$~R-4 & R-5

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.A.31/2005

% ***Judgment dated 30.09.2013***

SHYAM SUNDER @ PAPPU ..... Appellant
Through : Mr.Sudarshan Rajan, Adv.

versus

THE STATE ..... Respondent
Through : Mr.Feroz Khan Ghazi, Adv.

\+ CRL.A. 216/2005

SURAJ @ RAJBIR ..... Appellant
Through : Ms.Rakhi Dubey, Adv.

versus

STATE ..... Respondent
Through : Mr.Feroz Khan Ghazi, Adv.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (*ORAL*)

1. Present appeals arise out of a common judgment dated 22.11.2004 and order on sentence dated 24.11.2004 passed by learned Additional Sessions Judge, Delhi, in S.C.No.24/2003. The appeals have been heard together and are being disposed of by a common judgment.
2. By the impugned judgment, the appellants have been sentenced to undergo rigorous imprisonment for five years, each, for the offence punishable under Section 394/34 IPC with fine of Rs.5,000/-, each, and in default of payment of fine, five months rigorous imprisonment. The appellants were also sentenced to undergo rigorous imprisonment for

seven years, each, and to pay a fine of Rs.5,000, each, and in default of payment of fine, rigorous imprisonment for five months under Section 397/34 IPC. It was directed that both the sentences would run concurrently.

3. The case of the prosecution, as noticed by the trial court, is that on 6.2.2003 at about 3.15 a.m. at Budh Singh Gulab Singh Patrol Pump, Aurindo Marg, Lado Sarai, the appellants robbed Rs.85,000/- with cash box from the patrol pump staff by using country made pistol (katta) and a knife.
4. The prosecution in all has examined 13 witnesses. One witness was examined by the defence.
5. Learned counsel for the appellants submit that the entire case of the prosecution is based on the evidence of PW-6, Dinesh, who claims to have identified the appellants. It is further submitted that two other eye-witnesses i.e. PW-1, Sarwan, and PW-10, Gopal, who were admittedly present at the time of commission of offence did not identify the appellants in Court. It is contended that the evidence of PW-6, Dinesh, is unreliable. Elaborating their arguments further counsel submit that there is no evidence to corroborate the evidence of PW-6 as neither at the time of recording of FIR nor in the statement made under Section 161 Cr.P.C. the eye-witnesses had given any description of the appellants. It is also submitted that only a vague statement was made that the persons, who robbed them, were between the age of 25 to 30 years. It is, thus, contended that the evidence of PW-6 is not reliable as it is a very vague form of evidence, which cannot be the sole basis of convicting the appellants.
6. Learned counsel for the appellants further submit that the identification by PW-6, Dinesh, was not put to the appellants, which is a vital and

incriminating factor against them at the time of recording the statement under Section 313 Cr.P.C. Counsel submits that on this ground alone the impugned judgment and order on sentence is bad in law and the same is liable to be set aside. To buttress this argument, learned counsel for the appellants have relied upon ***Nirmal Pasi & Anr. v. State of Bihari,*** reported at JT 2002 (6) SCC 28, more particularly para 7, which read as under:

> "7. Apart from the abovesaid infirmities, we are surprised to note the manner in which the statements of the accused persons have been recorded by the trial court under Section 313 of the Code of Criminal Procedure. The purpose of recording statement under Section 313 of the Cr.P.C. is to enable the accused person to explain any circumstances appearing in the evidence against him. A piece of incriminating evidence relied on by the prosecution and found proved by the court so as to rest the conviction of the accused thereon must be put to the accused in his statement under Section 313 of the Cr.P.C. enabling him to offer such explanation as he may choose to do. Unless that is done, the piece of incriminating evidence cannot be relied on for finding a verdict of guilty. The questions for recording the statement of the accused-persons have been very superficially framed. There are just 4 questions asked to each of the accused persons. The incriminating piece of evidence consisting of identification of the accused persons by the witnesses and such identification in court being preceded by test identification parade held during investigation has not at all been put to the accused persons. The accused-appellants have not been afforded any opportunity of explaining such incriminating circumstances appearing in the evidence against them. The incident is of the year 1989. The accused-appellants are in jail. The trial had concluded in the year 1993. After the lapse of such a long time, we are not inclined to remand the case to the trial court for the purpose of recording the statements of accused-persons under Section 313 of the Cr.P.C. and thereafter deciding the case afresh."

