

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

+ **CRL.A.1262/2011**

% Reserved on: 24.08.2015
Date of Decision: 01.09.2015

MOHD.SAIDAB @ AJAJ Appellant
Through Mr. Ajay Verma, Adv.

versus

STATE Respondent
Through Ms. Rajni Gupta, APP.
SI Deshpal, P.S.Jama Masjid.

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J:

1. Mohd.Saidab @ Ajaj stands convicted by judgment dated 13.7.2011 passed by Additional Sessions Judge-01 (Central), Tis Hazari Courts in Sessions Case No.103/09 under Sections 392/394/34 and 397 IPC, arising out of FIR No.43/2008 (P.S.Jama Masjid).
2. By order dated 14.7.2011 the appellant has been sentenced to undergo rigorous imprisonment for seven years, fine of Rs.50,000/- (in default simple imprisonment for one year) for the offence under Section 394 IPC and rigorous imprisonment for seven years for the offence under Section 397 of the IPC. The sentences under both the counts have been ordered to run concurrently. No separate sentence has been passed under Section 392 of the Indian Penal Code.

3. The aforesaid judgment and order of conviction is under challenge in this appeal.

4. Pappu Yadav (PW-1) was robbed of 3.5 lakhs of rupees which he was carrying in a green bag at about 7.30 a.m on 11.6.2008. While he was being robbed of his bag containing money and other documents, he was fired at by one of the miscreants, leading to injuries in his left thigh. Another shot was fired, aiming at his head which missed. The miscreants who were four in number, on two motorcycles, sped away. Shortly thereafter, a police official reached the place of occurrence who was told by aforesaid Pappu Yadav regarding the occurrence. Pappu Yadav was taken to the hospital. His statement was recorded which led to the registration of the FIR No.43/08, P.S.Jama Masjid, under Sections 394/397/411 and 34 of the IPC.

5. The appellant and one Mohd.Sarif (who too was put on trial along with the appellant) were arrested on 14.7.2008 in connection with another case namely FIR No.48/08 (P.S.Jama Masjid) which was registered under Sections 399/402/307/186/353/34 of the IPC. The appellant and aforesaid Mohd.Sarif after their arrest in the aforesaid case, made a disclosure statement regarding the present incident.

6. Pursuant to the disclosure made by the appellant, one rexin bag containing Rs.25,000/- and a photograph of Pappu Yadav (PW-1) was recovered from the house of the appellant. On the same day Rs.33,000/- and an Election Identity Card of Pappu Yadav (PW-1) was recovered from the house of co-accused Mohd.Sarif.

7. The appellant was arrested in the present case and was brought before the Metropolitan Magistrate for Test Identification Parade. The appellant, however, refused to participate on the ground that his photograph had been taken and he had been shown to the witnesses.

8. The prosecution in order to bring home the charges against the appellant has examined 22 witnesses and has primarily relied on the deposition of Pappu Yadav (PW-1), the victim; recovery of the rexin bag containing Rs.25,000/- and the photograph of Pappu Yadav (PW-1) from the house of the appellant at his instance and identification of the appellant by PW-1 in the Court as having shot at PW-1 by him.

9. Pappu Yadav (PW-1) has deposed that on 11.6.2008 while he was going on a cycle rickshaw to Lajpat Rai market from New Delhi Railway Station, he was stopped by four boys of young age who were riding on two motorcycles. Miscreants on one motorcycle blocked the way of the rickshaw whereas the riders of another motorcycle tried to snatch the rexin bag which he was carrying and which contained cash of Rs.3.5 lakhs. On the resistance of PW-1, one of the miscreants took out a revolver and fired at his left thigh. Another shot was fired which missed the target. The miscreants snatched his bag and left the place of occurrence. One police officer, who by chance came at the place of occurrence, took him to the hospital. His statement was recorded (Ex.PW-1/A). He was relieved from the hospital in the evening.

10. PW-1 identified the appellant in the Court as the one who had fired at him. It was stated by him that none of the miscreants were wearing any helmet. He has denied the suggestion that Ex.PW-1/A was not prepared in his presence and that he handed over the

documents to the police officers including I-Card after the occurrence. He has further deposed that the incident of grappling, snatching and firing at him continued for about 15 minutes. He has also denied the suggestion that the identification of the appellant was at the behest of the IO of the case.

11. Head Constable Joginder Kumar (PW-3) has deposed that on 11.6.2008 he saw the injured Pappu Yadav (PW-1) in front of Pahalwan road, Gate No.3, Jama Masjid who told him that four motorcycle borne miscreants had injured him and have snatched his bag containing cash. PW-3 took PW-1 to JPN hospital in a TSR and got him admitted.

12. Head Constable Kailash Kumar (PW-4) was posted as constable at LNJP Hospital. He has stated before the Trial Court that Pappu Yadav (PW-1) was admitted in the hospital in his presence and he was brought by Head Constable Joginder Kumar (PW-3).

13. Thus from the deposition of the aforesaid prosecution witnesses, it stands established that Pappu Yadav (PW-1) was robbed of his belongings and was also fired at on 11.6.2008 near Jama Masjid. There thus remains no doubt that PW-1 was divested of his belongings and was also injured in the occurrence.

