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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 2nd February, 2022Decided on: 4th July, 2022

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CRL.A. 251/2020

RAMJAN alias PAGLA Appellant

Represented by: Ms. Sunita Arora, Advocate.

versus

STATE (GNCT OF DELHI) Respondent

Represented by: Mr. Amit Gupta, APP for State with
SI Shiv Kumar, PS Jahangirpuri.

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CRL.A. 399/2020 & CRL.M.B. 1612/2021

NASIRUDDIN alias BOBA Appellant

Represented by: Ms. Mallika Parmar, Adv. DHCLSC.

versus

STATE OF NCT OF DELHI Respondent

Represented by: Mr. Amit Gupta, APP for State with
SI Shiv Kumar, PS Jahangirpuri.

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CRL.A. 372/2021 & CRL.M.B. 1462/2021

SHEIKH JAHANGIR Appellant

Represented by: Mr. Prashant Mehta, Adv. with Ms.
Divita Vyas & Mr. Charanpreet
Singh, Advs.

versus

STATE Respondent

Represented by: Mr. Amit Gupta, APP for State with
SI Shiv Kumar, PS Jahangirpuri.



CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these three appeals, the three appellants Ramjan @ Pagla, Nasiruddin @ Boba and Sheikh Jahangir challenge the impugned judgment dated 10th December, 2019 convicting them for offences punishable under Sections 458/34 and 376(2)(g) IPC and appellant Nasiruddin @ Boba and Sheikh Jahangir having been convicted for offence punishable under Section 395 IPC and appellant Ramjan @ Pagla having been convicted for offence punishable under Section 397 IPC. Challenge is also laid to the order on sentence dated 12th December, 2019 whereby the appellants were directed to undergo 7 years rigorous imprisonment and a fine of ₹10,000/- each for offence punishable under Section 458/34 IPC, rigorous imprisonment for a period of 10 years and a fine of ₹20,000/- each for offence punishable under Section 376(2)(g) IPC. Nasiruddin @ Boba and Sheikh Jahangir were directed to undergo rigorous imprisonment for a period of 7 years and to pay a fine of ₹10,000/- each for offence punishable under Section 395/34 IPC and appellant Ramjan @ Pagla was directed to undergo rigorous imprisonment for 10 years and to pay a fine of ₹15,000/- for offence punishable under Section 397 IPC. Sentences were directed to run concurrently and benefit of Section 428 was also granted.

2. Besides the three appellants one Shah Alam was also convicted by the impugned judgment for offences punishable under Section 458/34 and 376(2)(g) IPC as also offence punishable under Section 395 IPC. Vide the order dated 9th July, 2021 in CRL.A. 399/2020 this Court directed the Registry to trace the appeal filed by Shah Alam. However, it was reported



that no appeal was filed by Shah Alam. Thus, though vide the impugned judgment of conviction four accused were convicted, however the appeals have been filed by the three appellants herein.

3. Briefly case of the prosecution is that on the intervening night of 1st & 2nd May, 2010 at about 3.30 AM when the prosecutrix was sleeping in her house along with her son aged 12 years and daughter aged 10 years, four boys aged about 20 years entered her bedroom. One of the boys put knife on her neck while the other boy put knife on the neck of her son and daughter and thereafter took cash, gold, silver jewellery and other documents. It is further alleged that three of the boys, who were later identified were Sheikh Jahangir, Shal Alam and Nasiruddin, took her to another room and the fourth boy i.e. Ramjan put knife on neck of her son whereafter three boys committed rape upon her. At around 3.30 AM the prosecutrix informed her tenant that her house on the ground floor has been ransacked, who in turn informed the Police resulting in the registration of FIR No. 153/2010 at PS Jahangirpuri for offences punishable under Section 458/392/395/397/376(2)(g) IPC and Section 25 Arms Act.

