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Akmal HussaIn Vs. State

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Court : Delhi

Decided On : Feb-04-2014

Judge : V. K. Jain

Appellant : Akmal Hussain

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on:

03. 02.2014 Date of Decision:

04. 02.2014 CRL.A. 1276/2010 MOHD ISRAR QURESHI Through: ..... Appellant Ms. Aishwarya Rao, Mr. Jatin Rajut and Mr. Anupam Advs. versus STATE + Through: ..... Respondent Mr. Feroz Khan Ghazi, APP for State Through: ..... Appellant Ms. Aishwarya Rao, Mr. Jatin Rajut and Mr. Anupam Advs. CRL.A. 1283/2010 AKMAL HUSSAIN versus STATE Through: ..... Respondent Mr. Feroz Khan Ghazi, APP for State CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT
V.K.JAIN, J.

On 27.11.2002, on receipt of copy of DD No.17A, ASI Samsuddin of Police Station Shakarpur, reached House no.145, Bank Enclave, Laxmi Nagar, Delhi, where the

complainant Smt.Suman Bansal was present. In her complaint, Smt.Bansal alleged that on the aforesaid date, she was sleeping in her bedroom and her servants, namely Raju, Lalan and Arvind, were present in the house. At about 1.15 pm, she got up on hearing some sound and found a boy aged about 20-25 years, present in the room, with a country made pistol in his hand. She asked him as to who he was and how he had entered her room. In the meanwhile, two more boys entered the room, one of whom was carrying a knife in his hand whereas the other one was carrying a country made pistol with him. One of the boys, threatened the complainant saying that they wanted her articles and asked her to hand over the keys of the safe to them. Being afraid, the complainant opened the almirah of the dressing room, adjoining the bedroom. After taking out the cash kept in the almirah, the intruders again threatened the complainant saying that they also wanted her jewellery. Since she was afraid of them, the complainant took out her entire jewellery from the almirah and handed it over to the intruders. Thereafter, they searched the almirah as well as the remaining part of the house and took out jewellery, wherever it was lying. During this process, the fourth boy, who also was carrying a country made pistol with him, came to her room and threatened the complainant, asking her not to identify them. The hands of the complainant were tied with her chunni and her legs were tied with telephone wire. After the intruders had left, her servants Raju, Lalan and Arvind came inside and helped her in removing the chunni and telephone wire with which she was tied. They told the complainant that all the three servants had been tied and locked in the adjoining room. One of the servants informed the complainant that the four robbers had forcibly entered the house when he opened the door on hearing call bell. The complainant informed her husband on telephone, about the incident. On checking, it was found that about Rs.3.50 lac and jewellery valued at Rs.2.5 lac were missing. The complainant told the police officer that a detailed list of the stolen articles would be given to him after thorough checking of the house. She also claimed that she could identify the robbers who had entered her house and committed the robbery.

2. The case of the prosecution is that on 8.11.2003, the Crime Branch arrested the appellant Mohd. Israr Qureshi, in some other case. During the course of interrogation, he confessed about his involvement in the robbery from the house of

the complainant, whereupon he was arrested. One ring found in his personal search was found to be stolen from the house of the complainant. This is also the case of the prosecution that on 25.11.2003, the appellant Akmal Hussain was arrested by the staff of Special Cell during interrogation of an FIR No.46/2003 and during the course of interrogation, he confessed about his involvement in the robbery of various articles from the house of the complainant. He also got recovered a stolen chain of the complainant from his house.

3. Both the appellants were charged under Section 392/397 IPC as well as under Section 411 thereof. Since they pleaded not guilty to the charges, as many as 15 witnesses were examined by the prosecution. One witness was examined in defence.

4. The complainant Smt. Suman Bansal came in the witness box as PW1 and stated that on 27.11.2002, at about 1.15 pm, she was sleeping in her room, whereas her servants namely Raju, Lalan and Arvind were working in the house. She woke up on hearing a noise and saw a boy standing in front of her, with a country made pistol in his hand. She asked him as to who he was and why and how he had come inside the house. In the meanwhile, within one or two minutes, two other boys came there. One of them was having a country made pistol in his hand, whereas the other one was carrying a knife in his hand. One of the boys threatened her and asked to hand over whatever she had, as also the keys of the safe. Being afraid, she opened the almirah and the assailants took out the cash amounting to Rs. 4 lac from that almirah. Thereafter, they again threatened her to hand over the jewellery which she was having in the house. Being afraid, she opened the second almirah, from which the articles of jewellery were taken out by the intruders. Immediately, the fourth assailant, having a country made pistol in his hand came there and thereafter, her hands were tied with a chunni whereas her legs were tied by a telephone wire. They ran away with cash and jewellery. Her servants Arvind and Lalan thereafter came to her rescue and untide her hands and legs. Their servants told her that the intruders had rung the door bell and when they opened the door, they forcibly entered the room.

