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

+ CRL. A. No. 1428/2011

Decided on 22nd January, 2015

ARIF

Through :Mr. B.P. Singh, Mr. K.V. Sreenithun
and Mr. Devender Kumar, Adv. with
appellant in person.

..... Appellant

Versus

STATE GOVT. OF NCT OF DELHI

Through : Mr. Yogesh Verma, APP

..... Respondent

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.(ORAL)

1. Aggrieved by the judgment dated 21st October, 2011 and order on sentence dated 22nd October, 2011, whereby appellant has been convicted under Sections 394/34 as well as Section 397 of the Indian Penal Code, 1860 (IPC) and sentenced to rigorous imprisonment for seven years and pay fine of ₹5,000/- each for both the offences, appellant has preferred this appeal.
2. Factual matrix as unfolded is that on 5th January, 2010 at about 8:00 PM, an information was received in the Police Station Krishna Nagar, Delhi from one Shri Ram Singh that on the main road of Vishwas Nagar, two persons had committed robbery at the point of knife, pursuant whereof DD

No. 23-A (Ex. PW2/C) was recorded and handed over to Sub Inspector Kanta Prasad for investigation, who reached the spot along with Constable Prembir Singh Bhati and came to know that victim had already been removed to Dr. Hedgewar Hospital. Sub Inspector Kanta Prasad reached the said hospital after leaving Constable Prembir Singh Bhati at the spot and obtained MLC of the victim Shri Narender Kumar and recorded his statement, wherein victim stated that he was an auto-rickshaw driver and he parked his auto-rickshaw bearing no. DL-1RE-6236 in front of Sri Ram Hospital, Karkardooma for answering the call of nature. At about 8 PM, appellant Arif and Rahish @ Chotu (whose names were disclosed after arrest of appellant) came there and started scuffling with him in order to rob him; when he resisted their this act, they caused injuries on his hand by the knife and snatched ₹14,400/- along with two identity cards of his children. They hit him on his head by a bottle and fled away. Victim stated that he can identify the said boys, if brought before him.

3. Sub Inspector Kanta Prasad wrote rukka Ex. PW8/A, pursuant whereof FIR No. 4/2010 (Ex. PW4/A) under Sections 394/34 IPC was registered. MLC Ex. PW1/A of victim was obtained. Doctor opined the injuries of victim as simple caused by the sharp object. On 6th May, 2010,

appellant was arrested in FIR No. 104/2010 under Sections 324/34 IPC read with Sections 25/27 of the Arms Act by the police officials of Police Station Krishna Nagar. In the said case, appellant appears to have made a disclosure statement regarding his involvement in the present FIR. He further disclosed that Rahish @ Chotu was his accomplice. Accordingly, appellant was arrested in the present FIR as well. Rahish @ Chotu could not be apprehended. Nothing was recovered in this case from the appellant's alleged disclosure statement. Knife was not recovered. Test Identification Parade (TIP) of the appellant was conducted on 17th May, 2010 but he refused to participate in the TIP, on the pretext that he was already shown to the victim.

4. After completion of investigation, appellant was sent to face trial for the offence under Sections 397/34 IPC by filing a charge-sheet in the court of Metropolitan Magistrate, Delhi. Documents, as envisaged under Section 207 of the Code of Criminal Procedure, 1973 (Cr.P.C.), were supplied to appellant by the Metropolitan Magistrate, Delhi and thereafter, case was committed to the Sessions court for trial, since offence under Section 397 IPC is triable by the Sessions Court.

5. Charges under Sections 394/34 and 397 IPC were framed against the

appellant on 27th April, 2011 to which he pleaded not guilty and claimed trial. Accordingly, trial commenced. Prosecution examined 8 witnesses in all. Thereafter, statement under Section 313 Cr.P.C. of appellant was recorded, wherein entire incriminating material, which had come on record in the evidence of prosecution, was put to appellant. Appellant denied his complicity in the crime and claimed himself to be innocent. However, appellant did not lead any evidence in his defence.

6. Star witness of the prosecution in this case is victim PW5 Shri Narender Kumar. His testimony has been found trustworthy and reliable by the trial court to conclude that prosecution had succeeded in proving beyond the shadow of reasonable doubt that appellant along with his accomplice had robbed the victim on 5th January, 2010 at about 8:00 PM on the point of knife, inasmuch as had caused simple injuries on his person. As regards nature of injuries are concerned, statement of PW1 Dr. Reetesh Ranjan has been accepted, which was duly corroborated by the documentary evidence in the shape of MLC Ex. PW1/A. Trial court has further concluded that appellant had refused to participate in TIP, therefore an adverse inference against him was liable to be drawn that had he participated in the TIP, he would have been identified by the victim. It has been further held that

identification of an accused in Court for the first time by the witness is a substantive piece of evidence and can be relied upon.

