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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
M.R. SHAH; J., ANIRUDDHA BOSE, J.
July, 11 2022

CRIMINAL APPEAL NO.993 OF 2012
Amrik Singh *Versus* **The State of Punjab**

CRIMINAL APPEAL NO.992 OF 2012
Subhash Chander *Versus* **The State of Punjab**

Criminal Trial - Test Identification Parade - When no TIP was conducted the first version of the complainant reflected in the FIR would play an important role - It is required to be considered whether in the FIR and/or in the first version the eye-witness either disclosed the identity and/or description of the accused on the basis of which he can recollect at the time of deposition and identify the accused for the first time in the Court Room - It would not be safe and/or prudent to convict the accused solely on the basis of their identification for the first time in the Court. *(Para 6.2 - 6.7)*

For Appellant(s) Mr. Shree Pal Singh, AOR

For Respondent(s) Ms. Richa Kapoor, Adv. Ms. Shivani Sharma, Adv. Mr. Prateek Bhandari, Adv. Ms. Jaspreet Gogia, AOR

J U D G M E N T

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 01.04.2011 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No.645 of 2004 and Criminal Appeal No.563 of 2004 by which the Division Bench of the High Court has dismissed the said appeals preferred by the accused and has confirmed the conviction and sentence passed by the learned Trial Court convicting the accused Amrik Singh and Subhash Chander for the offences punishable under Section 302 read with Section 34 and Section 392 of the IPC, the accused Amrik Singh and Subhash Chander have preferred the present appeals.

2. That the appellant herein was charged along with one Subhash Chander and Pritpal Singh for committing robbery and murdering one Gian Chand (deceased) during the course of the robbery. As per the prosecution case, the deceased Gian Chand, one Munshi Ram, father of the deceased along with the complainant Des Raj (PW1) were proceeding from the office of Sub-registrar District Fazilka and after dropping of the father of the deceased at the local bus stand, they proceeded towards their village. It was further alleged that on route to their village, three persons came on a scooter and tried stopping them. When the complainant who was driving the scooter did not stop, co-accused Subhash Chander thrown red chilli powder into the eyes of the complainant after which the scooter stopped and the complainant was temporarily blinded. That all the three tried to snatch the scooter of the complainant and in the said scuffle, present appellant – accused – Amrik Singh shot the deceased Gian Chand in the chest. The complainant arrived into the fields and upon his return he saw that the assailants have taken away

the scooter and Gian Chand was lying unconscious with blood oozing out of his chest. As per the case of the prosecution the motive was that the father of the deceased had executed a sale deed in favour of sons of the complainant (PW1) for the purpose of which they had gone to the office of the Sub-registrar. The consideration for the sale had not been paid and an amount of Rs.5 lakhs was in the dicky of the scooter, which the assailants had stolen. That thereafter PW1 proceeded to the police station. His statement was recorded by PW11 Inspector Karamjit Singh who proceeded to the scene of occurrence and found the dead body of Gian Chand lying over there. He prepared inquest report. He collected the necessary evidence. PW6 Dr. M.M. Singh conducted post mortem examination on the dead body of Gian Chand. Post mortem was conducted on 08.05.2001 at about 6.30 p.m. As per the medical evidence death could have occurred about 6 hours prior to the examination. In course of the investigation Subhash Chander and Amrik Singh – accused were arrested on the basis of the disclosure statement of the appellant accused – Amrik Singh. ASI - PW7 recovered a sum of Rs.1 lakh alleged to have been looted out of Rs.5 lakhs which according to the complainant PW1 was kept in the dicky of the scooter. On the basis of the disclosure statement of the co-accused Subhash Chander a further sum of Rs.1 lakh was recovered. After completion of the investigation, the IO filed the charge-sheet. As the case was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court. The accused pleaded not guilty and therefore they came to be tried by the Sessions Court for the offence punishable under Sections 302/34 and 392 read with Section 397 IPC.

2.1 To bring home the guilt of accused, prosecution examined as many as 11 witnesses which included PW1 the original complainant - the eye witness Karamjit Singh, Inspector - PW11, Dr. M.M. Singh – PW6 and other police officials. After the cross-examination of the prosecution witnesses the accused were examined and their further statements under Section 313 Cr.P.C. were recorded. All the incriminating circumstances appeared against them in the prosecution evidence were put to them in order to enable them to explain the same. They denied all such circumstances and pleaded their innocence. That thereafter on appreciation of evidence and mainly relying upon the deposition of PW1 – original complainant who was cited as eye-witness and on the recovery of Rs.1 lakh from the place suggested by the accused, the learned Trial Court held the accused guilty for the offences punishable under Sections 302/34 and 392 IPC and sentenced the accused to undergo life imprisonment for having committed the murder of deceased Gian Chand.

