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Pardeep @ Sandy Vs. State

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Court : Delhi

Decided On : Mar-12-2014

Judge : V. K. Jain

Appellant : Pardeep @ Sandy

Respondent : State

Judgement :

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

04. 03.2014 Date of Decision:

12. 03.2014 CRL.A. 719/2013 PARDEEP @ SANDY Through: ..... Appellant Mr. R.M. Tufail, Mr. Varun Agrawal & Mr. Anwar A. Khan, Advs. versus STATE Through: ..... Respondent Mr. Feroz Khan Ghazi, APP. + CRL.A. 720/2013 DEEPAK @ GHODA ..... Appellant Through: Mr. R.M. Tufail, Mr. Varun Agrawal & Mr. Anwar A. Khan, Advs. versus STATE Through: + ... Respondent Mr. Feroz Khan Ghazi, APP. CRL.A. 165/2014 PAWAN @ TAU Through: ..... Appellant Mr. R.M. Tufail, Mr. Varun Agrawal & Mr. Anwar A. Khan, Advs. versus STATE Through: ..... Respondent Mr. Feroz Khan Ghazi, APP. CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT
V.K.JAIN, J.

On 29.08.2010, about about 12.45 pm, an information was received that a person had been robbed of his motorcycle - Bajaj Discover, red colour, bearing registration number DL8 NC4908at Bawana Road, DSIDC, H-Block, Main Road. The information when conveyed to Police Station Bawana, was recorded vide DD No.22A, a copy of which was given to Head Constable - Brijesh Kumar for investigation when Head Constable - Brijesh Kumar reached the Main Ganga Toli Road, near Lal Flat, Sector - 3, DSIDC, Bawana, the complainant - Abhinav Dhruv was present there. The statement of the complainant was recorded by him. The complainant, inter alia, stated that on the aforesaid date, he was returning from Bawana on his motorcycle number DL8 NC4908 bearing chasis number - MD2DSPAZZ SPL47751and Engine number JBUBSI94103 At about 12.40 pm, when he reached the Main Ganga Toli Road near Lal Flat, Sector-3, DSODC Bawana, three boys driving a red colour motorcycle got his motorcycle stopped. One of them showed a knife to him and asked him to leave the motorcycle, failing which he would be killed. Being scared, the complainant got down from his motorcycle. The other boy then took charge of the motorcycle and drove it. The other two boys also drove away on the red colour Pulsar motorcycle. The investigation was later transferred to SI - Pawan Kumar of Police Station - Bawana.

2. On 03.09.2010, an information was received with respect to arrest of the appellants - Deepak, Pawan and Pardeep in the case registered vide FIR No.277/2010, by the staff of Outer District, Delhi. It is also the case of the prosecution that in the aforesaid case, the appellants made disclosure statements admitting their involvement in the robbery of the motorcycle of the complainant. After their arrest, the appellants refused to join Test Identification Parade. The motorcycle which the appellants are alleged to have stolen during the robbery is alleged to have been recovered from the house of the appellant - Pardeep, pursuant to the disclosure statements made by the appellants. All the three appellants were then charge-sheeted under Section 392/397/506/34 of Indian Penal Code. The trial court, however, charged all the appellants under Section 392/34 of IPC. Appellant - Deepak was also charged under section 397 of Penal Code and Section 27 of the Arms Act. Since the appellants pleaded not guilty, as many as 12 witnesses were examined by the prosecution. Two witnesses were

examined in defence.

3. The complainant - Abhinav Dhruv came in the witness box as PW2 and, inter alia, stated that on 29.08.2010, when he was returning from Bawana and when he reached the corner of Main Ganga Toli Road, Sector-3, Bawana, all the three accused persons came on a Pulsar motorcycle of red colour. The accused - Deepak gave him a signal to stop, by waiving his hands. Thereupon he slowed down his motorcycle. His way was blocked by the motorcycle on which the accused persons were travelling. The appellant - Pawan got down from that motorcycle, put a knife on his belly region and asked him to go away leaving the motorcycle. When he asked him as to what happened, Deepak slapped him and then fled away on his motorcycle. The other two accused namely - Pawan and Pardeep also fled away on their Pulsar motorcycle. He also claimed that though he went to the Police Station, being perplexed, he was not in a condition to narrate the complete facts and, therefore, after two days he again went to the police station and made his statement. He further stated that on 26.09.2010, he went to Rohini Courts where all the three accused persons seen by him.

