the appellants Ram Niwas and Sandeep.

Mr. Pradeep Prakash Chahar, D.A.G., Haryana.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J.

[1]. This appeal has been filed by the accused-appellants against the judgment of conviction under Section 392/397 IPC and order of sentence vide which they have been sentenced to undergo rigorous imprisonment for 7 years along with fine of Rs.5,000/- each for the offences under Section 392 read with Section 397 IPC and in the event of default of payment of fine they shall further undergo rigorous imprisonment for one year.

[2]. The brief facts are that on 26.08.2002 PW-Rajbir nephew of the complainant Gainda Ram had gone to City Karnal on his motor cycle to purchase seeds. When he was coming back on western canal bridge near village Kachhwa three young men duly armed with

pistol and dagger intercepted him. One of them fired a shot hitting in his neck due to which he fell down and those persons took away his motorcycle. Slippers of injured remained at the site. Two persons were carrying country made pistols whereas third person was having a dagger in his hand.

[3]. Five persons were apprehended in case bearing FIR No.282 dated 03.09.2002 under Section 399/402 IPC and under Section 25 of Arms Act. Three accused herein were amongst those five arrested in the said case. They were joined in the investigation in the present case on 03.09.2002 and made disclosure statements. Accused Madan @ Birju , Ram Niwas and Sandeep @ Sonu made their disclosure statements viz. Exs.PG, PH and PJ respectively.

[4]. In pursuance to the aforesaid disclosure statements, they got the motorcycle recovered. Recovery memo was prepared vide Ex.PK by SI Bhagat Ram in the presence of Constable Ramesh Kumar. The weapons i.e. pistol of .315 bore (Ex.P3) along with five cartridges (Exs.P-4 to P-8) were got recovered from Ram Niwas accused. Pistol of .12 bore (Ex.P1) along with one live cartridge (Ex.P2) was got recovered from Madan Lal @ Birju and a dagger (Ex.P-9) was got recovered from Sandeep. @ Sonu.

[5]. After necessary investigation challan was presented and the accused were charge-sheeted under Sections 392, 397, 394 IPC. The prosecution examined as many as 12 witnesses, prominent amongst them were Dr. Rakesh Girdhar (PW1), ASI Ram Sarup (PW6), Inspector Balbir Singh (PW7), Constable Ramesh Kumar

(PW8), Dr. Avinash Kumar (PW9), HC Satish Kumar, Armourer (PW10), Gaiinda Ram (PW10/A), Rajbir (injured) (PW-11) and SI Bhagat Ram (I.O.) as PW12.

[6]. The accused/appellants pleaded not guilty and pleaded their false implication in their statement recorded under Section 313 Cr.P.C. The appellants have been charged of the offence of robbery. Every theft and every extortion are robbery if the accused does the overt act as per requirement thereof. Complainant himself stepped into witness box as PW-11 and deposed that on 26.08.2002 he was coming from village Pingli after bringing the seed of cucumber on his motorcycle. When he had just gone some distance from Kachhwa bridge, then assailants/accused stopped his motorcycle and caught hold of his motorcycle and took out its keys. Accused Sandeep @ Sonu gave *lalkara* and thereafter Madan @ Birju fired a shot from his pistol. Injured tried to ran away but Ram Niwas fired shot from his pistol at him. He received bullet injury on his neck. Accused also chased him on the motorcycle but on seeing another motorcycle coming from opposite direction they ran away along with motorcycle of the injured. The injured came to Police Post Ram Nagar. He was taken to Civil Hospital and then to PGI, Rohtak.

[7]. The witness in his cross-examination stated that he purchased seeds from his relative and also stated that he had gone to Police Post Ram Nagar in a rickshaw by covering a distance of 2-1/2/ kms. Police did not take any action rather advised him to go to Hospital. From Hospital he rang his employer Kapil. He came to him

in the Hospital at about 730 p.m. And from there he was taken to PGI Rohtak. Complainant Gainda Ram deposed that he visited the injured in serious condition in the Hospital. Injured Rajbir was having very weak voice and he narrated the incident to him in a very feeble voice and he in turn repeated the same to the Police by making statement Ex.PL. Accordingly FIR was registered. I.O. Bhagat Ram has been examined as PW-12. He also interrogated the same accused and recorded the disclosure statement Exs. PG, PH and PJ in furtherance of their disclosure statements and also got recovered motorcycle Ex.PK. The I.O. also took weapons in Police custody through recovery memo Ex.PE.

