

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

+ **Crl.App. 57/2007**

% Date of reserve: 03.08.2009
Date of decision: 06.08.2009

AJESH KUMAR ... APPELLANT
Through: Mr. S.D. Singh, Mr. Rahul Kr. Singh,
advocates

Versus

The STATE ...RESPONDENT
Through: Mr. Navin Sharma, APP for state.

With

+ **Crl.App. 781/2007**

RAJ KUMAR & ORS. ... APPELLANT
Through: Mr. M.A. Hussain, advocate

Versus

The STATE & ORS. ...RESPONDENT
Through: Mr. Navin Sharma, APP for state.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

1. Both these appeals have been filed under Section 374 of Cr.P.C. by the appellants who were arrayed as co-accused persons in Sessions case no. 50/2001 along with one Dharam Singh Rawat declared as a proclaimed offender. The case had arisen out of FIR No. 374/95 registered at P.S. R.K. Puram under Section 394/392/397/411 IPC at the

instance of PW5 Narender Kumar who made the following statement to the Police:

“That on the intervening night of 7/8-7- 1995 at night, he was going on foot from Vigyan Sadan towards Sector-7, R.K. Puram to his residence at Katwaria Sarai. When he reached at bus stop Sector – 4, R.K. Puram started waiting for Tempo. At about 12 night, he sat at the bus stop aged about 18/19 years came from the side of Munirka and sat towards his sides. One of them asked him to give a cigarette. He told the said person that he was not in the habit of consuming cigarette. After about 4/5 minutes, the said boys surrounded him. One of them gagged his mouth and put a knife on his neck. Thereafter they all took him behind, at a dark place and gave beatings to him. When he told them that he was having no cash, they removed his golden ring from his finger. They also filed away with his briefcase which contained cash Rs. 1000/-, some office papers, card of the Citi Bank, pass book etc. When he raised alarm, they all concealed themselves at some place.”

2. On that basis the FIR was registered and investigated. During the course of investigation the complainant was also got medically examined. However, no MLC has been brought on record in this regard. After the arrest of one Kishen Kumar in case FIR No. 283/95 registered under Section 392 IPC, the appellant Raj Kumar was also arrested in that case. During interrogation he made a disclosure statement admitting his involvement as well as the involvement of the other appellant in this case. However nothing was recovered at their instance, yet they were arrested in this case and were sent for trial. They were also sent for TIP but the appellants refused to participate in the TIP because their photographs were shown to the witnesses.

3. Prosecution also relied upon the recovery of one golden ring from Dharam Singh(PO) a co-accused of the appellants which was identified during TIP proceedings by the complainant.

4. After the case was committed to the Sessions, Shri Dharam Singh failed to appear and was declared as Proclaimed Offender.

Charges were framed against both the appellants under Section 394/392 IPC read with Section 397 IPC, but they pleaded not guilty. To prove its case, prosecution examined PW1 HC Surender Pal, PW2 HC Vikram Singh, PW3 ASI Baba Sahib, PW4 HC Om Prakash, PW5 Narender Kumar, PW6 Ct. Devenra Singh, PW7 Sh. V.K. Mahenshwari, PW8 Insp. Lalit Mohan and PW9 SI Surinder Singh. Prosecution failed to produce the remaining prosecution witnesses despite various opportunities granted. So further evidence of the prosecution was ordered to be closed vide order dated 17.08.06.

5. In their statement under Section 313 Cr.P.C. the appellants denied each and every incriminating circumstance put to them by the Addl. Sessions Judge. However, they have not led any defence evidence.

6. By the impugned judgment despite admission of PW5 that he was shown photographs of the accused persons and he being the only eye-witness, the Addl. Sessions Judge convicted both the appellants under Section 394/34 IPC and sentenced them to undergo R.I. for 7 years each for the commission of the offence under Section 394/34 IPC and also to pay fine of Rs. 1000/- each and in default of payment of fine to further undergo S.I. for 1 month each vide order dated 27.10.2006. The Judgment of conviction is dated 16.10.2006. Hence this appeal.

7. To support the Judgement the trial Judge has relied upon the testimony of PW5: refusal to participate in TIP proceedings by the appellants and the testimony of other persons who came at the spot after the incident and took the injured to the hospital. Besides that

non-explanation of the appellants about their presence at the spot at odd hours on the date of incident and absence of any defence led by them to prove that they were present at some other place has also been used against them as an adverse circumstance. The APP also submitted that the appellants were apprehended in other case by the Police and only on their disclosure statement they were arrested in this case and it is only thereafter a request was made for getting TIP of the accused persons when they refused to participate in the TIP. Regarding the photographs shown to the witness it has been observed by the Addl. Sessions Judge:

“I find no substance in the contention of the Ld. Defence counsels for the accused persons that the accused persons were justified to refuse to participate in the TIP proceedings as the police had already shown their photographs to the complainant and the complainant has admitted the said fact. There is nothing on record that both the accused persons were shown to the complainant at any time prior to asking them to participate in the TIP proceedings. **Complainant has fairly clarified in his testimony before the court that after the commission of the offence, when he went to the PS, the police showed him photographs of number of suspects to identify them to be the assailants. HE further explained that out of the bundle of photographs shown to him, he identified both the accused persons to be the assailants.** This statement of the complainant inspires confidence as he had seen all the assailants to the time of incident. All the assailants had stayed for sufficient time with the complainant at the spot and he had seen them in the light of auto also. So there was no possibility of false identification of the assailants/ accused persons by the complainant. Moreover while appearing as PW5 before the court, the complainant specifically identified both A-1 and A-3, he attributed specific role to them also. He categorically stated that A-1 was the assailant who had placed knife on this neck. A-3 was the person who had given beatings to him. There is no cross-examination on this aspect by the Ld. Defence counsel. There was no reason for the complainant to falsely identify the accused persons simply at the asking of the IO as alleged by the Ld. Defence counsel.”

