

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INDIAN PANEL CODE

CRL. APPEAL NO. 267 OF 1999

Date of Decision: 4th April, 2008

SHIV PRASAD

Through: Appellant
Mr. Rajender Kumar,
Advocate(amicus curiae)

versus

STATE

Through : Respondent
Mr. M. N. Dudeja, APP

P.K.BHASIN, J:

1. The appellant Shiv Prasad has challenged the judgment and order dated 22.3.1999 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No.205/97 whereby he was convicted under Section 392 read with Section 397 of Indian Penal Code and was sentenced to undergo seven years rigorous imprisonment and also to pay a fine of Rs.100/- with a default stipulation of further one months rigorous imprisonment in case of non-payment of fine.

2. The relevant facts may first be stated. On 1.10.1991 at about 11.30 p.m. four persons came to the factory of PW-3 Prem Parkash Bansal at Prahladpur and at that time his two employees Suresh(PW-1) and one Tajan were present in the factory. One of the intruders was having a katta and he put the same on the temple of Tajan and the other intruder who was holding a knife put it on the back of PW-1 and took them in the office and two other intruders tied them with a rope and covered their eyes with a piece of cloth. In the factory some bags of plastic granules were lying and those intruders were loaded in a truck and taken away by the intruders. As per the further prosecution case, Mangal Bahadur, who was a chowkidar in the factory and one Krishan, who was also the employee in that factory, were also involved in that incident and they had also fled away from the factory along with other four persons. Thereafter, Suresh and Tajan informed the owner of the factory(PW-3) about the incident who then informed the police. PW-6 ASI Raghubir Singh reached the factory and recorded the statement (Ex. PW-3/A) of PW-3 Parkash Bansal and a rukka(Ex.PW-2/B) was then sent to the police station for the registration of an FIR under Section 380 IPC. Accordingly a case was registered under

Section 380 IPC vide FIR No. 209/91(Ex.PW-2/C). On receiving some secret information on 9.10.91 about the culprits involved in this incident the police apprehended eight persons, including the present appellant and the above named two employees of the complainant, from a godown in village Khera Khurd which belonged to Ram Lal (PW-5). All the eight persons were found sitting on the stolen bags of plastic granules which were 64 in number. Those bags were then sealed and taken into police possession vide memo Ex. PW-5/C. Later on the complainant (PW-3) identified the bags at the police station when he had gone there to find out the progress in his case.

3. After investigating the matter the police filed charge-sheet under Sections 395/397/342/412/34 IPC in the Court against all the eight persons apprehended on 09-10-91. They were then charged and tried for the commission of offences under Sections 395/398/34 IPC. During the pendency of trial four accused persons, namely, Tej Bahadur, Man Singh, Bhim Singh and Mangal Bahadur absconded and they were declared proclaimed offenders.

4. The learned trial Court finally convicted only the appellant under Section 392 read with Section 397 IPC relying upon the testimony of PW-1 Suresh and acquitted other three accused Krishan Prasad, Dharampal and Ram Hari. Aggrieved by his conviction the sole convicted accused, the appellant herein, challenged the impugned judgment and order by filing this appeal.

5. Since none had appeared on behalf of the appellant to advance arguments when it was taken up for hearing, Mr. Rajender Kumar, Advocate was appointed as amicus curiae to assist the Court.

6. Sh. Rajender Kumar contended that the conviction of the appellant was based on the testimony of the PW-1 and since his evidence was not relied upon by the trial Court against other accused persons the appellant could not be convicted on the same evidence. In support of this contention the learned counsel had relied upon a decision of Apex Court reported as 1992 SCC (Crl.) 833, Puttan @ Kamal Prasad v. State of U.P. wherein the conviction of the convicted accused under Section 394 read with Section 397 IPC was set aside on the ground that when on the same evidence two accused were acquitted there was no justification in sustaining the conviction of the third one. In another judgment of Honble Supreme Court cited by the amicus curiae which is reported as AIR 1989 SC 772, Sukhram v. State of Madhya Pradesh also it was held that if one accused is acquitted then other one would on same evidence cannot be convicted. It was also contended that in any event the evidence of PW-1 in the absence of a prior test identification parade could not be relied upon by the trial Court for convicting the appellant. In support of this contention the learned Amicus cited two decisions of the Apex Court reported as Devinder Singh and Anr. v. State of Himachal Pradesh, 2004 SCC (Crl.) 93 and Kanan and Ors. v. State of Kerala, 1979 (3) SCC 319 wherein it was held that when identification of the accused person not known to the witness is done for the first time in Court, his evidence becomes absolutely valueless unless there has been a previous test identification parade in respect of the accused.

7. On the other hand Shri M.N.Dudeja, learned Additional Public Prosecutor, supported the judgment of the trial Court and submitted that there was no infirmity in the impugned judgment.

