



\* IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Reserved on: 12<sup>th</sup> December, 2023*

*Pronounced on: 27<sup>th</sup> February, 2024*

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**CRL.A. 1080/2018**

**STATE GOVT OF NCT OF DELHI**

..... Appellant

Through: Ms. Manjeet Arya, APP for State.  
ACP Mohinder Singh (Retd.) ACP  
B.P. Thakiyal, Insp. Vijay Shanwal SI  
Amit Solanki PS Sunlight Colony.

versus

**MOHD. KASIM @ KHAN SAHEB & ANR.**

..... Respondents

Through: Mr. M.L. Yadav & Mr. Harish Chand,  
Advs. for R-1 & 2.

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**CRL.A. 1081/2018**

**THE STATE GOVT OF NCT OF DELHI**

..... Appellant

Through: Ms. Manjeet Arya, APP for State.  
ACP Mohinder Singh (Retd.) ACP  
B.P. Thakiyal, Insp. Vijay Shanwal SI  
Amit Solanki PS Sunlight Colony.

versus

**SAJID @ SAHIL**

..... Respondent

Through: Ms. Inderjeet Sidhu, Adv. (Amicus  
Curiae).

**CORAM:**

**HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA**

**J U D G M E N T**

**NEENA BANSAL KRISHNA, J.**

1. The aforesaid two Leave to Appeal petitions have been filed against the Judgment dated 09.11.2017, *vide* which the *respondents Mohd. Kasim @*



*Khan Saheb and Abdul Rehman, had been acquitted and Judgment dated 08.02.2018 vide which the third accused Sajid @ Sahil, had been acquitted in the FIR No. 103/2007 under Sections 302/394/472/34 of the Indian Penal Code and Sections 25 and 27 of the Arms Act, Police Station Srinivas Puri, Delhi.*

2. **Briefly stated**, on 11.03.2007, at about 8.30 p.m. on Service Road, near Bhogal Flyover, Hari Nagar, Ashram, Delhi, one Mr. Vinay Kumar Jain (deceased) parked his Santro Car bearing No. DL-3CP-8382 near his house in front of the Bajaj Showroom, when the accused Mohd. Kasim @ Khan Saheb and Abdul Rehman (*respondents in the Crl. A. 1080/2018*) along with the accused Sajid @ Sahil (*respondent in Crl.A. 1081/2018*) and one Sharafat Ali @ Mama (since absconding), in furtherance of their common intention, murdered him by shooting while he was still in his Car and committed robbery of the jewellery that was being carried by the deceased, Mr. Vinay Kumar Jain. The respondent Mohd. Kasim @ Khan Saheb and Abdul Rehman were asserted to be in possession of a pistol and ammunition which was used for commission of offences. They had come on two motorcycles bearing Registration No. DL-3S-AY-0345 and HR-51-S-5331, which were found to be fake numbers.

3. According to the prosecution, Mr. Kishan Chand Jain (*PW-7*), cousin brother of the deceased, witnessed the incident. He immediately rushed to the house of the victim and informed his wife Smt. Nutan and other family members, about the occurrence. Mr. Naresh Chand Jain, Uncle of the deceased also reached at the spot on having heard the gun shots and found his nephew Mr. Vinay Kumar Jain (deceased), lying on the road with bullet injuries, at a short distance from his shop. He saw four persons on two



motorcycles speeding away with bag of jewellery of his nephew. Smt. Nutan and her brother-in-law also reached the spot where they also found Mr. Vinay Kumar Jain lying injured near the car. The family members rushed him to Jeewan Nursing Home, where he succumbed to his injuries on the same night.

4. *Mr. Surender Panda, a neighbour*, who happened to be present on the roof of his house, also heard the gun shots. He also rushed out and enquired about the incident and made a call to the PCR at number 100. On information being received at about 8:50 p.m., DD No. 15A was registered at Police Station, Srinivas Puri, which was assigned to ASI Bengali Babu. He along with Constable Ilias Mohd., came to the spot where they came to know that the injured has been taken to hospital. In the interim, at about 9:25 p.m. information was received from the Nursing Home that Mr. Vinay Kumar Jain had been declared "*Brought Dead*" due to fire arm injury.

5. The investigations were then taken over by Inspector Mahender Singh, who rushed to the spot and directed ASI Bengali Babu to lift the samples of blood, earth Control, etc. from the scene of crime. Four fired bullets were recovered from the site, which were seized. The post-mortem of the deceased was done and the cause of death was declared to be sock and haemorrhage due to fire arm injuries. Subsequently, the recovered bullets and the Santro Car, were also sent to FSL.