4. PW3 - Head Constable Narender, inter alia, stated that on 02.09.2010, a call was received from the Special Staff that three persons had been apprehended along with illicit arms and stolen vehicles near Bawana Naher Guest House. When he reached there, Head Constable - Surender along with other officials was present there. The accused Deepak, Pawan and Pardeep were also present there. According to him, he interrogated and recorded disclosure statements of accused persons and then went to Village Peepli near Kharkhoda along with them. Two stolen motorcycles were recovered from the courtyard of the house of Pardeep, one of which belonged to this case having registration number DL8 NC4908 5. PW5 Virender, inter alia, stated that on 02.09.2010, a secret information was received in the office of Special Staff that 4-5 persons would come with the intention of committing robbery of motorcycle and vehicles in Badli Industrial Area near Bawana canal rest house. Head Constable Surender shared this information with Inspector Puran Pant and a raiding party was organized. At about 7 pm, three boys came there on two motorcycles and stopped near a Tavera vehicle which had already been parked there. They were pointed out by the informer, when they

were trying to open the backside door of the vehicle. One of them was found carrying a country made pistol and the other one was carrying a buttondar knife. According to him, a country made pistol was found with Pawan, whereas buttondar knife was found with Deepak. He further stated that when accused were interrogated they made disclosure statements Ex.PW3/A to PW3/C and got recovered two motorcycles from the house of the accused Deepak in Village Peepli, which included motorcycle number DL8 NC4908 6. PW8 - Head Constable Surender Kumar corroborated the deposition of PW5 - HC Virender with respect to the appellants coming on two motorcycles, a country made pistol being recovered from Pawan and a knife being recovered from Deepak. According to him, one round was recovered from Pardeep. PW11 - HC Krishan also deposed with respect to arrest of the appellants and recovery of country made pistol from Pawan and a knife from Deepak. He also deposed with respect to disclosure statement of the appellants and recovery of two motorcycles including the motorcycle stolen in the present case from the house of accused Deepak in Village Peepli.

7. In their statements under Section 313 of Code of Criminal Procedure, the appellants denied the allegations against them and claimed to be innocent.

8. DW1 - Mr. Satbir Singh is the resident of Village Peepli in District Sonepat at Haryana. He, inter alia, stated that he knew all the three appellants, he being a co-villager, and they were lifted by Delhi Police in his absence. DW2 - Mr. Dalsher stated that he knew all the three accused, he being a co-villager and that all of them were lifted by Delhi Police in September, 2010.

9. Vide impugned judgment dated 08.04.2013 the appellants were convicted under Section 392/34 IPC and vide impugned Order on Sentence dated 15.04.2013, they were sentence to undergo RI for 10 years each and to pay a fine of Rs 10,000/- each. Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of this appeal.

10. The impugned judgment has been assailed by the learned counsel for the appellants on the following grounds:a) There was a delay of 3 days in lodging the FIR, the incident having taken place on 29.8.2010 and the FIR having been lodged on 1.9.2010; b) No public witness was joined in the alleged recovery of motorcycle

from the house of the appellant Pardeep; c) There was delay in applying for TIP of the appellants; d) The case of the prosecution is that the knife to the complainant was shown by the appellant Pawan but when the complainant came in the witness box, he claimed that the knife was shown to him by the appellant Deepak; e) The appellants were shown to the complainant and their photographs were also taken; f) No record of calls to PCR was produced; g) The complainant did not go to jail for participating in the TIP; h) The motorcycle was taken on superdari on 26.9.2010 though it had been recovered on 2.9.2010.

11. The incident in question took place on 29.8.2010. The appellants were arrested in the night of 2.9.2010 in the case registered vide FIR No.277/2010 of Police Station S.P.Badli. On 3.9.2010, the intimation with respect to arrest of the appellants and their having confessed their involvement in this case was conveyed to Police Station Bawana vide DD No.11A (Ex.PW4/A). The application for production of the appellants was submitted by the Investigating Officer of this case, before the concerned Court on 6.9.2010 and on that date an order was passed by the said Court for production of the appellants in muffled face on 8.9.2010. The appellants were arrested on that date as would be evident from their arrest memo. Admittedly, the appellants refused to join TIP on 15.9.2010. If computed from the date of arrest, the application for holding TIP was moved after 6-7 days. If computed from the date of incident, the application for holding TIP was moved after 16-17 days. The question which arises is as to whether there was an undue delay in seeking identification of the appellants in a judicial TIP and if so, whether the delay stands explained or not.

