

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-723-SB-2005 (O&M)

Date of Decision: 26.05.2022

Paramjeet @ Kala and others

....Petitioner(s)

Versus

State of Haryana

.....Respondent(s)

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. R.S. Dhull, Advocate, for the appellant No.1.

Mr. Sanjiv Sheoran, Advocate, for the appellant No.3.

Mr. Ranvir Singh Arya, Additional Advocate General, Haryana.

JASGURPREET SINGH PURI, J.

1. The present appeal has been filed by three appellants namely, Paramjeet @ Kala, Vijay @ Dhare and Dhillu @ Ramesh who have been convicted by the learned trial Court.

2. Learned counsels for the appellants as well as the learned Additional Advocate General, Haryana have stated that during the pendency of the present appeal, the appellant No.2 i.e. Vijay @ Dhare has died. Consequently, the present appeal qua appellant Vijay @ Dhare stands abated. This appeal was earlier decided by this Court on 03.03.2020 whereby the present appeal was dismissed. Thereafter, one of the appellant had filed SLP (Criminal) before the Hon'ble Supreme Court and on 17.03.2021 the Hon'ble Supreme Court in Criminal Appeal No. 327 of 2021 arising out of SLP (Criminal) No.6846 of 2020 set aside the judgment

passed by this Court dated 03.03.2020 on the short ground that none had appeared for the appellant and there was no *amicus* engaged to assist the Court in that behalf and, therefore, the matter was remitted back to this Court for reconsideration of the appeal on merits uninfluenced by the judgment passed by this Court earlier.

3. The present appeal has been filed against the judgment dated 19.02.2005/22.02.2005 whereby the appellants were convicted to undergo rigorous imprisonment for a period of seven years each and were also directed to pay a fine of Rs. 2,000/- each for the offence punishable under Section 392 IPC read with Section 398 IPC. In default of payment of fine, the convicts shall further undergo simple imprisonment for a period of six months. So far as the appellant No.2-Vijay is concerned who has now died, he was further ordered to undergo rigorous imprisonment for a period of one year and was also directed to pay a fine of Rs. 500/- for the offence punishable under Section 25 of the Arms Act.

4. The facts leading to the lodging of the present FIR No. 199 dated 07.12.2000, under Sections 392, 397, 398 IPC and Section 25 of the Arms Act, Police Station Civil Lines, Bhiwani are that the complainant namely Bhim Sain son of Satnam Dass lodged a complaint to the police by alleging that he is running a consumer store at Sabji Mandi where he sits mostly and on 07.12.2000 i.e. the date of the lodging of the complaint at about 3.00 P.M, one LML Vespa Scooter on which three young boys were riding stopped their scooter and appeared in front of his shop. One of the above said three boys, who told his name to be Kala, entered into his shop and took out a pistol out of his dub, pointing the pistol towards his temple said that bring out money immediately and on his asking as to for what

purpose he should bring out money, he caught his neck and took him aside and held him there. The second boy out of the group whose name was Dhillu son of Jai Parkash @ Om Parkash was holding a pistol in his hand who removed Rs. 18,800/- from his safe by opening the safe and the third boy who was standing with pistol outside kept on standing for keeping a watch outside. One trader namely Ramesh son of Sham Lal Mahajan, who deals with Sarso Oil was sitting there and he had come for recovering the money (Ugrahi) on account of supply of the oil. He was holding a bag in his hand and the above boys snatched his bag and went away on their scooter. The colour of the scooter was light grey (sleti). They had earlier tried to cut off the telephone line of their shop. At that moment while they were going away, Ramesh asked for bahi (ledger). They went away after throwing the bahi. The appearance of one of them named Kala was of wheatish colour and was slim and tall. His age was around 24 years and he was wearing trouser and shirt. The second one was also wheatish in colour and was of medium built and he was also wearing trouser and shirt.