14. What is necessary to be found out now is whether the appellant had participated in the occurrence and had fired at PW-1.

15. According to the prosecution version, the appellant was arrested on 4.7.2008 in connection with another case vide FIR No.48/08 (P.S.Jama Masjid).

16. ASI Mohd.Haroon (PW-9) has testified to the fact that on 4.7.2008, on the basis of secret information he had apprehended the appellant, Mohd.Sarif and one Mohd.Wasi in Meena Bazar park. From the possession of the appellant one country made pistol and two live cartridges were recovered. The aforesaid arrest was made in connection with FIR No.43/08.

17. ASI Dharamvir (PW-10) has deposed that he was given the charge of investigation of FIR No.48/08. The appellant gave a disclosure statement and confessed to have committed the crime pertaining to FIR No.43/08. As such, police remand for two days was obtained by PW-10. He has further deposed that on 5.7.2008 he went to the house of the appellant and at his instance recovered one rexin bag containing an amount of Rs.25,000/- of 500 denomination and a passport size photograph on which 'Pappu' was written. He has also stated that one Mohd.Sarif who too was arrested in connection with FIR No.48/08 led the police party to a house in Khajuri Khas and on his pointing currency notes of Rs.33,000/- of 500 denomination each along with the Election Identity Card of Pappu was recovered. During the course of interrogation the appellant and Mohd.Sarif made disclosure statements (Ex.PW-11/E and PW-11/F respectively). The recovery memo of the currency notes and other articles from the appellant and Mohd.Sarif were marked as Exh.PW-11/G and PW-11/I respectively. Two motorcycles also were recovered at the instance of Mohd.Sarif.

18. In his cross-examination PW-10 has admitted that the appellant and Mohd.Sarif were not arrested in his presence and that the contents

of disclosure statement made by the appellant was not mentioned in his statement (Ex.PW-10/DA). However, he has denied the suggestion that the appellant did not make any disclosure statement in his presence. He has also admitted the fact in his cross-examination that no memo of the case of FIR No.48/08 was signed by any public witness. In fact no attempt was made to serve any public witness with notice after their refusal to join the investigation. No specific marks were put on any one of the currency notes which were recovered from the possession of the appellant.

19. Head Constable Surinder Singh (PW-11) who was one of the members of the raiding team along with ASI Mohd.Haroon (PW-9) has deposed that on 5.7.2008 the appellant took the police party to his house at Chota Chamanwala from where a polythene bag containing Rs.25,000/- and a photograph was recovered at his instance. He has also admitted that the contents of the disclosure statements were not mentioned in detail in his statement (Ex.PW-11/DA). However, he has denied the suggestion that the IO of the case had recorded the disclosure statement on his own. It has also been stated by the aforesaid prosecution witness that in the statement Ex.PW-11/DA there is no reference of the presence of Pappu Yadav (PW-1) in the investigation. However, it is admitted by him that Pappu Yadav (PW-1) signed the pointing out memo along with him.

20. It has been argued on behalf of the appellant that no reliance could be placed on the testimony of police officials/witnesses who have testified to the fact that the looted amount was recovered from the house of the appellant. The recovery was not effected in presence

of any independent witness. There are contradictions in the testimony of police/official witnesses. PW-11 has categorically deposed that the recovery was effected in presence of the complainant (PW-1) but the recovery memos did not bear the signature of the complainant.

21. It has been strenuously canvassed that the contents of the disclosure statement made by the appellant and another co-accused were not disclosed in the 161 statement of the aforesaid witnesses.

22. Section 27 of the Indian Evidence Act provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

23. Section 27 of the Evidence Act is, therefore, an exception to the rules enacted in Section 25 and 26 of the Evidence Act which provide that any confession made to a police officer shall be proved as against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

24. The testimonies of PW-10 and 11 confirm the fact that the aforesaid witnesses did not disclose as to what information they had obtained from the appellant which led to the discovery of a fact namely part of the looted property and the photograph of the complainant (PW-1). In the absence of such statement, it cannot be proved that the recovery was pursuant to the information provided by

the appellant or the co-accused. The recovery of the part of the looted property including the photograph of the complainant, therefore, does not inspire confidence.

25. Pappu Yadav (PW-1) was robbed on 11.6.2008. However, the recovery is said to have been effected on 5.7.2008 i.e after about 25 days of the occurrence. In fact PW-1 has also not stated in his statement (Ex.PW-1/A) as to what was kept in the bag apart from cash of Rs.3.5 lakhs.

26. Thus the time lag, absence of specific information as to what, apart from cash, was looted and no statement by the police officers regarding the contents of the confession makes the entire recovery doubtful.

27. The Trial Court rightly disbelieved the factum of recovery of looted amount from the house of the appellant.

28. Thus the only evidence which is now available against the appellant is his identification by PW-1 as being one of the members of the group of miscreants who participated in looting and firing at PW-1.