12. The necessity for holding a Test Identification Parade arises only in those cases where the accused are not previously known to the witnesses, The purpose of TIP being that that the witnesses who claim to have seen the culprits at the time of the occurrence are made to identify them from amongst other persons, so that their memory and veracity can be checked. As a general rule, the substantive evidence of a witness is the deposition made by him in the Court and the purpose of a prior test identification is to test and strengthen the credibility of his evidence in the Court. The failure to hold Test Identification Parade does not ipso facto render the evidence of identification in the Court inadmissible, though ordinarily

the Court would look for some corroborative evidence where the accused is identified for the first time during trial and no attempt is made, during the course of investigation, to get him identified from the eye witnesses in a judicial TIP. The identification in the Court would be stronger if the witness had opportunity to see the accused in a day time, whereas it would be comparatively weaker, in case the accused is seen at a dark spot. It is, however, desirable that a Test Identification Parade should be conducted soon after the arrest of the accused so as to give an opportunity to the witness to identify him at the earliest, when the incident witnessed by him is still fresh in his mind, as also to eliminate the possibility of the accused having been shown to the witness prior to the TIP. Inordinate delay in holding TIP creates doubt on the genuineness of the TIP since it would be difficult for the witnesses to remember the face of the culprits after a long period, though lapse of some days is not enough to erase the identity of the assailant from the memory of the witness who has undergone a harrowing experience, such as an armed robbery.

13. In Lal Singh v State of U.P. (2003) 12 SCC554 the Honble Supreme Court, dealing with the issue of delay in conducting the TIP, inter alia, held as under:

It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probablising the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence.

In Pramod Madal vs. State of Bihar 2004 (13) SCC150 the Apex Court, inter alia, observed as under:

It is neither possible nor prudent to lay down any invariable rule as to the period within which a Test Identification Parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the Courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the Test Identification Parade must be held, it would only benefit the professional criminals in whose

cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They therefore, have only to avoid their arrest for the prescribed period to avoid conviction.

In Mulla and Anr. vs. State of Uttar Pradesh (2010) 3 SCC508 no description of the accused persons was given in the FIR. The TIP was held 63 days after the occurrence and 55 days after their arrest. In the meanwhile, the accused persons were taken to Court. The identification in the Test Parade was challenged by the appellants on the ground of delay in conducting the said parade. Noticing that the Test Identification Parade was conducted properly and required procedures were followed, the objection was rejected by the Apex Court though there was no corroborative evidence which could link the appellants with the commission of the crime. The proposition of law which emerges from the above-referred decisions is that though attempt should be made to hold TIP at the earliest possible, it cannot be said as to within how many days of the occurrence or the arrest of the accused, the Test Identification Parade must be held. Every case will, therefore, have to be examined on its own merit to ascertain whether in the facts and circumstances of the case, there was an unexplained delay in holding TIP of the accused and whether, on account of such delay, there was a possibility of the witness having forgotten the face of the culprit or there was a probability of the accused having been shown to the witnesses in the meanwhile.

14. In my view, neither the time lag between the date of arrest of the appellants in this case and the date on which they refused to join TIP nor the time lag between their arrest i.e. 2.9.2010 and the date on which they refused to join TIP on 15.9.2010 can be said to be such as could be construed as abnormal requiring the prosecution to give adequate explanation for the said delay. Though the appellants had refused to join TIP on the ground that they had been shown to the witnesses and their photographs had also been taken, there is no evidence to prove that either the appellants or their photographs were shown to the complainant. It would be pertinent to note here that on 14.9.2010, an application was filed by the I.O. of this case for production of the appellants and on that application, an order was passed by the concerned Magistrate directing their production on 15.9.2010 in muffled face. There is no evidence of the complainant being present either on that

date or on 8.9.2010 when they were produced in the Court and were arrested in this case. No suggestion was given to PW2 either that he had seen the appellants in the Court on 8.9.2010 or that he had seen them on 15.9.2010. Therefore, there was no reasonable possibility of the appellants having been shown to the accused before they refused to join TIP on 15.9.2010.