5. Learned Chief Judicial Magistrate, Bhiwani on 28.02.2001 committed the case to the Court of learned Sessions Judge, Bhiwani for further proceedings. Thereafter, the charges were framed against all the three accused by the Additional Sessions Judge, Bhiwani on 05.03.2001 under Sections 392 and 398 IPC. So far as the appellant No.2-Vijay (since deceased) is concerned, charge under Section 25 of the Arms Act was also framed against him.

6. The prosecution in order to prove their case examined Head Constable Jai Pal Singh as PW-1, ASI Om Parkash as PW-2, Bhim Sain (Complainant) as PW-3, Ramesh Kumar (eye witness) as PW-4, Inspector

Yaad Ram as PW-5, Head Constable Jagdish Chander as PW-6, Bhisham Chander as PW-7 and Satbir Singh as PW-8. Thereafter, on the closure of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded wherein they denied the circumstances appearing against them in the prosecution evidence and thereafter, without adducing any evidence they closed their defence evidence.

7. Learned Additional Sessions Judge, Bhiwani came to the conclusion that the prosecution has succeeded in proving that on 07.12.2000 all the three accused have committed robbery and they were convicted under Section 392 IPC read with Section 398 IPC and apart from the same, the prosecution was also able to prove that the appellant Vijay (since deceased) was having in his conscious possession one country made pistol and, therefore, he was convicted under Section 25 of the Arms Act as well.

8. Learned counsels for the appellants have submitted that in the present case the prosecution has not been able to prove their case beyond reasonable doubt. They further submitted that the judgment passed by the learned Additional Sessions Judge, Bhiwani was totally erroneous and perverse and without proper appreciation of the facts and law. It was submitted that when the complainant Bhim Sain stepped into witness box as PW-3, he did not support the prosecution version at all and thereafter, he was declared hostile. Similarly, when the eye witness Ramesh Kumar deposed as PW4, he also did not support the prosecution version and was declared hostile. The case of the prosecution was rested only on the disclosure statements made by the accused persons before the I.O whereby some money and weapons were alleged to have been recovered from them

on the basis of their disclosure statements but the specific portion of statement before the police as well as the disclosure statements were never put to the aforesaid two witnesses during the course of cross-examination nor the same were reproduced and, therefore, no doubt can be raised with regard to the credibility of the aforesaid two witnesses. They further submitted that initially Inspector Yaad Ram was the Investigator Officer before whom allegedly disclosure statements were made which were Ex. PE, Ex. PF and Ex. PG pertaining to the three accused and he himself has stated in his cross-examination that the accused were arrested in the present case by him on 17.12.2000 at about 2.00/2.30 P.M. and that he remained Incharge of the investigation during the period from 08.12.2000 to 17.12.2000. Learned counsels further submitted that thereafter a new Investigating Officer namely Sub Inspector Rajender Kumar took over the investigation on 18.12.2000 and thereafter, allegedly on fresh disclosure statements, the cash amount alongwith some weapons and cartridges were recovered. They further submitted that the basic investigation was done by the aforesaid Sub Inspector Rajender Kumar since he had taken over the investigation on 18.12.2000 but he was never examined by the prosecution for the reasons best known to them. They further submitted that once disclosure statements were recorded on 17.12.2000 by the earlier Investigating Officer, then there was no need to record disclosure statements again on 18.12.2000 by the new Investigating Officer who himself never stepped into the witness box. It was further submitted by the learned counsels that no independent witness was examined in the present case and as per the prosecution evidence, no effort was made to join any independent witness during the course of investigation and at the time of

alleged recovery of weapons and cash. They further submitted that there are material contradictions in the disclosure statements recorded by the two different Investigating Officers. They further submitted that the accused have been named in the complaint made by the complainant Bhim Sain but there is nothing in the prosecution evidence or on the record to show that when these accused persons came on the shop of the complainant for committing alleged robbery, then they already knew the names of these persons and, therefore, it was a concocted story made by the police. Thereafter, no identification parade was conducted and rather, the complainant Bhim Sain and the eye witness Ramesh Kumar did not support the prosecution version at the time of trial. They further submitted that the prosecution has miserably failed to prove anything against the appellants in the present case and, therefore, the impugned judgment passed by the learned Additional Sessions Judge, Bhiwani whereby the appellants were convicted is liable to be set aside.