8. After having gone through the testimony of Suresh (PW-1), who is the only eye-witness of the incident produced before the trial Court and whose evidence has not been accepted in respect of other accused persons, I have unhesitatingly come to the conclusion that the learned trial Court has wrongly convicted the appellant while acquitting his co-accused persons. As per the prosecution case when the appellant was apprehended on 09-10-91 along with his co-accused persons 64 bags of plastic granules(dana) stolen by them from the factory of the complainant(PW-3) were recovered from their possession. However, the learned trial Judge has disbelieved the prosecution case regarding that recovery. The appellant was convicted on the basis of evidence of PW-1 Suresh who identified him in Court for the first time after the incident. The other two accused, namely, Dharampal and Ram Hari were acquitted since PW-1 had not deposed anything against them in his chief-examination and he stated that he could not identify these persons as his eyes had been covered at the time of the incident with a cloth. Accused Krishan, who was the employee of the complainant, was acquitted by the learned trial Judge on the ground that all that PW-1 had stated about him in his evidence was that he had also left the factory along with the other culprits and further that in the first information about the incident recorded at the police station vide DD No. 37-A(Ex.PW-2/A) there was no mention of accused Krishan Prasad and the information received was that the robbers had taken away the chowkidar with them. In these circumstances, accused Krishan Prasad was given the benefit of doubt. While dealing with the prosecution case against the present appellant the learned trial Judge has noticed in his judgment that appellant Shiv Prasad was a stranger to PW-1 Suresh and in the ordinary course his dock identification could not be taken very seriously. By this, the learned Judge appears to have intended to convey that since accused Shiv Prasad was a stranger to the sole eye witness of the incident there should have been a prior test identification parade, which admittedly was not got conducted by the police. It, thus, appears that the learned trial Judge was not convinced about the involvement of the appellant also merely on the basis of identification evidence of PW-1 Suresh. It, therefore, became a matter of anxiety to find out as to how the appellant was held guilty by the learned trial Judge after having observed that in the ordinary course his dock identification could not be taken very seriously. This is how the learned trial Judge while considering the prosecution case against the appellant in para no. 8 of the impugned judgment. 8. I am now left with the solitary statement of PW-1 Suresh. He has identified Shiv Prasad as the person who was armed with Katta. Shiv Prasad was admittedly a stranger to him and in the ordinary course dock identification would not be taken very seriously. In the case of Shiv Prasad, however, there were distinct identity marks and PW-1 Suresh mentioned the same in the statement which he made to the IO on the night of occurrence. Accused Shiv Prasad has a mole on his nose and his nose is pierced also. PW-1 Suresh mentioned both these features to the IO. This satisfies me that Suresh was actually present at the time of occurrence and he had seen accused Shiv Prasad with a katta.

9. In my view, the learned trial Court has erroneously sought corroboration of the testimony of PW-1 from the statement given to the investigating officer during investigation ignoring the settled legal position that any statement made to an investigating officer in the course of investigation is hit by the provisions of Section 162 Cr.P.C. and the same cannot be relied upon except for the limited purpose of contradicting its maker either by the accused or even by the prosecution if the witness turns hostile. Since, appellant was admittedly not known to PW-1 the prosecution should have arranged a test identification parade for getting the appellant identified from PW-1 and the other eye-witness Tajan. That was, however, not done and there is no explanation forthcoming from the side of the prosecution for the absence of prior test identification parade and consequently the identification of the appellant for the first time in Court as the culprit by PW-1 could not have been relied upon by the learned trial Court since it itself had observed that in the ordinary course dock identification of the appellant by PW-1 could not be taken seriously which shows that the learned trial Judge himself was not considering this witness to be belonging to that category of witnesses whose evidence could be relied upon without any corroboration. In the present case, the corroboration of the testimony of PW-1 could be from the evidence of recovery of stolen property from the appellant which, as noticed already, was though adduced but was not found to be reliable by the learned trial Court itself or from identification of the appellant by PW-1 at a test identification parade which was not got conducted by the investigating agency. As per the prosecution case the appellant and his co-accused persons were apprehended on some secret information and since the recovery of stolen property from the appellant and his co-accused persons at the time of their apprehension has been disbelieved by the trial Court the manner of their arrest also becomes doubtful and consequently the identification of the appellant by PW-1 in Court for the first time more than two years after the incident without a property test identification parade. In this regard a useful reference can be made to the views of the Honble Supreme Court also expressed in (1979) 3 SCC 319, Kanan And Others Vs. State of Kerala. Dealing with the effect of absence of a prior test identification in a case where the apprehended person on the suspicion of being involved in some crime by the victim who did not know that person before the incident the Honble Supreme Court observed as under: Both the trial Court and the High Court have found that the mere fact that no T.I. parade was held would not destroy the evidence of PW 25. With due respect, we feel that the High Court erred in law in taking this view. It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observation. The idea of holding T.I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. In these circumstances, therefore, we feel that it was incumbent on the prosecution in this case to have arranged T.I. parade and got the identification made before the witness who called upon to identify the appellant in the Court. On this ground alone, the testimony of PW 25 becomes unworthy of credence and must be excluded from consideration.

10. I also find force in the submission of the learned amicus curiae that since the evidence of PW-1 who had implicated appellant as well as the complainants employee Krishan Prasad during his evidence in Court was not accepted by the learned trial Court in respect of the acquitted accused Krishan Prasad the same evidence could not have been relied upon for convicting the appellant and the benefit of doubt should have been given to him also and this view is fortified by the two decisions of the Honble Supreme Court on this aspect cited by the learned amicus curiae.

11. I am, therefore, of the view that this appeal deserves to be allowed and is hereby allowed. The judgment and order dated 22.03.1999 are set aside and the appellant is acquitted of the offence for which he was convicted by the trial Court. The sentence of imprisonment awarded to the appellant was suspended during the pendency of this appeal and now as a result of his acquittal bail bond executed by him stands cancelled and his surety also stands discharged.

12. For the valuable assistance rendered by the amicus curiae the Delhi High Court Legal Services Committee shall pay his fees which is fixed at Rs. 5500/- and it be informed accordingly by the Registry.

Sd./-
P.K.BHASIN,J

April 4, 2008