

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

% Reserved on: 7th February, 2018
Decided on: 6th September, 2018

+ **CRL.A. 94/2017**

JAMEEL Appellant
Represented by: Mr.Abdul Salam, Advocate

Versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent
Represented by: Ms. Meenakshi Chauhan, APP
for the State with SI Ombir
Singh, PS Welcome

+ **CRL.A. 377/2017**

VISHNU DEV PASWAN Appellant
Represented by: Ms.Aishwarya Rao, Advocate

versus

STATE Respondent
Represented by: Ms. Meenakshi Chauhan, APP
for the State with SI Ombir
Singh, PS Welcome

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Jameel and Vishnu Dev Paswan challenge the impugned judgment dated 4th January, 2016 convicting them for offence punishable under Section 120B read Section 420 IPC besides convicting Vishnu Dev Paswan for offences punishable under Section 328/420 IPC and the order on sentence dated 6th January, 2016 directing them to undergo rigorous

imprisonment for a period of three years each and to pay a fine of ₹10,000/- each, in default whereof to undergo simple imprisonment for a period of nine months each, for offence punishable under Section 120B read with Section 420 IPC. Vishnu Dev Paswan was further directed to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹10,000/-, in default whereof to undergo simple imprisonment for a period of nine months, for offence punishable under Section 420 IPC and rigorous imprisonment for a period of three years and six months and to pay a fine of ₹10,000/-, in default whereof to undergo simple imprisonment for a period of nine months, for offence punishable under Section 328 IPC. Sentence of Vishnu Dev Paswan was directed to run separately one after another.

2. Assailing the conviction, learned Counsel for Jameel submits that none of the prosecution witnesses including the complainant Shamshad Khan deposed about Jameel. Kamal Ali Khan (PW-5) and Ziya ul Rehman (PW-6), only deposed about Vishnu Dev Paswan who presented himself as Rameshwar Gupta and not about Jameel. Lastly, Shamshad Khan met Vishnu Dev Paswan and Firoz Khan @ Naseem (PO) at the guest house. Thus, Jameel was not even present at the guest house. Furthermore, though there is alleged recovery of currency notes, however, no evidence has been led to connect the same to the complainant. Thus, the prosecution has failed to prove the offences against Jameel.

3. Learned Counsel for Vishnu Dev Paswan urges that there was no recovery from the appellant. No proper identification of the appellant was carried out and he was identified after 7 years in Court. There is no cogent evidence on record to prove that the appellant gave cigarette to Shamshad Khan after which he felt intoxicated. There is no evidence to prove that the

appellant was a part of conspiracy. The sentence imposed is harsh in nature as the sentences have been directed to run consecutively.

4. Learned APP for the State on the other hand submits that there is no illegality in the impugned judgment and order on sentence.

5. Sequence of events leading to prosecution case is a written complaint (Ex. PW-4/A) dated 31st December, 2004 by Shamshad Khan (complainant herein) wherein he stated that he worked as an iron scrap dealer. Since last 2-2½ months Mahesh Gupta @ Pappu used to come to him and talked about scrap dealing. On 26th December, 2004, Pappu came to his residence and said that he has a business party who will let them purchase copper scrap and whatever profit is earned will be divided. He was made to meet the business party on 26th December, 2004 behind the petrol pump, Jheel Park, Welcome and the party asked him to come to Daryaganj Guest House, behind Golcha where they will discuss about copper scrap dealing. On 27th December, 2004, he along with Pappu went to Daryaganj guest house where he was asked to arrange for ₹10 lakhs and bring it to the guest house by next day. He told them that he will take two days to arrange the funds as a result of which they gave him time till 29th December, 2004. He had ₹2 lakhs. He arranged ₹3 lakhs from Akeel Baksh and ₹2 lakhs from Hazi Shafiq. On 29th December, 2004, after he had arranged the funds, he received a phone call from them. He told them that he has arranged ₹7 lakhs and they can come to his residence. On 29th December, 2004 at about 10:00 A.M., they came to his residence and after having tea, Pappu arranged for an auto rickshaw and said that he will reach Daryaganj in one hour and they should also reach there with the money.

6. After reaching near Welcome Petrol Pump, they gave him a cigarette

and after smoking it, he felt intoxicated and after a while those persons got off the auto rickshaw and disappeared with money. Though he was feeling dizzy, he alighted from the auto-rickshaw and started looking for them. However, he could not find them. Thereafter, he sprinkled some water on his face and went to Daryaganj guest house where he got to know that they had left from there. Thereafter, he went to Pappu's residence in Welcome where he found that the house was locked. On inquiring from the neighborhood, he got to know that the house is owned by Sanjay Gupta and Pappu used to live as a tenant and after locking the house he left with his children.

