

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

% Judgment reserved on: 18.09.2009
Judgment delivered on: 15.12.2009

Crl. Appeal No.1068/2006

GULSHAN Appellant

vs

STATE THROUGH GOVT. OF NCT, DELHI Respondent

AND

Crl. Appeal No. 425/2008

MANOHAR LAL Appellant

vs

STATE THROUGH GOVT. OF NCT, DELHI Respondent

AND

Crl. Appeal No. 1069/2006

SATISH KUMAR Appellant

vs

STATE THROUGH GOVT. OF NCT, DELHI Respondent

Advocates who appeared in this case:

For the Appellants	: Ms Vasudha V Indurkar & Mr Mukesh Jhakar, Advocates for the appellant in Crl.A. 1068/2006 Mr Atul Kumar, Ms Sweety Singh & Ms Archana Kumari, Advocates for the appellant in Crl.A. 425/2008. Mr A K Singh, Mr S K Singh & Mr Shiv Khanna, Advocates for the appellant in Crl.A. 1069/2006.
For the Respondent	: Mr Amit Sharma, Additional Public Prosecutor for the respondent-State.

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may
be allowed to see the judgment ? No

2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. The captioned appeals have been filed by three persons who are convicted for various offences under the Indian Penal Code, 1860 (in short the 'I.P.C.') by a common judgment. Each of the convicted persons, as indicated hereinabove, has preferred a separate appeal. Manoharlal is the appellant in Crl. A. No.425/2008 (hereinafter referred to as 'Manoharlal'); Gulshan is the appellant in Crl. A. No. 1068/2006 (hereinafter referred to as 'Gulshan'); while Satish Kumar is the appellant in Crl. A. No.1069/2006 (hereinafter referred to as 'Satish'). Collectively, I shall be referring to them as the appellants. While Gulshan and Satish were charged under Sections 392/394/397/34 of the I.P.C.; Manoharlal was, in addition to the said offences, also charged under Section 411 of the I.P.C.

1.1. The trial court vide its judgment dated 08.11.2006 and sentence dated 09.11.2006 has convicted Manoharlal only for offences punishable under Sections 394/397 read with Section 34 of the I.P.C., while Gulshan and Satish were convicted for offences under Section 394/34 of the I.P.C.

2. The prosecution's version is as follows: On 23.04.2004 at about 5.15 pm one Prashad Bhai, i.e., the complainant (PW1) who was working as a teacher in the Adhyatmic Ishwariya Vishwavidhalya at the relevant point in time, while taking a stroll in the Teachers Park, Nimri Colony, Delhi (in short 'Teachers Park') was waylaid by four persons aged between 20 to 25 years. Out of the four persons, one of them, who was holding a knife in his hand, removed, a sum of Rs 1200/- from the top pocket of PW1's shirt, and a mobile phone (make- Nokia 3350) kept in the left hand pocket of his trousers, at the threat of an injury.

3. This information was received at police post Wazirpur, Police Station, Ashok Vihar and was recorded as DD Entry no. 28. Immediately thereafter, H.C. Hemraj and Constable

Dinesh Kumar reached the site of the incident, that is, the Teachers Park. The statement (Ex PW1/A) of the complainant (PW1) was recorded at about 7.40 pm. Based on the statement of the complainant, a rukka was prepared, which was sent to the police station for registration of a FIR. The FIR (Ex PW3/A) was registered at 8.10 pm.

4. The prosecution, in support of its case, cited 11 witnesses. The defence has not led any evidence. The trial court, however, has recorded the statements of the appellants under Section 313 of the Code of Criminal Procedure Code, 1973 (in short the 'Cr.P.C.').

4.1 The complainant (PW1) in his examination-in-chief before the court repeated his statement made to the police, in the first instance, particularly with regard to the core aspects of the prosecution case, which was that: he spreads God's Messages, since he did not find enough people to convey the God's message, he was roaming in the Teachers Park; at about 5.15 pm, he was waylaid by four boys; one amongst the four boys held a knife to his person; and a sum of Rs 1200 was removed from the pocket of his shirt while a mobile phone (make- Nokia 3350) was taken from the left hand pocket of his trouser. He gave his mobile no. as 9891038272.

4.2 It is important to note that in his examination-in-chief, he testified that at the point in time when he was robbed by the appellants and their fourth accomplice (who incidentally was never arrested), he had received knife injuries on his right hand. Curiously, this fact was not stated by the complainant in the statement made to the police, in the first instance, on 23.04.2004.