2.2 Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence by the learned Trial Court convicting the accused for the offence punishable under Sections 302/34 and 392 IPC, the accused Amrik Singh and Subhash Chander preferred the Criminal Appeal No.645-DB of 2004 and Criminal Appeal No.563 of 2004 before the High Court. By the impugned judgment and order the High Court has dismissed the said appeals and has confirmed the order of conviction and sentence passed by the learned Trial Court. The judgment and order passed by the High Court is the subject matter of present appeals.

3. Ms. Roohina Dua, learned counsel appearing on behalf of the accused has vehemently submitted that in the facts and circumstances of the case and on the

evidence on record both, the learned Trial Court as well as the High Court have committed serious error in convicting the accused for the offence punishable under Section 302 read with Section 34 and Section 392 IPC respectively.

3.1 It is submitted that as such the appellants have been convicted on the deposition of PW1 – original complainant – informant and the identification of the accused in the Court by PW1.

3.2 It is submitted that in the present case admittedly no Test Identification Parade (hereinafter referred to as 'TIP') has been conducted to identify the accused. It is submitted that in the present case as such non-conducting the TIP is fatal to the case of the prosecution more particularly when PW1 is the original complainant who did not disclose any description of the accused before the I.O. and even in the FIR.

3.3 It is submitted that even the conviction of the accused on the alleged recovery of Rs.1 lakh each is also not sustainable. It is submitted that even the learned Trial Court has also disbelieved the case on behalf of the prosecution that the complainant and the deceased were carrying Rs.5 lakhs in the dicky of the scooter. It is submitted therefore that the factum of Rs.5 lakhs being carried in the scooter by the complainant and the deceased has not been established and proved, the recovery of Rs.1 lakh each from the accused becomes insignificant. It is submitted that the prosecution has to prove by leading cogent evidence that the complainant and the deceased were carrying Rs.5 lakhs in the dicky of the scooter as alleged and the amount which is recovered from the accused is the very amount which the complainant and the deceased were carrying in the scooter.

3.4 It is submitted that therefore the accused cannot be convicted on the basis of the identification of the accused by PW1 in the Court which is for the first time and on the basis of the recovery of Rs.1 lakh each from the accused.

3.5 It is submitted that therefore in absence of any cogent evidence on the identification of the accused and it can be seen that the prosecution has failed to prove the identification of the accused beyond doubt, to convict the accused solely on the basis of the identification of the accused by PW1 for the first time in the Court is not warranted. It is submitted that in the facts and circumstances of the case it is not safe to rely upon the identification of the accused for the first time in the Court.

Making above submissions, it is prayed to acquit the accused.

4. Present appeals are vehemently opposed by Ms. Richa Kapoor, learned counsel appearing for the respondent – State.

4.1 It is vehemently submitted by learned counsel for the State that in the present case when PW1 – eye-witness has identified the accused in the Court Room, non-conducting the TIP would not vitiate the trial and the case of the prosecution.

4.2 It is submitted that PW1 – complainant is an eye-witness. It is submitted that he has deposed in the Court that "One of those boys fired a gun shot at Gian Chand which hit him at his chest on the seat of heart. All the three said young persons are the accused who are present in Court today. (Witness has pointed out towards one of the accused as a person who had fired at Gian Chand and that accused has disclosed his name as Amrik

Singh). The accused who is standing on one side had put the chili powder in my eyes (the name of accused pointed out by the witness has been disclosed as Subhash Chander)".

4.3 It is vehemently submitted by learned counsel on behalf of the State that in every case non-conducting the TIP would not vitiate the trial and/or case of the prosecution. It is submitted that the TIP is conducted only to make sure by the Investigating Officer that the investigation is going on in the right direction as against the real culprit. It is submitted that it is also conducted to refresh the memory of the witnesses who saw the accused. It is submitted that as held by this Court in a catena of decisions, TIP is not substantive evidence and in fact the substantive evidence is that of identification in Court. It is submitted that holding of TIP, if the accused is not known to the complainant earlier is to ascertain whether the investigation is being conducted in a proper manner and with proper direction and is admissible in evidence as corroborative evidence under Section 9 of the Indian Evidence Act. It is submitted that however, the absence of test identification parade may not ipso-facto sufficient to discard the testimony of witness who has identified the accused in the Court. It is submitted that even in a given case, the Court if comes to the conclusion that the testimony of the prosecution witness specially of an eye-witness is of a sterling quality, and trustworthy, the testimony of such a witness can be accepted with regard to identification of the accused in court and conviction can be sustained without any doubt upon the said testimony. In support of the above learned counsel appearing for the State has heavily relied upon the decisions of this Court in the case of **Malkhansingh and Ors. Vs. State of Madhya Pradesh; (2003) 5 SCC 746 (paras 16 and 17)** and **Md. Kalam Vs. State of Rajasthan, (2008) 11 SCC 352 (para 7).**

4.4 It is submitted that even in the present case there is a recovery of Rs.1 lakh from the accused and from the place disclosed by the accused. It is submitted that as such the accused have failed to explain and/or failed to account the recovery of Rs.1 lakh each.