7. Counsel for the appellants have further relied upon ***Shaikh Maqsood v. State of Maharashtra***, reported at (2009) 6 SCC 583, more particularly paras 8 and 9, which read as under:

"The purpose of Section 313 of the Code is set out in its opening words- `for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him'. In Hate Singh, Bhagat Singh v. State of Madhya Pradesh, AIR 1953 SC 468, it has been laid down by Bose, J that the statements of accused persons recorded under Section 313 of the Code `are among the most important matters to be considered at the trial'. It was pointed out that: (AIR p.470, para 8)

> '8. … The statements of the accused recorded by the committing magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box and [that they have] to be received in evidence and treated as evidence and be duly considered at the trial…..'

This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

13. The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. The word `generally' in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out

against the accused so that he may be able to give such explanation as he desires to give.

15. The importance of observing faithfully and fairly the provisions of Section 313 of the Code cannot be too strongly stressed:

> "30. … It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.

9. We find substance in the plea of learned counsel for the appellant that no question was put to the accused which established that he was the author of the crime. That being so the conviction cannot be maintained and is set aside. The appeal is allowed. The appellant be set at liberty forthwith unless required to be in custody in connection with any other case."

8. Counsel for the appellants have next relied upon ***Ranvir Yadav v. State of Bihar***, reported at (2009) 6 SCC 595, more particularly para 11, which reads as under:

> "Above being the position the appeal deserves to be allowed. It is a matter of regret and concern that the trial court did not indicate the incriminating material to the accused. Section 313 of the Code is not an empty formality. There is a purpose behind examination under Section 313 of the Code. Unfortunately, that has not been done. Because of the serious lapse on the part of the trial court the conviction as recorded has to be interfered with. Conviction recorded by the High Court is set aside. Bail bonds executed to give effect to the order of bail dated 8.1.2002 shall stand cancelled because of the acquittal. The appeal is allowed to the aforesaid extent."

9. Another submission, which has been made by learned counsel for the appellants, is that the appellants were arrested on the basis of a disclosure made by them in judicial custody after they were arrested for the commission of another offence. It is further submitted by the counsel that a disclosure statement by itself cannot be the sole ground of conviction of the appellants in the absence of recovery of either the knife or katta, or cash box, which was alleged to have been stolen and the Maruti car, in which the appellants had travelled to commit the offence and had which was used by them for running away. For this proposition, learned counsel for the appellants have relied upon ***Umesh Kamat v. State of Bihari,*** reported at (2005) 9 SCC 200, more particularly para 12, which reads as under:

> "Thus, there is any amount of doubt on the point whether PW4, in the situation in which he was placed, could closely observe the identifiable features of the appellant in mask that too in the glow of dim lantern and in the light emitted by the torches flashed at him or other inmates of the house. This doubt has to be viewed in the context of two things, firstly there was no recovery of property, nor any other corroborating evidence linking the appellant to the crime. The second aspect is that the trial Court was not inclined to believe the evidence of the identification of three other accused at the same identification parade held on 19.7.1994 and commented that they were falsely implicated. If so, the evidence of PW4 should have been scrutinized with greater caution instead of proceeding on a premise that he was a truthful witness. One more aspect which deserves notice is that PW4 did not have the occasion to observe the dacoits' operations inside the house. He would have noticed them only initially for a short-while before they entered the house. It is his case that he became unconscious a little later as a result of injury inflicted on him. These are all the various doubts which loom large over the prosecution story of identification of the appellant. Unfortunately, the High Court did not analyze the evidence of prosecution witnesses so as to test the credibility of their evidence in the light of admitted or undeniable facts apparent from the record."

10. Another leg of the argument of learned counsel for the appellants is that the appellants are not liable to be convicted under Section 397 of the IPC as there is no evidence to show that any of them were armed with deadly weapons. Counsel for the appellants have relied upon the evidence of PW-1 wherein it has been stated that Sanjiv (not the present appellants) was armed with a weapon and the absence of any evidence to show that the appellants were armed with any deadly weapon the offence under Section 397 Cr.P.C. is not made out. In support of this argument counsel have relied upon ***Ashfaq v. State (Govt. of NCT of Delhi)***, reported at AIR 2004 Supreme Court 1253, more particularly paras 9 and 10, which read as under:

> "9. The further plea that one accused alone, was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under Section 397 IPC with the assistance of Section 34 IPC over-looks the other vital facts on record found by the Courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, does not create any new substantive offence as such but merely serves as complementary to Section 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to the conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case

were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, dehors any reference to Section 34 IPC.

