
(2009) 10 DEL CK 0011
In the Delhi High Court
Case No : Criminal App. 522 of 2007

Montu @ Bahadur

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 26-10-2009

Acts Referred:

Evidence Act, 1872 — Section 9

Penal Code, 1860 (IPC) — Section 186, 307, 34, 353, 394

Citation : (2009) 10 DEL CK 0011

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Sahila Lamba, Amicus Curia, for the Appellant; Navin Sharma, APP, for the Respondent

Final Decision : Allowed

Judgement

Mool Chand Garg, J.—The appellant, who was tried as one of the accused in Sessions Case No. 183/2006 arising out of FIR No. 24/2004 u/s 394/397/457/411/34 IPC of P.S. Mehrauli, has assailed the judgment of the Addl. Sessions Judge dated 25.4.2007 holding him guilty of offence punishable u/s 394/397/34 IPC along with other accused persons. He has also challenged the order of sentence dated 27.4.2007 awarding him punishment of R.I. for a period of 7 years besides payment of fine of Rs. 3,000/- and in default of payment of fine to further undergo S.I. for 7 days.

2. It is the case of the appellant that there is no evidence available against him. It is also his case that his identification by PW4 in the Court is based upon showing of his photographs by the police officials and, therefore, such evidence is of no consequence. He has also stated that the factum of showing his photographs by the Police before holding his test identification parade is admitted by PW4 and, therefore, no credence can be given to his identification by PW4 in Court for the first time. Moreover, the award of minimum sentence of 7 years to the appellant is also not sustainable because there is no evidence against the

appellant of having used any weapon in the alleged crime.

3. The present case was registered by the police on the basis of statement made by PW2, Nirmal Kumari Ex.PW2/A, to the effect that, she along with her family members was residing at D148, Freedom Fighters Colony, Delhi. On the intervening night of 12/13.01.2004 at about 4.15 am, four intruders entered inside their house. They all were armed with knives and pistols, aged about 35/40 years and were wearing jackets. They were speaking Bihari language. They had covered their faces. They at the point of pistol committed robbery in their house and removed cash, golden ornaments, silver glasses, silver coins, golden chain and golden bangles. She also stated that they also caused injuries to her grandson PW4 Saurav whose mouth was gagged with a sweater and hands tied from behind. After committing robbery all the four intruders left the house after touching her feet. They bolted the door from outside and threatened her not to disclose the incident to anyone. On that basis FIR No. 24/2004 u/s 394/34 IPC was registered at P.S. Mehrauli on 22.02.2004. The appellant was arrested by SI Vikram Singh in case FIR No. 100/04, when he also made a disclosure statement about the commission of offence in this case. At his instance one silver glass which does not have specific mark is also stated to have been recovered. Police wanted to hold TIP of the appellant which was conducted by Ms. Barkha Gupta, the Learned MM on 27.02.2004, where the appellant refused to participate by alleging that he has been shown to the witnesses earlier. It is a matter of record that PW-2 has not identified any of the witnesses and has reiterated that they had covered their faces at the time of commission of crime. PW-9 who was examined as a witness to recovery of identification of silver glass from the appellant has also stated that such glasses are ordinarily available in the market.

4. It has been stated by PW2 Nirmal Kumari that she could not identify the accused persons who had entered her house for commission of robbery because she has weak eye sight and the accused persons had covered their faces. However, PW4 Saurav has stated that he had seen the accused persons including the appellant. According to him the person who caused injury on his person was (A-1) Saurabh @ Khokhan, who is not the appellant. According to him the said accused stabbed him with a knife and had caused injuries to him. As stated above, the aforesaid witness in his statement has admitted of having seen the photographs of the appellant from the data base on the day he visited the Police Station i.e. 25.2.2004 on which date the appellant was also called for his TIP, which was held on 27.2.2004 i.e. soon after the witness had seen the photographs of the appellant.

5. It would be appropriate to take note of the statement made by PW4:

When the accused persons came in my room their faces were not covered. Vol. When they reached our house they had covered their faces before going outside.

