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

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Date of Decision: 25.03.2015

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CRL. APPEAL NO. 488/2009

YUSUF

..... Appellant

Through: Ms. Saahila Lamba, Advocate with
Ms. Karuna Chhatwal, Advocate.

versus

STATE OF DELHI

..... Respondent

Through: Mr. Rajat Katyal, APP.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. This appeal is directed against the judgment dated 13.02.2008 passed by the learned Additional Sessions Judge (ASJ), Karkardooma Courts, Delhi, in Sessions Case No. 161/06 arising out of FIR No. 162/03, PS New Usmanpur, under Sections 392/394/397/34 IPC. By the impugned judgment, the appellant Yusuf and the co-accused Arif were held guilty and convicted for offences punishable under Sections 452, 392, 394 and 397 of the Indian Penal Code (IPC). The appellant also assails the order on sentence dated 19.02.2008, whereby the appellant was sentenced to undergo three years RI and to pay a fine of Rs. 2,000/- for offence punishable under Section 452 IPC. In default of payment of fine, he was further directed to undergo RI for six months. The appellant was further sentenced to undergo

RI for three years and to pay a fine of Rs. 5,000/- for offence punishable under Section 392 IPC. In default of payment of fine, the appellant was directed to undergo RI for nine months. The appellant was also sentenced to undergo RI for four years and to pay a fine of Rs. 2,000/- for offence punishable under Section 394 IPC. In default of payment of fine, the appellant was awarded further RI of six months. Finally, he was also sentenced to undergo RI for seven years for offences punishable under Section 397 IPC. The co-accused Arif was similarly sentenced. It was directed that the sentences awarded shall run concurrently. Both the convicts were granted benefit of the period already undergone in detention during investigation and trial of the case.

2. The case of the prosecution as set out in the impugned judgment is as follows:-

On the night intervening 8/9-07-03, Sushil Kumar was sleeping at his house along with other family members. At about 4 a.m., he was in slumbers. The offenders awakened him. He found two persons standing by the side of his bed, having long knives in their hands. When he tried to raise an alarm for help, one of the offenders put a knife on his neck and dragged him. They took him to the veranda, where other offenders were present. On hearing the commotion, Virender, brother of Sushil Kumar, also woke up and came into the verandah. Offenders overpowered him and took him, as well as Sushil Kumar, in a bedroom. They tore bedsheet and tied their hands and legs. Himanshu, the son of Virender, and Suman, wife of Virender, were also tied by them. By putting them in fear of instant death, offenders took keys of the almirah and started ransacking the house. They

looted a sum of Rs. 35,000/- in cash, apart from jewellery from their house. While leaving, they criminally intimidated them of abduction of Himanshu, in case they lodged a report. After the offenders ran away, Suman released herself and untied hands of Sushil Kumar and her husband. A telephone call was made to police control room, after connecting the telephone wires, which were cut by the offenders. Police reached there. Sushil Kumar lodged a report, which became the bedrock of the case, and thereafter investigation commenced. During the course of investigation, accused persons were arrested. Hence, chargesheet was filed against them.

3. To substantiate the charges framed for offences under Section 392 IPC read with Section 34, 394 and 397 of the IPC-to which both the accused pleaded not guilty and claimed trial, the prosecution examined 13 witnesses, which were as under:-

Master Himasnhu (PW1)

Suman (PW2)

Sushil Kumar (PW3)

Charan Lal, Constable (PW4)

Sunder Lal, Constable (PW5)

N.K.Sharma, SI (PW6)

Kamlesh, Head Constable (PW7)

Balwan Singh, Head Constable (PW8)

Harender, Constable (PW9)

S.B.Gautam, SI (PW10)

Dr. Rajesh, (PW11)

Virender (PW12), and

Barkha Gupta, MM (PW13)

On the basis of the evidence led, the learned ASJ convicted both the accused, as aforesaid.

