

***IN THE HIGH COURT OF DELHI**

+Crl.A.No. 224/2007

Judgment reserved on: 13th August, 2009
% Date of decision: 22nd September, 2009

Liyakat Khan ... Appellant
through: Mr. Sumeet Verma, Advocate

Versus

State Respondent
through: Mr. Manoj Ohri, APP for the state

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

GITA MITTAL, J

1. By this appeal, the appellant has laid a challenge to his conviction by the judgment dated 22nd September, 2006 and the order of sentence dated 5th October, 2006 imposed thereon.

2. The present proceedings commenced on a complaint made by one Raj Kumar who was a three wheeler driver with regard to an incident which occurred on 29th February, 2004. He stated that he had left his house at 8 a.m. on a three wheeler scooter no. BL 1RJ 007. While returning home at about 10 p.m., he was waved to a stop near Mangol Puri bus stand by a fat person (referred to as 'Liyakat' by his companions) who was about 5'-6" in height and was dark complexioned with a moustache with burn scars on one hand. He was accompanied by two other persons. He hired the

complainant's auto rickshaw for going to Azadpur stating that his two companions were to be dropped at Uttam Nagar Terminal. At their instance the three wheeler was stopped near the Dholi Piau, Janakpuri, Delhi. Liyakat stated that he had to meet his brother who was working on the Metro. He got down from the three wheeler, walked some distance and returned to the right side of the complainant asking him to deliver all his valuables. The second person, referred to as Paina, took out a knife and placed the same on the complainant's neck. Liyaqat is alleged to have taken out Rs.595/- from the complainant's pocket while Paina snatched the complainant's wrist watch as well.

3. So far as the third person, later identified as Rajesh is concerned, he is also alleged to have taken out a knife. On the refusal of the complainant to start the three wheeler, Rajesh was alleged to have torn his shirt and attempted to stab him on his thigh. The complainant was then pulled out of the three wheeler and the same was driven away by Liyaqat. The complainant raised an alarm which was responded to by a constable who was passing by. They pursued the three wheeler on the motorcycle which was intercepted near the CRPF camp. In this process, the motorcycle overturned and the constable received injuries. Rajesh took out a knife and waved it in the air but he was apprehended while the other two accused persons escaped.

4. On the statement of the complainant, a case under section

392/397/411 read with section 34 of the Indian Penal Code and section 25/27 of the Arms Act was registered as FIR No. 130/2004 by the police station Kirti Nagar.

5. The other two accused persons, Liyaqat Khan who is the appellant before this court and Rakesh @ Paina, were arrested subsequently in some other cases where they made a disclosure statement disclosing their involvement in the present occurrence. They were, therefore, arrested in the present case as well. During the course of investigation, a test identification parade was conducted by the police in jail on 24th March, 2004. The complainant-Sh. Raj Kumar correctly identified the appellant and Rakesh @ Paina as being involved in the said incident.

6. The matter was committed to the courts of Sessions Judge where the trial of the appellant was held. By an order dated 6th July, 2004 charges were framed against all the three accused persons for offences punishable under section 392/34 of the Indian Penal Code for the robbery and under section 397 read with section 392 of the Indian Penal Code for the use of deadly weapon i.e. knives in the commission of such robbery. All the accused pleaded not guilty and claimed trial.

7. In support of its case, the prosecution examined 13 witnesses while only Rajesh led evidence in defence. The entire case of the prosecution rests on the testimony of PW 4 Raj Kumar and PW 5 Constable Mahesh Pratap. The prosecution has also relied on the

medical examination of Constable Mahesh Pratap with regard to the injuries which were suffered by him when the motorcycle had overturned at the time of interception of the three wheeler when it was being allegedly driven away by the accused persons.