He also deposed:

On 03.03.2004 I had gone to the P.S. Mehrauli. Police recorded my statement twice first on the date of incident and second on 03.03.2004 when I had gone to the Police Station. I have received information from P.P. IGNOU for participating in the TIP to be conducted in Tihar Jail. I do not recollect if I had received intimation in writing orally. I did not go to P.S. Mehrauli between 13.01.2004 to 25.02.2004. I had disclosed to the Police that the accused persons were between the age group of 35 to 40 years and that one of them was of fair complexion and other dark complexion. I had not disclosed their heights. Vol. the police had brought data base photographs of the persons described by me. They had brought albums of data base photographs. And after seeing the said albums I was required to identify the culprits. I do not remember the dates when the Police official was brought database photographs. I had identified the accused persons in the said database photographs. It is correct that I had identified the accused persons in the database photographs before I identified in the TIP proceedings.

6. It has been submitted on behalf of the appellant that as per Ms. Barkha Gupta, Learned MM, the TIP in this case was conducted on 27.02.2004. PW4 had gone to the Police Station on 25.02.2004 when he was shown the database photographs and it is for that reason when the TIP of the appellant was sought to be conducted, he refused to participate in the said TIP. It is submitted that the later identification of the appellant in Court by PW4 is certainly based upon the photographs shown to him by the Police and is not based upon by the TIP which was required to be conducted in view of Section 9 of the Evidence Act. It is, thus, submitted that the evidence of PW4 regarding his identification is of no consequence.

7. It would also be appropriate to take note of the statement made by PW18, the I.O. of this case, who has deposed as follows:

On 22.02.2004 I formally arrested all the three accused persons present in the Court.

On 24.02.2004 accused Montu present in the Court was brought to Court of Ld. MM on the basis of PW. After taking permission from court and arrested accused Montu. He was interrogated thoroughly and his disclosure statement Ex.PW12/B was recorded.

TIP of accused were got conducted on 25.02.2004 and 27.02.2004. I received the copy of TIP proceedings. On 01.03.2004 I obtained PC of all the four accused persons. I interrogated all the accused one by one and recorded their disclosure statements on 04.03.2004 vide memo Ex.PW15/A to D. As per their disclosure statements all the accused took the police team to Yamuna Pusta near Old Bridge. PW Atul Kumar was present with us. From the jhuggi of accused Montu he got recovered one silver glass.

8. From this statement also it is apparent that TIP of the appellant was sought to be conducted only after showing the photographs of the appellant to the

witnesses before holding the TIP. It is not the case of the prosecution that data base photographs were shown for the purpose of fixing the identity of the appellant before his arrest.

9. It is also submitted on behalf of the appellant that learned Trial Judge has failed to appreciate that the articles allegedly recovered at the instance of the appellant can any time be purchased from any market and therefore believing the same to be recovered on the basis of the alleged disclosure statement made by the appellant is false.

10. It would also be appropriate to take note of the statement made by PW9 which is reproduced hereunder:

I cannot tell the MEI number of that mobile. I do not remember on which date I had visited the police station last time. I used to remain in the police station for about 10-15 minutes and enquired from Surender Dahiya about my case. It is correct that similar gold bangles and silver glass are easily available in the market. I signed the seizure memo at the spot at the time of recovery.

11. Learned amicus curiae appearing for the appellant has also placed reliance upon the judgment delivered by Apex Court in the case of Ravindra @ Ravi Bansi Gohar v. State of Maharashtra 1998 (2) JCC (SC) 107, where it has been held:

8. The next unusual feature of the case, is the showing of the photographs of the accused to the witnesses who were to identify them in T.I. parade. As noticed earlier, the High Court did not lay any importance on this aspect of the matter so far as the two appellants are concerned on the ground that those photographs were shown to P.Ws. 2 and 12, who were already known to them to test whether their identification was correct or not and that fact was confirmed by holding identification parade immediately after their arrest. This finding of the High Court, in our view, is wholly unsustainable. The identification parades belong to the investigation stage and they serve to provide the investigating authority with materials to assure themselves if the investigation is proceeding on right lines. In other words, 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 - and not by showing the suspects or their photographs. Such being the purpose of identification parades the investigating agency, by showing the photographs of the suspects, whom they intended to place in the T.I. parade, made it farcical. If really the investigating agency was satisfied that P.Ws. 2 & 12 did know the appellants from before and they were in fact amongst the miscreants, the question of holding T.I. parade in respect of them for their identification could not have arisen.