6. The further case of the prosecution is that on 12.03.2007, at about 11:55 p.m, near Trauma Centre Hospital, Civil Lines, Delhi, on the basis of secret information, the police tried to stop the four accused, who were travelling in a car and tried to flee. Three of them, namely Mohd. Kasim @ Khan Saheb, Abdul Rehman and Sharafat Ali, open fired at the police team.



Sajid @ Sahil also tried to attack another member of the Police party. However, all of them were apprehended. *One pistol of 7.62 mm loaded with two live cartridges, was recovered from the accused Mohd. Kasim @ Khan Saheb. Abdul Rehman was found in possession of one 7.62 mm pistol with one fired cartridge, which got struck in the Chamber and four live cartridges in the magazine. All the four accused including Sajid @ Sahil and Sharafat Ali were found to be in possession of 400 grams each of stolen jewellery, which was subsequently identified to be the jewellery stolen from the deceased. All the four accused were arrested and FIR No. 56/2007 under S.25 and S. 27 Arms Act , P.S. Civil Lines was registered against them.*

7. The TIP proceeding of the case property was conducted before the learned Metropolitan Magistrate where the wife and the brother of the deceased, identified the keys and the bag containing jewellery as belonging to the deceased. During the investigations, the I.O. verified that the Keys recovered from the bag found from the house of the accused, belonged to the locks of the shop of the deceased by using them to open the Locks on the Shop, which were also seized by the police. On completion of investigations, the *Charge-Sheet under Sections 302,394,472 and 34 of the Indian Penal Code and 25 and 27 of the Arms Act*, against the accused, was filed in the Court.

8. The prosecution examined *a total of 41 witnesses.*

9. **The learned Additional Session Judge in the impugned judgement**, observed that though according to the police, articles like empty cartridge, iron rod, motorcycle-indicator-glass, sample of blood and sample of earth control, was seized by the police but there was no cogent evidence that they were duly sealed and the seal delivered by the Inspector to a third



party, to rule out the possibility of tampering. In the absence of such evidence, the recoveries from the spot were not held to be proved. Likewise, though the Crime Team had visited the spot, but no crime report was filed. Moreover, the site inspection had been carried out, after one day for which there was no explanation.

10. Furthermore, a separate *FIR No. 56/2007* had been registered against the four accused on their apprehension by the police in the intervening night, on 13.03.2007 and recovery of the armed pistols and the jewellery was made but the said Criminal Case resulted in the acquittal of all four accused and the recoveries were held to be doubtful. Learned ASJ thus, observed that the recovery of arms from the accused persons, was not believable. Also, there was no cogent CFSL report connecting the pellets found in the car of the deceased with the pistols allegedly recovered from the accused. Likewise, recoveries of four helmets, bag of Adidas containing keys from the rented accommodation of Mohd. Kasim @ Khan Saheb, at his instance, were also found to be not believable.

11. **The learned ASJ thus, concluded** that the entire evidence as produced by the prosecution was contradictory and not believable and no public witnesses had been joined at the time of recoveries; and the disclosure statements of the accused did not become admissible in evidence as the alleged recoveries pursuant thereto, were held to be doubtful. It was thus, held that the prosecution had failed to prove its case against Mohd. Kasim @ Khan Saheb and Abdul Rehman, *vide* Judgment dated 09.11.2017.

12. The accused Sajid @ Sahil had absconding during the trial and was declared "*Proclaimed Offender*". He was subsequently, arrested and faced a separate trial. For the similar reasons as noted above, *the accused Sajid @*



