

**Mukesh Vs. State**

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**Court :** Delhi

**Decided On :** Jul-28-2014

**Judge :** Sunita Gupta

**Appellant :** Mukesh

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision: + 28th July, 2014 CRL.A. 427/2014 MUKESH Through: ..... Appellant Mr. Rakesh Kumar Sharma and Mr. Rajan Kashyap, Advocates versus STATE Through: ..... Respondent Mr. M.N.Dudeja, Additional Public Prosecutor for the State %  
CORAM: HONBLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 18th November, 2013 and order on sentence dated 25th November, 2013 passed by the learned Additional Sessions Judge, Dwarka Courts, New Delhi in Sessions Case No.84/2011 arising out of FIR No.119/2009 u/s 397/392/307/34 IPC registered with PS Chhawla, New Delhi whereby the appellant was sentenced to undergo rigorous imprisonment for a period of ten years and a fine of Rs.10,000/- in default of payment of fine, SI for a period of three months for the offence u/s 392/34 IPC. The accused was also

sentenced to undergo RI for a period of ten years with a fine of Rs.5000/- and in default, to undergo SI for two months for offence u/s 307/34 IPC. He was also sentenced to undergo RI for seven years for the offence under Section 397 IPC. All the sentences were to run concurrently. He was given benefit of Section 428 Cr.P.C.

2. Prosecution case in nutshell is that on 18th May, 2009, in the night, Mithlesh Jha was going in Tavera No.DL1VB5137 belonging to Sh. Pradeep Singh from Nangloi to Gurgaon. At about 11:45 PM, when he reached near Reliance Petrol Pump, Jhatikra Road, he noticed one person going on the road and he was walking like a drunkard. In order to avoid him, he took his vehicle on the side of the road at a slow speed. When the vehicle reached near the said person, he assaulted him on his head with a knife in the moving vehicle. As a result of which, darkness appeared in front of his eyes and he stopped the vehicle. When he regained full consciousness, he found that one of them had pointed pistol towards him and the one who assaulted him with a knife was sitting by his side. He was again assaulted on his stomach and chest with knife. When he was trying to prevent injury from the person carrying pistol by catching hold of his hand, accused Mukesh inflicted knife blows on his hand and caused cut in his vein near the wrist. As a result of which, blood started gushing out. He tried to counter their attack by pushing them out but he was thrown out of the vehicle in injured condition. He was tried to be kidnapped by putting in the vehicle but he obstructed by putting his legs in between the door of the vehicle upon which he was left and the accused persons fled away from the spot along with the vehicle. He informed the police from his mobile No.9818139211. He was thereafter removed to DDU Hospital where he remained hospitalized for 14 days.

3. It is further the case of prosecution that on receipt of DD No.3A regarding stabbing of someone with a knife and firing of gunshot and snatch of vehicle, Inspector Surender Sharma along with Constable Jasbir proceeded to the spot near Jhatikara More but no one was found at the spot. On coming to know that the injured had been taken to DDU Hospital by PCR Van, Inspector Surender Sharma along with Constable Jasbir went to DDU Hospital where injured Mithlesh was found admitted. Inspector Surender Sharma tried to record his statement but he

was declared unfit to make any statement and no eye-witness could be traced in the hospital despite efforts. As such, rukka was sent to Police Station for registration of the case and FIR No.119/209 u/s 392/397/34 IPC was recorded by ASI Mahender Singh.

4. Vehicle No.DL-1VB5137 was seized by PS Rajender Park, Gurgaon. On coming to know about seizure of the vehicle, Inspector Surender Sharma along with Constable Jasbir went to PS Rajindra Park, Gurgaon and took the vehicle into possession and obtained the examination report of crime scene. Efforts were made on 20 th May, 2009 and 23rd May, 2009 to record the statement of injured Mithlesh but on both the occasions, he was declared unfit for statement by the doctor. On 27th May, 2009, statement of Mithlesh was recorded. Site plan Ex.PW15/D was prepared at his instance.

5. On 26th June, 2009, accused Mukesh was arrested in case FIR No.101/2009, PS Crime Branch along with other accused persons. He made a disclosure statement in respect of various cases including FIR No.119/2009, PS Chhawla. As such, the concerned Investigating Officer of the case was informed regarding arrest of the accused and making his disclosure statement Inspector Surender Sharma of PS Chhawla came to the office of Crime Branch on 3rd July, 2009 and collected the copy of the disclosure statement made by the accused.