[8]. Learned counsel for the appellants has argued that Police did not join any independent witness at the time of alleged disclosure statement and at the time of recovery of motorcycle. Therefore, prosecution story is not free from any reasonable doubt. Secondly identification of accused for the first time in the Court by PWs is not an identification on the basis of which conviction can be recorded. Thirdly the FIR in which accused appellants were arrested and admitted their complicity in terms of present case was tested at trial and the appellants have been acquitted therein.

[9]. According to learned counsel anything recovered in the said case cannot be made basis or any incriminating evidence in the present case. Link evidence is missing altogether as the weapons so recovered were not subjected to armoury test promptly. The weapons so recovered on 03.09.2002 were got tested only on

15.10.2002 and, therefore, report is fatal.

[10]. This Court has considered the submissions of learned counsel for the appellants in broader aspect of the controversy. It is true that the Police is required to join independent witness but mere non-joining of independent witnesses in itself is not a ground to doubt the prosecution story particularly when prosecution has been successful in bringing trustworthy evidence on record.

[11]. In the present case, appellants were arrested in another FIR, they made disclosure statement on production in the present case. In pursuance of disclosure statement, recovery of motorcycle was effected. Therefore, disclosure which ultimately led to recovery, has evidentiary value in terms of Section 27 of the Evidence Act. The alleged improbable aspect of the case on the ground of non-joining of independent witness would become farce once the accused disclosed incriminating act and got recovery effected. Other features become formal in view of this pertinent factor on record.

[12]. Secondly the identification of the accused for the first time in Court is claimed to be no identification in the eyes of law. Apparently when the witnesses did not have any equation with the accused at prior point of time then it was imperative to corroborate the factum of identification. The identification of accused in the Court for the first time should have been corroborated.

[13]. In ordinary circumstances, identification of an accused by witness for the first time in Court should not form basis of his conviction, but at the same time the testimony of the witness has to

be read with caution as the accused in this case could not be arrested by the Police immediately after the occurrence. The accused himself disclosed the factum of their involvement in the present case in different FIR and in pursuance to that such disclosure they were joined in the investigation of the present case.

[14]. During the course of investigation when the statement of injured was recorded, the injured specifically pointed out at Sandeep @ Soun who had given *lalkara* like “mar sale ko”. Therefore, present case was not solely based upon identification of the accused for the first time in Court, but the injured identified one of the accused Sandeep @ Sonu when his statement was being recorded by the Investigating Officer and he identified one of the accused who gave *lalkara* to that effect. In this way the witness/injured rightly identified all the accused persons in Court when he was examined.

[15]. Even though recovery of Khakha of pistol .315 bore vide recovery memo Ex.PF/1, recovery memo of .12 bore Ex.PF/2, khakha of pistol .12 bore Ex.PF/3, Khakha of dagger Ex.PF/4, recovery memo of dagger Ex.PF/5 were of FIR No.282 dated 03.09.2002 under Sections 399/402 IPC and under Section 25 of Arms Act. These documents were duly exhibited and have been proved in the statement of Investigating Officer namely Balbir Singh who prepared PW-7 in the present case. The factum of recovery of weapons has been duly proved and nothing incriminating could come from the cross-examination of the said witness. ASI Ram Sarup while appearing as PW-6 corroborated the statement of PW-7

Inspector Balbir Singh, MHC Hukam Chand PW-5 and has proved the possession of weapons in FIR No.282 dated 03.09.2002. Therefore, testimonies of Inspector Balbir Singh PW-7 and ASI Ram Sarup as PW-6 and MHC Hukam Chand as PW-5 established the link evidence between two cases and on the strength of said evidence, the recoveries effected in FIR No.282 dated 03.09.2002 can be read in evidence of the present case.