29. The appellant was identified by PW-1 as the person who had fired at him causing injuries in his leg. Such identification in Court, though a substantive piece of evidence requires corroboration. Since the identification of the appellant at the trial is for the first time, therefore, it needs to be carefully examined whether such identification is correct or not. Be it noted that the appellant and the co-accused did not accede to the request of being put on Test Identification Parade. The appellant in his statement recorded under

Section 313 of the Code of Criminal Procedure has stated that he was produced before the Magistrate with his face uncovered. The contention of the appellant has been rebutted by the prosecution on the ground that no such suggestion was given to Inspector Vijay Kumar (PW-20), the Investigating Officer of this case. It has also been argued on behalf of the prosecution that PW-1 also was not suggested that he was made to see the appellant when he was called at the police station or at the time of recovery of the part of the looted article.

30. The purpose of a prior Test Identification Parade is to test and strengthen the trustworthiness of the evidence of the victim. It is a safe rule of prudence to generally look for corroboration for the sworn testimony of a witness in Court as to the identity of the accused who is a complete stranger, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions. If a Court is satisfied about the reliability of a particular witness regarding identification there would be no requirement of any further corroboration. The identification parade is only a part of investigation and no hard and fast duty is cast upon the prosecuting agency to hold a Test Identification Parade. They do not constitute substantive evidence and are generally governed by Section 162 of the Code of Criminal Procedure.

31. Nonetheless in the present case, the identification of the appellant in Court by PW-1 appears to be doubtful for the reasons that the recovery of the looted property from the house of the appellant was made on 5.7.2008 after the appellant was arrested in connection with another case on 4.7.2008. Head Constable Surinder Singh

(PW-11) in his deposition has stated that the pointing out memo and some of the documents were signed by PW-1 and him.

32. He has also stated that when the disclosure statement of the appellant and another co-accused were being recorded in the case, the complainant (PW-1) was present. That apart, since the recovery of the looted cash and the photograph of PW-1 has been doubted, the same doubt creeps in the identification of the appellant in Court by PW-1.

33. Pappu Yadav (PW-1) has deposed before the Court that he did not say in his statement before the police i.e. Ex.PW-1/A that the assailants/miscreants were not wearing helmets. The make and colour of the motorcycle also was not told by PW-1 in his statement before the police. What has been stated by PW-1 is that he had seen the faces of the assailants. PW-1 has also admitted of the fact that the entire occurrence of looting continued for about 15 minutes.

34. Complete reliance upon PW-1 so far as the identification is concerned is not possible. PW-1 hails from Kanpur and perhaps he would have seen the appellant for the first time, if the appellant had participated in the occurrence. Before the Trial Court, only two persons were put on trial, one being the appellant and the other co-accused having become a proclaimed offender shortly after being put on trial. Admittedly there were four persons who had committed the robbery. The third miscreant was held to be a juvenile and has been tried by the Juvenile Court. In such an event, it was very easy for the prosecution to have made the complainant (PW-1) identify one of the accused out of the two as the assailant or the person who had fired at him. The arrest of the appellant in a different case of the same police

station i.e. Jama Masjid after about 25 days of the occurrence in which PW-1 was injured and the disclosure of the appellant leading to recovery of the looted cash and the photograph of PW-1 on the next day creates doubt about the assertion of the prosecution that the appellant was not shown to PW-1. Though no other police official except PW-11 has stated before the Trial Court that PW-1 had participated in the proceedings whereby recovery was made, nonetheless the statement of PW-11 is very categorical. Such statement does cast doubt over the genuineness of the identification of the appellant in Court.

35. The Trial Court has given a curious reasoning that since PW-1 is a resident of Kanpur he would have no animosity with any one of the accused persons and would have no motive to implicate any person falsely. What the Trial Court perhaps lost sight of was that only two persons were put on trial, one being the appellant and he having been put on trial only on the basis of the recovery of part of the looted property and the photograph and the aforesaid recovery having been doubted by the Trial Court itself. PW-1 has also not been able to identify the cash which was recovered at the instance and from the house of the appellant.

36. Thus taking the whole conspectus of the circumstances available in the case namely the arrest of the appellant in a different case of the same police station; recovery of part of looted cash and photograph of PW-1 from the house of the appellant; the statement of PW-11, a police official who was part of the recovery proceedings and the fact that the only material against the appellant apart from the

identification, being the recovery from his house and added to all this the identification of the appellant by PW-1 for the first time in the Court lends support to the theory proposed by the defence that the identification is not genuine. There was no reason for the Trial Court to have disbelieved the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure that he was shown to PW-1 prior to his being put on Test Identification Parade.

37. In that event benefit of doubt is required to be given to the appellant.

38. Thus the prosecution has failed to build up its case beyond the shadow of reasonable doubts.

39. The appellant is, therefore, acquitted of all charges by giving him benefit of doubt. The judgment and order of conviction is set aside and the appellant is directed to be released from jail forthwith, if not, wanted in any other case.

40. The appeal stands allowed.

41. Trial Court record to be returned.

42. Two copies of the judgment be sent to the Superintendent of the concerned jail for record as well as compliance.

SEPTEMBER 01, 2015

ASHUTOSH KUMAR, J

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