6. Further investigation was conducted by SI Sanjeev Sharma. On 7th July, 2009, accused Mukesh was produced in Court and after seeking permission of the Metropolitan Magistrate to interrogate him, he was interrogated and was arrested vide memo Ex.PW14/A. His Test Identification Parade was got conducted by Sh. Sumit Das, Metropolitan Magistrate. Efforts were made to arrest the remaining accused persons but they could not be traced. After completing investigation, charge sheet was submitted against accused Mukesh. On committing the case to the Court of Sessions, charge for offence under Section 397/392/307/34 IPC was framed against the accused to which he pleaded not guilty and claimed trial.

7. In order to substantiate its case, prosecution has examined as many as 15 witnesses. The case of accused was one of denial simplicitor and false implication in the case. He did not prefer to lead any defence evidence. After minutely

scrutinizing the evidence led by the prosecution, the learned Additional Sessions Judge convicted the appellant for offence under Section 392/307/34 and 397 IPC and sentenced him as mentioned hereinbefore. Feeling aggrieved, the present appeal has been preferred by the appellant.

8. I have heard Sh. Rakesh Kumar Sharma, Advocate for the appellant and Sh. M.N. Dudeja, learned Additional Public Prosecutor for the State.

9. Challenging the findings given by the learned Additional Sessions Judge, learned counsel for the appellant submitted that the person who removed the injured in the hospital has not been examined. It is not clear as to how the police officials came to know that injured has been removed to DDU Hospital as when the SubInspector along with Constable reached the spot, nobody was available over there. Furthermore, the complainant has not supported the case of prosecution and has admitted that he was shown the photographs of the accused and, therefore, he identified him. Moreover, the accused was never made to participate in the Test Identification Proceedings, inasmuch as, his name does not find mentioned in the list of the persons who participated in the Test Identification Proceedings. CrI. A. No.427/2014 Identification Parades conducted by the Metropolitan Magistrate in some other cases where name of the accused is included in the list of participants which is missing in the instant case. Except for the complainant, there is no other eye-witness to the incident. The weapon of offence was not recovered. Under the circumstances, it was submitted that the prosecution has failed to bring home the guilt of the accused beyond reasonable doubt. He is entitled to be acquitted of the offence.

10. Per contra, it was submitted by the learned Additional Public Prosecutor for the State that the injured had completely supported the case of prosecution. His statement was recorded thrice. His initial statements were recorded in the year 2010 wherein he totally supported the case of prosecution. However, he was recalled for further cross-examination in the year 2013 and at that time he was won over by the accused and, therefore, did not support prosecution.

11. Reliance was placed on *Khujji alias Surendra Tiwari v. State of MP*, AIR 1991 SC1853 for submitting that the statement of a hostile witness cannot be treated to

be effaced from the record altogether. It was further submitted that the ocular testimony of the injured finds due corroboration from the medical evidence. The injured remained unconscious and was not fit for statement for number of days and remained hospitalised for a period of 14 days. The injuries were opined to be dangerous. There is no animosity between the accused and the complainant or any of the police officials for which reason he would be falsely implicated in this case. The impugned judgment does not suffer from any infirmity which calls for interference, as such, the appeal is liable to be dismissed.

12. I have given my considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the record.

13. PW2 Mithlesh is the star witness of the prosecution who also sustained injuries in the incident. He has unfolded that on 18th May, 2009, he was going in Tavera No.DL1VB5137 belonging to Sh. Pradeep Singh, from Nangloi to Gurgaon. At about 11:45 PM when he reached near Reliance Petrol Pump, Jhatikra Road, he noticed one person going on the road and he was walking like a drunkard. In order to avoid him, he took his vehicle on side of the road at a slow speed. When the vehicle reached near the said person, he assaulted him on his head with a knife in the moving vehicle. As a result of which, darkness appeared in front of his eyes and he stopped the vehicle. When he regained consciousness, he found that one of them had pointed pistol towards him and the one who assaulted him with a knife was sitting by his side. He was again assaulted on his stomach and chest with knife. When he was trying to prevent injury from the person carrying pistol by catching hold of his hand, the accused Mukesh inflicted knife blows on his hand and caused cut in his vein near the wrist. As a result of which blood started gushing out. He tried to counter their attack by pushing them out but he was thrown out of the vehicle in injured condition. He was tried to be kidnapped by putting in the vehicle but he obstructed by putting his legs in between the door of the vehicle upon which he was left and the accused persons fled away from the spot along with the vehicle. He informed the police from his mobile No.9818139211. He was thereafter removed to DDU Hospital where he remained hospitalized for 14 days.