*Sahil, was acquitted vide Judgment dated 08.02.2018.*

13. **The Leave to Appeal** has been sought by the prosecution on the grounds that the recoveries of the fire arms and the reports given by the experts in regard to the empty cartridges that were recovered from the crime scene and the pellets recovered from the Santro Car matched with the fire arms recovered from the accused persons/respondents and had been wrongly rejected by the learned ASJ. Moreover, recovery of jewellery from possession of the four accused, was also an incriminating fact, which has not been taken into consideration. The testimony of the recovery witnesses, has been disbelieved for no cogent reasons. There is a presumption under Section 114 of the Indian Evidence Act, about the duties by the Government servants, as being performed regularly. Merely because they were police witnesses, who had deposed about the arrest of the accused persons and recoveries effected from them, would not render their testimony suspicious. Moreover, the accused/respondents had not claimed the ornaments recovered from them to be their own. Keeping in view, the quantity of jewellery recovered from the four accused, it is impossible to accept the version of the accused that the ornaments were not seized from them. The stolen items i.e. the keys and bags containing the jewellery items had also been recovered pursuant to the disclosure statement and should not have been brushed aside. It is claimed that there was no contradiction in the testimony of the prosecution witnesses and the recoveries effected from the respondents/accused, which clearly established the commission of the crime by them. It was the claim that the accused had been wrongly acquitted and sought Leave to Appeal against the two Judgments of acquittal.

14. **Submissions heard.**



15. The prosecution case largely rests on the direct evidence of one witness Sh. Mr. Kishan Chand Jain corroborated by the circumstantial evidence, to link the respondents to commission of an offence.

**Testimony of Eye Witness PW-7, Mr. Kishan Chand Jain**

16. Admittedly, the only *eye witness to the* incident of shooting of Mr. Vinay Kumar Jain by the four accused was *PW-7, Mr. Kishan Chand Jain, the cousin brother of the Mr. Vinay Kumar Jain*. He had deposed that on the day of incident, he was passing on his scooter and when he was round the corner of the *gali*, he saw some persons hitting with iron rods the car and the window panes on the back of the car and his cousin Mr. Vinay Kumar Jain was inside the car. He rushed there but they threatened him to go back or they would shoot him. He left the scooter and went to the house of Mr. Vinay Kumar Jain, which was at about 20 to 25 steps distance from the spot. He informed the parents, wife, sisters and his son about the incident and they together rushed to the scene of incident.

17. However, in his cross-examination, he has stated that he saw his cousin lying on the road near the car, which clearly implies that he had not seen his cousin inside the car while he was being allegedly hit. It may also be noted that while he had seen the accused persons hitting at the car but in the statement to the police, he had asserted that one boy was hitting at the car. Also interestingly, as soon as he saw the crime, instead of rushing to the assistance his brother, he went to the house of the deceased to inform the family members. The entire circumstances as deposed by PW-7 and inherent contradictions in his testimony, clearly leads to the conclusion that he had reached the spot after the incident and was not an eye-witness to the



incident. Accordingly, the testimony of the sole eye witness, has rightly been disbelieved by the Ld. ASJ.

**Circumstantial Evidence**

***Recoveries of Pellets, blood Sample, Earth Control, etc from the Scene of Crime:***

18. The testimony of eye-witness having been discarded, this Court now needs to look at the circumstantial evidence that has been relied upon by the prosecution. The first recovery made by the police was from the spot on the night of the incident and on the next day. There was earth control, sample of blood, iron rod and a broken glass etc. that was recovered from the spot. The learned ASJ has found that though, according to the IO, they were all sealed in *pullandas*, there is no evidence as to who retained the seal, after it was used. The possibility of the seal having been retained by the IO and the samples being tinkered subsequently, could not be ruled out.

***Arrest of the Accused Persons and recovery of Jewellery/bag/ Keys:***

19. The other significant evidence was the arrest of the four accused on 12.03.2007 at about 11:55 p.m, near Civil Lines, Delhi, i.e. after about one day of the incident. Pertinently, all four were found to be travelling together in the car and interestingly, all four were found in possession of 400 grams of jewellery, i.e. the exact quantity of jewellery. How could different pieces of jewellery weigh the exact same amount, be recovered in equal quantity from all the accused, leaves much to be said about the credibility of the prosecution story. Moreover, having committed the crime, it is highly improbable that all four would not only be sticking together but would also be carrying the stolen booty on their person for the convenience of the police to arrest them.



20. We further note that according to the case of prosecution, the jewellery was being carried in a bag by the deceased in the car, when he was accosted and the jewellery stolen. However, subsequently, the Police had set up a case that on the disclosure of accused/ respondent Mohd. Kasim , the Police Team had searched his house and recovered the bag which the deceased was having with him containing the jewellery and the keys of the shop of the deceased. The keys were subsequently verified to belong to the locks put on the shop of the deceased. However, this piece of evidence does not in any manner prove to be a substantial link in the chain of events or can be held sufficient for concluding the involvement of the accused persons in the commission of offence.

