

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction

Present :

The Hon'ble Mr. Justice Bibek Chaudhuri

CRA/556/2017

With

IA No. CRAN 3 of 2018 (Old No. CRAN 2106 of 2018)

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IA No. CRAN 4 of 2019 (Old No. CRAN 1145 of 2019)

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IA No. CRAN 5 of 2020 (Old No. CRAN 3530 of 2020)

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IA No. CRAN 6 of 2020 (Old No. CRAN 3532 of 2020)

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IA No. CRAN 7 of 2020 (Old No. CRAN 4568 of 2020)

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IA No. CRAN 8 of 2020 (Old No. CRAN 4569 of 2020)

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IA No. CRAN 9 of 2020

Md. Jamal @ Jamaluddin Khan & Anr.

-Vs.-

The State of West Bengal & Anr.

Mr. Fazlur Rahaman, Adv.,

Mr. Sourav Paul, Adv. ...for the appellant no. 1.

Mr. Kallol Mondal, Adv.

Mr. Krishan Ray

Ms. Amrita Chel

Mr. Souvik Das ...for the appellant no. 2.

Mr. Ranabir Roychowdhury, Adv.

Mr. Iqbal Kabir, Adv. For the State.

Heard on : 18.01.2021

Judgment on : 25.01.2021

Bibek chaudhuri, J.

The instant appeal is filed by the accused/convicts/appellants in

S.T No.1(8)2000/SC 56(2) 1999 against the judgment and order of

conviction and sentence under Section 392/397 of the Indian Penal Code.

Both the appellants were convicted under Section 235(1) of the Code of Criminal Procedure for the offence punishable under Section 392 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 7 years each and to pay a fine of Rs.50,000/- each in default to suffer further rigorous imprisonment for six months.

The aforesaid convicts were further sentenced to suffer rigorous imprisonment for a term of 7 years for committing offence under Section 397 of the Indian Penal Code. The sentences were directed to be run concurrently.

Entally Police Station case no.40 dated 27th February, 1997 under Section 392/397 of the Indian Penal Code and Sections 25(1B) (a) of the Arms Act was registered against two unknown accused persons on the basis of a statement made by one Biswajit Dey and recorded by one Kunja Bihari Das, SI of Police attached to Entally Police Station at the relevant point of time. It was stated by the said Biswajit Dey that on 27th February, 1997 at about 11 am he was going to State Bank of India, Moulali Branch to deposit a sum of Rs.65,000/- keeping the said sum of money with duly filled in pay-in-slip in one chocolate colored rexene bag. He reached the ground floor of the Bank at about 11:30 am. Suddenly he was attacked by a person from behind with sharp cutting weapon. He received injury on his back, face, ear and head and fell down on the stairs of the Bank. Immediately thereafter, one person who was well built and wearing a blue

coloured pant and a T-shirt forcibly took away his bag containing money and pay in slip and started to flee away. The defacto complainant raised an alarm shouting “Dacoit, Dacoit” and chased them. One of the miscreants took shelter inside a garment shop with Revolver and the bag of the informant containing money and pay in slip in his hand. Local people also chased them. Immediately after the said miscreant took shelter inside the garment shop, local people closed the rolling shutter gate of the said shop. The informant was subsequently taken to Nil Ratan Sarkar Hospital.

After registering the case as aforesaid, Police started investigation and finally submitted charge sheet against both the accused/appellants under Sections 392/397 of the Indian Penal Code. The accused person duly faced trial.

It is pertinent to mention here that the appellant No.1 Sk. Jamaluddin faced trial while on bail. However, appellant no.2 Dilwara Hossain faced trial while he was in judicial custody. It is ascertained from the Lower Court Record that prosecution examined in all 13 witnesses. Amongst them PW-3, Biswajit Dey is the defacto complainant of the case. PW-4 Naresh Shaw is a shop owner at Entally market. PW-5 Ratan Shaw and PW-6 Satyanjay Mukherjee were witnesses to the seizure of a bag containing money amounting to Rs.65,000/- and pay in slips and one improvised fire arm, but both the said witnesses did not support the prosecution case except their signature on the seizure list. They were eventually turned hostile against the prosecution. PW-7, Deb Ranjan