15. Malik The learned counsel for the appellant Deepak has referred to Jafar vs. State (NCT of Delhi) decided on 3.3.2009 in Crl.A.No.573/2007, Wakil Singh & Ors. vs. State of Bihar, AIR 1981 SC1392 Subhash and Shiv Shankar vs. State of U.P. AIR 1987 SC1222 Ravindra @ Ravi Bansi Gohar vs. State of Maharashtra & Ors. AIR 1988 SC3031 Vinod Singh vs. Govt. of NCT Delhi decided on 4.7.2011, Crl.A.No.31/2000 and Chendyala Suresh vs. State of A.P. 2013(1) Crimes 42 (AP). In Jafar Malik(supra), this Court found that the accused had been shown to the witnesses before TIP and that resulted in his acquittal. However, in the case before this Court, there is no evidence of the appellants having been shown to the complainant before they refused to join TIP on 15.9.2010. In Vakil Singh(supra), the accused were identified in a TIP, which was held after about 3 months of the dacoity. The Court was of the view that it is not possible for a human being to remember the features of the accused after such a long gap and therefore it would be unsafe to convict the accused in a serious charge on the testimony of the witness who identified him in the TIP after about 3 months. However, in the case before this Court, as noted earlier, the time lag was only 6-7 days if computed from the date of arrest of the appellants in this case and 16-17 days if computed from the date of the incident. Moreover, the incident in the case before this Court happened in broad day light. In Subhash (supra) the identification parade was held after three weeks of the arrest of the accused and, therefore, there was some room for doubt if the delay was in order to enable the witnesses to see the accused in the jail premises or police lock up and make a note of his features In Ravindra(supra), there was evidence of the photographs of the accused persons having been shown to the witnesses before test identification parade. It was held in a lock up of the investigating agency thereby giving sufficient opportunity to the witnesses of seeing them. The identifying witnesses in that case were police Constables attached to the concerned police station. However, the facts of the case before this Court are altogether different and there is no evidence of the

photographs of the appellants having been shown to the complainant. In Vinod Singh (supra), the eye-witnesses were examined in the Court after more than five years from the date of occurrence. Moreover, the Court found that the case before it was a case of unfair investigation and evidence relating to arrest of the appellants as well as the disclosure statements made by them leading to discovery of stolen property was unreliable. This judgment, therefore, would not apply to the facts of the case before this Court and consequently would be of no help to the appellants. In Chendyala Suresh (supra), there was delay of 25 days in conducting TIP. However, the facts of the case before this Court being altogether different, the aforesaid judgment would be of no help to the appellants.

16. Since the appellants have neither been able to show that either they or their photographs had been shown to PW-1 before they refused to join TIP nor have they been able to make out existence of circumstances from which an inference of their having been shown to the witness, an adverse can be drawn against them on account of their refusal to join TIP. The Court, in such circumstances, would be justified in presuming that had they participated in the TIP, they would have been identified by the complainant and that precisely was the reason they refused to join the said proceedings.

17. As regards the delay in lodging FIR, the primary purpose for the Court insisting upon prompt lodging of FIR to eliminate the possibility of any false implication or a coloured version of the incident creeping in the FIR, as a result of deliberations which may take place in the meanwhile. But, a delayed FIR is not per se illegal though it would certainly put the Court on guard to scrutinize the evidence more carefully, so as to eliminate a reasonable possibility of false implication. A perusal of DD No.22A Ex.PW-12/A, registered at Police Station Bawana on 29.08.2010 would show that on the aforesaid date, Police Control Room had been informed of the theft of motorcycle bearing No.DL8S5 4908 by three boys who were travelling on a Pulsar motorcycle. A perusal of the FIR Ex.PW-1/B would show that the version given by the complainant was on the same lines except that in the information sent to Police Control Room, there was no reference to a knife having been shown to the complainant. This is not a case where one or more accused have been named or otherwise identified in the FIR. Therefore, the delay in