10. So far as the other charges are concerned, though an attempt has been made to challenge those findings, we are of the view that the concurrent findings, as rightly contended for the respondent, are not only well merited but are found sufficiently based on and supported by overwhelming materials on record and no patent illegality or infirmity as to warrant our interference have been shown to vitiate in any manner those concurrent findings recorded by the Courts below in this case. The conviction under Section 397 IPC made read with Section 34 IPC alone is consequently altered and sustained under Section 397 IPC itself and the sentence imposed by the Courts below or, this count would stand."

11. Learned counsel for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. It is contended by the counsel that PW-6 has duly identified the appellants, he has categorically deposed and pointed out to the appellants as the persons who committed the crime. It is further contended that the evidence of PW-6 is trustworthy and reliable and the appellants have rightly been convicted on the statements made by the eye-witnesses. It is next submitted that much cannot be read into the fact that PW-10 and PW-1 have been declared as hostile witnesses for the reason that memory of an incident would depend on a person individually and they have acted as natural witness, who did not depose falsely. It is also contended that all the three witnesses have proved the commission of the offence that the robbery had taken place and persons were armed with deadly weapons on the night of 6.2.2003.

12. I have heard learned counsel for the parties and also considered the evidence recorded by the learned trial court. The evidence of PW-1, Sarwan; PW-6, Dinesh; and PW-10, Gopal, leave no room for doubt that on 6.2.2003 at 3.15 a.m. four armed persons robbed a petrol pump and removed cash totalling Rs.80.85 lakhs. The evidence placed on record

also shows that the money box was also removed by the persons, who committed the crime.

13. The main thrust of the arguments of learned counsel for the appellants is that the appellants cannot be convicted on the sole testimony of PW-6, Dinesh. There is force in the submission made by learned counsel for the appellants for the reason that in the statement recorded under Section 161 Cr.P.C. none of the witnesses had given any description of the persons, who committed the dacoity except a general statement which was made that they were between 25 to 30 years of age. Two other eye-witnesses did not identify the appellants in Court. PW-1, who was also present at the time of the incident, deposed that four persons came in a car and robbed him by threatening to kill and pointed katta towards him. They carried away Rs.80,000/- to 85,000/- from the office and also took the cash box. PW-1 was unable to identify the appellants, who were present in Court. This witness was declared hostile and cross-examined by the learned Additional Public Prosecutor. The other eye-witness, PW-10, also did not identify the appellants, who were present in Court.

14. It has been repeatedly held by the Supreme Court that the prosecution must establish its case and prove the same beyond any element of doubt. The appellants were arrested by PW-7, HC Ominder, pursuant to a trap laid down by the Police of Police Station Mangolpuri. The evidence of PW-7 is a material piece of evidence and the same reads as under:

> "PW-7 HC Ominder No.463 NW P.S. Mangol Puri, Delhi.
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> On SA
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> On 21/3/2003 five persons were nabbed while they were travelling in a stolen maruti car on a trap laid by us at near Safal plant more turn Mangolpuri Industrial area. Different members of the raiding party overpowered those five persons. I overpowered accused Shyam Sunder present in the court today who was carrying

a buttondar knife for which separate case under arms act was registered at P.S. Mangol Puri. Accused Suraj Ali @ Rajbeer and accused Sanjeev was also nabbed along with accused Shyam Sunder at the same time. Their disclosures were recorded. I signed on the disclosure of accused Shyam Sunder ExPW7/A as a witness. All the three accused are present in the court today. Accused persons also admitted their involvement in various incidence in robbery including the robbery in this case.

XXXX By Sh. D.N. Arya counsel for the accused persons.

It is wrong to suggest that no disclosure was made by the accused persons and they are falsely implicated in this case."