7. On the basis of the aforesaid complaint, FIR No.5/2005 (Ex. PW-3/A) was lodged at PS Welcome for the offence punishable under Section 420 IPC. Investigation was assigned to SI Arvind Kumar (PW-11). He recorded the statements of Shamshad Khan, Ziya ul Rahman, Shakir Ali, Akeel Baksh and Shafiquddin. He along with Ct. Praveen went to Bhajanpura in search of Mahesh Gupta @ Pappu. Thereafter, he along with ASI Shamim and Ct.Satender went to Kurhand, District Banda, UP in search of Mahesh Gupta @ Pappu, however, he was not traceable. Hue and cry notices (Ex. PW-11/A) were circulated and affixed at public places.

8. On 13th March, 2005, Mahesh Gupta @ Pappu, was apprehended by the police of PS Nima Heda, Chittorgarh, Rajasthan on the basis of secret information. Disclosure statement of Mahesh Gupta @ Pappu was recorded vide Ex. PW-4/B, he was arrested vide arrest memo Ex. PW-4/DD and his personal search was conducted vide memo Ex. PW-4/DE. In his disclosure statement, he disclosed that he got ₹10,000/- as his share out of the cheated money and he had purchased a gold chain for ₹5,755/- out of the aforesaid money.

9. SI Arvind Kumar along with Mahesh Gupta @ Pappu, Ct. Satender and HC Om Pal reached the house of Jameel situated at 5th Pusta, Jaat Gali, Village Gamhri, Delhi where they met the brother of Jameel who told them that Jameel had gone for a stroll in Jheel Park. Accordingly, they reached Jheel Park from where Jameel was apprehended on the pointing out of Mahesh Gupta @ Pappu. Jameel was arrested vide arrest memo Ex. PW-9/A and his personal search was conducted vide memo Ex. PW-4/DA. Jameel told the police that actual name of Firoz Khan was Naseem who was his father-in-law and actual name of Rameshwar Gupta was Vishnu Dev Paswan. Efforts were made to trace Naseem @ Mister, however, he could not be traced and was declared a proclaimed offender.

10. On 19th March, 2005, Jameel got recovered ₹10,000 which was a part of the cheated money and the same was seized vide Ex. PW-4/DC. Vishnu Dev Paswan (appellant herein) was also declared a proclaimed offender as despite efforts he could not be arrested.

11. On 28th January, 2006, Vishnu Dev Paswan was arrested by SI Joginder Singh (PW-12) vide arrest memo Ex. PW-10/A. His personal search was conducted vide Ex. PW-10/B and his disclosure statement was recorded vide Ex. PW-10/C. Application for TIP of Vishnu Dev Paswan was moved, however, on 3rd February, 2006, he refused to participate in TIP proceedings.

12. During the course of trial accused Mahesh Kumar Gupta and Naseem alias Mister absconded, hence they were declared proclaimed offenders vide orders dated 29th October, 2009 and 23rd February, 2012 respectively. Thus, trial proceeded only qua the appellants Jameel and Vishnu Dev Paswan and they were convicted and sentenced as noted above.

13. Complainant Shamshad Khan was examined as PW-4 in Court. He deposed in sync with the statement made before the police. He further stated that the persons whom he met at Jheel Park, Welcome introduced themselves as Rameshwar Gupta and Firoz Khan. He pointed out towards accused Naseem who had introduced himself as Firoz Khan and Vishnu Dev Paswan who had introduced himself as Rameshwar Gupta. In his deposition he also clarified that on 29th December 2004 at Rajdhani Petrol Pump he received a phone call from Mahesh. Mahesh asked him to come with money but he called them at his residence. All the three i.e. Mahesh, Firoz and Rajeshwar came to his house. He showed them the money. All four of them left from his house and while walking, Firoz Khan gave him a cigarette for smoking. When the four of them reached Rajdhani Petrol Pump, Mahesh Gupta stopped an auto and told three of them to reach the guest house and that he would also reach there. So he, Firoz and Rajeshwar left in the auto. After some time, he started feeling giddiness and when he regained consciousness, he found himself alone in the auto. He sprinkled some water on his face and found the polythene bags with money missing. He took another auto and went to the guest house, where he found that the room had been vacated. He went to Mahesh Gupta's house also who had also left after vacating.