4.5 It is submitted that therefore the High Court as well as the learned Trial Court have not committed any error in convicting the accused for the offence punishable under Sections 302 and 392 read with Section 34 IPC (so far as the accused Subhash Chander is concerned).

Making above submissions it is prayed to dismiss the present appeals.

5. Heard. We have gone through the impugned judgment and order passed by the learned Trial Court as well as the High Court convicting the accused and the findings recorded. We have minutely gone through the entire evidence on record more particularly the FIR as well as the deposition of PW1.

6. At the outset, it is required to be noted that the appellants – accused have been convicted mainly on the identification of the accused by PW1 in the Court Room and on the recovery of Rs.1 lakh each from the accused persons which were recovered from the places suggested by the accused. Thus, the conviction of the accused in the present case is solely on the identification of the accused by PW1 in the court room. Prior thereto no TIP has been conducted by the Investigating Agency.

6.1 Now so far as the conviction based on the recovery of Rs.1 lakhs each from the accused is concerned, at the outset it is required to be noted that even the learned Trial Court has also specifically given the finding that the prosecution has failed to prove that the original complainant and the deceased were carrying Rs.5 lakhs cash in the dicky of the scooter as alleged. To connect the accused for having conducted the evidence of loot of Rs.5 lakhs, primarily the prosecution was required to establish and prove that the person from whom the amount which was having to have looted. Thereafter the prosecution is required to establish and prove that the amount which is recovered from the accused is the very amount which the complainant/the person from whom the amount is looted. Even the learned Trial Court has also not given much stress on the recovery of Rs.1 lakh each from the accused. Be that it may we are of the opinion that when the prosecution has failed to prove that the complainant and the deceased were carrying Rs.5 lakhs cash in the dicky of the scooter and it was the very looted amount which was recovered from the accused, the accused cannot be convicted on the basis of recovery of some cash.

6.2 Now so far as the conviction of the accused on the PW1 – eye-witness identifying the accused in the Court Room and non-conducting the TIP is concerned, while appreciating the said aspect the averments in the FIR which was given by PW1eye-witnesses are required to be referred to. It may be true that as per the settled position of law the FIR cannot be encyclopedia. However, at the same time when no TIP was conducted the first version of the complainant reflected in the FIR would play an important role. It is required to be considered whether in the FIR and/or in the first version the eye-witness either disclosed the identity and/or description of the accused on the basis of which he can recollect at the time of deposition and identify the accused for the first time in the Court Room? Having gone through the FIR on the identity of the accused it is stated as under:

> "I was driving the scooter and Gian Chand was sitting behind me. When we were at link road shaterwala from Fazilka A bohar G.T. road about 1-1$^{1/2}$ kilometer ahead, three young persons reached with us on a scooter from the backside, out of them, two clean shaven young persons having ages of 30-35 year and one Sikh (sardar) who had tied a (Thathi) a piece of cloth having the age of about 30- 32 years, who was sitting in the middle was having a 12 bore gun of small barrel all these three young persons while reaching with us tried us to stop. When we did not stop then a clean-shaven young person who was sitting on the rear seat of the scooter thrown chilly powder on our faces and eyed with his hand as a result of which we could not see and we stopped our scooter being helpless a and opened our eyes after placing hand on the eyes. In the meantime these young persons stopped their scooters ahead of our scooter and came forward to snatch our scooter. We tried to prevent them, in the meantime, a Sikh Youngman fired a shot at Gian Chand in a strength way with his 12 bore gun hitting him on the chest as a result of which he fell down on the ground."

6.3 Thus, from the aforesaid it is seen that except stating that the accused were three young persons out of which two were clean shaven and the one Sikh (sardar) who had tied a (Thathi) having the age of 30-32 years no further description had been given by the complainant – PW1. Nothing has been mentioned in his first statement that he had seen the accused earlier and that he will be able to identify the accused. In light of the above, the deposition of PW1 in the Court and his identifying the accused for the first time in the Court is required to be appreciated. In the examination-in-chief, PW1 has stated as under:

"When at about 1-30 p.m. when we had covered a distance of about eight k.m.s from G.T. road and were going on the link road of Shaterwala, three young persons came from our back side on a scooter. They tried to stop us but we did not stop. They over took our scooter and put chillies powder in my eyes. That chilly powder entered in my right eye and I had to stop my scooter. After rubbing the eye I opened the same. Gain Chand alighted from my scooter."