14. Record reveals that this witness was examined on 25th February, 2010 and was cross-examined on 24th April, 2010. Nothing material could be elicited to discredit the testimony of this witness. At that juncture, he denied the suggestion that no such incident, as stated by him, ever happened or that he had identified the accused at the instance of Investigating Officer of the case or that he was shown to him outside the Court. He also denied the suggestion that he did not identify the accused in the Test Identification Proceedings. The suggestion that the accused has been falsely implicated in this case at the instance of the Investigating Officer of the case was also denied by him. However, in pursuance to the application under Section 311 moved by him, the witness was recalled for further cross-examination on 30th September, 2013 and at that time, he took somersault by deposing that he could not see the assailant due to darkness at the time when he was inflicting injuries on his person. He further went on to state that when he had gone to attend the Test Identification Proceedings at Tihar Jail, he was shown the photographs of the accused at his residence by the police officials and on that basis, he identified the accused.

15. Learned Trial Court rightly observed that the testimony of even a hostile witness can be relied upon so far as it supports the prosecution story. Learned Trial Court relied upon the judgment pronounced by Honble Supreme Court in *Khujji (supra)*, wherein it was observed that the evidence of a witness declared hostile, is not wholly effaced from the record and that part of evidence which is otherwise acceptable can be acted upon. Honble Supreme Court referred to the earlier decisions rendered by the Court in *Bhagwan Singh v. State of Haryana*, 1976 Cri LJ203 *Rabindra Kumar Dey v. State of Orissa*, 1977 Cri LJ173 and *Syed Akbar v. State of Karnataka*, 1979 Cri LJ1374 where it was observed that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. In that case, the examination-in-chief of the witness was recorded on 26th November, 1978 when he identified all the assailants by name. His cross-examination commenced on 15th December, 1976 and at that time he stated that appellants had their backs towards him and hence

he could not see their faces while he could see the remaining four persons. It was observed that during the one month period that elapsed since the recording of his examination-in-chief, something transpired which made him to shift his evidence on the question of identity to help the appellant. His statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. The observations applies with equal force to the present case wherein when the examination-in-chief of the witness was recorded on 25th February, 2010 he gave a microscopic account of the entire incident and also gave the details of the role played by the appellant, identified him to be the person who stabbed him in his stomach and chest and that he also identified him during Test Identification Proceedings in Tihar Jail. When he was cross-examined on 24th April, 2010, at that time also, he supported the case of prosecution and the defence could not elicit anything in its favour. After the lapse of more than three years when he was recalled for cross-examination, at that time, he tried to wriggle out from his earlier statement by deposing that due to darkness, he could not see the appellant and had identified the accused during Test Identification Proceedings from the photograph shown to him by the police officials at his residence. The appellant is not alleging any enmity, ill will or grudge against the injured or any of the police officials for which reason the witness would have identified him on 25 th February, 2010 and 24th April, 2010 when he came to depose before the Court and earlier when he identified the accused during Test Identification Proceedings. Even no animosity is alleged against any of the police officials for which reason they would falsely implicate him in such a serious case by showing the photograph of the accused to the injured. After a lapse of more than three years, he wants to wriggle out of his earlier statements on the point of identity of accused which clearly shows that during this long period something must have transpired which made him shift his evidence on the question of identity to help the appellant but there is no reason to disbelieve his statements made on 25.02.2010 and 24.10.2010.

16. It is settled law that testimony of an injured witness stands on a higher pedestal than any other witness, inasmuch as, he sustain injuries in the incident. As such, there is an inbuilt assurance regarding his presence at the scene of the crime and it is unlikely that he will allow the real culprit to go scot free and would

falsely implicate any other persons. In *Abdul Sayeed v. State of Madhya Pradesh* [(2010) 10 SCC259, the Supreme Court held as under:

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness.

[Vide *Ramlagan Singh v. State of Bihar*, *Malkhan Singh v. State of U.P.*, *Machhi Singh v. State of Punjab*, *Appabhai v. State of Gujarat*, *Bonkya v. State of Maharashtra*, *Bhag Singh, Mohar v. State of U.P.* (SCC p. 606b-c), *Dinesh Kumar v. State of Rajasthan*, *Vishnu v. State of Rajasthan*, *Annareddy Sambasiva Reddy v. State of A.P.* and *Balraje v. State of Maharashtra*.].

29. While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab*, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

28. *Darshan Singh* (PW4 was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka* this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P. v. Kishan Chand* a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends

support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana*). Thus, we are of the considered opinion that evidence of Darshan Singh (PW4) has rightly been relied upon by the courts below.