5. During the course of her deposition in the Court, the complainant identified both the appellants who were present in the Court at that time as the boys, who were amongst the four intruders, who had committed the robbery at the point of country made pistol from her house. She further stated that on 10.12.2003, she had identified her gold chain and a gold ring in a Judicial Test Identification Parade. She also identified her signature on the list of stolen articles Ex.PW1/B. The complainant identified the chain Ex.PW1/P1 and the gold ring Ex.PW1/P2, during the course of her deposition.

6. PW2 Anand Kumar Bansal is the husband of the complainant, who has deposed about theft of jewellery and cash from his house and stated that the cash stolen from the house belonged to his company Anshul International and his Manager Mukesh had delivered the same to his wife on 26.11.2002. PW3 Mukesh Jain is the manager of PW2 and he corroborated his deposition with respect to keeping Rs.4 lac with the complainant in house number 145, Bank Enclave, Delhi. PW4 Deepak Bhardwaj is an employee of PW2. He has stated that on 26.11.2002, he had delivered Rs.4 lac to PW3 Mukesh, who then delivered the said amount to the complainant.

7. PW7 Head Constable Bhopal Singh stated that on 28.11.2003, the appellant - Akhmal Hussain, while in police custody, made a disclosure statement Ex.PW7/A and on 30.11.2003 and got recovered her gold chain from first floor, House number 17, Gali no.20, Brahm Puri, where it was lying behind a television set, wrapped in a paper. PW10 SI Ramesh Sharma stated that on 7.11.2003, the appellant Mohd. Israr Qureshi was arrested on the pointing out of the informer, from near Shamshan Ghat, Mustafabad, on account of he is being wanted in a case of robbery and from his personal search, one gold ring was recovered. The witness identified the gold ring recovered from the possession of the appellant Mohd. Israr Quereshi.

8. PW8 Mr. Amit Kumar, who was working as a Metropolitan Magistrate at the relevant time stated that on 17.11.2003, the Test Identification Parade of the case property was conducted by him and during the said proceedings, the complainant identified the case property. The said proceedings are Ex.PW8/B. PW12 Mr.

Pawan Kumar Jain was working as Metropolitan Magistrate at the relevant time stated that on 22.11.2013, the appellant Mohd. Israr Qureshi refused to participate in the TIP at Central Jail. The proceedings conducted by him are Ex.PW12/A.

9. In their statements under Section 313 Cr.PC, the appellants denied the allegations against them. DW-1 is an official from the Record Room (Sessions) and he stated that the appellant Akmal Hussain was acquitted in the case registered vide FIR No.96/03 Police Station Special Cell, vide judgment dated 26.10.2009.

10. The conviction of the appellants was challenged by their counsels on the following grounds: (i) None of the servants of the complainant was examined either by the Investigating Agency or during the course of trial. (ii) No proof of the purchase of the jewellery was produced by the complainant. (iii) The appellants were arrested about a year after the incident of robbery and it was not possible for the complainant to identify them after such a long period.

11. As regard the first contention, I find that it has come in the deposition of the complainant Smt. Suman Bansal that none of the three servants were employed with them at the time she was examined in the Court. She expressed ignorance when asked as to whether the statements of her servants were recorded by the police or not. She also stated that these servants were not aware of any cash or jewellery lying in the house. The investigation in this case was conducted by PW15 Inspector Sardar Singh Rana, since PW6 ASI Samsudin only recorded statement of the complainant and thereafter the investigation was conducted by Inspector Rana. During the cross-examination of PW15, he was not asked as to whether he had recorded the statement of servants of the complainant or not. If the appellant wanted to take any advantage on account of the prosecution not citing the servants as the witnesses, they ought to have asked the Investigating Officers, as to whether he had examined them and if so, why they were not cited as witnesses. In case he were to say that he had not examined them, the Investigating Officer ought to have been asked as to why he did not do so. There can be no dispute that except for some strong reasons, the statements of the servants should have been recorded on the date of robbery itself and they should

have been cited as witnesses, but, in the absence of any cross examination of the Investigating Officer on this point, it cannot be known as to whether he had actually recorded their statements or not and if not, what was the reason for that. In the absence of any cross examination of the Investigating Officer in this regard, no adverse inference against the prosecution can be drawn on account of its not examining the servants of the complainant. In any case, none of the servants, according to the complainant had witnessed the robbery taking place.