Bhunias, an owner of a hotel situated opposite to the State Bank of India, Moulali Branch, was also declared hostile by prosecution. PW-8, Dr. Dulal Karmakar was a Medical Officer attached to Nil Ratan Sarkar Medical College & Hospital. In his evidence he stated that on 27th February, 1997 one Biswajit De was admitted to Nil Ratan Sarkar Medical College & Hospital. PW-10 Dr. Ashim Kumar Das was one of the Directors of Maple Nursing Home Pvt. Ltd. Biswajit De was admitted to the said Nursing Home on 28th February, 1997 with sharp cutting injuries on his left ear, right of the face, right forearm, back and head. He was discharged from the said Nursing Home on 9th March, 1997. The Discharge Certificate issued by the Nursing Home authority in the name of Biswajit De was marked 'X' for identification. During investigation of the case. PW-11 Mr. Jaladhar Mondal and PW-12 Mr. Amit Chattopadhyay were posted as Judicial Magistrates at Sealdah. On 3rd October, 1997 and 19th March, 1997 respectively, they conducted test identification parade in respect of two appellants. PW-13 Sub Inspector Kunjabehari Das was the investigation officer of the case.

During trial of the case some documents were marked exhibits which I propose to refer subsequently in the body of the judgement.

Learned advocate for the appellant no.1 has assailed the impugned judgement and order of conviction and sentence mainly on the ground of delay in holding test identification parade of appellant no.1. It is submitted by the learned advocate for the appellant no.1 that test identification parade was held after more than seven months from the

date of the alleged incident. In order to substantiate his argument he refers to the First Information Report and submits that the defacto complainant did not give any distinctive particular and physical appearance and special features of the accused person. He himself stated in his complaint which was recorded by PW-13 Kunjabehari Das that he was attacked by one of the miscreants from behind. Therefore, he had no occasion to see the assailant. He further refers to the evidence of PW-3 where he candidly admitted that test identification parade was held in presence of the Police Officer. Therefore, test identification parade so far as it relates to appellant no.1 is vitiated and cannot be relied upon. He also refers to the evidence of PW-11 who was Judicial Magistrate, 4th Court at Sealdah at the relevant point of time and vide its order dated 3rd October, 1997 he clearly recorded that investigating officer brought the identifying witnesses. It was also not reflected as to who had identified the under trial prisoners and the suspect with the Magistrate before holding the test identification parade.

Learned advocate for the appellant no.1 has submitted series of decisions of the Hon'ble Supreme Court where conviction was set aside as a result of improper test identification parade. He first relies upon a decision of the Hon'ble Supreme Court in Chunthuram vs. State of Chhattisgarh (Criminal Appeal No.1392 of 2011) passed by the Hon'ble Supreme Court on 29th October, 2020. It is held in the said judgement that the test identification evidence is not substantive piece of evidence but can only be used in corroboration of statement in Court. The

infirmities in the conduct of test identification parade has still effect over the prosecution case, when the identification is held in presence of Police. The restrained communication tantamount to statement made by the identifier to a Police Officer in course of investigation and they fall within the span of Section 162 of the Code of Criminal Procedure.

On the similar principle, the learned counsel for the appellant no.1 relies on the following decisions:-

Museer Khan vs. State of Madhya Pradesh : 2010 SCC 748, Ram Kishan Mithanlal Sharma v. State of Mumbai; 1955 (1) SCR 903. He also refers to the following decisions on the similar point regarding veracity of evidence in test identification parade:

- i) **Satrughana @ Satrughana Parida v. State of Orissa (Criminal Appeal No.727-29 of 1992) decided on December 10, 1992;**
- ii) **Subash and Shiv Shankar v. State of Uttar Pradesh decided on 14th April, 1987.**
- iii) **Wakil Singh vs. State of Bihar decided on 31st March, 1981,**
- iv) **Bali Ahir v. State of Bihar decided on January 18, 1983.**
- v) **Mohd. Abdul Hafeez v. State of andhra Pradesh reported in AIR 1983 SC 367.**

According to the learned advocate for the appellant, the alleged incident took place on 27th February, 1997. Test identification parade was held on 3rd October, 1997 by PW-11. The Hon'ble Supreme Court in the

aforesaid cases disbelieved identification of the accused/appellant in test identification parade held after 15 days from the date of occurrence. If the ratio of the aforesaid judgments is accepted then identification of appellant Md. Jamal by PW-3 Biswajit Dey must be held to be suspicious and only on such ground the appellant should be acquitted and the order of conviction and sentence ought to be set aside.