14. Shafiquiddin (PW-1) stated that he runs a shop in Loha Mandi, Welcome, Delhi. On 27th December, 2004, Shamshad had demanded ₹2 lakhs from him and he gave him the same. Akeel Baksh (PW-2), who does metal scrap business also stated that on 27th December, 2004, he gave ₹3 lakhs to Shamshad.

15. Kamal Ali Khan (PW-5) stated that he is the owner of Malhotra guest

house situated at 2911, Sir Syed Ahmed Road, Daryaganj. He had brought the original and photocopy of visitor register (Ex. PW-5/A) where at page no. 139, serial no. 2678 dated 26th December, 2004, there was an entry with respect to Rameshwar Gupta. He pointed out towards Vishnu Dev Paswan and stated that he was the one who stayed at the guest house as Rameshwar Gupta.

16. Ziya ul Rehman, who works as a receptionist in Daryaganj guest house, stated that she had made the entry in the visitor register when Rameshwar Gupta came to the guest house on 26th December, 2004 and was given room no. 5 in the guest house. However, in the counts he could not identify Rameshwar Gupta.

17. Shakar Ali (PW-7), who was working in Malhotra Guest house, pointed out towards Vishnu Dev Paswan and stated that he was the person who was staying in room no. 5 of the guest house.

18. As noted above in the testimony of Shamshad Khan, no role has been attributed to Jameel. Even in his cross-examination he stated that he had never met Jameel in the alleged transaction with Mahesh Gupta, Firoz Khan and Rameshwar Gupta. He had not gone to the house of Jameel alone at any point of time. Jameel did not meet him at the petrol pump. Jameel never came to his house. He did not remember whether he had seen Jameel prior to 26th December, 2004. He was shown the house of Jameel by Mahesh Gupta. He did not know whether anything was recovered from the house of Jameel in his presence by the police. He did not know what purpose was told to Jameel when he was brought from his house. He also denied that the amount of ₹10,000/- was planted by the police on Jameel.

19. No specific role being attributed to Jameel by Shamshad Khan even if

₹10,000/- was recovered from his house, the same does not connect Jameel to the offence committed in the absence of any identification of the money. Thus, Jameel is entitled to be acquitted.

20. Appellant Vishnu Dev Paswan was initially declared proclaimed offender and after his arrest supplementary charge-sheet was filed against him. On an application for conducting his Test Identification Proceedings, he was remanded to judicial custody. On 3rd February, 2006 when his TIP was conducted, he refused to participate in the same on the ground that the complainant Shamshad knew him prior to the incident. However, in cross-examination, no such suggestion has been given to Shamshad rather the suggestions are that Vishnu Dev Paswan never met the complainant on 26th, 27th or 29th December, 2014 nor was any deal for scrap entered between them. Contention of learned counsel for the appellant that the delayed identification cannot be relied upon deserves to be rejected. As noted above, Vishnu Dev Paswan was not arrested initially and after his arrest on 28th January, 2006, he refused to undergo TIP on 3rd February, 2006. As the accused were absconding, examination of prosecution witnesses finally commenced on 19th October, 2010 when Shamshad Ali was examined as PW-4 on 18th November, 2010 and his cross-examination was conducted on 11th January, 2011. Thus, on the first available opportunity before Court Shamshad Ali identified Vishnu Dev Paswan. Further, there being number of meetings between Shamshad Ali and Vishnu Dev Paswan, he had sufficient time to identify him and it was not a case of fleeting glimpse. Further, no recovery from Vishnu Dev Paswan is no ground to acquit him despite the overwhelming and unimpeachable evidence of Shamshad Ali and Shakar Ali.

21. In view of the discussion aforesaid, appellant Jameel is acquitted of the charges framed. Impugned judgment of conviction and order on sentence qua Jameel is set aside. Conviction of Vishnu Dev Paswan for offences punishable under Sections 120B read with Section 420 IPC, Section 420/328 IPC is upheld. As noted above, the sentences awarded to Vishnu Dev Paswan by the learned Additional Sessions Judge on the three counts are directed to run consecutively. The sentences awarded are not modified however, they are directed to run concurrently.

22. Appeals are disposed of.

23. Copy of this order be sent to Superintendent, Central Jail, Tihar for updation of the Jail record and intimation to appellant Vishnu Dev Paswan, who is in custody.

24. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 06, 2018

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