12. As regards the identity of the stolen articles and their ownership, as stated by PW8, Shri Amit Kumar, the same were identified before him by the complainant in a judicial TIP conducted on 17.11.2003. It was held by the Honble Supreme Court in Erabhadrappa alias Krishnappa v. State of Karnataka, AIR 1983 SC446 that where a lady witness identifies the stolen articles such as ornaments and sarees at the trial without prior Test Identification Parade, the testimony of such a witness was not inadmissible in evidence for want of prior Test Identification Parade, as ladies have uncanny sense of identifying their own belongings, particularly the articles of personal use. A particular article may be identified by any particular mark on it or by its frequent use or observation which causes a permanent impression on the mind of identifier that leads to recognition of the article. The stolen articles recovered from the appellants, being a chain and a ring respectively were the articles which the complainant must be seeing and also using quite frequently. Therefore, the complainant was capable of identifying the aforesaid articles during the course of judicial TIP conducted by PW8 Shri Amit Kumar. A perusal of the TIP proceeding conducted by PW-8, Shri Amit Kumar would show that he had mixed up the ring produced before him, with four other golden rings and had kept all the rings in a single row. It was thereafter only that the complainant appeared before him and identified the ring, which was stolen from her house. It has come in evidence that the ring found in possession of the appellant Mohd. Israr Qureshi was duly sealed with the seal of R.K, after it was seized from him. A perusal of the TIP proceedings conducted by PW-8 would show that the case property produced before him was found to be sealed with the seal or R.K. It would show that there was no tampering with the ring, after it was recovered from the possession of the appellant Mohd. Israr Qureshi and till the date it was produced before PW-8 for the purpose of TIP proceedings, conducted

by him. A perusal of the proceedings dated 10.12.2003 conducted by PW-8 would show that as many as five gold chains were mixed up with the chain, alleged to have been recovered from the house of the appellant Akmal Hussain and thereafter all the chains were placed in a line. Thereafter, the complainant was called and asked to pick up her chain. She was able to correctly identify the very same chain which was recovered from the house of the appellant Akmal Hussain. Moreover the appellants have not claimed the ownership of the aforesaid articles. Therefore, the deposition of the complainant in the court coupled with a prior identification in the judicial TIP, is sufficient to establish her ownership with respect to those articles particularly when the appellants do not claim that the aforesaid belong to them. The case of the appellants is that no such article at all was recovered from them or got recovered by them.

13. As regards the ability of the complainant to identify the robbers, despite the time lag between the incident of robbery and the date on which the complainant identified the appellants in the Court, I find that according to the complainant the intruders were in the house for about 25-30 minutes. The incident of robbery took place in day light. Since the robbers were not masked, remained in the house of the complainant for a substantial period and they also came face-to-face with her by threatening her and demanding the cash and jewellery, the complainant had ample time and opportunity to notice and retain in her mind, the features of the robbers which would at a later date enable her to identify them in a TIP or during the course of trial. A perusal of the FIR would show that the complainant described the first intruder in detail by stating that he was aged about 20-25 years, was of a dark complexion, with the height of about 5 feet and was wearing white shirt, white pant and a black jacket. She could not have given them details had she not looked at him carefully and not retained, in her mind, the features which she stated to the police. The two boys who later entered the room of the complainant were also described in the complaint. One of them was stated to be aged about 20-25 years, with fair complexion and a height of about 5 feet and 7 inch. He was stated to be wearing a blue T-shirt, blue jeans and sport shoes. The other boy was stated to be aged about 20-25 years with fair complexion and height of about 5 feet 3 inch. He was stated to be wearing pant and shirt. The fourth boy was also stated to be aged about 20-25 years old with fair complexion, mustached and having height of 5 feet