8. Upon a detailed consideration, the learned trial court has passed a detailed judgment dated 22nd September, 2006 returning a finding of guilt against two of the accused persons on all counts. The learned trial judge separately heard the accused persons on the question of sentence and has passed a separate judgment dated 5th October, 2006 thereon. So far as the present appellant Liyaqat Khan is concerned, the trial judge observed that he had been convicted for a similar offence for the second time and consequently did not deserve any leniency. Consequently, for the commission of the offence punishable under section 392 of the Indian Penal Code, the appellant was sentenced to undergo rigorous imprisonment for a period of seven years and was also sentenced to pay fine of Rs.5000/-. In default of payment of fine, it was directed that he shall undergo simple imprisonment for a period of six months further. For the commission of the offence punishable under section 411 of the Indian Penal Code, it was directed that he shall undergo rigorous imprisonment for a period of 1½ years. Rakesh @ Paina, the third co-accused was acquitted of all charges.

9. Aggrieved by his conviction and sentence, the appellant has

filed the present appeal assailing the same.

10. Mr. Sumeet Verma, learned counsel who has been appointed an amicus curiae on behalf of the appellant has vehemently assailed the judgment of the trial court on factual and legal grounds. It is contended that PW 4-Raj Kumar; the complainant, hopelessly failed to support the case of the prosecution in the witness box and that there are contradictions in all material particulars in his testimony which have been completely overlooked by the learned trial judge. Strong reliance is placed on the refusal of PW 4 to identify the accused persons in the witness box during trial.

11. Learned counsel has also contended that as per the case of the prosecution, Rakesh was the prime accused in the matter who at knife point had compelled the victim to part with his wrist watch. Despite the statement made by PW 4 in this behalf, it is urged that the learned trial judge has disbelieved the prosecution and has acquitted Rakesh for the sole reason that PW 5-Constable Mahesh Pratap failed to identify this accused person in court. Learned counsel contends that admittedly there has been no recovery of any kind of the weapon of offence or of any of the stolen articles from the appellant. As a result, the trial court could have come to only one conclusion and that is one of the innocence of the appellant.

12. So far as the statement of the complainant is concerned, Mr.

Sumeet Verma, learned counsel has pointed out that the same is completely contradicted by the testimony of PW 5 Constable Mahesh Pratap in court. Learned counsel also assails the arrest of the appellant in the case in hand. It is pointed out that the appellant was not arrested in the present case and that he has been implicated in the present matter only on account of a disclosure statement allegedly made by him when he was apprehended in some other case. Another circumstance which is urged in support of the innocence of the appellant is the fact that the prosecution has not assailed the acquittal of Rakesh @ Paina, the co-accused in the case.

13. Learned counsel has further submitted that so far as the conviction for the offence under section 411 of the Indian Penal Code is concerned, no charge was laid against the appellant. Further more, as per the case of the prosecution itself, even if a charge was laid against the appellant, the same was not established. Learned counsel has contended that the appellant cannot be convicted simultaneously for the offence under section 392 and section 411 of the Indian Penal Code.

14. Mr. Manoj Ohri, learned APP for the state has strongly supported the judgment. It is contended that so far as the refusal of the victim to identify the accused person in court is concerned, not much would flow from the same inasmuch as it was a case of the victim also that PW 5 Constable Mahesh Pratap reached the

spot and has arrested the accused Rajesh after interception of the three wheeler in which they were trying to escape. The stolen vehicle was also recovered. It is further submitted that the PW 4 Raj Kumar had given a vivid physical description of the present appellant in the statement made by him based whereon the FIR was registered. PW 4 admitted his signatures on the statement which was given to the police during his testimony in court which has been exhibited as PW 4/A.

15. It is submitted that PW 4 was hostile only with regard to the identity of the accused persons and has attempted to draw a confusion between the roles which he had attributed to them in court. It is urged that PW 4 has otherwise supported the prosecution in all material particulars.

16. So far as the challenge to the conviction under section 411 of the IPC is concerned, learned APP for the state would support the judgment of the learned trial court on the ground that the appellant has been found guilty of the same for the reason that he was trying to escape with the robbed three wheeler.