From the submission made by the learned advocate for the appellant, it is ascertained that the learned counsel has assailed the test identification parade mainly on two grounds:-

- i) Physical feature of the appellant no.1 was not stated by the informant at the first possible stage i.e. in course of recording his statement under Section 154 of the Code of Criminal Procedure and secondly delay in holding test identification parade.

Though the law with regard to evidentiary value of test identification parade is absolutely settled and test identification parade can never be considered as a substantive piece of evidence, identification is to be considered under the facts and circumstances of each case. In the instant case it is stated in the First Information Report by the defacto complainant that as soon as he was assaulted from his behind he turned back and saw that a well build men wearing a blue pant and T-

shirt was assaulting him and another person was trying to snatch away the bag containing money from his hand. After they became successful in snatching the bag, they started to flee away. The defacto complainant also chased him. The person who assaulted him managed to flee away. Another person with a bag and revolver in his hand took shelter in a garment shop at Moulali market. He was caught red handed by local people. The said statement was duly corroborated by PW-3 in his evidence. In course of cross examination his evidence remains intact. He did not deviate from what he stated in his evidence in chief regarding distinctive feature of appellant no.1. Therefore, I am not in a position to accept the argument advanced by the learned advocate for the appellant no.1 that the test identification parade of Md. Jamal cannot be considered as a result of his distinctive feature being not stated by the defacto complainant in his statement under Section 154 of the Code of Criminal Procedure.

- ii) The learned Advocate for the appellant No.1 has questioned the truthfulness of the T.I. Parade of the appellant on the ground of inordinate delay.

It is true that in most cases of robbery or dacoity committed by persons are unknown to victims. The only

evidence which may connect with the crime is the evidence of identification in a T.I. Parade and in some cases evidence of recovery of articles which are subject matter of robbery. When nothing was recovered from the possession of the appellant the only evidence against him is identification by the victim in T.I. Parade. Therefore, it is desirable that T.I. Parade should be held without unnecessary delay and it should be held at the earliest opportunity. However no hard and fast rule can be laid down in this regard. In **Lal Singh vs. State of U.P** reported in **AIR 2004 SC 299**, the appellant were arrested on 28th December, 1980 and they were put up for identification in a T.I. Parade on 4th February, 1981. The Hon'ble Supreme Court accepted identification of the suspect as trustworthy under the facts and circumstances of the case. In **Ramanand Ramnath vs. S.O Madhya Pradesh** reported in **(1996) 8 SCC 514**, T.I Parade was held after about 15 days of the date of arrest of the accused. The Hon'ble Supreme Court was pleased to hold that there was no unusual delay in holding T.I. Parade. In **Daya Singh vs. S.O Haryana** reported in **(2001) 3 SCC 468**, it was held by the Hon'ble Supreme Court that delay in identification parade cannot be held to be vitiated where an enduring impression of the identity of the accused was gained

during the incident. In **Md. Kalam vs. S.O Rajasthan** reported in **(2008) Cr LJ 2602 (SC)** , it was held that if the circumstances are beyond control and there is some delay in holding test identification parade, it cannot be said to be fatal to the prosecution. In **Matru vs. S.O U.P** reported in **(1971) 2 SCC 75**, it is observed by the Hon'ble Supreme Court that identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court.

In the instant case the incident took place on 27th February, 1997. Accused Md. Jamal @ Jamaluddin Khan was arrested on 1st September, 1997 and his T.I. Parade was conducted on 3rd October, 1997. Therefore, the investigating authority had no occasion to produce Md. Jamal in T.I. Parade before his arrest. Under such circumstances the argument advanced by the learned Advocate for the appellant No.1 that T.I. Parade was held after a lapse of about eight months from the date of incident and therefore it cannot be relied upon, is not an acceptable proposition in law under the facts and circumstances of the case.

Except delay in holding T.I. Parade, the learned Advocate for the appellant No.1 has not raised any issue regarding involvement of the appellant in commission of the offence. The appellant No.1 was identified

by PW3 on dock during his evidence. The identification of accused in court during trial is the substantive evidence and such identification was not questioned in course of cross examination of PW3.