12. On the other hand learned APP appearing for the state submitted that the prosecution has established its case beyond reasonable doubt. All the prosecution witnesses have fully supported the case of the prosecution and there is nothing to disbelieve their positive testimony. It is also submitted that the present appellant along with other accused persons was also arrested in case FIR

No. 100/2004 and 101/04 u/s 186/353/307/34 IPC. He is not an innocent person who is committing the crime for the first time but is a habitual offender. Therefore, the impugned judgment be upheld and the sentence be maintained.

13. I have heard the arguments of the learned APP for the state and the learned amicus curiae appearing for the appellant and have perused the testimony of the prosecution witnesses on record.

14. It would be appropriate to take note of the observations made by the Apex Court in the following judgments also:

i) Shaikh Umar Ahmed Shaikh v. State of Maharashtra AIR 1998 SC 1922

ii) Mahabir v. The State of Delhi 2008 (2) JCC 1244

iii) Ravi @ Ravichandran v. State Rep. By Inspector of Police 2007 (2) JCC 1458

iv) Dasari Siva Prasad Reddy Vs. The Public Prosecutor, High Court of A.P.,

15. In Shaikh Umar Ahmed Shaikh v. State of Maharashtra (Supra) it has been held as under:

The Designated Court after having rejected the evidence of identification parade on the ground that the suspects were possibly shown to the witnesses, relied upon the evidence of identification of the accused in the Court by the two witnesses and on that evidence recorded conviction against the appellants. No doubt, the evidence of identification parade is not a substantive evidence, but its utility is for purposes of corroboration. In other words, it is utilized for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. The real and substantive evidence of the identity of the accused comes when witnesses give statement in the Court, identifying the accused. It is true that in the present case, PW-2 and PW-11 identified the two accused who are the appellants before us in the Court. But, the question arises; what value could be attached to the evidence of identify of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made basis for recording conviction against the accused. The reliance of evidence of identification of the accused in the Court by PW-2 and PW-11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eye-witnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside. We accordingly set aside the judgment and order dated 14.01.1997 passed by the Additional Judge,

Designated Court for Greater Bombay in TSC No. 21 of 1994, convicting the appellants. The appellants are acquitted of charges. The appeal is allowed. The appellants are entitled to be released forthwith. We order accordingly. Appeal Allowed.

16. Similarly in the case of Mahabir v. The State of Delhi (Supra) also the accused persons were shown to the eye witnesses before their T.I.P., it has been held that:

In view of the accepted position that the accused persons were brought to the hospital to be shown to PW4, grievance that the test identification parade was really of no consequence because they had already been shown to the witnesses has substance. That being only piece of material which was used for conviction of Mahabir, same cannot be sustained. The same is set aside. He be released forthwith.

17. In the case of Ravi @ Ravichandran v. State (Supra) where photographs of the accused persons were shown to the witnesses also not named in the FIR as is the case in hand, the Apex Court held that:

17. It is no doubt true that the substantive evidence of identification of an accused is the one made in the Court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a First information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not very sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the First Information Report. PW-1 for the first time before the court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.

18. In a case of this nature, it was incumbent upon the prosecution to arrange upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification

19. In Suryamoorthi and Another Vs. Govindaswamy and Others, this Court held:

10. Two identification parades were held in the course of investigation. At the first identification parade PW1 identified all the seven accused persons whereas PW2 identified three of them, namely, accused 2, 6 and 7 alone. It is, however, in evidence that before the identification parades were held the photographs of the accused persons had appeared in the local daily newspapers. Besides, the accused persons were in the lock-up for a few days before the identification

parades were held and therefore the possibility of their having been shown to the witnesses cannot be ruled out altogether. We do not, therefore, attach much importance to the identification made at the identification parades.