17. In support of the submission that the testimony of PW 4 who has been declared hostile at the instance of the prosecution and been cross examined by it can be relied upon, Mr. Ohri has placed reliance on the pronouncement of the Supreme Court reported at **(1999) 8 SCC 624 : 2000 Cr. L J 408 Koli Lakhmanbhai Chanabhai vs. State of Gujarat**

18. Learned APP for the state has submitted that even if the testimony of PW 4 was to be read in its entirety, the appellant has been identified in court by PW 5 Constable Mahesh Pratap who has no animosity with the accused persons. It is submitted that the conviction of the appellant could be based on the sole testimony of PW 5. In support of this submission, learned APP has cited the pronouncement of the Apex Court reported at **(1974) 3 SCC 584 Nathu Singh vs. State of Madhya Pradesh.**

19. It is further urged that the appellant is not a first time offender but has been convicted of a similar offence on earlier occasions as well for which he has also undergone imprisonment. In view of the seriousness of the offence and its impact on society, it is urged that a strict view requires to be taken as the same would be counter productive in the long run. Learned APP has placed reliance on the pronouncement of the Apex Court reported at **MANU/SC/0055/2005 : AIR 2005 SC 682 : 2005 CrI L J 913 State of Madhya Pradesh vs. Munna Choubey & Anr.**

20. I have heard learned counsel for the parties and have also carefully examined the record of the trial court. The primary issue which arises for consideration is the weight to be attached to the testimony of a witness who does not completely support the prosecution while making his deposition in court. PW 4 Raj Kumar is one such person. The case arose out of a complaint made by him with regard to an incident in which he was a victim. In his

testimony in court, while he does refer to an incident in which he was robbed of money, his wrist watch and his three wheeler scooter on knife point by three persons and he also affirms the fact that a police man on a motorcycle had stopped the autorickshaw but he refused to identify the accused persons as the persons who had robbed him. PW 4 has also wrongly mentioned this incident as having occurred on 29th April, 2004.

21. This witness was declared hostile by the court on the request of the learned prosecutor who thereafter subjected him to extensive cross examination. PW 4 affirmed that the police had recorded his statement which bore his signatures and was exhibited during the trial as Ex PW4/A. When confronted with portions of the statement, the witness did not dispute the correctness of Exh PW 4/A but only stated that he did not remember the portions with which he was confronted.

22. PW 4 had also confirmed that his shirt was torn by the robbers and that he had handed over the shirt and his pant to the police vide memo Ex PW 4/B which bore his signatures.

PW 4 however denied that he had ridden pillion on the policeman's motorcycle when a chase was given to the autorickshaw which was being driven away by the robbers. He also denied that the autorickshaw was intercepted near the red light of the CRPF camp by the constable on the motorcycle or that the constable received any injuries.

23. PW 4 refused to identify the accused Rajesh in court who was apprehended at the spot. However, he admitted that his arrest memo Ex PW 4/C bore his signatures. The witness also admitted his signatures on the seizure memo of the knife and Ex PW 4/A which was a seizure memo of the three wheeler scooter. He did not assail these documents. There is no cross examination with regard to them either.

24. So far as the variation in the date of the incident is concerned, the complainant has explained that he did not remember the date. He however has clearly stated that he had gone for the test identification parade to Tihar jail on 24th March, 2004 and that he had identified the appellant Liyaqat Ali as well as the accused Rakesh @ Paina in the jail during the identification proceedings. When cross examined on behalf of the accused persons, the witness had supported the test identification parade and denied suggestions that he had identified the two accused in jail at the instance of the police.

25. Mr. Manoj Ohri, learned APP has carefully taken me through Exh PW 4/A the first statement given by the complainant. There is no contradiction so far as the date or place of the incident is concerned. In this statement, the complainant had given a vivid and graphic physical description of the robbers. He has described the person who had engaged his scooter as a fat boy who was 5'6" tall having a dark complexion and thick mustaches. The

complainant has clearly stated that this person was having scars of burns on both hands. The complainant had stated that the fat person who had engaged the scooter was the one who was being addressed as Liyaqat and had got down from the scooter near Dholi Piau on the pretext that his brother was working in Metro. He had gone for some distance and then returned to the right side of the scooter. The second person who was thin and being addressed as Paina had taken out a knife. The complainant has made a similar statement to this extent in court. As per Exh PW 4/A, he then stated that Paina had put the knife on his neck and Liyaqat, the appellant had forcibly taken Rs.595/- from his pocket. In court, PW 4 stated that his money and wrist watch were snatched away by the boy who had put a knife on his thigh.