4 inch. He was stated to be wearing a pant and a shirt. These details leave no reasonable doubt that the complainant had adequate time and opportunity at her disposal to see the intruder carefully and note down not only their personal particulars, but also the clothes which they were wearing. Therefore, I see no reason why identification of the appellants by the complainant, during the course of trial should be rejected, merely on the ground of time lag of about one year between the date of robbery and the date of her deposition in the Court. During cross-examination of the complainant, this was not the case of the appellants that their age did not match the age of the robbers, given by her in the FIR. Moreover, as noted earlier, as far as the appellant Mohd. Israr Qureshi is concerned, he refused to join TIP before a Metropolitan Magistrate. A perusal of the TIP proceedings conducted by the said Magistrate would show that the appellant Mohd. Israr Qureshi refused to join TIP on the ground that police had already shown his face to the witnesses in the Police Station and had also taken his photograph. However, when the complainant came in the witness-box, no suggestion was given to him either that she had seen the appellants in the police station or that their photographs were shown to her. Similarly, when the Investigating Officer came in the witness box as PW-15, no suggestion was given to him that he had shown the appellants to the complainant in the police station or that he had taken their photographs and shown the same to the complainant. Therefore, there is no valid explanation given by the appellant Mohd. Israr Qureshi for refusing to join TIP. If the accused refuses Test Identification Parade without any justifiable cause, he does at his own peril and the Court will, in such circumstances, be justified in drawing an inference that had the appellant participated in Test Identification Parade he would have been identified by the witnesses and that precisely was the reason why he refused to join the TIP. Similar view was taken by the Honble Supreme Court in Suraj Pal vs. State of Haryana (1995) 2 SCC64 Therefore, the Court would be justified in inferring that had the appellant Rafiqul participated in the TIP, he would have been identified by the complainant. Therefore, in this case also, it can be safely presume that had the appellant Mohd. Israr Queresh participated in the Test Identification Parade, he would have been identified by the complainant, and that precisely was the reason he refused to join the said Test Identification Parade.

14. As noted earlier, the stolen ring was found in the possession of the appellant Mohd. Israr Qureshi at the time he was arrested. The ring was duly identified by the complainant in the judicial TIP, conducted by PW-8. The appellant Mohd. Israr Qureshi did not tell the Court as to how he had come in the possession of the aforesaid stolen articles. Identification of the appellant Mohd. Israr Qureshi, coupled with his refusal to join TIP and recovery of the stolen ring from his possession, in my view, is sufficient to establish his identity as one of the four persons who committed robbery of jewellery and cash from the house of the complainant on 27.11.2002.

15. As regards appellant Akmal Hussain, as noted earlier, he was identified by the complainant during the course of trial. Ex.PW-14/A is the disclosure statement made by the said appellant in the case registered vide FIR No.96/2003 of Police Station Special Cell, Lodhi Colony, New Delhi. In FIR No.564/02 Ex.PW8/A is the disclosure statement made by the appellant, Akmal Hussain, while in police custody. In this statement he, inter alia, stated that he could get the jewellery recovered from his house. A perusal of the seizure memo Ex.PW7/A, coupled with the deposition of Head Constable Bhopal Singh and SI Rajinder Singh would show that on 30.11.2003 the appellant Akmal Hussain took the police officials to his room in House No.17, Gali No.20, Brahm Puri, and produced a chain lying behind television set wrapped in a piece of paper and the aforesaid chain was seized vide memo Ex.PW7/C after sealing the same with the seal RSN. The following view taken by this Court in Crl. Appeal No.32/2013 Rijaul Karim versus State (NCT of Delhi) decided on 27.01.2014, with respect to identification during trial without prior TIP is pertinent for this case as well.

13. The legal position with respect to identification of an accused was summarized by the Honble Supreme Court in Dana Yadav @ Dahu and Ors. Vs. State of Bihar (2002) 7 SCC295inter alia as under:

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court. X X X (e) Failure to

hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law. (f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction. (g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.

As a legal principle, the substantive evidence of a witness is the statement made by him in the Court. The identification for the first time in the Court, by its very nature, is of a weak character and, therefore, the Court normally looks for corroboration of such evidence by way of some other evidence which may, inter alia, include identification in a Test Identification Proceeding. Identification in a Test Identification Parade is not a substantive piece of evidence, though it can be used as a piece of corroborative evidence if the witness identifies the accused while deposing in the Court.

14. The power to identify also varies in terms of power of observation and memory of the identifying person. Another relevant circumstance in this regard is as to for how much time the witness had seen the accused. If, for instance, he had only a glimpse of the accused, he may not be in a position to firmly recall his identity, but if he had interacted the accused for a substantial time and had ample opportunity to observe him, he may face no difficulty in identifying him at a later date.