9. On the other hand, Mr. Ranvir Singh Arya, learned Additional Advocate General, Haryana has submitted that the prosecution case was based upon the evidence which has been adduced and has been fully established. He further submitted that the appellants are habitual offenders and the mere fact that the complainant and the eye witness have turned hostile and did not support the prosecution version would not mean that the prosecution was not able to prove its case and has therefore prayed for the dismissal of the present appeal.

10. I have heard the learned counsel for the parties and have also perused the record.

11. A complaint was filed by the complainant namely Bhim Sain on

the basis of which the present FIR was lodged and as per the complaint, he stated that three persons had come to his shop and they were carrying pistols and by exerting threat on him, they took away Rs. 18,800/- from his safe. Two of the accused i.e. appellant No.1 and 3 came inside the shop and appellant No.2 namely Vijay was standing outside the shop for keeping a watch. Thereafter, one trader namely Ramesh Kumar was also sitting there in connection with his business and from him also, they snatched his bag and went away on their scooter. The names of appellants No.1 and 2 have been mentioned in the complaint and rather the name of the father of one of the accused namely Dhillu was also mentioned as Jai Parkash @ Om Parkash. A perusal of the record would show that at the time of trial the prosecution tried to prove their case through the witnesses PW-1 Head Constable Jai Pal Singh who stated that he had seen and checked the pistol of 9 mm and found that the pistol is in working condition and there were five seals on the pistol Ex. P1 and Ex. P2 was a live cartridge. ASI Om Parkash deposed as PW-2 and stated that he had recorded the statement of the complainant Bhim Sain without any omission and addition and the same was signed at point 'A' and the said statement is Ex. PB and the same was forwarded to the police station.

12. Thereafter, complainant Bhim Sain was examined as PW-3 and eye witness Ramesh Kumar was examined as PW-4. A perusal of the depositions made by them would show that PW-3 Bhim Sain categorically stated in his examination-in-chief that on 07.12.2000 at about 3.00 P.M. when he was present at his shop, then 5-6 boys had come to his shop and one of them gave slap on his face and demanded money from him. The other boy caught hold of him and took out currency notes of Rs. 18,800/-

approximately and they escaped after snatching the money and thereafter, he raised alarm Bachao-Bachao. He further deposed that however while leaving, they had left the currency notes on the spot. The police party arrived at the spot and took the currency notes in custody and his statement was recorded in the police station and he narrated the above version to the police. He thereafter categorically stated that the accused persons present in the Court are not said persons. In this way, the complainant Bhim Sain did not support the prosecution version and rather narrated totally different facts and circumstances as compared to the complaint on the basis of which FIR was registered and, therefore, he was declared hostile. Cross examination of the aforesaid complainant Bhim Sain was conducted by the Public Prosecutor and a perusal of the same would show that it has been stated in the cross examination that the statement Ex. PB was read over and explained to the witness and he stated that no such statement was made by him to the police. He further stated in his cross-examination that the aforesaid statement bears his signatures at point 'A' but the police had obtained his signatures on blank papers and that Ramesh Kumar was also present on the spot. He was also cross examined by the defence counsel and he further stated that the persons who had come to his shop were not having any pistol etc. and they were empty handed.

13. A perusal of statement of PW-4 Ramesh Kumar who was the eye witness would show that he stated that he does not know anything about this occurrence and that the accused present in the Court had not snatched currency notes from Bhim Sain on 07.12.2000. He was also declared hostile and was thereafter cross examined by the learned Public Prosecutor in which he stated that no such statement was ever made by him

to the police and it was incorrect that the said persons had snatched his bag of currency notes. Thereafter, the prosecution gave up some prosecution witnesses namely, ASI Chhotu Ram, Satbir Singh, Draftsman, Head Constable Ram Kumar and ASI Dalip Singh as unnecessary.