26. PW 4 has further stated that the appellant had demanded that he start the three wheeler and when he displayed reluctance, then Rajesh tore his shirt and tried to injure him with a knife on his left thigh. The complainant has stated that he started the three wheeler and thereafter he was forcibly asked to get down from the vehicle whereupon the present appellant drove off with the autorickshaw.

In his deposition in court, PW 4 stated that the accused persons threatened to kill him if he did not give the TSR.

27. PW 4 Raj Kumar has stated that he raised an alarm when he was robbed and a police personnel reached there. In view of the

deposition of PW 4, the testimony of this police personnel, namely Constable Mahesh Pratap who was examined as PW 5 in court assumes importance. PW 5 has stated that while proceeding to his residence on completion of his duty on his motorcycle around 10.20 p.m., he saw a person complaining that his autorickshaw has been snatched. PW 5 made him sit on his pillion and they chased the miscreants towards the direction in which they had gone. The robbers took a u-turn at a red light and proceeded towards Uttam Nagar. When they reached near the CRPF camp on the outer Ring Road, PW 5 intercepted the three wheeler scooter by blocking it with his motorcycle whence he fell down. The robbers tried to escape. Two of the persons managed to run away. However one of them could be apprehended who pulled out a knife. PW 5 grappled and overpowered him taking away the knife from him. PW 5 has clearly stated that he had seen the face of the person who was driving away with the autorickshaw and he has pointed out to the appellant who was present in court as driver of the robbed vehicle. PW 5 has informed the police station Janak Puri and handed over the person apprehended at the spot to Sub-Inspector Jagat Singh alongwith the knife and the autorickshaw which were recovered.

28. PW 5 has also proved the recovery memos of the pant, shirt, autorickshaw and the knife. This witness has also identified accused Rajesh as the person who was apprehended at the spot.

29. It is well settled that testimony of a witness who has turned

hostile in the witness box would remain admissible in the trial and there is no legal bar to even basing a conviction of an accused person upon such testimony if corroborated by other reliable evidence (Ref : **MANU/SC/0093/1975: AIR 1976 SC 202 Bhajan Singh vs. State of Haryana** and **MANU/SC/0203/1995: AIR 1976 SC 294 Satpal vs. Delhi Administration**).

30. It needs no elaboration that so far as the testimony of a person who is declared hostile can be relied upon to the extent that it supports the prosecution version and evidence of such witness cannot be treated as having been washed off the record. (Ref: **(1999) 8 SCC 624 Koli Lakhmanbhai Chunabhai vs. State of Gujarat**)

31. The testimony of PW 4 is to be examined on these principles. The first statement made by PW 4 has been exhibited and proved on record as Ex PW 4/A. In this statement, he has given the description of the accused persons. The description which he has given of the person who had stopped the autorickshaw matches the description of the appellant who was produced before the trial court. Furthermore, the statement in court is also supported by the statement Ex PW 4/A in material particulars. The witness in his cross examination explained that he does not remember the date correctly. While in a given case, this may be considered a material lapse, however there is other contemporaneous evidence in support of the case of the prosecution with regard to the date of the

incident in the nature the deposition of PW 5, the seizure memos and the police record. Constable Mahesh Pratap-PW 5 had admittedly reached the spot when the robbers were trying to escape.

32. The learned magistrate in whose presence the test identification parade was conducted appeared in the witness box as PW 13. The learned Metropolitan Magistrate has proved the proceedings of the test identification parade ('TIP' hereafter) which were held by her in the jail.

33. It needs no elaboration that the substantive evidence of a witness is the deposition which is made by him in court during the trial. A test identification parade is held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence who were not previously known to them for the purposes of satisfying the investigating officers of the bonafides of the prosecution witnesses and to furnish evidence to corroborate their testimony in court. Such parades are essentially governed by the provisions of Section 162 of the CrPC. The proceedings of the test identification parade do not constitute substantive evidence. (Ref: **MANU/SC/0141/1971 Matru vs. State of U.P.**; **MANU/SC/0165/1973 Santok Singh vs. Izhar Hussain**; **AIR 1970 SC 1321 Budh & Anr. vs. State of HP** ; **1995 2 RCR 86 (P&H) Kherati Lal vs. Union Territory of Chandigarh**).