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

17. To the similar effect is the judgment reported in *Mano Dutt and Anr. v. State of UP*, (2012) 2 SCC (Cri) 226.

18. A feeble attempt was made by learned counsel for the appellant for challenging the Test Identification Proceedings conducted by the Metropolitan Magistrate by submitting that in the list of under trials mentioned in the proceedings, name of the appellant does not find mention and, therefore, he was not made to join the proceedings. The submission deserves outright rejection, inasmuch as, the proceedings were conducted by PW9 Sh. Sumit Dass, Metropolitan Magistrate and he has deposed that on 7th July, 2009, an application, Ex.PW9/A for conducting Test Identification Proceedings of accused Mukesh was marked to him by the Link Magistrate. On 7th July, 2009, SI Sandeep Sharma, Investigating Officer of the case met him outside the jail and identified the witness Sh. Mithlesh Jha, s/o Sh. Tirpit Jha. Thereafter, he went inside the jail where accused Mukesh, s/o Ram Kumar was produced from custody and was identified by the Assistant Superintendent Sh. Badri Dutt. The accused was explained the meaning of Test Identification Proceedings. He was asked to select 8-10 undertrials of his age group and physique for TIP. He brought ten undertrials of his choice who were similar in age and physique as that of accused.

He noted their names and parentage at Sl.No.1 to 10 in the proceedings. The accused and other under trials were asked to wear white kurtas and pyjamas and the accused was asked to stand at the position of his preference and he preferred to stand at Sl.No.8 from his left hand side and at Sl.No.4 from his right hand side. Thereafter, witness Mithlesh Jha was called inside the room from outside the Jail No.7, Tihar and was asked to identify the accused among the above mentioned persons. He correctly identified the accused standing at Sl.No.8 from his left side as the person who had snatched his vehicle and had caused injuries to him. He recorded his statement Ex.PW9/C to this effect. The learned Magistrate also proved the TIP Proceedings, Ex.PW2/A.

19. The testimony of the learned Metropolitan Magistrate finds corroboration from the TIP proceedings, Ex.PW2/A which clearly reflects that accused Mukesh was produced before the learned Magistrate and was duly identified by the Assistant Superintendent, Jail. Thereafter accused himself produced 10 under-trials of his own choice whose names find mentioned from Sl.No.1 to 10 and the witness correctly identified the accused. There was no question of mentioning the name of the accused at Sl. No.1 to 10, inasmuch as, they were the undertrials who were produced by the accused for conducting his Test Identification Parade. In fact, the submission made by the learned counsel for the appellant is contradictory to the suggestion given to PW2 Mithlesh Jha on 30th September, 2013 when it was suggested to him that the witness was shown the photograph of the accused at his residence prior to holding Test Identification Parade and on that basis, he had identified the accused.

20. From the foregoing, it stands proved that PW2 Mithlesh Jha has given a graphic description of entire incident. His presence at the spot cannot be doubted as he was injured in the incident. Moreover, the ocular testimony of this witness finds due corroboration from the medical evidence as it stands proved that the injured was removed to DDU Hospital where his MLC PW5/A was prepared by Dr. Kritika Dubey who has since left the hospital and the MLC was proved by Dr. Babita. PW5-Dr. Vikas Chaudhary has further proved that the injuries on the person of Mithlesh were dangerous.

21. The mere fact that the weapon of offence could not be recovered does not cause any dent on the prosecution case. In *Mohinder v. State*, 2010 VII AD Delhi 645 reiterated by this Court in *Chuni Lal v. State*, 2013(4) JCC2529 it was observed that nonrecovery of weapon of offence during investigation is not such an important factor to neutralize the direct evidence on complicity of accused in the murder of deceased.

22. The entire evidence has been considered in right perspective by the learned Additional Sessions Judge and no fault can be found with the findings of the learned Trial Court vide which the appellant was convicted for offence under Section 307/392/34 IPC and 397 IPC.

23. Even as regards quantum of sentence, learned Additional Public Prosecutor for the State submitted that the appellant is historysheeter of PS Chhawla. He was found involved in 10 cases of robbery, auto lifting, cheating from area of PS Nazafgarh, Chhawla, Punjabi Bagh, Nihal Vihar, Paschim Vihar, Dwarka, Mayapuri and Harinagar. It was submitted that he is desperate and habitual criminal. Reference was also made to the nominal roll for submitting that even as per nominal roll, the appellant is facing trial in as many as 7 cases.

24. Keeping in view the seriousness of the offence coupled with the fact that the dangerous injuries were caused on the person of the injured resulting in hospitalization for a period of 14 days and he is still undergoing treatment coupled with the antecedents of the appellant, no interference is called for even regarding the quantum of sentence.

25. The appeal, being bereft of merits, is dismissed. Information be sent to the appellant through the Superintendent, Jail. Copy of the judgment along with Trial Court record be sent back. (SUNITA GUPTA) JUDGE JULY28 2014 rs

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