14. Inspector Yaad Ram deposed as PW-5 and he stated that on 07.12.2000 he was posted as Sub Inspector at Police Station Civil Lines, Bhiwani and on receipt of the statement of Bhim Sain complainant written by ASI Om Parkash through Constable Krishan Kumar, he recorded formal FIR in this case which is Ex. PD. All the three accused were arrested and they were remanded to police custody till 20.12.2000 and during investigation and on interrogation, accused Vijay made his disclosure statement Ex. PE, Paramjit @ Kala made his disclosure statement Ex. PF and accused Ramesh @ Dhillu made his disclosure statement Ex. PG and thereafter, the investigation was handed over to Sub Inspector Rajender Kumar. During cross-examination he stated that he remained in possession of the investigation during the period from 08.12.2000 to 17.12.2000 and he conducted the interrogation of the accused at the house of the Duty Magistrate for about 2/2.30 hours and all the accused were interrogated separately. He further stated that no independent witness was joined during interrogation as no one was available at that time He further stated that though he tried to join the independent witness but no one came there. He further stated that he did not send anybody else to summon the independent witnesses and he did not give its note in the zimni of that day.

15. Head Constable Jagdish Chander was examined as PW-6 and he stated that on 18.12.2000 when he was posted as Head Constable at Police Station Civil Lines, Bhiwani, then he accompanied Sub Inspector Rajender

Singh in the investigation of this case. All the three accused were interrogated and they made disclosure statements differently as Ex. PI, Ex.PK and Ex.PL and there was recovery of pistols, cartridges and money, apart from a scooter mark LML Vespa bearing registration No. HR-16-1824. In cross-examination he stated that he was joined in the investigation for the first time on 18.12.2000 and thereafter, the accused persons were taken to respective places on the basis of their disclosure statements. He also stated that no independent witness was joined in the investigation. They summoned Nambardar, Sarpanch etc. from the village where the accused were taken but no one came forward. He further stated that they did not get the signatures of the Chowkidar of the village in any proceedings. The said Head Constable Jagdish Chander was recalled for further examination whereby he stated that he cannot tell any reason for not holding test identification in this case and only Investigating Officer can tell the reason. He further stated that no efforts were made to join independent witness though available.

16. The Investigating Officer namely Sub Inspector Rajender Kumar never stepped into the witness box and the remaining two official witnesses i.e. Bhisham Chander, Reader to District Magistrate, Bhiwani and Satbir Singh, Draftsman, Court Compound, Bhiwani were examined on the issue of sanction order and the site plan.

17. The primary argument raised by the learned counsels for the appellants was that the prosecution was not able to prove its case at all and has rather miserably failed to prove the same. One of the primary argument raised by the learned counsels for the appellants was that the complainant Bhim Sain and eye witness Ramesh Kumar have not supported the

prosecution version and have rather stated the facts which were totally different from the prosecution version and the initial complaint and they were declared hostile. Therefore, it will be necessary to refer to the law relating to hostile witnesses as well as the effect of Section 145 of the Evidence Act. The Hon'ble Supreme Court in *V.K. Mishra and another Versus State of Uttarakhand and another [2015(9) SCC 588]* held that under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. The attention of the witness is to be drawn on that part and this must reflect in his cross-examination by reproducing it. If he denies having made that part of the statement, then his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the Court, then his attention should be drawn to the passage marked for the purpose of contradiction and it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made such statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the Court cannot suo moto make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.

18. In *Rohtash Kumar Versus State of Haryana [2013(4) SCC 434]* the Hon'ble Supreme Court observed that it is a settled legal proposition that 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 witness cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable upon a careful scrutiny thereof. Reference was made in another case in *State of U.P. Versus Ramesh Prasad Misra and another [1997(1) RCR (Criminal) 55]* wherein it was held that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny and thereafter, that portion of the evidence which is consistent with the either case of the prosecution, or that of defence, may be relied upon.