34. In ***Mahavir vs. State of Delhi AIR 2008 SC 2343***, it was held that the whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

The observations of the Apex Court in para 11 of this pronouncement in this behalf can usefully be adverted to and read as follows :-

“11. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. 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. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. 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. This 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. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration [MANU/SC/0043/1958](#) : 1958CriLJ698), Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh [MANU/SC/0224/1959](#) : AIR1960SC1340 , Budhsen and Anr. v. State of U.P. [MANU/SC/0103/1970](#) : 1970CriLJ1149 and Rameshwar Singh v. State of Jammu and Kashmir [MANU/SC/0174/1971](#) : 1972CriLJ15 .”

35. So far as the test identification parade is concerned, on 16th April, 2004, PW 13 Ms. Archana Sinha, Metropolitan Magistrate

received an application for holding such parade of the appellant and Rakesh. The TIP was held on 24th March, 2004 in the Tihar jail. In her deposition PW 13 has stated that both PW 4- Raj Kumar and PW 5-Constable Mahesh Pratap correctly identified the appellant. The proceedings which were recorded in jail on 24th March, 2004 have been exhibitd as Ex PW 13/4 and certified by the Magistrate as Ex PW 13/C.

36. The learned Magistrate also conducted the test identification parade of the accused Rakesh on 24th March, 2004 in jail. This accused was correctly identified by PW 4 Raj Kumar. However it is deposed by PW 13 that Constable Mahesh Pratap did not correctly identify accused Rakesh. The learned Magistrate proved her proceedings with regard to accused Rakesh as Ex PW 13/D and the certificate thereon as Ex PW 13/E.

Despite opportunity being given, this witness was not cross examined on any aspect at all on behalf of any of the accused persons.

37. It is to be noted that PW 5 is not the investigating officer in the case but was a chance witness to the occurrence. His substantial evidence so far as the identity of the accused is concerned, stands corroborated by the proceedings of the test identification parade. These proceedings also stand proved on record by the unimpeached and unchallenged testimony of PW13, Metropolitan Magistrate who conducted the same.

38. PW 4 has chosen not to identify the accused persons as those involved in the offence. However in the instant case PW 5 has made a categorical identification of the appellant as the person who was driving away with the robbed autorickshaw. It is not the appellant's case that PW 5 had any animosity or malice against the accused persons. There is no allegation of hostility of any kind also on the part of PW 5 against the accused persons. His testimony could not be shaken despite a thorough cross examination on behalf of the accused persons. PW 5 has fully supported the prosecution case in all material particulars. No reason whatsoever has been put forth for discarding the testimony of this witness which has recovered corroboration even from the testimony of PW 4.

39. It is stated by PW5-Constable Mahesh Pratap that he had suffered injuries in the effort to intercept the stolen vehicle. He was examined in the Deen Dayal Upadhyaya Hospital at about 1.45 a.m. On 1st March, 2004. The MLC containing his examination recorded by the doctor has been proved on record as Ex PW 8/A which shows that he had suffered abrasions on the left knee.

40. My attention is drawn to the evidence of PW 13, Ms. Archana Sinha, the learned Magistrate who conducted the TIP and was not subjected to any cross examination. The learned Magistrate has certified her proceedings which certificates have been proved on record as Ex. PW13/C and 13/E. It is urged by Mr. Manoj Ohri that

PW 5 Constable Mahesh Pratap has identified all the accused persons and there is no doubt at all with regard to such identification. It is further urged that the PW 4 had identified all accused persons in the test identification parade proceedings which were conducted by a learned Metropolitan Magistrate in Tihar Jail on 24th March, 2004. For this reason, the prosecution cannot fail merely because PW 4 has been either won over or has not supported his own statement in court on account of the fear or otherwise has refused to identify the accused.