4. The second convict-Arif preferred criminal appeal No. 821/2008 and the said appeal was allowed by this Court on 05.12.2014. It appears that while the appeal preferred by Arif was heard and disposed of, the appeal of the appellant-Yusuf was lying dismissed for non-prosecution vide order dated 03.12.2014. Subsequently, on an application being moved by the convict, the application for restoration was allowed on 27.01.2015. Consequently, the primary argument advanced by learned counsel for the appellant is that the appellant is identically placed as the co-accused Arif, and the appellant is deserving of the same treatment. She submits that the appellant is entitled to be acquitted in the face of the acquittal of the co-accused Arif.

5. Learned counsel for the appellant has taken me through the impugned judgment as well as the judgment of this Court in Criminal Appeal No. 821/2008, titled, 'Arif Vs. State' dated 05.12.2014, which has resulted in acquittal of Arif. I consider it appropriate to extract the relevant portion of the judgment of this Court in the case of Arif (supra) to examine whether the decision in the case of Arif (supra) can be relied upon by the appellant in the present case to his advantage. In Arif (supra), this Court, *inter alia*, records:

“3. The case of the prosecution is that on the intervening night of 8th/9th July 2003, Sushil Kumar (PW-3) was sleeping in his house at V-71, Khajurwali Gali, Ghonda, Delhi along with his other family members i.e. Smt. Suman (PW-2), the wife of the brother of PW-3 and her son Himanshu (PW-1). At around 3.45 am, PW-3 woke up and found two persons standing by the side of his bed having long knives in their hands. When he raised an alarm for help, one of them put a knife on his neck and dragged him. On hearing the commotion, his brother Virender (PW-12) also woke up and reached there. He was also taken by the intruders to a bedroom where PWs 3 and 12's hands and legs were tied up. PW-1 (son of PW-12) and PW-2 (wife of PW-12) were also tied up putting all of them in fear of instant death. They took the keys of almirah and started ransacking the house. They were stated to have taken away Rs.35,000 cash and jewellery and while leaving criminally intimidated all of them. After they ran away PW-2 got herself released and untied the hands of PWs-3 and 12.

4. For about two months no progress was made in the investigation. On 26th August 2003, A-1 was arrested in FIR No. 404 of 2003 registered at Police Station (PS) Moti Nagar under the Arms Act. He is stated to have made a disclosure statement about his involvement in the present case. This led to the arrest of the Appellant herein i.e. A-2 on the same day. Interestingly, Appellant's disclosure statement was recorded in FIR No. 405 of 2003 of the same PS although the fate of that FIR is not known.

5. A test identification parade (TIP) was conducted on 9th September, 2003 in which the Appellant participated. The learned MM who conducted the TIP was examined as PW-13. She confirmed that neither PW-3 nor PW-12 who were called inside the jail premises were able to identify the Appellant. The TIP proceedings were exhibited as Ex.PW-13/A and proved by her. In the Court, however, PW-2 identified the Appellant and A-1. She stated that the Appellant had tied her legs while A-1 had slapped her face. In the course of her examination-in-chief, she stated that as she was pregnant

I did not see the accused persons between today and the date of incident. At that stage, learned APP for the State was permitted by the Court to cross-examine her. She now stated in response to a question by the learned APP as under:

“It is incorrect to suggest that on 12th September 2003, I along with my husband, Virender, Devar Sushil and my son Himanshu came outside Court No. 15, KKD and we saw both the accused persons present in the Court outside Court No.15 in the police custody and I identify them as two out of four are the same who committed robbery of cash and jewellery in our house and also threatened us and also caused injuries while committing robbery on the persons of my husband. I have not stated the said fact to the police (confronted with the statement mark A1 where this fact is so recorded).”

6. The above suggestion by the APP reveals that PW-2 was in fact shown the accused on 12th September 2003 i.e. three days after the TIP, outside Court No.15 in the KKD Courts while they were still in police custody. This renders her identification in the Court of the Appellant suspect.