4. In her subsequent statement the prosecutrix also stated that a fifth person who was aged around 16 to 17 years was standing outside the door who was later identified as one 'SS' and on whose apprehension on 9th May, 2010 the appellants were arrested on 8th June, 2010; 12th June, 2010 and 31st August, 2010 respectively. Co-convict Shah Alam was arrested on 8th October, 2010 in another case after he was declared a proclaimed offender in this FIR. The appellants herein refused to undergo the Test Identification Parade on 11th June, 2010, 25th June, 2010 and 1st September, 2010 where after the prosecutrix identified them in the Police Station.



5. Learned counsel for the appellant Sheikh Jahangir who has opened the arguments contends that though the claim of the prosecution is that on the underwear of the prosecutrix semen stains were found, however the same did not tally with any of the accused. The finger prints recovered from the spot did not tally with that of the appellants. No proper investigation was carried out by collecting the CCTV footages from the vicinity or tracing the location of the appellants at the relevant time. Despite the claim of the prosecutrix was that she was injured, as per her MLC no injury, tear, laceration/bleeding was found. The prosecutrix gave no details of the jewellery articles allegedly stolen nor was recovery of any jewellery articles made from any of the accused pursuant to their disclosure. Though the prosecutrix claim that she had purchased a mobile phone Nokia-95 from Hong Kong, however she could neither prove the bill and admitted that the SIM card was also purchased in the name of Ranjit Babu. Even as per the prosecution lot of people gathered, however none was cited as a witness. The Test Identification Parade was rightly refused by the appellants, as PW-4 admitted that she was shown the photos of the accused prior to the TIP. In her cross-examination the prosecutrix admitted that she does not remember the description of the clothes worn by the accused. Though two defence witnesses DW-1 and DW-2 were produced, however their testimonies were not considered by the learned Trial Court. Though the claim of the prosecution is that appellant Sheikh Jahangir absconded, however the appellant was in his house and arrested from his house.

6. Learned counsel appearing on behalf of Nasiruddin states that the prosecutrix has improved her version and though initially she claimed that there were four accused, later she stated that there was one more accused



outside. Despite the crime team report Ex.PW-5/A two chance prints were lifted, however they do not tally with any of the appellants. There are material contradictions in respect of the claim qua seizure of clothes of the victim. Seizure memo does not state that the clothes of the victim were seized. Though semen stains were found on the underwear of the victim, however they did not match with any of the appellants. Statement of the prosecutrix before the Juvenile Justice Board in the enquiry relating to the fifth boy also shows material improvements. Though the appellant was declared a proclaimed offender, however he was arrested from the house. There is no recovery of any of the articles from the appellants or the co-accused. Even the mobile phone claimed to be stolen did not belong to the prosecutrix.

7. Learned counsel for Ramjan submits that there is no allegation qua Ramjan that he committed the offence of sexual assault on the prosecutrix. Even though the son of the prosecutrix who appeared as PW-17 stated that appellant Ramjan put knife on him, however recovery of knife from the appellant Ramjan is doubtful. The same was allegedly recovered from the jhuggi which is an open place and no public witness was associated while affecting the recovery. In the application seeking compensation, the prosecutrix stated that the prosecutrix belongs to a poor strata, thereby belying her version in the Court that she had sufficient gold, silver and cash which was stolen away. The appellants thus claim that there being serious infirmities in the prosecution case they be acquitted of the charges framed or in the alternative their sentence be reduced to the period undergone.

8. Learned APP for the State submits that the prosecution case is based on the testimony of the prosecutrix who appeared as PW-4 and her son and



daughter who appeared as PW-17 and PW-21 respectively. There are no contradictions much less material contradictions in the testimony of these witnesses, for the reason there were multiple accused and multiple witnesses hence observation power of each victim will not be the same and their versions thus cannot be treated as material improvements going to the root of the matter. The three witnesses have assigned specific roles to the appellants. Immediately after the incident, intimation to the Police was sent thereby ruling out any chances of manipulation. Merely because DNA analysis was not done, the same will not discredit the FSL report which notes presence of semen stains. Thus, version of the three witnesses, the victim and her two children the two eye-witnesses, is duly corroborated by the other material on record. Hence the appellants be not acquitted nor the sentence be reduced.