***Recovery of Fire Arms/ jewellery from the Accused persons in FIR No. 56/2007; Issue Estoppel:***

21. The other incriminating piece of evidence was the arrest and the recovery of one pistol each, allegedly made from the accused Mohd. Kasim @ Khan Saheb and Abdul Rehman. *FIR bearing No. 56/2007* was registered separately against the four accused for being in possession of the fire arms and stolen property. However, the charge-sheet filed in that FIR has resulted in an acquittal. There is no whisper of any Appeal having been preferred against the acquittal of the four accused in the said case. So being the case, the findings of acquittal for the charges of being found in possession of fire arms is binding in the present case, on the principle of *issue estoppel*, which states that once an issue has been decided by a Court of competent jurisdiction in different proceeding, the findings would be binding in any other proceedings, wherein it comes up for consideration.

22. *Article 20(2) of the Constitution of India* states that no person shall be



prosecuted and punished for the same offence more than once. This is called the doctrine of *double jeopardy*. The objective of this Article is to avoid harassment which may be caused by successive criminal proceedings, where the person has committed only one crime as stated in the maxim *nemo debet bis vexari*, which means that no man shall be put twice in peril for the same offence. There are two aspects of doctrine of jeopardy viz. *Autrefois* convict and *Autrefois* acquit. *Autrefois* convict means that the person has been previously convicted in respect of the same offence. *Autrefois* acquit means that the person has been acquitted on a same charge for which he is being prosecuted. The Constitution of India bars double punishment for the same offence. The conviction for such offence does not bar the subsequent trial and conviction for another offence and it does not matter even if some ingredients of these two offences are common.

23. In Monica Bedi vs. State of Andhra Pradesh (2011) 1 SCC 284, the Apex Court considered the meaning of “same offence” employed in Article 22 and observed that the second prosecution and conviction must be for the same offence.

24. What is prohibited under Article 22 is the second prosecution and conviction for the same offence. If the offence is distinct, the rule of *double jeopardy* would not be applicable. The rule of *double jeopardy* as contained in Article 22 is distinguishable, where several offences are committed by the accused person in the same series. The principle of *issue estoppel* which is also known as *Cause of action estoppel* thus, becomes applicable which is distinct from the principle of *double jeopardy* or *autrefois acquit*, as embodied in Section 300 Cr.P.C.

25. The Supreme Court of Federation of Malaya in Sambasivam vs.



Public Prosecutor 1950 AC 458 considered the case where two charges were framed for carrying a firearm and being in possession of ammunition. The appellant was acquitted of the second charge but being subject to second trial for the first charge, the Privy Council held:

*“The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.”*

26. The aforementioned judgment was referred to in Collector of Customs vs. L.R. Mewani, AIR 1970 SC 962, wherein the Court observed that the rule of *estoppel* is a facet of doctrine of *autrefois* acquit. In Manipur Administration vs. Thokchom Bira Singh, AIR 1965 SC 87 observed that the rule of *issue estoppel* in a criminal trial, means that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel against the prosecution wherein the same facts come up for consideration. This principle has been merged with the principle of *autrefois* acquit as enshrined in Article 300 of Cr.P.C.

27. The law relating to *issue estoppel* has been succinctly explained in the case of Ravinder Singh vs. Sukhbir Singh and Others (2013) 9 SCC 245, wherein it was observed that this principle applies when an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of the accused. Such a finding would then constitute an *estoppel* or *res judicata* against the prosecution, but would not operate as a



bar to the trial and conviction of the accused for a different or distinct offence. It would only preclude the reception of evidence that will disturb the findings of fact already recorded, when the accused is tried subsequently for a different offence but in which the previous offence may be included.

28. The doctrine of *Issue estoppel* not only ensures judicial propriety but also safeguards the rights of accused by barring re-adjudication of facts in issue, in a subsequent trial between same parties, already decided in favour of the accused in the previous trial, by a court of competent jurisdiction. Thus, the rule of *issue estoppel* prevents re-litigation of an issue which has been determined in a criminal trial between the parties. If with respect to an offence arising out of the transaction, a trial has taken place and the accused has been acquitted, another trial with respect to the offence alleged to arise out of the transaction which requires the Court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial, is prohibited by the rule of *issue estoppel*. In order to invoke the rule of *estoppel* not only the parties in the two trials should be the same but also the fact in issue, proved or not, as present in the earlier trial, must be identical to what is sought to be reagitated in the subsequent trial. If the cause of action was determined to exist i.e. judgment was given on it, the same is said to be merged in the judgment. If it was determined not to exist, the unsuccessful prosecution, can no longer assert that it does; it is stopped per *rem judicatam*.