8. The learned counsel for the appellant submits that the reasoning given by the Learned Trial Court to convict the appellants are

unsustainable in law and raises serious doubt about the story of the prosecution inasmuch as:

- i. the time of the incident as given by the prosecution is about 12.00 in the Night i.e. almost mid-night. As per the statement of PW5 at the time when the appellants and two other accused persons had beaten the appellant, nobody else was present. It is also the case of the prosecution that after the incident the appellants were not found at the spot. No particulars of the appellants or the other co-accused persons were mentioned in the complaint filed by PW5, yet the Trial Judge has relied upon the testimony of those witnesses to support the case of the prosecution who according to the prosecution had gathered later on and had not seen the incident.
- ii. Even though it is the case of the prosecution that the appellants gave beating to the injured PW5 and that he was examined at the hospital in respect of the injuries caused to him, the MLC has not been proved on record by the prosecution which goes to show that there is no evidence of causing any injury to the injured by the appellants.
- iii. Nothing has been recovered from the appellants either pursuant to their disclosure or otherwise during the course of investigation in this case which may support the case of prosecution against the appellants.
- iv. As regards refusal to participate in the TIP the admission made by the injured, namely, that the photographs of the appellants were shown to that witness is sufficient to justify the refusal of the appellants in participating the TIP. It is well settled that in such a case when the witnesses has seen the photographs prior to the TIP no sanctity could be attached to the TIP proceedings.

9. On the other hand, Learned APP has submitted that the

appellants are not innocent. They are involved in other cases also and in fact one of them has been convicted in another case which prima facie shows their involvement. It is also submitted that merely because MLC has not been produced will not nullify the testimony of the complainant and other witnesses who had taken the complainant to the hospital. It is also argued that merely because the Police has shown the photographs of the complainant to the witnesses along with photographs of the other persons with a view to identify the appellants and other accused persons who admitted their involvement in this crime in their voluntary disclosure made in another case would not justify the refusal of the appellants to participate in the TIP proceedings and therefore the adverse inference has been rightly drawn against them by the prosecution.

10. Having heard the learned counsel for the appellant and the learned APP for the State, I find that in the present case the prosecution has not been able to prove its case beyond reasonable doubt. The identification of the appellants by PW5 cannot be accepted as he did not see the photographs of the appellants before the arranging of TIP proceedings.

11. It was not a case where the Police during the course of investigation has recorded any proceedings to have shown the photographs to PW5 as an attempt to identify the accused persons. If that was a step taken bona-fide by the prosecution they ought to have mentioned in the charge-sheet which would have given a chance to cross-examine the witnesses in that light, rather the hide & seek in which the prosecution has proceeded to fasten the criminal liability on

the appellants in this case and their efforts to hold TIP soon after showing the photographs of the appellants to the witnesses cast serious doubt on their version.

12. The law with regard to TIP has been well settled by the Supreme Court in the case of N.J. Suraj Vs. State represented by Inspector of Police (2004) 11 SCC 346 wherein it has been held:

3. Undisputedly, in the present case, there is no direct evidence and this is a case of circumstantial evidence. The prosecution has alleged two circumstances against the accused. The first circumstance is that the accused was last seen with the deceased in the hotel where in a room the dead body of the victim was recovered. The prosecution has attempted to prove this circumstance by the evidence of PWs 1, 2, 3, 4, 6 and 9. **The appellant was put to the test identification parade where these witnesses are said to have identified the appellant, but in their evidence they admitted that the photograph of the accused was shown to them before holding the test identification parade. In view of the fact that the photograph of the accused was shown to the witnesses, their identification in the test identification parade becomes meaningless and no reliance could be placed thereon.** The presence of the accused and the victim in the hotel has also been attempted to be proved by the fact that the appellant made an entry in a register maintained in the hotel showing therein that he had taken a room on the fateful day for staying there. The entry in the register, according to the prosecution, is said to have been made by the accused in his own writing. As the accused denied the writing, the same was sent to the handwriting expert for examination, who has reported that the writing in the register did not tally with the admitted writing of the accused. Thus, we are of the view that the prosecution has failed to prove this circumstance by credible evidence.

13. In view of the aforesaid the statement made by PW5 is not admissible inasmuch as there is no other evidence to corroborate his testimony.

14. Moreover, despite several opportunities granted to the prosecution they have failed to bring on record the MLC so as to

establish the primary allegations of giving beatings to the injured by the appellants. Admittedly, there is no recovery affected from the appellants and the disclosure statement made by them is inadmissible in evidence. Thus it is not the case where the prosecution has proved its case beyond reasonable doubt.

15. In these circumstances, the appeal filed by both the appellants are allowed. The appellants be released forthwith in case they are not wanted in any other case. Copy of the order be sent to the Jail Superintendent for compliance. TCR be also sent back.

MOOL CHAND GARG, J.

AUGUST 06, 2009
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