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"Out of three young persons, two young boys tried to snatch my scooter. Gian Chand came parallel to me and tried to prevent those boys from snatching the scooter. One of those boys fired a shot at Gian Chand which hit him at his chest on the seat of heart. All the three said young persons are the accused who are present in the court today (witness has pointed towards one of the accused as the person who had fired at Gian Chand and that accused has disclosed his name as Amrik Singh). The accused who is standing on one side had put the chili powder in my eyes (the name of the accused pointed out by the witness has been disclosed as Subhash Chand)."

In the cross-examination he had deposed as under:

"I had not stated before the police that the chilli powder had effected only my right eye and I opened the same after rubbing it. I had stated before the police that chilli powder was put in our eyes as a result of which were not in position to see."

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"In connection with the investigation of this case I had been going to the police station quite often. The accused were never shown to me during investigation.) Before the occurrence, I had seen them in the City on one or two occasions. I After the occurrence I have seen, them in the court today for the first time. At the time of occurrence their names were not known to me. I do not know where they had been residing before the occurrence. When I made my statement before police I had only disclosed the age of accused and not their description. It is incorrect that I have deposed falsely, lit is incorrect that accused were known the earlier. It is further incorrect that accused have been falsely implicated in this case as Pritpal Singh had filed writ petition against the police in the month of August/September 2001."

6.4 From the aforesaid it can be seen that as such there are some contradictions in the first statement of the complainant recorded in the form of FIR and in the deposition before the Court. In the deposition before the Court, he has tried to improve the case by deposing that he had seen the accused in the city on one or two occasions. The aforesaid was not disclosed in the FIR. Even in the cross-examination as admitted by PW1 he did not disclose any description of the accused. At this stage it is to be noted that PW1 has specifically and categorically admitted in the crossexamination that it is incorrect that the accused were known earlier. He disclosed only the age of the accused. In that view of the matter conducting of TIP was necessitated and, therefore in the facts and circumstances of the case, it is not safe to convict the accused solely on their identification by PW1 for the first time in the Court.

6.5 Now so far as the reliance placed upon the decision of this Court in the case of **Malkhansingh (supra)** relied upon by learned counsel appearing on behalf of the State in support of her submissions that the TIP is not substantive evidence and in fact the substantive evidence is that of identification in Court is concerned, on facts the said decision shall not be applicable to the facts of the case on hand. Even in the said decision it is observed what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to

examine. In the case before this Court, it was found that the crime was perpetrated in broad daylight; the prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other; before the rape was committed, she was threatened and intimated by the accused; after the rape was committed, she was again threatened and intimidated by them. On such facts it was found that it was not a case where the identifying witness had only a fleeting glimpse of the accused on a dark night.

6.6 Similarly, another decision of this Court in the case of **Md. Kalam (supra)** relied upon by learned counsel appearing on behalf of the State also shall not be applicable to the facts of the case on hand. It is observed in the said decision that the evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. It is observed that the purpose of TIP therefore is to test and strengthen the trustworthiness of that evidence. It is observed that it is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. It is further observed that the said rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Therefore, on facts it was observed that failure to hold a TIP would not make inadmissible the evidence of identification in Court. It is further observed that the weight to be attached to such identification should be a matter for the courts of fact.

6.7 Even applying the law laid down by this Court in the aforesaid decisions and looking to the facts narrated hereinabove, we are of the opinion that it would not be safe and/or prudent to convict the accused solely on the basis of their identification for the first time in the Court.

7. In view of the above and for the reasons stated above, we are of the firm opinion that both, the learned Trial Court as well as the High Court have committed a grave error in convicting the accused. The judgment and orders passed by the learned Trial Court confirmed by the High Court convicting the accused for the offence under Sections 302 read with Section 34 and Section 392 IPC respectively are unsustainable and they deserve to be quashed and set aside and the accused are to be acquitted for the purpose for which they were tried.

8. In view of the above and for the reasons stated above the appeals succeed. The impugned judgment and order passed by the learned Trial Court as well as the High Court convicting the accused for the offences punishable under Sections 302 read with Section 34 and Section 392 IPC are hereby quashed and set aside.

The accused are acquitted from the charges for which they were tried. The appellants – accused be released forthwith, if they are not required in any other case.

The Appeals are allowed accordingly.

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