9. The prosecutrix who appeared in the witness box as PW-4 deposed that on the intervening night of 1st & 2nd May, 2010 while she was sleeping in her house with her son aged 12 years and daughter 10 years, at about 3.30 AM four boys entered in her bedroom. One of the boys put knife on the neck of her son, the second boy put knife on the neck of her daughter and the third boy put knife on her neck, while the fourth boy picked up the keys from the refrigerator and opened the almirah. He took out ₹60,000/-, a gold necklace, four gold bangles, three chains, five pairs of jhumkis, jhallas and ballis etc., two kgs of silver jewellery i.e. Tagdi, guchchha and pazeab etc. He also picked up a mobile phone make Nokia -95 of black colour which was lying on the refrigerator. She further stated that three boys forcibly took her into the room in the house by putting knife on her. They also put knife on the neck of her son and threatened that in case she made noise, they will



kill her and her children. They tore off her clothes and three boys raped her turn by turn. Thereafter, all the four boys ran away with the belongings. She found that the grill of the door of her house was removed. Her son telephonically informed the tenant, who appeared in the witness box as PW-3, who in turn informed the Police. Police recorded her statement Ex.PW-4/A on which the above-noted FIR was registered.

10. In her examination in chief she further stated that she had purchased the mobile Nokia-95 from Hong Kong, however cannot produce the bill. The SIM card of the mobile phone was purchased in the name of PW-3. The fifth boy was standing outside near the jangla, whom she had also seen. However, in her statement Ex.PW-4/A she did not tell anything about the fifth boy but made a supplementary statement in this regard. She identified the appellants in the Court after they refused TIP, when she came to know about their names. According to her, Sheikh Jahangir, Shah Alam and Nasiruddin committed rape on her. Further, Shah Alam and Nasiruddin also performed oral sex with her. She was medically examined on the day of incident and her clothes including the underwear which she was wearing at the time of incident were seized in the hospital and a pullandah was prepared which was handed over to the investigating officer. At the time of incident Ramjan @ Pagla had put knife on the neck of her son. Before the accused left, they left one of the knives on the bed. The grill and knife were seized by the Police vide memo Ex.PW-4/B. Her clothes which were duly seized and sent to FSL, were opened and a salwar and a ladies shirt in torn condition with one underwear were found which she also identified as the clothes worn at the time of incident. She also identified the knife recovered from the spot which was left by the accused on the bed and duly seized.



11. In her cross-examination she stated that her house consists of two rooms in 25 sq.yds. and is four storied. She was residing on the ground floor and on the other three floors tenants were residing. She stated that she did not give the bills regarding gold and silver articles robbed, as the same had been gifted to her by her mother-in-law at the time of marriage. She stated that the incident took place for around 30 minutes, and then after the accused left she did not make any call to the Police herself, despite the fact she was having another mobile phone with her. Though she stated that she had given physical description of the accused persons in her complaint, however she was confronted with that portion in Ex.PW-4/A where it was not so recorded and only age of the accused was mentioned. She stated that after the incident she made first call to her tenant PW-3, however she did not narrate that rape had been committed to him or any other person on the spot due to hesitation.

12. Learned counsels for the appellants have contended that despite the fact the complainant stated that lot of neighbours had collected, however none was cited as a witness. This contention of the appellants deserves to be rejected for the reason in cross-examination this witness stated that when call to 100 number was made, lot of neighbours had gathered in the street. Since those neighbours gathered after the complainant informed PW-3 and on his making the call to the PCR, the neighbours were thus not the eye-witness to the incident and therefore not required to be examined.