lodging FIR cannot be said to be motivated or attributed to a desire to falsely implicate one or more persons. According to the complainant, he did not lodge FIR on the dame day since he was perplexed on account of incident he had gone through. The explanation given by him does not merit an outright rejection. In any case, even if the explanation given by him is excluded from consideration, the delay in lodging FIR would be immaterial considering that the material information had already been conveyed to Police Control Room and had been duly recorded vide DD No.22A. The learned counsel for the appellant Pardeep has referred to Mehraj Singh vs State of U.P. 1994 SCC (5) 188, where the Court emphasized the importance of prompt lodging of FIR in a criminal case, particularly in a murder case and it was inter alia observed that the object behind such instances is to obtain earliest information regarding circumstances in which the crime was committed, including the name of the actual culprits and the parts played by them, the weapons, if any, used as also the names of eye-witnesses and that delay in lodging FIR often results in embellishment which is a creature of an afterthought. However, in the case before this Court, since no one has been named in the FIR and the theft had already been reported and also recorded vide DD No.22A, the delay in lodging the FIR is of no consequence, as far as the conviction under Section 392 of IPC is concerned.

18. The identification of all the appellants in the Court, coupled with their refusal to join TIP, without any justification, in my view, is sufficient to prove their identity as the persons involved in the incident of robbery in which the motorcycle of the complainant was stolen on 29.08.2010. As far as the appellant Pardeep is concerned, there is a corroborative evidence in the form of recovery of the stolen motorcycle from his house on 03.09.2010. Since the stolen motorcycle came to be recovered by the police only on the aforesaid date, there is no possibility of its having been planted on the appellant Pardeep.

19. It has come in evidence that all the three appellants, while in police custody, made disclosure statements Ex.PW-3/A to C. In the disclosure statement of the appellant Pawan, there is no mention of the place where the stolen motorcycle of this case had been kept. However, in the statements of the appellant Deepak and Pardeep, it was stated that the motorcycle was parked at the house of Pardeep. It

is not known as to which of the disclosure statement was recorded first. Only the first disclosure statement whereby the police officer was informed that the stolen motorcycle had been parked at the house of the Pardeep would be admissible in evidence. Nevertheless, the fact remains that pursuant to one of the disclosure statements, the police discovered the fact that the stolen motorcycle was parked in the house of Pardeep. Therefore, the first disclosure statement, whereby the police officer discovered the fact that the stolen motorcycle had been parked at the house of Pardeep would be admissible in evidence under Section 27 of the Evidence Act.

20. The provisions of Section 100 of the Code of Civil Procedure do not apply to a recovery made by the police pursuant to the disclosure statement of an accused which is admissible in evidence under Section 27 of Evidence Act and, therefore, it was not obligatory for the Investigating Officer to join public witnesses before recovering the stolen motorcycle. Consequently, the recovery of the stolen motorcycle cannot be rejected on the ground that no public witness was associated with the recovery. In State of NCT of Delhi Vs. Sunil & Another :

2000. VIII AD (SC) 613, a plea was taken that there was no independent witness of the recovery made by the police pursuant to the statement of the accused while in police custody. The following observations made by the Honble Supreme Court in this regard are pertinent:

Hence, it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witness. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signatures of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from

the accused on its own worth.

21. As regards non-production of PCR record, I find no merit in contention since DD No.22A clearly shows that the Police Control Room had been informed with respect to the theft of the motorcycle in a robbery, committed by three persons travelling on a red Pulsar motorcycle.

22. As regards PW-2 not going to jail, there was no need for him to do so since the appellants had already refused to join TIP on 15.09.2010 and consequently neither any date for holding TIP in the jail was fixed nor was the witness asked to go to the jail on that date.

23. As regards the complainant not taking the stolen motorcycle on superdari immediately after it was recovered, the same, in my view, is of no consequence since the registration number of the motorcycle was given in the FIR itself.

24. For the reasons stated hereinabove, I hold that all the three appellants have rightly been convicted under Section 392 of IPC read with Section 34 thereof. Their conviction is, therefore, upheld. However, in the facts and circumstance of the case, while maintaining the sentence of fine, the substantive sentence awarded to the appellants is reduced from seven years each to three years each. The appeals stand disposed of. One copy of this order be sent to the concerned Jail Superintendent for information & necessary action. LCR be sent back along with a copy of this order. MARCH12 2014/rd/ks/bg V.K. JAIN, J.

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