

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINAL PROCEDURE

CRIMINAL APPEAL NO. 723 OF 2000

Date of Decision: 2nd December, 2008

MOHD. ALTAF
Through: None

...Appellant

versus

STATE
Through: Mr. Jaideep Malik, APP

....Respondent

JUDGMENT

P.K.BHASIN, J(ORAL)

1. In this appeal, the appellant has challenged his conviction under Sections 392/397/34 IPC recorded vide judgment dated 22.7.2000 by learned Additional Sessions Judge in Sessions case No.40/97 as well as the sentence of seven years rigorous imprisonment awarded to him vide order dated 24.7.2000.

2. The relevant facts giving rise to the present appeal are that the appellant along with one Anwar was tried by the trial Court under Sections 392/397/34 IPC on the allegations that on 21.9.96 they had robbed PW-2 A.Salam of his two gold rings, one Titan watch and cash of Rs.250/- on the point of knife while he was going on a rickshaw from Fatehpuri to Darya Ganj at about 7.00 in the morning. As per the prosecution case, after robbing PW-2 A.Salam, the appellant and his companion had run away from the spot which was somewhere on Subhash Marg near Darya Ganj and thereafter A. Salam had gone to the police post at Red Fort and had lodged a

complaint(Ex.PW-2/A) about the aforesaid incident of robbery and then FIR was registered at Kotwali Police Station. The appellant and his co-accused Anwar came to be arrested on 17.11.96 when they were apprehended by two policemen while they were running away after committing another robbery on that date at about 6.30 a.m. at Asaf Ali Road. In respect of that incident FIR No.665/96 under Sections 392/34 IPC was registered at P.S. Darya Ganj. During their interrogation in that case, the appellant and his co-accused Anwar had allegedly confessed their involvement in the present incident of robbery also which had taken place on 21.9.96. Accordingly, the Kotwali Police Station, within whose jurisdiction the present incident had taken place, was informed and thereafter both the accused persons were formally arrested in the present case also on 22.11.1996 for which date the Investigating Officer of this case had sought their production in Court by moving an appropriate application before the concerned Metropolitan Magistrate. On 23.11.96, the appellant and his co-accused were produced before the concerned Metropolitan Magistrate pursuant to the application moved by the Investigating Officer of the present case for arranging a Test Identification Parade. The appellant as well as his co-accused refused to participate in the Test Identification Parade. On the completion of usual investigation formalities, both the accused persons were charge-sheeted and in due course their case came to be committed to the Court of Sessions. Both the accused were charged and tried under Sections 392/397/34 IPC. The learned trial Judge accepting the testimony of the complainant (PW-2) as well as their refusal to participate in the Test Identification Parade held both of them guilty. Feeling aggrieved, both the convicted accused filed separate appeals. As far as the appeal of the co-convict Anwar is concerned, learned Additional Public Prosecutor informed that the same was dismissed during the course of hearing as he did not dispute his conviction but his imprisonment period was reduced to the period which he had already spent in jail.

3. The sentence of imprisonment of the present appellant was suspended during the pendency of this appeal. However, when this appeal was taken up for hearing today there was no appearance on his behalf. Considering the fact that this appeal has been pending since the year 2000 and the trial Court record had already been received, I heard the learned Additional Public Prosecutor instead of dismissing it in default relying upon the decision of the Hon”ble Supreme Court in “Bani Singh Vs. State of U.P.”, (1996) 4 SCC 720, wherein it has been held that if at the time of hearing an appeal the

accused or his counsel do not appear the Court should dispose of the appeal on merits instead of dismissing it in default.