[16]. It has been proved on record that Ram Niwas was having .315 bore Ex.P3 along with four live cartridges (Exs.P4 to P8). Accused Madan @ Birju was having pistol of .12 bore (Ex.P1) and one live cartridge (Ex.P2), similarly Sandeep @ Sonu was having a dagger (Ex.P9) in his hand. The disclosure statements made by accused vide Exs.PG, PH and PJ have been duly proved on record and the accused led to recovery of motorcycle vide recovery memo Ex.PK which also stood established on record. Constable Ramesh Kumar has been examined as PW-8 who has deposed categorically in terms of interrogation of accused persons and factum of their making disclosure statements and thereafter recovery of motorcycle in pursuance thereof.

[17]. The Investigating Officer SI Bhagat Ram-PW-12 has given minute details of investigation. Dr. Rakesh Girdhar while appearing as PW-1 has given description of injury sustained by Rajbir and opined that possibility of this injury being caused by fire arm cannot be over-ruled. Such type of opinion by the doctor is always based on experience and nothing wrong can be attributed to it. Similarly Dr.

Avinash Kumar (PW-9), Senior Resident, Department of ENT, Medical College, Rohtak also found lacerated wound of gun shot on the right **sub-mandibula region** and found the injury to be dangerous to life.

[18]. Link evidence is established on record with the statement of PW-2 MHC Inderjit Singh who by way of his affidavit Ex.P8 has proved the receipt of case property i.e. pistols and dagger and sent the same to FSL, Madhuban, Karnal for examination through Constable Surinder Singh. Constable Surinder Singh has been examined as PW-3 and vide his affidavit Ex.PC the link evidence stood established on record. The testing mechanism of pistol from Armourer has also proved with reference to the statement of witness PW-10.

[19]. The testing of weapons on 05.10.2002 cannot nullify the effect of incriminating thing particularly in view of statement of Armourer whose statement was corroborated by the report of FSL (Ex.PR). Both the weapons were found recovered from accused Madan @ Birju and Ram Niwas and were found to be in working order.

[20]. Acquittal of accused in FIR No.282 dated 03.09.2002 cannot form basis for acquittal in the present case. Only the recoveries of weapons have been relied in the present case with reference to statements of witnesses to the extent of proving recovery in the aforesaid FIR. The prosecution of accused persons in the present case remained on different pedestal so far as

culpability of the accused in the present case was concerned. The evidence led in both the cases was different. In the instant case prosecution has successfully brought home the guilt of the accused to the hilt.

[21]. Learned counsel for the appellants cites 2003(4) RCR (Crl.) 645, State of Haryana v. Balbinder Singh and others and 2002(4) RCR (Crl.) Dana Yadav v. State of Bihar to contend when the description of the accused are not given in the FIR and the prosecution could not link the accused with the robbery and the identification of the accused in Court for the first time should have been appreciated to equate the appellants.

[22]. The aforesaid judgments operate in the circumstance of those cases only. In the present case the accused-appellants were arrested in different cases in which they admitted their guilt. Their disclosure statements were recorded in the present case and recoveries were also effected. The identities of the accused as well as the case property were duly established on record. The deviation from the normal rule in terms of identification of the accused for the first time in Court stood explained when the statement of injured Rajbir was being recorded by the Police, he identified one of the assailants Sandeep by pointing out towards him that he was person who gave lalkara like “mar sale ko”.

[23]. In such type of situation when identification was already made before the appearance of the accused in the Court, the plea of defence being wholly erroneous has to be rejected.

[24]. According to this Court the prosecution has successfully brought the accusation/guilt of the accused/appellants beyond all reasonable doubts and they have been rightly convicted and sentenced. Resultantly finding no error in the judgment, the conviction and sentence of the appellants are upheld.

[25]. The appeal is totally bereft of merits and same is dismissed as such.

May 27, 2015

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**(RAJ MOHAN SINGH)
JUDGE**