19. In a latest judgment of the Hon'ble Supreme Court in *Bijender @ Mandar Versus State of Haryana [2011(1) SCC 92]* while dealing with a similar like of situation wherein the accused were charged under Sections 392, 397, 120-B IPC and Section 25 of the Arms Act referred to the nearly three centuries old cardinal principle of criminal jurisprudence i.e. "that it is better that ten guilty persons escape, than that one innocent suffer". In that case the only eye witness to the alleged crime was the complainant and his nephew who did not support the case of the prosecution. The complainant in his testimony before the Court unequivocally denied that the appellant or his co-accused were involved in the execution of the offence. The very identity of the appellant as one of the perpetrators stood obscured, particularly considering that all the accused in the case were arrested on the

basis of a secret information, the origin was naturally unknown. It was further observed that in order to sustain the guilt of such accused, the recovery should be unimpeachable and not be shrouded with elements of doubt.

20. After giving the thoughtful consideration to the facts and circumstances of the present case and after perusing the record and hearing the learned counsel for the parties, this Court is of the considered view that the present appeal deserves to succeed due to the following reasons:-

- (i) As per the prosecution the complainant Bhim Sain had given a written complaint to the police on 07.12.2000 whereby he gave description of the events in the complaint which led into the lodging of the FIR. Thereafter, when the complainant stepped into witness box as PW3, then he did not support the prosecution version and rather stated that about 4-5 persons had come on his shop and after giving a slap on his face, they demanded money and took out currency notes of Rs. 18,800/- but thereafter they left the currency notes and police party had also arrived at the spot. The complainant was declared hostile. Similarly, the only eye witness namely Ramesh Kumar also stepped into witness box. As per the complaint given by the complainant the bag of the aforesaid Ramesh Kumar was snatched and they had taken away the bag but the aforesaid Ramesh Kumar while deposing at the time of trial stated that he does not know anything about the occurrence and the accused present in the Court had not snatched currency notes from the complainant Bhim Sain on 07.12.2000. Ramesh

Kumar was also declared hostile. A perusal of both the statements would show that after they were declared hostile and during cross-examination the statement Ex.PB was read over and explained to the complainant Bhim Sain and statement Mark-A was read over and explained to the eye witness Ramesh Kumar. However neither the relevant portion of the statement was pointed out nor the same was reproduced by the prosecution and, therefore, the same was in violation of the judgment of the Hon'ble Supreme Court in *V.K. Mishra and another Versus State of Uttarakhand and another(Supra)*. Apart from the same since the entire case of the prosecution was rested upon the disclosure statements and statement made to the police, none of those statements were referred to at the time of cross-examination. Therefore, there is no ground or occasion to disbelieve the aforesaid two witnesses and it cannot be said that merely because they have been declared hostile that they should not be relied upon.

- (ii) There were two Investigating Officers in the present case. The first Investigating Officer was Inspector Yaad Ram who stepped into witness box and had stated that he recorded the formal FIR in the present case on the basis of receipt of statement made by the complainant Bhim Sain and thereafter three days police remand was taken. He had further stated that all the three accused had made disclosure statements as Ex. PE, Ex. PF and Ex. PG. He further stated in the cross-examination that he remained Investigating Officer from

08.12.2000 to 17.12.2000 and the accused were arrested by him on 17.12.2000 at 2.00 /2.30 P.M. and further stated that he did not send anybody else to summon the independent witness and he did not give its note in the zimni of that day and no independent witness was joined during investigation as no one was available at that time. Thereafter, on 18.12.2000 another Investigating Officer namely Rajender Singh, Sub Inspector took over the investigation and he thereafter recorded another set of disclosure statements as Ex. PJ, Ex. PK and Ex. PL and thereafter, according to the prosecution on the basis of these disclosure statements the cash amount, pistols and cartridges etc. were recovered. However, although the first Investigating Officer namely Yaad Ram had stepped into witness box but the second Investigating Officer namely Rajender Singh was never examined and he never stepped into witness box and it was on the basis of the disclosure statements made before him by the accused that the arms, cash etc. were allegedly recovered. Although recovery is admissible in evidence under Section 27 of the Indian Evidence Act but there is no reason or justification coming forward as to why the second Investigating Officer namely Rajender Singh did not step into witness box. Apart from the same, two separate disclosure statements have been made before two different Investigating Officers and that also on next succeeding day. A perusal of the initial written complaint which was converted into FIR would show that the complainant had mentioned the names of two of the accused