7. PW-3 also identified the Appellant in the Court. However, as already noted, he failed to identify the Appellant at the earlier point in time in the TIP. In view of the suggestion given to PW-2, the identification of the Appellant in Court by the other prosecution witnesses would also be suspect. When the presence of the Appellant at the spot is in great doubt, the judgment of the trial Court finding him guilty of the aforementioned offence cannot be sustained in law. The Appellant is entitled to benefit of doubt and is accordingly acquitted of the offence under Sections 452/392/394/397 IPC.”

(emphasis supplied)

6. Learned counsel for the appellant submitted that like in the case of Arif, during the TIP proceedings, PW12-Virender had failed to identify the appellant-Yusuf. She submits that the commonality between the appellant's case and that of Arif also extends to the fact that on 12.09.2003, when both the appellant and Arif had been produced in Karkardooma Courts, PW2-Suman, her husband Virender (PW12), Sushil Kumar (PW3) and Himanshu (PW1) were shown both the accused outside Court No. 15 while in police custody. Therefore, the identification of the appellant and the co-accused Arif by the three prosecution witnesses, namely, PW2, PW3 and PW12 during the course of their deposition before the Court would be of no avail. Learned counsel submits that since the same lacuna inheres the appellant's case, the decision in the case of Arif can be pressed into service to the appellant's advantage. She submits that the presence of the appellant at the scene of the crime is suspect. She further submits that even the TIP had been got conducted highly belatedly. In this regard, learned counsel submits that the appellant and co-accused Arif had been arrested in case FIR Nos. 404 and 405 of 2003, PS Moti Nagar under the Arms Act respectively. The case of the prosecution was that in their disclosure statements made by both the accused on 26.08.2003 – in the course of the investigation of the said cases, they had disclosed regarding their involvement in the present case. The IO of the present case was put to notice of the same vide DD No. 33B on 28.08.2003. Learned counsel submits that, therefore, between 28.08.2003 and 09.09.2003 – when the TIP took place, there was sufficient time and opportunity available for the accused being shown to the prosecution witnesses, which could have led to the identification of the appellant in the TIP. Learned counsel submits that no recovery of either the

stolen money, or the jewellery had been effected, and even the chance prints lifted from the scene of crime did not match with the finger prints of the appellant.

7. On the other hand, the submission of Mr. Rajat Katyal, learned APP is that the decision in Arif (supra) would be of no avail to the appellant, since there is a material difference on facts. He submits that, whereas, Arif had not been identified during TIP by either PW3 or PW12, the appellant-Yusuf had been categorically identified by PW3. In this regard, he has referred to TIP proceedings of 09.09.2003, and also the testimony of PW3. Mr. Katyal submits that there was no occasion for the accused being shown to PW3 or PW2 prior to the TIP proceedings, because on 28.08.2003 when information was sent to the IO in this case with regard to the involvement of the accused in the present case, both the accused were already in Judicial Custody (JC). He submits that the accused were formally arrested in the present case on 01.09.2003 at Tihar Jail, while they were in JC. Application for TIP of both the accused Yusuf and Arif had been made on 03.09.2003, on which the learned MM passed an order that the same be put up before Miss Barkha Gupta, MM, on 04.09.2003. On 04.09.2003, learned Duty Magistrate, passed the order directing that the matter be put up for TIP on 09.09.2003. Mr. Katyal submits that in these circumstances, the TIP could be conducted only on 09.09.2003, and not prior to that. He submits that throughout this period, the accused remained in JC and there was no question of the accused being shown to any of the prosecution witnesses. He submits that in the present case, application for police remand of the accused was, in fact, rejected on 12.09.2003. He has also referred to the testimony of PW3 and

points out that no suggestion was given to PW3 that the accused had been shown to him prior to the TIP. Mr. Katyal submits that, firstly, there was no delay in the conduct of the TIP and, secondly, no prejudice has been caused to the appellant in the facts and circumstances of the case. Mr. Katyal submits that the appellant joined the TIP voluntarily and had not raised any objection at the time of the TIP that he had been shown to the prosecution witnesses, particularly, PW3, prior to TIP.