Thus I am not in a position to accept the argument advanced by the learned Advocate for the appellant No.1 praying for his acquittal.

Mr. Kallol Mondal, learned Advocate for the appellant No.2 does not make any submission on the point of sentence of appellant No.2 under Section 392 of the Indian Penal Code. On the charge under Section 397 of the Indian Penal Code, it is submitted by Mr. Mondal that the penal provision under Section 397 attracts only when at the time of committing robbery, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person.

As against appellant No.2 Mr. Mondal frankly submits that immediately after the occurrence both the offenders were chased by the defacto complainant. Both of them were running away and appellant No.2 took shelter in a garment shop situated at Moulali market. The evidence on record also suggests that he was apprehended by local people from the said shop with stolen booty and a country made revolver. There is no evidence that he used the said revolver at the time of committing robbery. The defacto complainant received cut injury on his back, right hand side of face, ear and head. Such injuries were caused by a sharp cutting weapon and not by a revolver. No sharp cutting weapon were recovered from appellant No.2. Therefore, it is submitted by Mr. Mondal that the

learned trial judge committed error in judgment in convicting the appellant No.2 under Section 397 of the Indian Penal Code.

I am in agreement with Mr. Mondal that mere possession of deadly weapon does not satisfy the statutory requirement, as it provides “uses any deadly weapon” under Section 397 of the Indian Penal Code. But if the weapon with which the offender was armed was within the vision so as to be capable of creating terror in the mind of the victim, that would be sufficient to satisfy the word “uses” for the purpose of Section 397 of the I.P.C. It need not be further shown to have been actually used for cutting, stabbing and shooting as the case may be. The decision of the Hon’ble Supreme Court in the case of **Ashfaq vs. State (Govt. Of Nct of Delhi)** reported in **(2004) 3 SCC 116** may be relied upon in this regard.

In the instant case PW3 stated on oath, “One run away while the other who was carrying the bag was turning down and turned down in the manner for number of times and showed firearm towards me, so that I might be freighted” (quoted as recorded by the learned trial judge). This part of evidence was not even contradicted during cross examination of PW3. In view of such unchallenged testimony of PW3, I have no other alternative to hold that the prosecution was able to prove the charge under Section 397 of the Indian Penal Code against appellant No.2.

Learned Advocates for both the appellants lastly submits that the appellant No.1 has suffered sentence for more than four years. Appellant No.2 is suffering sentence for five years and two months. Considering the period of detention of the appellants, the order of sentence may be

reduced up to the period for which they have actually undergone sentence.

It is held by the Hon'ble Supreme Court in the **State of M.P vs. Santosh Kumar** reported in **(2006) 6 SCC 1**, that in order to exercise the discretion of reducing the sentence, the statutory requirement is that the Court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the Court to impose a sentence less than the minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no strait-jacket formula can be indicated. What is applicable to trial court regarding recording reasons is equally applicable to the High Court. Young age of the accused and the fact that he belongs to a Schedule Tribe were not considered to be either adequate or special for reduction of sentence in a case under Section 376 of the Indian Penal Code.

Coming to the instant case the learned Counsel for the appellants have not submitted adequate and special reasons in support of their prayer for reduction of sentence suffered by the appellants. In **State M.P vs. Phool Chand** reported in **(2005) 12 SCC 199**, it is observed by the Supreme Court that when the statute provide for minimum punishment for seven years giving no discretion to reduce the sentence, it is not possible for the High Court to reduce the period of sentence. In Section 397 of the Indian Penal Code it is stipulated that the punishment shall not be less than seven years.

Thus, on careful perusal and consideration of the impugned judgment with the evidence on record and considering the submission made by the learned Counsels for the appellants and the respondent, I do not find any infirmity in the impugned judgment.

For the reasons stated above the instant appeal be and the same is dismissed on contest, however without cost.

The conviction and order of sentence passed by the learned trial judge in ST No.1(8)2000/SC 56(2) 1999 is affirmed.

Lower court record be sent down to the court below at ones.

A plain copy of this judgment be handed over to the learned Counsels for the appellants forthwith.

With the disposal of the appeal, connected applications are also treated to be disposed of.

(Bibek Chaudhuri, J.)