18. The law with regard to quality of evidence when the case is based upon the identification for the first time in Court is well settled by this Court in the case of Nawal Kishore Vs. State,

8. The procedure for the conduct of the parade is largely a matter of police practice, but Judges have occasionally suggested rules which should be observed if the accused is not to be prejudiced and the parade is to have maximum probative value. The cardinal principle is fairness to the accused. Care should be taken that the witness does not see the accused in custody before the parade, or while the parade is being formed. Courts have commented adversely upon witnesses being put into a room with a window through which they might have seen the parade. The prosecution should also eliminate, as far as possible, the chance that someone may have told the witness which man to pick out.

12. The crucial question is always about the quality of the evidence. If it is poor the Judge should acquit in the absence of supporting evidence. If there are circumstances or items of evidence capable of supporting it, it will be safe to convict. Otherwise the verdict will be unsafe or unsatisfactory. Much depends upon the quality of the evidence in each case. Quality is what matters in the end. (R.V. Turnbull (1977) QB 224 (231). A capable judiciary, Wigmore has said, and an effective jury system (both depending upon a conscientious citizenship and a sound condition of politics) are in the end the only real safeguards of an innocent man (Wigmore on Evidence 3rd Ed. Volume VII para 2044 page 286).

Applying these principles what do we find this case? There is no description of the features, complexion, or likenesses of the accused in the First Information Report except that some accused is described as tall and the other short statured and all are described as young man. There was no identification parade because the accused refused to participate in the parade. It is established on the evidence of Jai Parkash and Talwar that the accused had been shown to the doctor and the compounder before hand. The doctor never picked out the accused nor did he say when he was shown These are the men who robbed me. Similarity of the appearance of the accused persons to that of the culprits is not established beyond reasonable doubt. The quality of the identification evidence is not good. This is the conclusion I have arrived at in this case.

23. The accused have been awarded long sentences of eight years rigorous imprisonment each. The Court would expect proof beyond reasonable doubt of the guilt of the accused. The greater the crime, the stricter the proof. This maxim applied to this case. The burden of establishing the guilt of the accused beyond reasonable doubt always lies on the prosecution which never shifts. In Woolmington v. Director of Public Prosecutions (1935) AC 462 481) Viscount Sankey said:

No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

This principle is a fundamental part of the English Criminal Justice. So with us. The same position prevails in the Criminal law in India.

24. The investigation has been most unfair in this case. The Cardinal principle is fairness to the accused. This principle has not been observed in the investigation. All precautions and safeguards intended for the benefit of the accused were thrown to winds. There was no upright and clean investigation. The evidence is not confidence- inspiring. Leaving frills and embroideries aside, the evidence of prosecution witnesses cannot be accepted, conflicting as it is in material particulars. It will be unsafe to convict the accused on the unsatisfactory evidence led by the prosecution. On the whole case my conclusion is that the prosecution has failed to establish the guilt of the accused beyond reasonable doubt.

19. A perusal of the aforesaid judgments goes to show that whenever the accused is shown to the witnesses before conducting the T.I.P. their identification in the TIP or their subsequent identification has not been appreciated as a good evidence for their conviction by the Apex Court. Admittedly in the present case except for the disclosure statement made by the appellant and his co- accused persons one after the other, i.e., the second accused on 12.11.2005 and the appellant and his other co-accused on 13.11.2009 which is nothing else but the repetition, there is no other evidence which may prove the guilt of the appellants except the identification made by PW-4 in the T.I.P. and the identification of the appellant by PW-3 in the Court. The disclosure statement is also not admissible because the recovery of silver glass which is available in the market would not prove the guilt of the appellant.

20. Thus, in view of the aforesaid legal position and the facts of this case I allow the appeal and acquit the appellant by giving him benefit of doubt. The appellant be released forthwith, if not wanted in any other case. A copy of this order be sent to the Jail Superintendent for immediate compliance. TCR, if any, be sent back along with a copy of this order. Pending applications, if any, stand disposed of.

21. The fee of amicus curiae is fixed as Rs. 4500/-.