4. A perusal of the impugned judgment shows that the appellant has been convicted on the basis of evidence of the complainant (PW-2) who identified him as well as his co-accused as the culprits who had robbed him. The learned trial Judge has also taken into consideration the fact that when after arrest the appellant was required to participate in a Test Identification Parade he had declined to do that. The prosecution had examined the concerned Metropolitan Magistrate before whom the appellant and his co-accused had refused to participate in the Test Identification Parade. He is PW-5 Dr. Sudhir Kumar Jain. He has proved the Test Identification Parade proceedings and the same are Ex.PW- 5/A in respect of the present appellant. However, I find from the trial Court record that when the statement of the appellant/accused was recorded under Section 313 Cr.P.C. it was not even put to him that he had robbed the complainant A. Salam, as had been claimed by him in his evidence. This was the only incriminating piece of evidence against the accused and that itself was not put to the accused which is the requirement of law. It is well settled that no piece of evidence can be used against an accused which is not put to him at the time of recording of his statement under Section 313 Cr.P.C., as the accused has a valuable right to offer an explanation to an incriminating piece of evidence. In this regard I may make a useful reference to a decision of the Hon'ble Supreme Court in "Sharad Birdhichand Sarada v. State of Maharashtra", (1984) 4 SCC 116 in which it had been held that if any incriminating circumstance has not been brought to the notice of the accused at the time of the recording of his statement under section 313 Cr.P.C. the same has to be completely excluded from consideration. The relevant observations made in para nos. 143-145 are reproduced below: "143. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat Air 1953 SC 468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court

uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or Section 313 of the Criminal Procedure Code, the same cannot be used against him. In *Shamu Balu Chaugule v. State of Maharashtra* (1976) 1 SCC 438 this Court held thus: The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him. 144. To the same effect is another decision of this Court in *Harijan Megha Jasha v. State of Gujarat* AIR 1979 SC 1566 where the following observations were made: In the first place, he stated that on the personal search of the appellant, a chadi was found which was bloodstained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant. 145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration.”

5. In this regard the submission of the learned Public Prosecutor was that the appellant in his grounds of this appeal has not taken up this ground of challenge to his conviction. However, I do not find any force in this submission. The appellant who had sent from jail his hand written memorandum of appeal had not taken this to be one of the grounds of challenge against the impugned judgment, this Court cannot ignore such a glaring infirmity in the trial of the accused. Learned Public Prosecutor also submitted that omission on part of the prosecution of putting the important incriminating circumstances to the accused at the time of his examination under Section 313 Cr.P.C. should be pleaded and established to have caused prejudice to the accused. I do not find any force in this submission also of the learned Prosecutor since an accused is not obliged to show that he had been prejudiced in any way because of any circumstance not having been put to him at the time of recording of his statement under Section 313 Cr.P.C. This was held to be so even by the Hon”ble Supreme Court in “*Kuldip Singh and Ors. v. State of Delhi*”, (2004) 12 SCC 528. In that case also a plea was raised on behalf of the prosecution that the omission to put some incriminating piece of evidence to the accused under Section 313 Cr.P.C. would have no serious consequence unless the accused was able to show that he had been prejudiced because of that omission. Repelling that

contention the Hon'ble Supreme Court observed as under (in para no. 9): "9. "That apart, as rightly pointed out by learned counsel for the appellants, if this piece of evidence as to re-employment of Kuldip was true then it becomes a material piece of evidence as a link in the chain of circumstances relied on by the prosecution, therefore, this link evidence which indicates the likely involvement of the appellant in the crime ought to have been put to the accused while he was being examined under Section 313 CrPC, which was admittedly not done. That being the case, the prosecution has disintitiled itself from placing reliance on this piece of evidence. We do not agree with the learned counsel for the respondent that either it is not necessary for the prosecution to have put this circumstance to the accused in his examination under Section 313 CrPC or that he should plead and establish a prejudice caused to him by such default on the part of the prosecution. As stated above, this is an incriminating circumstance upon which, in our opinion, the prosecution is relying to indicate the involvement of the appellant. Therefore, the question of establishing prejudice does not arise"

6. So, the evidence of the complainant to the effect that the appellant-accused was one of the two culprits who had robbed him on 21.9.96 cannot be used against this accused and if this evidence is excluded from consideration there remains nothing in the prosecution evidence based on which the conviction of the appellant-accused can be sustained. Admittedly there is no recovery of any of the articles of the complainant of which he was robbed either from the possession of the accused at the time of his arrest or thereafter at his instance pursuant to his disclosure statement.

7. I am, therefore, of the view that this appeal deserves to be allowed and is accordingly allowed. The judgment of conviction and order on sentence of the learned Additional Sessions Judge in respect of the appellant Mohd. Altaf are set aside and consequently he stands acquitted.

Sd/-
P.K.BHASIN, J