13. In the cross-examination she further stated that for enquiring about the progress of the case, she used to visit the Police Station. On the day when Ramjan was arrested, she had visited the Police Station when she was shown Ramjan whom she identified as one of the accused involved in the incident



and thus she was instructed to appear on 11th June, 2010 to identify the accused persons in jail in TIP before the learned MM. However as the accused refused, no TIP was conducted.

14. As regards the other accused i.e. Nasiruddin and Sheikh Jahangir are concerned regarding the TIP, in her cross-examination the complainant stated that it is correct that after the arrest of accused persons she was called at PS and Sheikh Jahangir was shown to her whom she identified as the same person who had come to her house at the time of incident. She, however, denied the suggestion that the accused refused to participate in TIP as accused Sheikh Jahangir was also shown to her at Police Station. She further stated that she did not remember whether the accused persons involved in this case were shown to her or not prior to the TIP.

15. Thus, the best case of the appellants even on cross-examination of the complainant is that the appellants were shown to the victim prior to the Test Identification Parade. It is well-settled that dock identification is the proper identification. The time spent by the accused along with the complainant was approximately 30 minutes which was sufficient for her to identify the accused persons and thus even if the Test Identification parade was rightly denied, the evidence of identification by the witnesses in the Court cannot be discarded. It is trite law that Test Identification Parade is not a cast iron straight jacket legal proposition admitting of no exceptions. This Court in the decision reported as State Vs. Mohd. Afzal & Ors. 107 (2003) DLT 385 held:

“304. The facts which establish the identify of an accused person are relevant facts as per Section 9 of the Evidence Act. Substantive evidence of a witness is the Statement made by him in the Court. No doubt, there are judgments holding that



evidence of identification of an accused person at the trial for the first time is inherently of a weak character and to carry the strength of conviction, the evidence should show as to how and under what circumstances the witness was identifying a particular accused. However, the judgments have to be read and understood in the peculiar facts of those cases. We may note a few. In the judgment 1970CriLJ1149 , Budhsen and Anr. v. State of U.P., it was held :-

"The purpose of a prior test identification, Therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration."

306. The aforesaid observations show that law on Test Identification Parade is not a cast iron straight jacket legal proposition admitting of no exceptions. Requirement of Test Identification Parade emanates from the rule of prudence to generally look for corroboration as to the identity of the accused who is a stranger to the witness. As held in the judgment reported as 2003CriLJ3535 , Malkhan Singh and Ors. v. State of M.P., this rule of prudence is subject to exceptions, when for example, the Court is impressed by a particular witness on whose testimony, it can safely rely. After all, the identification parade belongs to the stage of investigation and there are no provisions in the Code of Criminal Procedure which make it mandatory for the Investigating Agency to conduct a test identification parade, nor is there any provision which confers right upon the accused to claim one. We may note that a test identification parade does not constitute a substantive evidence and they are governed by Section 162



Cr.P.C.

307. In Malkhan Singh's case (*supra*), the Hon'ble Supreme Court cited with approval its earlier observations in an unreported judgment of Hon'ble Supreme Court in Criminal Appeal No. 92/56, *Prakash Chand Sogani v. The State of Rajasthan* and it was held :

"It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if prosecution fails to hold an identification on the plea that witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, prosecution would run the risk of losing its case."

308. It, Therefore, flows that test identification parade is a rule of prudence and prior identification of the accused by the witnesses re-assures the Court that his evidence of identification carries conviction. It would be required where accused is not known to the witness. Distinction has been drawn in law where a witness identifies an accused whom he had sufficient time to see in contradistinction to a fleeting glimpse of the accused. Further, if the evidence of the witness otherwise inspires confidence, absence of a prior test identification parade would be no ground to reject or disbelieve the testimony of the witness, more particularly in the case where the witness is a member of the public and no motive is attributed to him for falsely implicating the accused person. "

16. Contention of learned counsel for the appellants that the finger prints lifted from the spot did not match with the appellants does not lead to the inference of ruling out the presence of appellants at the spot. Though the converse of the appellant's finger prints being found on the spot would have



been a very convincing evidence to prove their presence on the spot, however non-matching of the finger prints of the appellants does not rule out their presence at the spot. Merely because the victim could not produce the bills of the telephone or that she had purchased the mobile from Hong kong despite her financial condition, as stated in the application for compensation, cannot be a ground to reject her testimony.