41. Learned APP has also drawn my attention to the corroborative evidence in the nature of the MLC (Ex. PW 8/A)of the Constable Mahesh Pratap which was recorded on 1st March, 2005 upon his medical examination.

42. Learned counsel has further contended that there are several portions of the testimonies of PW 4 and PW 5 on which there is no conflict and that conviction can safely be based thereon. It is pointed out that it has come in the testimony of both PW 4 and PW 5 that the appellant drove off with the three wheeler scooter. PW 5 has in fact identified the appellant as the person who was driving the vehicle when he chased it in hot pursuit.

43. The pant and shirt which PW-4 was wearing at the time of the incident bore knife cuts and were handed over by him to the police. PW 4 also proved the seizure memo of his clothes as Exh PW 4/B. The seizure memo records that the pant bears tears and the pocket

was torn. These clothes were produced during the course of testimony of PW 4 Sh. Raj Kumar and were duly identified by him. From the above discussion, it would appear that the PW 4 has turned hostile in court only with regard to the identification of the accused persons but has supported the prosecution in all other particulars. The challenge by the appellant to his conviction, primarily on the ground that the victim refused to recognize him in court, is of no significance. The testimony of PW 4 is corroborated by other material evidence pointed out above.

44. Mr. Sumeet Verma, learned counsel for the appellant has urged that the PW 4 has not supported the prosecution even with regard to the role which he has attributed to the accused persons. In his statement based on which the police has recorded the rukka, PW 4 stated that the money was taken by the appellant while in his testimony in court he has stated that the money and watch was taken by the person who held the knife.

45. It has further been urged at length that in the rukka recorded by the police, PW 4 had attributed possession of the knife and theft of the wrist watch to Rakesh who was acquitted by the trial court only for the reason that PW 5 Constable Mahesh Pratap did not identify him. It is urged that on parity of reasoning, the appellant was entitled to be acquitted as well.

46. In view of the above discussion, this submission is wholly misconceived. As per the statement of PW 13, Constable Mahesh

Pratap did not identify Rakesh even in the test identification parade conducted on 24th March, 2004. On the other hand PW 4 has identified the accused persons as being involved in the incident in the TIP but failed to do so in court. In this background, there was no legal evidence to return a finding of guilt against Rakesh and he was consequently acquitted by the trial court.

47. The appellant is stated to have escaped when the autorickshaw was intercepted and only one of the accused persons out of the three could be apprehended. He was arrested in a similar case wherein he made a disclosure that he was implicated in the present case. He was arrested in the present case and only thereafter investigation qua him was conducted.

48. There is no contradiction in the statement of PW 4 so far as theft of the autorickshaw is concerned. PW 5 has categorically stated that the appellant was trying to escape with the stolen autorickshaw when he was pursued by him on the basis of the material which has been placed before the trial court.

In the light of the above discussion, the finding of guilt of the appellant for commission of offences punishable under section 392 read with section 34 and for the offence punishable under section 411 read with section 34 of the IPC cannot be faulted on any legally tenable grounds. The challenge to the finding of guilt by the appellant is hereby rejected.

49. It is now necessary to consider the challenge to the order of

sentencing imposed upon the appellant.

50. The need for awarding just punishment was recognised even in the time of Kautilya. As per the Kautilyan jurisprudence by V.K. Gupta in the chapter 'Nature & Scope of Punishment', Kautilya has stated that "whoever imposes severe punishment becomes repulsive to people, while he who awards mild punishment becomes contemptible. The ruler just with the rod is honoured. When deserved punishment is given, it endows the subjects with spiritual good, material well being and pleasures of the senses." This philosophy is woven into a statute and jurisprudence.

Punishments prescribed by the penal code reflect the legislative recognition of the social needs, the gravity of the concerned offence, its impact on the society and what the legislature considered as a punishment suitable for the particular offence. It needs no elaboration that courts are required to imbibe that legislative wisdom and to respect it.

51. Judicial pronouncements have emphasised proportionality as a test to fit the offence. The impact of a sentence on social order requires to be considered. In **(2005) 8 SCC 1 State of M.P. vs. Bala @ Balaram** (supra), it was held that the court has to do justice to the society and to the victim on the one hand and to the offender on the other. The balance must be taken to have been struck by the legislature and consequently, legislative wisdom reflected in the statute has to be accepted by the court.