4.3 The complainant (PW1), however, identified the three appellants who were present in court. The complainant also proved his statement made to the police (Ex PW1/A) and the signatures appended on it at point 'X'. He also testified that police had come to the spot and prepared a site plan (Mark X) on his pointing out the site of the incident. He deposed that his mobile phone which the appellants had robbed him of, was registered in the name of his friend one C. Sriram (PW4). He stated that the mobile phone was given by

PW4 to him for the purposes of performing 'Sewa'. He proved the cash bill and the warranty card of the said mobile phone, which was seized vide memo (Ex PW1/B), as also his signatures on it, at point X. PW1 also identified the mobile phone (Ex P3), which was taken out of a sealed parcel in court, after its seal (RVS) was broken. PW1 further testified that the day after the incident i.e., 24.04.2004 he had got himself treated at a hospital for injuries, sustained by him on his right hand, which were inflicted on him by one of the assailants. In this respect, he alluded to MLC (Mark X) prepared by the concerned doctor of Bara Hindu Rao Hospital. PW1 further testified that since his attention was focused on the money being removed from his shirt's pocket by the assailants, he did not realize that he had been injured till he suffered severe pain in his hand. PW1, however, categorically stated that eventhough he had sustained an injury on his right hand during the incident; he had not communicated this fact to the police in his statement (Ex PW1/A). He, however, clarified that the number of the mobile phone which was taken away by the appellants was 9899240315; which was the mobile number, alongwith the sim card number 20001982478, which he had given to the police, when his statement, in the first instance (Ex PW1/A) was recorded by the Police.

4.4 In his cross-examination, PW1 deposed that on being robbed, he went over to a nearby house which was half a furlong away from the site of the incident, from where, he called the police. PW1 further stated that the police personnel on his dictation recorded his statement. PW1 categorically deposed that he had given the description of the persons who had attacked him with the knife. Importantly, PW1 reiterated that he had not informed the police as regards the injury sustained by him on his right hand. PW1 denied the suggestion that he had identified the appellants on the say so of the police. PW1 further deposed that he was not in a position to give any identification marks, such as height, complexion and the appearance of the fourth accused. PW1, however, stated that if the fourth accused was brought before him, he would be in a position to identify him. PW1 stated that he was with the police on the date of the incident till about 8 to 8.30 pm. PW1 further testified that he had visited the hospital on 24.04.2004. PW1 also stated that he had visited the police

station 2-3 days after the incident, which is when his statement was recorded. He further deposed that the said mobile phone was gifted to him by his friend C. Sriram (PW4) in January, 2004; however, the cash invoice in respect of the same was not handed over by him at that point in time. He denied the suggestion that the appellants were not the persons who had attacked him on 23.04.2004 or that he was not attacked with a knife which caused injuries on his person.

5. Constable Vinod Kumar (PW2) testified to the effect that on the date of the incident at about 5.15 pm they had received information at police post Wazirpur, JJ Colony, Police Station Ashok Vihar, Delhi with respect to a robbery having been committed. PW2 stated that on receiving the information, he alongwith H.C. Hemraj proceeded to the site of the incident, where the statement of PW1 was recorded. PW2 further stated that based on the statement of PW1, a rukka was prepared which he took to the police station for registration of the FIR. He stated that the investigation of the case was handed over to the ASI Rajinder (PW11); whereupon he accompanied ASI Ranjinder (PW11) to the site of the incident at about 5.15 pm. A site plan was prepared by PW11 at the pointing out of PW1. In his cross-examination, PW2 accepted that he reached the site of the incident at about 5.30 pm. PW2 also accepted the fact that he had left the site of the incident for registration of the FIR at about 6.45 pm, and he re-visited the site of the incident alongwith ASI Rajinder (PW11) at 8.15 pm. He accepted the fact that PW1 was with them on the date of the incident till about 9.00 pm. To be noted that PW2 testified that neither did he nor anyone else noticed any injury on the person of PW1.

6. H.C. Dinesh (PW3) testified with respect to the fact that the FIR (Ex PW3/A), based on the rukka brought to him by PW2 (at about 8.00 pm) was prepared by him, which bore his signatures at point X. PW3 also stated that rukka (Ex PW1/A) bears his signatures at point X. Importantly, PW3 testified that on 02.05.2004, while he was posted as the duty officer at police station Ashok Vihar, at about 10.00 pm, Constable Rajinder Singh (PW10) brought a rukka signed by H.C. Chetrapal based on which he recorded FIR No. 303/04 (Ex

PW3/C). He proved his signatures at point X, on FIR 303/04. He further deposed that about 10.15 pm, Constable Praveen Kumar brought another rukka based on which he recorded FIR 304/04 (Ex PW3/D). He proved his signatures at point X on FIR 304/04.