who are the present appellants No.1 and 3 and rather the name of father of appellant Dhillu @ Ramesh has also been mentioned in the initial complaint to the police. It was a case of alleged robbery and nothing has come on the record to show as to how the complainant came to know about the names of these persons including the father of one of the appellant and, therefore, this aspect also creates suspicion and doubt in the prosecution story.

- (iii) No independent witness was got joined at the time of investigation and at the time of recovery. Rather the statement of Jagdish Chander PW6 who had stated that he accompanied I.O. Rajender Singh stated in his cross-examination that they summoned Nambardar, Sarpanch etc. through Chowkidar from the village but none came forward. He further stated that they did not get his signature on any of the proceedings of the case. The aforesaid Head Constable Jagdish Chander was recalled for further examination wherein he deposed that he cannot tell any reason for not holding test identification in this case and only Investigating Officer can tell the reason. He further stated that no private witness was joined at the time of effecting recoveries and no efforts were made to join the independent witnesses though available. From the aforesaid deposition made by the Head Constable Jagdish Chander it is clear that there is no justification for not joining any person as independent witness and so far as not holding the test identification in the present case is concerned, the Head

Constable Jagdish Chander stated that he cannot tell the reason for that and only Investigating Officer can tell the reason. However, the Investigating Officer Rajender Kumar never stepped into the witness box.

- (iv) A comparison of the initial written complaint by the complainant and his statement at the time of trial shows that it is totally different and does not match at all to any extent. As per the deposition at the time of trial, the complainant Bhim Sain stated that 5-6 boys had come on his shop whereas in the initial complaint he had stated that 3 boys out of which names of two were also mentioned had come to his shop. In the statement before the Court, he stated that one of the person slapped him whereas in the initial complaint he had stated that they were armed with pistols and had put the same on his temple. In the statement before the Court, he stated that an amount of Rs. 18,800/- was snatched but they left it behind the aforesaid amount whereas in the initial complaint, he stated that they took away the entire money. Before the Court he stated that police party arrived on the spot and took the currency notes whereas in the initial complaint he stated that afterwards he went to the police station for lodging of the report. Before the Court he stated that the accused persons present in the Court were not the persons who had come to his shop whereas in the initial complaint he had named the persons. So far as his signatures on the initial complaint are concerned, he admitted the same but had stated that his

signatures were taken by the police on blank papers.

- (v) The entire case of the prosecution was therefore rested on the disclosure statements but the prosecution has not been able to prove the same. These statements were never put to the complainant Bhim Sain and eye witness Ramesh Kumar during cross-examination and, therefore, the story put forward by the prosecution with regard to disclosure of cash, arms etc. is highly doubtful especially in view of the fact that there is no reason as to why two disclosure statements were recorded by two different Investigating Officers on successive dates coupled with the fact as to why second Investigating Officer namely Rajender Kumar was not examined and why the independent witnesses were also not joined during the investigation and recovery.

21. In view of the facts and circumstances, the prosecution had miserably failed to prove its case. Therefore, the present appeal is allowed. The judgment dated 19.02.2005 and order dated 22.02.2005 passed by the Additional Sessions Judge, Bhiwani are hereby set aside. Both the appellants No.1 and 3 are acquitted of the charges framed against them. The amount of fine, if any paid, shall be refunded to them and they are directed to be released from custody, if not required in any other case.

26.05.2022

rakesh

(JASGURPREET SINGH PURI)
JUDGE

Whether speaking : Yes/No
Whether reportable : Yes/No