29. In Direct Recruit Class II Engg. Officers' Assn. Vs. State of Maharashtra (1990) 2 SCC 715 the Constitution Bench of Apex Court observed the binding nature of a judgment of the court of competent jurisdiction and observed it to be in essence a part of the rule of law on the



basis of which administration of justice depends. The emphasis is on a judgment given by a competent court on merits, must bind all parties involved until the same is set aside in appeal; and an attempted change in the form of the petition or in its grounds cannot be allowed to defeat the plea of *res judicata*. It may thus, be concluded that the fact of *res judicata* or *issue estoppel* is different from the principle of double jeopardy or *autrefois acquit* in Section 300 Cr.P.C.

30. In case of Pritam Singh vs. State of Punjab AIR (1956) SC 415, acquittal of an accused under Section 19F Arms Act being tantamount to a finding that there was no proof of possession against the accused for murder, but if the acquittal under Arms Act is a subsequent decision to the conviction of the murder trial, the doctrine of issue estoppel shall not be applicable. The rule of *issue estoppel* requires the previous judgment to be inter parties as observed in Sheo Nandan vs. State AIR 1964, Allahabad, 139. The fact in issue proved in earlier one, must also be identical to what is sought to be agitated in the subsequent trial, as observed in Ravinder Singh vs. State of Haryana, AIR 1975 SC 856.

31. Hence, applying the above principles in the present case, once the prosecution in separate trial held in FIR No. 56/2007 had failed to prove the recovery of weapons from the accused persons and it has been held by a competent court that there is no evidence to prove the recovery of arms from the accused persons, and the accused were acquitted for the offence of S.25/27 Arms Act in FIR No. 56/2007, the same aspect of recovery of firearms from the accused, cannot be raised again for adjudication in the present case in which the accused were subsequently tried offence of robbery and murder using the arms.



32. Though the Ld. ASJ reappreciated the evidence of the recovery witnesses of Arms, but having done so in FIR No. 56/2007 and disbelieved the recovery/ possession of the arms by the accused and acquitted them, the said findings were binding in the present proceedings on the principle of *Issue Estoppel*. Be as it may, the recovery of Arms from the accused persons, which was one of the significant link in the commission of the offence, has also not been proved by the prosecution. This most vital link of the evidence also gets discredited leaving no incriminating evidence against the accused persons/ respondents.

***Recovery of Motorcycles used by the Accused while Committing the Offence:***

33. Inspector Bhagwati Prasad had deposed that at the instance of accused Mohd. Kasim @ Khan Saheb, two motorcycles and four helmets were recovered from the street on which his house was located, which were seized *vide* Memo Ex.Y/N. These two motorcycles were undeniably stolen vehicles. The recovery of two motorcycles may have been made at the instance of the accused Mohd. Kasim @ Khan Saheb, but such recovery was from a public place and was also stolen property.

34. The prosecution had lamely tried to connect the crime with the accused persons/respondents by asserting the recovery of two motorcycles; however neither is there any cogent evidence that they were used by the accused persons for commission of offence by them nor that they were in anyway connected with these motorcycles. Even if the recovery of two motorcycles at the instance of Mohd. Kasim @ Khan Saheb is accepted, but it is no incriminating evidence against the accused persons, is establishing their in culpability in the commission of the offence.

***FSL Reports:***

35. The other piece of evidence relied upon by the prosecution is the FSL reports. However, these Reports do not have any significance and relevance in the absence of proof of recovery of the arms and ammunition from the accused persons, a finding been given in this regard in favour of the respondents/ accused. Also, the recovery of pellets from scene of crime, has not been proved by any cogent evidence. This evidence has been rightly discarded by the learned ASJ.

**Conclusion**

36. We, therefore, conclude that the learned ASJ has rightly concluded that the prosecution has not been able to prove their case beyond reasonable doubt against the accused/respondents and had thus, rightly given the benefit and acquitted the respondents/ accused persons.

37. We find no merit to grant Leave to Appeal against the respondents, which are hereby **dismissed**, along with pending application(s), if any.

(NEENA BANSAL KRISHNA)  
JUDGE

(SURESH KUMAR KAIT)  
JUDGE

**FEBRUARY 27, 2024**

*RS*