6.1 Importantly, PW3 was not cross-examined.

7. C. Sriram (PW4) testified that on 01.04.2003 he had brought from Kuala Lumpur, a Nokia mobile phone model 3350 bearing IMEI no. 351108301100182. This mobile phone was gifted by him to PW1 in January, 2004; however, the papers i.e., the cash memo and warranty card were handed over to PW1, only on 18.05.2004. In his cross-examination, he accepted that there was no writing work in place with respect to the mobile phone handed over by him to PW1. In the cross-examination, he also denied the suggestion that he had not given the mobile phone to PW1, and that the same had been lost. PW4 also identified the cash bill (Ex P1) and the warranty card (Ex P2).

8. PW5, Sh Yogender, Manager of a distribution concern of the manufacturers of mobile phone, deposed that, he was not in a position to shed any light on the cash bill (Ex P1) and the warranty card (Ex P2) of the mobile phone in issue.

9. PW6, Constable Jagbir testified that he and Constable Rajinder Singh had apprehended Gulshan at Haryana Nahar, Tapakna Pool under Section 25 of the Arms Act, 1959 (in short the 'Arms Act') in connection with the case registered as FIR No. 303/04. He deposed that this information was communicated to H.C. Chetrapal who was handed over a knife recovered from Gulshan. He further stated that H.C. Chetrapal recorded the disclosure statement of Gulshan (Ex PW6/A), which bears his signatures at point X, and that of Gulshan at point Y. He categorically stated that Gulshan, in his disclosure statement had revealed the commission of offence, at the Teachers Park. He also proved Furd Nishandehi (Ex PW6/B) which bears his signatures at point X, and that of Gulshan at point Y.

10. PW7, Dr Om Prakash Prashad who was posted as MO Surgery, at Hindu Rao Hospital proved the opinion recorded by him on the MLC (Ex PW7/A) pertaining to PW1. Importantly, in his cross-examination he did not rule out the possibility of the injuries referred to in the MLC being self-inflicted.

11. PW8, Constable Praveen Kumar, deposed that on 02.05.2004 he was posted at police post JJ Colony, Wazirpur, PS Ashok Vihar, Delhi. He testified that on the said date while he was on a patrolling duty alongwith Constable Rajinder Singh, at about 8.30 pm they came across Manoharlal. On seeing them he tried to flee away which is when, he was apprehended. Manoharlal's search revealed that he was carrying a button actuated knife. He further stated that this message was sent to Head Constable Hemraj Singh on wireless. On receiving the message, Head Constable Hemraj Singh reached the spot, in about 10 minutes. A case, being FIR No. 276/04 was registered against Manoharlal. Manoharlal also made a disclosure statement (Ex PW8/A) which bore his signatures at point A, wherein he revealed the commission of the offence at Teachers Park. He also proved the arrest memo (Ex PW8/B) and his signatures on it at point A. Similarly, he also proved the personal search memo (Ex PW8/C) prepared pursuant to the personal search of Manoharlal. The pointing out memo (Ex PW9/A) prepared at the behest of Manoharlal, which bore his signatures at point A, was also proved by him. In his cross-examination, PW8 testified that on Manoharlal being apprehended a knife was recovered from him; consequently, a case, being FIR No. 304/04, under Section 25 of the Arms Act was registered, at Police Station Ashok Vihar. In the said case, a disclosure statement (Ex PW8/B) which bore his signatures at point A was made with respect to the offence committed at Teachers Park. Furthermore, PW8 denied the suggestion made to him in cross-examination that neither did Manoharlal make any disclosure statement, nor was any knife recovered from him. He also denied the suggestion that Manoharlal had actually been apprehended from his house.

12. PW9, Constable Ashok Kumar testified that on 18.05.2004, while he was posted at Police Station Ashok Vihar; PW1 came to the Police Station and produced before the ASI

Rajinder Singh (PW11) the cash invoice MJ 042 dated 01.04.2003, and the warranty card, in respect of the Nokia mobile phone, model No. 3350 bearing IMEI no. 351108301100182. He also proved the seizure memo with respect to the same, being Ex PW1/B; the cash bill (Ex P1); and the warranty card (Ex P2). He also proved the seizure memos with respect to the said cash bill and warranty card (Ex PW1/B). In his cross-examination, PW9 stated that he did not recollect whether PW1 had signed the seizure memo. He, however, denied the suggestion that PW1 had not produced the cash bill and the warranty card, or that the seizure memo (Ex PW1/B) was not prepared in his presence.