15. Reading of the evidence of PW-7 would show that after the appellants were arrested, their disclosure statements were recorded wherein they had admitted their involvement in various incidents of robbery including the present case. ASI Shiv Raj, PW-2, has testified in his cross-examination that nothing was recovered in pursuance to the disclosure made by the accused persons. PW-8, HC Shiv Kumar, had testified that on 21.3.2013, accused Naushad along with three other co-accused, who were stated to be present in Court, were over-powered when they were travelling in a stolen Maruti car. Based on the statements of the appellants neither the katta nor the knife, nor the money box, nor the Maruti car, which the appellants had used to reach the spot of the incident and subsequently in which the money was carried away by them, were recovered. There is no evidence on record to suggest that this Maruti car was recovered based on the disclosure made by the appellants herein. Thus, there is no other corroborating evidence linking the appellant to the crime.
16. In the absence of recovery of either of the katta, knife, money box or the maruti car, the identification of the appellants made by PW-6, Dinesh, with no other corroborating evidence becomes an extremely weak piece of evidence to convict the appellants.

17. Applying the law laid down by the Supreme Court of India in the case of ***Ashfa*** (supra) to the facts of this case and reading the evidence of PW-1, I also find force in the submission made by learned counsel for the appellants that the appellant could not have been convicted under Section 397 of Cr.P.C. as there is no evidence to suggest that either of the appellants were armed with any deadly weapon.

18. Learned counsel for the appellants have contended that since a very important incriminating factor of identification of the appellants by PW-6, Dinesh, has not been put to the appellants at the time of recording of statement under Section 313 Cr.P.C., on this ground alone the appellants should be acquitted. Learned counsel for the State has also examined the statement made by the appellants under Section 313 Cr.P.C. and is unable to point out whether this fact was put to the appellants.

19. In the case of ***Janak Yadav and Others v. State of Bihar***, reported at (1999) 9 Supreme Court Cases 125 the Supreme Court has observed that where no examination under Section 313 Cr.P.C. was conducted by the trial court in such a situation it was open for the High Court to have examined the accused, whose statement under Section 313 Cr.P.C. had not been recorded, itself under Section 313 Cr.P.C. and then proceed with the hearing of the appeal or direct retrial. Para 5 of the judgment reads as under:

> "5. Section 313 CrPC prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. That opportunity is a valuable one and cannot be ignored. It is not a case of defective examination under Section 313 CrPC where the question of prejudice may be examined but a case of no examination at all under Section 313 CrPC and as such the question whether or not the appellants have been prejudiced on account of that omission is really of no relevance. It was open to the High Court to have either examined the accused, whose statements under

> Section 313 CrPC had not been recorded, itself under Section 313 CrPC and then proceeded with the hearing of the appeal or directed retrial of the case confined to the stage of recording of the statements of the appellants under Section 313 CrPC but it was not justified to order the retrial of the entire case by framing de novo charges and examining afresh prosecution evidence. The direction of the High Court to that extent cannot be sustained."

20. It may also be noticed that in somewhat similar circumstances a Division Bench of this Court in the case of *N. Dev Dass Singha v State.*, Crl.Appeal No.647/2010, had directed production of the appellant in Court, the incriminating circumstances were put to the appellant, a supplementary statement was recorded and thereafter the Division Bench continued to hear the matter on merits. Relevant paras read as under:

> "15. Section 313 Cr.P.C. empowers the Court to examine an accused after the completion of evidence of the prosecution. It has repeatedly been held that this act of examining the accused should not be treated as an empty formality. An accused must be granted an opportunity of explaining any circumstance which may incriminate him with a view to grant him an opportunity of explaining the said circumstance that may appear against him in evidence.
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> 16. We have examined the statement of the appellant recorded under Section 313 of the Cr.P.C. and find that there is force in the submission made by learned counsel for the appellant in this regard. We may add that this is a defect, which is curable.
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> 18. Accordingly, during the course of hearing of this appeal, by an order dated 1.8.2013 we had directed the appellant to remain present in Court to enable this court to record the supplementary statement of the appellant under Section 313 of the Cr.P.C, which was recorded on 7.8.2013."

21. Since this Court has already reached a conclusion that there is not sufficient evidence to convict the appellants, there is no necessity in this case to record a supplementary statement of the appellants. Accordingly,

for the reasons stated above, the impugned judgment and order on sentence are set aside. The appellants shall be set free in case they are not wanted in any other case. Bail bonds be cancelled.

22. Present appeals stand disposed of.

G.S.SISTANI, J

SEPTEMBER 30, 2013
msr