52. In **MANU/SC/0055/2005 State of M.P. vs. Munna Choubey & Anr.**, the Apex Court emphasised that **imposition of sentence without considering its effect on social order in many cases may be in reality a futile exercise. Such impact as well as public interest, cannot be lost sight of and per se require exemplary treatment.** The court denegated adoption of a liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

53. On the principles which guide imposition of sentence in **(2006) 2 SCC 359 Shailesh Jaswantbhai & Anr. vs. State of Gujarat & Ors.** the court held thus :-

“7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society".

Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

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10. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

11. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Council MCGDautha v. State of Callifornia 402 US 183 : 28 L.D. 2d 711 that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of

gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.”

54. So far as the order on sentence is concerned, a perusal of the nominal roll of the appellant which has been received from the jail shows that the appellant was found guilty for a commission of offences in the case arising out of FIR No. 124/2004 registered by the police station Moti Nagar under section 379/411 and has already undergone the sentence which was imposed upon him. He was also sentenced for an offence registered as FIR No. 67/04 under section 25/54/59 of the Arms Act registered by the police station Prashant Vihar and he has also undergone the sentence imposed for commission of this offence.

55. In addition to these two convictions, the appellant stands convicted for commission of offences under section 394/397/34 of the Indian Penal Code in the case which was registered as FIR No. 117/04 by the police station Janak Puri under section 392/397/411 Indian Penal Code. In this case, the appellant has been sentenced to undergo rigorous imprisonment for seven years and fine of Rs.100/-. The appellant has filed an appeal in this case being Appeal No. 223/07 which is pending even on date.

56. The appellant filed an application CrI.M.A.No. 8315/2008 praying for an order directing the sentence in that case to run concurrently with the sentence awarded in that present case. This application was dismissed by this court on 27th May, 2008 holding

as follows :-

"Crl.M.A.No. 8315/2008 in Crl.App.223/2007

Arguments heard. Taking into consideration the involvement of the appellant in a number of cases before his conviction in the present case which runs into around 48 cases, no indulgence is required to be granted to the petitioner under section 427 CrPC and therefore the application is dismissed.

List the appeal for hearing, as prayed for by the petitioner, on 26.08.2009.

Copy of the paper book including evidence be supplied to both the sides by the Registry."

57. In **(2005) 2 SCC 710 the State of Madhya Pradesh vs. Munna Choubey & Anr.**, the Apex Court has cautioned that undue sympathy with regard to accused persons would do more harm to the justice system and would undermine public confidence in the efficacy of law and society could not long endure under such threat. The Apex Court has cautioned every court to award a proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. It was further stated that an undue liberal attitude by imposing meagre sentences or taking too sympathetic a view on account of lapse of time would be counter productive in the long run and against societal interest.

58. I find that for commission of the offence under section 392 of the Indian penal Code, the trial court was empowered to impose a sentence up to 10 years and imposition of a mandatory fine. The trial court has taken into consideration the conviction of the appellant in similar cases and has consciously and carefully

imposed the rigorous sentence for a period of seven years only.

Similarly, so far as the conviction for the offence under section 411 is concerned, the learned trial judge has not imposed the maximum sentence of three years rigorous imprisonment but has awarded a sentence of only 1 ½ years. The sentences have been directed to run concurrently. The trial judge has also directed that the appellant will be entitled to the benefit of section 428 of the Code of Criminal Procedure. No mitigating circumstance is pointed out. There is, therefore, no reason to interfere with the sentence which has been imposed.

For all the foregoing reasons, I see no reason to interfere with the judgment dated 22nd September, 2006 and the order of sentence dated 5th October, 2006.

Before parting with the case, I must record the competent assistance rendered by Mr. Sumeet Verma, learned amicus curiae and Mr. Manoj Ohri, APP for the state in taking me through the record and making the submissions aforenoticed.

As a result of the above discussion, this appeal is hereby dismissed.

**GITA MITTAL
(JUDGE)**

September 22, 2009
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