13. PW9, Krishan Kumar, Court official of Sh Raj Kapoor, MM, Delhi (also inadvertently shown as PW9 in the trial court record) produced for examination of the trial court, the original judicial file pertaining to the case against Manoharlal, being FIR No. 304/04. He deposed that the original pointing out memo, the copy of which is Ex PW9/A, as well as the original disclosure statement, the copy of which is Ex PW9/B, was in the judicial file of the said court.

14. Constable Rajinder Singh, Belt No. 2321 (PW10), testified with respect to the fact that Gulshan was apprehended by him at about 8.15 pm, on 02.05.2004 while he was on a patrolling duty alongwith Constable Jagbir Singh, in A-Block Haryana Nahar, Tapakna Pool. He also testified that on a personal search of Gulshan, a knife was recovered, as also the fact that he made a disclosure statement (Ex PW6/A). PW10 also proved the personal search memo, and the arrest memo being Ex PW10/A and Ex PW10/B. He testified that Manoharlal and Satish were arrested from their house in his presence. He proved the personal search memo and arrest memo being Ex PW10/D and Ex PW10/E respectively and his signatures at point A on the said exhibits. He further proved that the disclosure statement of Satish (Ex PW10/F) and the pointing out memo (Ex PW10/G). Importantly, he stated in his testimony that the said mobile phone was seized by the I.O. (PW11) vide possession memo (Ex PW10/H) which bears his signatures at point A. Curiously, in response to a leading question by the prosecution he stated that the mobile phone (Ex P3) was recovered from the room of Manoharlal in

House No. K-123, JJ Colony, Wazirpur, Depot. He deposed that the same was lying on the TV in his room. Furthermore, in his cross-examination PW10 alluded to the fact that Manoharlal and Satish were arrested at about 11-11.30 pm from their respective houses. As regards Satish, PW10 stated that he was arrested from his house. He accepted the fact that eventhough the relatives of Satish were present at the house their signatures were not obtained on any document.

15. ASI Rajinder Singh (PW11) testified that on 23.04.2004, while he was posted at Ashok Vihar Police Station, he was handed over the FIR by Constable Vinod Kumr (PW2) with regard to an incident of robbery having been committed at Teachers Park. PW11 stated that he reached the site of the incident alongwith H.C. Hemraj. PW11 testified that on reaching there he prepared a site plan (Ex PW11/A) which bears his signatures at point A. He further testified that on 02.05.2004, H.C. Chetrapal and H.C. Hemraj Singh informed him that they had arrested Manoharlal and Gulshan in two separate cases being: FIR Nos. 303/04 and 304/04, respectively. He, thus, stated that they were formally arrested by him in the present case. He proved the arrest memos of Manoharlal and Gulshan being Ex PW8/B and Ex PW10/B respectively. He also testified that Satish was arrested from his house vide arrest memo Ex PW10/E. He testified that the said arrest memo bears his signatures at point B. He also proved the personal search memos of all the three accused persons Exs PW10/A, PW10/D and PW8/C, and also his signatures at point B. He specifically testified that the mobile phone was recovered from the house no. K-123, JJ Colony, Wazirpur, Delhi of Manoharlal, in respect of which a seizure memo (Ex PW10/H) which bears his signatures at point B, was prepared by him. He also testified that on 18.05.2004, the complainant (PW1) handed over the cash bill and warranty card to him which was seized vide memo (EX PW1/B), and that it bore his signatures at point B. He also stated that the MLC of PW1 (Ex PW7/A) was taken on record. He specifically testified that application for Test Identification Parade (TIP) was moved before the concerned Metropolitan Magistrate with respect to the appellants. He stated that the appellants

refused to participate in the TIP. He identified the mobile phone (Ex P3) on being shown to him in Court, as the one which was recovered from accused Manoharlal.

16. In their statement under Section 313 of the Cr.P.C., the only response which the appellants gave was that they had been falsely implicated.

17. In the background of the aforesaid, submissions were made on behalf of Gulshan by Mrs. Vasudha V. Indurkar, Advocate; on behalf of Manoharlal by Mr. Atul Kumar, Advocate; and on behalf of Satish by Mr A.K. Singh, Advocate. The summation of the submissions made by the learned counsels in support of their respective appeals is as follows:

(i) in the statement made to the Police by the complainant (PW1) in the first instance, he had not given any description of the appellants. The fact that the appellants were identified for the first time in Court by the complainant (PW1), is a testimony, which ought not be relied upon by the court;