7. Learned counsel for the appellant has vehemently contended that identification of the appellant by PW5 in the Court after about one year and eight months is a weak type of evidence, more so, when incident took place during the night time at a place where there was no light. He further contends that it is difficult for a person to identify a stranger, whom he had seen for few moments, after lapse of long time. It is further contended that no adverse inference can be drawn regarding refusal of appellant to participate in the TIP, since admittedly, appellant was shown to victim in the Police Station immediately after his arrest. Accordingly, TIP proceedings in this case are nothing but farce. He further contends that identification for the first time in Court is a weak type of evidence and is not sufficient to prove that appellant had robbed the victim, more so, when PW5 has taken shifting stand while deposing in court viz-a-vis what was stated by him in the FIR, inasmuch as his testimony suffers from material contradictions. He has placed reliance on State of Madhya Pradesh vs. Chamru @ Bhagwandas etc. etc., AIR 2007 Supreme Court 2400, Nazim Khan @ Guddu vs. State, 2014 (3) JCC 1602 and Dana Yadav @ Dahu and Ors. Vs. State of Bihar,

AIR 2002 SC 3325.

8. Per contra, learned APP has contended that adverse inference has to be drawn against the appellant, since he had refused to participate in TIP and trial court has rightly drawn adverse inference against the appellant. He has further contended that identification of an accused in Court by the witness is a substantive piece of evidence and cannot be brushed aside. He has contended that testimony of PW5 is trustworthy and reliable, since it is in line with the prosecution case and cannot be ignored. He has further contended that appellant was not known to victim and there is no reason as to why victim would have falsely implicated him in this case.

9. I have considered the rival contentions of the parties and have perused trial court record as also the judgments relied upon by the learned counsels. In Dana Yadav (supra), Supreme Court has held thus:-

“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, in so far 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. This Court has dealt with this question on several occasions. In the case of Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh AIR 160 SC 1340 which is a three Judge Bench decision of this Court, Wanchoo, J., with whom A.K. Sarkar and K. Subba Rao, JJ. agreed, speaking for the Court, observed that the substantive evidence of a witness is his statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding or any other evidence. The law laid down in the aforesaid decision has been reiterated in the cases of Budhsen and Anr. v. State of U.P. MANU/SC/0103/1970: 1970CriLJ1149 , Sheikh Hasib alias Tabarak v. The State of Bihar (1912) 4 SCC 733, Bollavaram Pedda Narsi Reddy and Ors. v. State of Andhra Pradesh MANU/SC/0339/1991: 1991CriLJ1833 , Ronny alias Ronald James Alwaris and Ors. v. State of Maharashtra MANU/SC/0199/1998: 1998CriLJ1638 and Rajesh Govind Jagesha v. State of Maharashtra MANU/SC/0703/1999: 2000CriLJ380. It is well settled that identification parades are held ordinarily at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject matter of alleged offence or the persons who are alleged to have been involved in the offence. Such tests or parades, in ordinary course, belong to the investigation stage and they serve to provide the investigating authorities with material to assure themselves if the investigation is proceeding on right lines. In other words, it is through these identification parades that the investigating

agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits. Reference in this connection may be made to the decisions of this court in the case of Budhsen, (supra), Sheikh Hasib (supra), Rameshwar Singh v. State of Jammu & Kashmir MANU/SC/0174/1971, 1972CriLJ15 and Ravindra alias Ravi Bansi Gohar v. State of Maharashtra and Ors. MANU/SC/0480/1998: 1998CriLJ4059 .

It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by catena of decisions of this Court in the cases of Kanta Prashad v. Delhi Administration MANU/SC/0043/1958: 1958CriLJ698 , Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan and Ors. v. State of Kerala MANU/SC/0139/1979: 1979CriLJ919 , Mohanlal Gangaram Gehani v. State of Maharashtra MANU/SC/0090/1982: [1982]3SCR277 , Bollavaram

Pedda Narsi Reddy (supra), State of Maharashtra v. Sukhdev Singh and Anr. MANU/SC/0416/1992 : 1992CriLJ3454 , Jaspal Singh alias Pali v. State of Punjab MANU/SC/0090/1997: 1997CriLJ370 , Raju alias Rajendra v. State of Maharashtra MANU/SC/0814/1998: 1998CriLJ493 , Ronny alias Ronald James Alwaris (supra), George and Ors. v. State of Kerala and Anr. MANU/SC/0227/1998: 1998CriLJ2034 , Rajesh Govind Jagesha (supra), State of H.P. v. Lekh Raj and another MANU/SC/0714/1999: 2000CriLJ44 and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat MANU/SC/0744/1999 : 1999CriLJ5013.”

