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HIGH COURT OF DELHI : NEW DELHI

Date of hearing: April 27, 2009

Date of Order: May 11, 2009

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Crl. Appeal No. 182 of 2009

% Virender Pratap Mourya ... Appellant
Through: Mr. Ramesh Rawat and Mr. Narender
Sharma, Advocates

versus

The State ... Respondent
Through: Mr. Amit Sharma, Additional Public
Prosecutor for the State

**CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR**

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

SUNIL GAUR, J.

1. Just five days before the Christmas of the year 2006, it was evening time, when Ms. Deepmala, a Interior Designer, alighted from a bus at Padmini Enclave bus stop in Hauz Khas, Delhi and she started walking towards her house. When she was passing through C-3 Block of Safdarjang Development Area, she was hit by motorcycle and she fell down. The pillion rider of the motorcycle came close to her and snatched her purse and thereafter, both the assailants fled away on their motorcycle.

2. Ms. Deepmala was taken to hospital for treatment and information regarding this incident was received by the local police but since Ms. Deepmala was not fit for giving her statement, therefore, no legal action was initiated on the day of the incident and it could be done on 23rd December, 2006 when Ms. Deepmala gave a Complaint (Ex.PW-10/C). Thereafter, legal proceedings commenced. Appellant/accused had refused to participate in the Test Identification Parade. Once the investigation was completed, charge sheet for the offences punishable under section 394/397/34 of Indian Penal Code was filed against Appellant and his co-accused before the court concerned.

3. A charge under section 394/34 of Indian Penal Code was framed by the trial court against Appellant and his co-accused and they chose to contest the aforesaid charge. Iqbal Qureshi – co-accused of the Appellant was also charged for commission of the offence under section 397 of Indian Penal Code.

4. During the trial, not only the evidence of the Complainant/first informant Ms. Deepmala (PW-1) was recorded but also of Head Constables – Ombir Singh (PW-4), Sant Raj (PW-5), Bachu Singh (PW-9), who had participated in the investigation of this case. Surinder Singh (PW-7) is the landlord of the accused, who had deposed before the trial court that Appellant and his co-accused, alongwith the police and come to their tenanted accommodation

on 21st December, 2006 and at the instance of the appellant, a mobile phone Ex.P-1 (also Ex.P-4) was recovered from his room. Parvinder Singh (PW-8) deposed that he had sold mobile phone Ex.P-1 (also Ex.P-4) to Complainant (PW-1). Inspector – Rajesh Dahiya, (PW-10) is the Investigating Officer of this case.

5. Trial court had put the incriminating evidence to the appellant and his co-accused and had questioned them in order to find out, as to why they have been falsely implicated in this case. The stand of the appellant and his co-accused was of denial and they did not lead any evidence in their defence. However, co-accused Iqbal Qureshi had got examined himself as DW-1 in his defence.

6. The trial ended in the conviction of the appellant and his co-accused for the offence under Section 394/34 of Indian Penal Code and they have been sentenced to undergo rigorous imprisonment for three and half years each with fine of Rs.1,500/- each, which is impugned in this appeal by appellant – Virender Partap Mourya.

7. After having heard both the sides and upon careful perusal of the evidence on record, I find that the contentions raised on behalf of the appellant are primarily relating to MLC of injured (PW-1) not being proved and of the Test Identification Parade proceedings being not duly proved and of the recovered articles being produced in the court in unsealed condition and of site plan of the spot not

being at the instance of the complainant (PW-1). However, the principle submissions advanced on behalf of the appellant were that impugned conviction being bad in law as the star witness, i.e., complainant (PW-1) had failed to identify the appellant as an accused and had also failed to identify the recovered articles as the one belonging to her and of there being delay of three days in lodging of the FIR in question. According to the learned Counsel for the appellant, all this renders the prosecution case doubtful, impugned conviction illegal and entitles the appellant to a clean acquittal.