8. Having heard learned counsels, perused the impugned judgment, the evidence brought on record as well as considered the decision in the case of Arif (supra), I am of the view that the said decision does not advance the case of the appellant in any way. In the case of Arif, he had not been identified during the TIP by either PW3 or PW12. The prosecution had not taken PW2 for the TIP. It has come on record that she was pregnant at that stage and, therefore, she did not go for the TIP. So far as PW1-Himanshu is concerned, he failed to identify either of the accused in the court, by stating that the faces of the intruders were muffled. The trial court has analyzed and examined the mental condition of Himanshu (PW1) – a minor child of about 9 years, to explain his failure to identify either of the accused in para 18. I find myself in complete agreement with the reasoning adopted by the trial court qua the failure of PW1 to identify either of the accused.

9. On the other hand, the appellant has been clearly identified during the TIP by PW3. The TIP was conducted by learned MM. The relevant extract of the TIP proceedings, which are Ex.PW13/C, *inter alia*, reads as follows:

“Now the witness has been called from outside the jail premises. One person has entered. His name is revealed as

Shri Virender Kr. Kashyap son of Shri Amar Nath. I have asked him to look at all the persons standing in the row carefully and to identify the accused if he can. The witness has seen all of them very carefully after which he submits that, “जो आदमी मेरे व जज साहेब के right hand side से तीसरे नंबर पर खड़ा है, वह ही मुलजिम है” i.e. the person standing at 3rd place from my right side and his right side is the accused involved in the case. The witness again said that probably, “जो आदमी मेरे व जज साहेब के left side से तीसरे न. पर है वह मुलजिम है i.e. the person standing at 3rd place from my left side and his left side is the accused involved in this case. The witness is asked to sign the proceedings and sent to other room so that he does not come in contact with other witnesses. All necessary precautions of TIP are taken. Door of room is closed.

I have given an option to accused to change his clothes and he has changed his clothes with another accused. Now he has preferred to stand at 5th place from my left side & at 6th place from my right side. **Now the other witness has been called from outside the jail premises. His name is revealed as Shri Sushil Kr. Kashyap son of Shri Amar Nath. I have asked him to look at all the persons standing in the row carefully and to identify the accused if he can. The witness has thoroughly seen all of them & after it he has gone near the accused who is standing at 5th place from my left side & his left side & at 6th place from my right side & his right side & touched the accused stating that he is the accused involved in this case. He is asked to sign the proceedings and is sent to other room.**

At this stage, it is revealed that there is no other witness. **TIP proceedings are over wherein the Ist witness has failed to identify the correct accused but the 2nd witness has very specifically & categorically identified the accused involved in this case.”**

(Emphasis supplied)

10. There is merit in the submission of Mr. Katyal that there was no occasion for the appellant being shown to PW3 prior to the TIP. In this regard, it is clear from the proceedings taken note of earlier, that both the accused were in JC throughout from the time the IO of this case was first given intimation about the apprehension of the accused in cases under the Arms Act, till the conduct of TIP, and even thereafter. The information was given to the IO on 28.08.2003 vide DD No. 33-B, PS New Usmanpur, while the accused were in JC. They were formally arrested on 01.09.2003 at Tihar Jail, while in JC. The application was moved before the concerned Magistrate for TIP of the accused on 03.09.2003, which was put up on 04.09.2003. On 04.09.2003, orders were passed for conduct of TIP on 09.09.2003. All this while, the appellant was in JC. The TIP took place in Tihar Jail. The learned Magistrate took every care to ensure that the accused were not shown to PW3 or PW12 prior to the TIP, or that they were identified by the police before the TIP. Therefore, it cannot be said that there was any delay on the part of the police to get the TIP of the accused conducted. Furthermore, the fact that the appellant was in JC throughout, and the procedure adopted by the learned Magistrate for conduct of the TIP also rules out the possibility of the appellant being shown to PW3 prior to the TIP proceedings conducted on 09.09.2003. Pertinently, PW3 did not identify the other accused Arif, and PW12 did not identify both the accused. This itself rules out the possibility of the accused being shown and identified by the police to either PW3 or PW12. I may also take note of the testimony of PW3, including his cross-examination, in this regard.