10. In Nazim Khan (supra), This Court has held thus

“17. It, therefore, is clear that the test identification parade report although is not a substantive evidence but can be used only for the purpose of corroboration. There can be two results of test identification parade. Firstly, the refusal to participate in the test identification parade by the appellant is without any justification. Such a refusal is a piece of evidence and the courts can take an adverse inference against the accused that if he would have participated in the test identification parade, he would have been identified by the witness and the refusal can be used to corroborate the dock identification by witness. Secondly, the accused has a justifiable reason to refuse to participate in the test identification parade. Where accused has justifiable reason, no adverse inference can be taken against him.

18. In the present case, the accused/appellant has refused to participate in the test identification parade on the ground that he was shown to the witness at the Police Post Jharoda as well as his photographs were shown to the witness. Now the question is whether

showing of photographs to the witness before the test identification parade or showing him to witness before test identification parade justifies the refusal to participate in test identification parade by the accused?”

11. Now, coming back to the facts of this case, appellant was not arrested immediately after the incident. He was arrested after about five months in a different case, wherein he has allegedly made a disclosure statement for having committed the offence involved in this case. Said disclosure statement has not been placed on record nor was proved, inasmuch as there is nothing to suggest that any fact was discovered, pursuant to the said disclosure statement. Disclosure statement is not admissible in law under Section 26 of the Evidence Act, 1872 unless it leads to recovery of such fact by the accused pursuant to such a disclosure statement. In this case no recovery was effected in this case. Be that as it may, after appellant was arrested in this case, he was put to TIP but he refused to participate in the TIP. Indubitably, his refusal to participate in TIP, if no plausible reason is offered, would be sufficient to draw an adverse inference against him that had he participated in the TIP he would have been identified by the witnesses. However, in case justifiable and plausible explanation is offered by the accused, no such adverse inference can be drawn. In this case, PW5 has admitted in his examination-in-chief as well as in his cross-examination

that he had seen the appellant in the Police Station Krishna Nagar on 6th May, 2010 and had identified him before the Investigating Officer. Admittedly, TIP was held thereafter. Accordingly, appellant was justified in refusing to participate in the TIP and no adverse inference can be drawn against him. In the similar circumstances, when accused was shown to the witness prior to TIP, Supreme Court in Chamru @ Bhagwandas (supra) held thus, “We also agree with the contention of the learned defence counsel that the identification proceedings held by S.D.M. Shri Patel (PW1) were only a farce. Both Bantu (PW7) and Indu (PW8) admitted in cross-examination that the Police had shown them the photograph of Chamru. This would render the entire proceedings as useless. And conviction cannot be based on such evidence.”

12. Accordingly, identification of the appellant by PW5 for the first time in Court, in this case, without any corroboration will not be sufficient to conclude that it is the appellant, who had robbed him more particularly, when PW5 has admitted in his cross-examination that there was no electricity supply at the time of incident on the electricity pole. Though, he claimed that there was an electricity pole near the place of incident but no such electricity pole has been shown in the site plan. Be that as it may,

according to PW5 there was no electricity supply at the time of incident and if that is so, then there would have been quite dark at 8 PM in the month of January and it is highly improbable that PW5 could have identified the appellant after about 1½ years, having seen him for a brief period.

13. Above all, testimony of PW5 suffers from material discrepancies. In the FIR, he has stated that two boys had overpowered him and robbed him at the point of knife. However, while deposing in Court, he stated that three boys had robbed him. He deposed that he informed the police from the spot. Thereafter, police officials reached there and he was taken to Dr. Hedgewar Hospital, where he was medically examined. However, as per the charge-sheet, he was removed to hospital by one Shri Rohtash Kumar, inasmuch as, MLC also shows that PW5 was taken to hospital by Shri Rohtash Kumar but, in his cross-examination, he stated that he was taken to hospital by one Shri Raj Kumar.

14. For the foregoing reasons, I am of the view that appellant is entitled to benefit of doubt. Trial court has failed to take note of the above noted legal and factual position. Accordingly, impugned judgment and order on sentence are set aside and appellant is acquitted. Appellant is on bail. His bail bond and surety bond are discharged.

15. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

JANUARY 22, 2015

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