8. On behalf of the respondent-State, it has been asserted by Additional Public Prosecutor for the State that injured complainant (PW-1) may not have identified the appellant as an accused and the recovered articles before the trial court by taking the plea of lapse of time, but the recovered mobile phone Ex.P-1 (also Ex.P-4) is proved to be of the complainant (PW-1) and is also proved to have been recovered from the appellant and therefore, the presumption under section 114 of the Evidence Act has been rightly raised against the appellant by the trial court and since the appellant has failed to rebut the aforesaid presumption, therefore, his conviction is justified and the sentence imposed upon him is reasonable one.

9. The question which falls for consideration in this appeal is

that when star witness, i.e., injured/complainant (PW-1) expresses inability to identify the accused as assailant, by taking the plea of '*lapse of time*', then, whether it is open to the trial court to convict the appellant by drawing a presumption under Section 114 of the Evidence Act upon recovery of mobile phone Ex.P-1 (also Ex.P-4) of the complainant from him?

10. The contentions raised on behalf of the appellant regarding Test Identification Parade proceedings, MLC of the injured being not formally proved and of recovered articles being not identified by the complainant and there being delay of three days in lodging of the FIR, are all inconsequential in view of the fact that complainant (PW-1) is unable to identify the appellant as the assailant and is also unable to identify the purse containing the recovered articles.

11. From the evidence of the landlord (PW-7) of the appellant and from the evidence of the Investigating Officer (PW-10), the recovery of the mobile phone (EX. P-1) from the room of the appellant and at his instance, stand duly proved on record and the aforesaid evidence remains unassailable. Furthermore, from the evidence of Arvinder Singh (PW-8), it stands amply proved that mobile phone EX. P-1 (also EX.P-4) was sold to the complainant (PW-1).

12. On the basis of the aforesaid evidence, trial court drew a

presumption under Section 114 of the Evidence Act against the appellant, by noting that this incident is of 20th December, 2006 and the recovery of the mobile phone in question was effected on the next day. Trial court has used the circumstance of refusal to participate in Test Identification Parade by the appellant, to label the appellant as a thief and because appellant was unable to explain the possession of the recovered mobile phone, it has been concluded by the trial court that these circumstances establish that appellant had robbed the complainant of her mobile Ex. P-1 (also Ex. P-4) and proceeded to convict the appellant for the offence under Section 394/34 of the IPC.

13. The aforesaid approach of the trial court is erroneous as theft would become robbery only when the complainant / injured points a finger at the accused to pin point that the accused is the assailant who had robbed the complainant. In the absence of the incriminating evidence of the complainant/ injured, the offence of theft will not become robbery and therefore, the conviction of the appellant for the offence under Section 394/ 34 of the IPC, cannot be sustained and is hereby set aside. However, since the possession of the complainant's mobile phone EX. P-1 (also EX. P-4) with the appellant remains unexplained, therefore, by invoking presumption under Section 114 of the Evidence Act, what at best, can be said is that the appellant was found in illegal possession of

the mobile phone of the complainant on the next day of this incident and that the adverse inference which would be drawn against him is that Appellant was in illegal possession of mobile phone (Ex.P-1) of the Complainant and the offence committed by the appellant would fall under Section 411 of the IPC which provides for a maximum sentence of three years.

14. In the light of the aforesaid narration, the obvious answer is that by invoking presumption under Section 114 of the Evidence Act, on the basis of the recovery of complainant's mobile phone Ex. P-1 (also Ex. P-4) soon after this incident, brings the offence committed by the appellant, within the sweep Section 411 of the IPC but it still remains beyond the scope of Section 394 of the IPC. Resultantly, the conviction of the appellant is altered from Section 394 of the IPC to Section 411 of the IPC, being the lesser offence.

15. On the quantum of sentence, no submissions were advanced on behalf of the appellant. Incidents like the present one, are on the rise and the need of the hour is that the sentence imposed, ought to have deterrent effect. Therefore, while altering the conviction of the appellant, the sentence which deserves to be imposed upon the appellant is of two years and nine months for the altered offence, with fine of Rs.1,500/- and in default of payment of fine, Appellant shall undergo simple imprisonment for a period of two months. It is ordered accordingly.

16. This appeal is partly allowed to the extent indicated above. Appellant is in custody. He be apprised of this order through he concerned Jail Superintendent.

17. This appeal stands disposed of with direction, as aforesaid.

Sunil Gaur, J.

May 11, 2009
rs/pkb