17. Version of the victim is duly supported by her son who was then 12 years old and appeared in the witness box as PW-17. He too stated that on 2nd May 2010 his mother along with him and his sister was sleeping at their house. At about 3.00 AM they heard the noise of khatpat. When they woke up, four boys came inside the house and they were having knives in their hands and one of them put knife on his mother, second boy put knife on his sister and third boy put knife on him. He further stated that the fourth boy picked up the key of the almirah which was lying on the fridge, opened the almirah and took out documents, jewellery, money etc. The three boys took his mother in another room and fourth boy continued to put knife on him. After half an hour they went away. Later he came to know that the clothes of his mother were torn and they committed *Bathamiji* with his mother. He identified the appellants and stated that Ramjan put knife on him. Nasiruddin put knife on his sister and Jahangir put knife on his mother.

18. The daughter of the prosecutrix also appeared and deposed as PW-21 who also spoke in line with her brother, however when she was asked to identify the four persons she stated that she was scared of them. She stated that at the time of incident she was 9-10 years old and studying in 6th standard. At the time of incident her father was not sleeping with them. Her father was a fruit supplier in the Mandi, had come home after one or two



days of the incident and met them and their mother. She clarified that her mother had gone abroad to Hong Kong after leaving her and her brother as one of their relations was residing there.

19. In their statements recorded under Section 313 Cr.P.C. the accused stated that the witnesses have deposed falsely, they have been identified falsely in the case and they were made to sign on blank papers which were converted into incriminating evidence against them. Nasiruddin examined his father-in-law as DW-1 who stated that on 1st May, 2010 Nasiruddin came to his house in the night hours and remained in his house for the whole night and that he used to work as a labourer in a Tent house those days and that the Police took his son-in-law from his house and had assured that they would leave his son-in-law after making inquiry. Later he came to know that he was arrested. The other defence witness DW-2 was the mother of Shah Alam.

20. From the line of cross-examination, a defence has been sought to be set up by the appellants that when the victim was found in a compromising position with PW-3, she cooked up the story of robbery and rape against them. However, the same cannot be by implicating unknown people who had no connection whatsoever with the complainant. Vide Ex.PW-4/B the Police not only recovered a knife from the spot but also broken grill pipes which clearly showed that trespass into the house was made by breaking open the grills. Further, vide Ex.PW-13/A the clothes of the prosecutrix i.e. Salwar, shirt, which were torn were duly seized and handed over by Doctor concerned. When the clothes were produced in Court, they were in torn condition. Version of the complainant was also supported by PW-3 who stated that he lived as a tenant on the second floor of the house of the



complainant and on the night of 1st & 2nd May, 2010 at about 3.30 AM he received a telephone call from the complainant about looting in her house at ground floor. When he came down, the house had been ransacked and the grill/jaali of the door was found removed.

21. Considering the testimony of the victim duly supported by her two minor children and the tenant and the identification of the accused in the Court by the victim and her son, this Court finds no error in the impugned judgment of conviction and the order on sentence.

22. Appeals are accordingly dismissed.

23. Copy of this order be uploaded on the website of this Court and be also sent to the Superintendent Tihar Jail for intimation to the appellants as also for updation of record.

CRL.M.B. 1612/2021 in CRL.A. 399/2020

CRL.M.B. 1462/2021 in CRL.A. 372/2021

Applications are disposed of as infructuous.

(MUKTA GUPTA)
JUDGE

JULY 04, 2022

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