15. In Raman Bhai Naran Bhai Patel and others versus State of Gujarat [(2000) 1 SCC358, the two injured eye witnesses PW2 and PW14 tried to identify the

accused only in the Court and they were not knowing them earlier. No identification parade was held during the course of investigation. It was held by the Apex Court that though their evidence is to be treated to be one of a weak nature, but if cannot be said to be totally irrelevant or inadmissible. The Court was of the view that since the aforesaid witnesses were seriously injured in the incident and could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light, they could not be said to be interested in roping any innocent person by shielding the real accused who had assaulted them. In Budhsen and another versus State of U.P.[1970 Crl. L.J1149, the Apex Court, inter alia, observed that though as a general rule, identification of the accused for the first time in the Court without there being any corroboration whatsoever cannot form the sole basis for conviction, there may be exceptions to the said general rule when for example the Court is impressed by a particular witness, on whose testimony it can safely rely, without corroboration.

16. Since the Police, pursuant the disclosure statement made by the appellant, Akmal Hussain, discovered the fact that the stolen jewellery was lying in his house and the said discovery of fact was confirmed by recovery of jewellery from the house, the statement made by him is admissible in evidence under Section 27 of the Evidence Act, to the extent it pertains to the jewellery being kept in his house. Three possibilities arise from the disclosure statement made by the appellant, Akmal Hussain. The first possibility is that he himself had kept the chain in his house, from where it was recovered by the police; the second possibility is that he had seen someone keeping the aforesaid chain in the room where it was found by the police; and the third possibility is that someone had told him that the aforesaid chain was lying in his house. He did not tell either the police or the court as to how he had come to know about the chain being available in his house, the inevitable inference is that he had himself kept the aforesaid chain in the room from where it was later recovered by the police.

17. The identification of the appellant, Akmal Hussain, by the complainant coupled with the recovery of the stolen chain from his possession, in my view, is sufficient to establish his identity as one of the robbers involved in the incident of robbery.

18. Though it has not come in the deposition of the complainant as to what was the role played by the appellant, Akmal Hussain, and what was the role played by other appellant Mohd. Israr Qureshi, that to my mind would be inconsequential since the deposition of the complainant leaves no reasonable doubt that the robbery was committed by four (4) persons, in furtherance of their common intention to commit robbery of cash and jewellery, etc. from the house of the complainant. It has also come in the deposition of the complainant that all the four (4) robbers were armed, three being armed with country made pistols and one being armed with a knife. The weapons of all the four intruders were seen by the complainant. Carrying weapon in the hands during commission of robbery amounts to use of the weapons within the meaning of Section 397 of IPC. In Phool Kumar Vs. Delhi Admn. AIR 1975 SC905the accused was carrying a knife in his hand at the time the robbery was committed. It was found from the deposition of PW-16 that the appellant/accused Phool Kumar had a knife in his hand. The Honble Supreme Court held that he was therefore carrying a deadly weapon. In Salim Vs. State 1987 (3) Crimes 794 the Honble High Court of Delhi held that to categorise knife or to fix its size for it to be a deadly weapon may not be appropriate. It was held that to say that a knife to be a deadly weapon should be of a particular size would not be a correct statement. In State of Maharasthra Vs. Vinayak 1997 Cr.L.J.

3988 Bombay High Court held that knife is a deadly weapon within the ambit of expression deadly weapon used in section 397 of IPC. Therefore, irrespective of the size, any knife is a deadly weapon and therefore, accused Rajesh is liable to be punished under Section 392 of IPC read with Section 397 thereof. The appellants, therefore, have been rightly convicted under Section 392 read with Section 397 thereof.

19. Since the appellants have been sentenced to undergo RI for seven (7) years each and pay fine of Rs.500/- each or to undergo SI for one (1) month in default, there is no scope either for reducing the substantive sentence awarded to them or to reduce the fine. However, in the facts & circumstance of the case, it is directed that in default of payment of fine, the appellants shall undergo SI for fifteen (15) days each instead of one (1) month each awarded by the trial court. Both the

appeals stand disposed of accordingly. One copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial Court record be sent back along with a copy of this order. FEBRUARY04 2014/rd/bhanesh/bg Crl. Appeal Nos1276/2010&1283/2010

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