11. PW-3, *inter alia*, stated that, ***“on 09.09.2003, I went to Tihar Jail to identify the robbers where I identified one of the robber out of the four. The accused Yusuf is present today in the court, whom I identified in the TIP in the Tihar Jail as one of the assailants in my house. Accused Yusuf was having katta in his hand, however, when I taken to another room, he cut the cloth with which I was tied on my legs, with the knife. Second accused Arif also second one out of four assailants who committed robbery of cash and jewellery from our house along with co accused Yusuf and two other more at the point of knives and kattas. He was having a long knife in his hand. Accused Arif tied the mouth of my Bhabhi. On 12.9.2003, I also identified both the accused persons Yusuf and Arif present in the court while they were in the custody of the police as being among those four robbers, who committed robbery of cash and jewellery at the point of knives and kattas at our house on 9.7.2003 at about 4.00 a.m”.*** (Emphasis supplied)

12. During his cross-examination by counsel for the appellant, PW3, *inter alia*, stated as follows:

“It is correct that I had not identified one accused Arif in the TIP in Tihar Jail. It is wrong to suggest that I identified accused Arif as I was shown his photo outside the court today, at the instance of the IO. In Tihar Jail, accused Yusuf was wearing the clothes of cream colour when I had identified him in TIP proceedings. I cannot say today as to at what position/serial number, he was standing at the time of his identification by me in TIP proceedings. It is incorrect to suggest that I had identified him in the TIP proceedings at the instance of the IO. Thereafter, police came to our house to give the summons. Police did not meet me since the day of the incident in my house. Police never informed me to identify the accused persons except in the case of their TIP proceedings.

.....When robbers entered our house one or two robbers had partly covered their faces, whereas the other robbers were without any cover on their faces. Out of the two accused, present in the court, accused Arif had partly covered his face.”

(Emphasis supplied)

13. In his cross-examination by counsel for the accused Arif, PW3, *inter alia*, stated thus:

“Police had never called me to the PS. Police sent me summons for going to Tihar for TIP of accused. Police had not shown me any photographs of the accused persons prior to their TIP. Accused Arif had his face covered from his nose below. My signatures were taken only on the complaint Ex.PW3/A and on no other document. I had myself collected information from the police regarding the proceedings against the accused persons in KKD Court. The same were going on in room No. 15, where I had also identified the accused to the police in the court room. It may be on 12.9.2003.”

(Emphasis supplied)

14. The testimony of PW3 generally stands corroborated by the testimony of PW2 and PW12 with regard to the incident on the fateful night. On a perusal of the testimony of PW3, it appears that he is entirely credible and trust worthy. He has denied the suggestion that he had been shown the photograph of the appellant prior to the TIP, or that he had identified the appellant in the TIP proceedings at the instance of the IO. There is no reason to disbelieve him. He was the victim of the crime, who suffered – both physical and financial injury. In *State of U.P. vs. Naresh & Anr.* (2011) 4 SCC 324, the Supreme Court observed:

“The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide: Jarnail Singh v. State of Punjab, (2009) 9 SCC 719; Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673; and Abdul Sayed v. State of Madhya Pradesh (2010) 10 SCC 259).”

15. The lack of recovery of either the cash, or the jewellery from the appellant could be attributed to the delay of about 2 months in his arrest. Arif, possibly, could not be identified because his face was muzzled and was given the benefit of the doubt. Merely because the appellant was identified by only one prosecution witness, i.e. PW-3, it does not follow that the said identification was doubtful.

16. In the light of the aforesaid discussion, I find no merit in this appeal and dismiss the same.

VIPIN SANGHI, J

MARCH 25, 2015

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