(ii) the version of the prosecution is unbelievable, and the testimony of PW1 is untrustworthy for the reasons that; firstly, eventhough the incident happened in a public park, no public witness was examined by the prosecution and secondly, while the complainant (PW1) remembered the sim card number which he gave to the police in his first statement (Ex PW1/A), he was unable to give the number which is inscribed on the phone set i.e., IMEI number;

(iii) the version given by the complainant is unbelievable, which is evident from the fact that he made a reference to two mobile numbers, one which relates to the mobile phone which was robbed (i.e. mobile number 9899240351) and the other being mobile number 9891038272, which also finds a mention in his statement made to the police;

(iv) eventhough Constable Vinod Kumar (PW2) in his testimony stated that they had received information about the incident at 5.15 pm and that they had reached the spot at 5.30 pm the DD entry records the time of the said incident as 6.00 pm;

(v) that the entire version of the prosecution that the PW1 had suffered an injury was fabricated. This was evident from the fact that eventhough as per the testimony of PW2

they were with the complainant for not less than 3-4 hours, the injury on the complainant was neither noticed by the police personnel who visited the site of the incident, nor was it reported by the complainant to them. In this connection, reference was made to the deposition of Dr Om Prakash Prashad (PW7) who deposed that the injury in respect of which he had given an opinion could be self-inflicted;

(vi) the knife which was evidently used during robbery by the appellants, by which injury was inflicted on the complainant (PW1), was not produced by the prosecution;

(vii) the prosecution has failed to connect the appellants to the crime. The reliance by the prosecution on the disclosure statement of Gulshan (Ex PW6/A) and the pointing out memo (Ex PW6/B) of Gulshan for the purposes of connecting Manoharlal and the disclosure statement of Manoharlal (Ex PW9/B) and his pointing out memo (Ex PW9/A) for connecting Satish to the crime is inadmissible as evidence in law as it is hit by the provisions of Sections 25 to 27 of the Evidence Act;

(viii) in conducting the TIP, the prosecution has not followed the provisions of Section 294 of the Cr.P.C. In this connection, reliance was placed on the order of the Court dated 26.04.2005. Based on the said order, it was contended that the only TIP proceedings which were exhibited were that pertaining to Manoharlal, which was marked as 'PY'.

(ix) the testimony of PW10 and PW8 was contradictory, in as much as, while PW10 deposed to the effect that Manoharlal and Satish were arrested from their respective houses, in his presence; PW8 deposed that Manoharlal was arrested on 02.05.2004, while he was on patrolling duty alongwith Constable Rajinder Singh, at about 8.30 pm when, Manoharlal was coming from the direction of Shanti Nagar and proceeding to Bharti Nagar Nala. There being an apparent contradiction, their testimony cannot be relied upon.

(x) The provisions of Section 397 are not attracted in this case as the entire version of the prosecution witnesses with regard to the complainant being robbed at the threat of a knife being held to his person and the resultant injury to his right hand is fabricated. In

the alternative, it was submitted that since the injury as per the MLC (Ex PW7/A) has been classified as 'simple' the provisions of Section 397 are not attracted.

18. On the other hand, Mr Amit Sharma, learned APP submitted that the complainant (PW1) had consistently stated, both in his statement before the police as also in court, that on 23.04.2004 at about 5.15 p.m. while he was taking a stroll in the Teachers Park, he was robbed by four persons aged between 20 to 25 years. The fact that a sum of Rs 1200 was removed from the top pocket of his shirt and the mobile phone (make- Nokia 3350) from the left hand pocket of his trouser, by being shown a knife, was clearly adverted by the complainant, both in his statement to the police, as well as his testimony in the court.

18.1 The injury, which the complainant (PW1) suffered by virtue of the knife used in the incident, had been explained adequately by him in his examination-in-chief in the court. The learned APP submitted that even if it is assumed that an injury had not been inflicted upon the complainant even then a charge under Section 397 of the IPC was made out; since for the purposes of conviction under the said provisions the victim need not be inflicted with injury.

18.2 The learned APP further submitted that the submission of the learned counsel for the appellants that the description of the appellants was not provided by the complainant (PW1), in the first instance, and that they were identified for the first time in the court, is not quite accurate. He submitted that the complainant, in his statement, has referred to the fact that the assailants were four in number between the ages of 24 to 25 years and this fact is recorded in the DD entry.

18.3 As regards the submission of the learned counsel for the appellants that the TIP proceedings were not proved, the learned APP in rebuttal submitted that it is not the case of the defence that the TIP proceedings were not refused by the appellants. Eventhough the TIP proceedings were exhibited vis-à-vis only Manoharlal; this fact was put to each of the appellants by the court while recording their statement under Section 313 of the Cr.P.C. He submitted that in response thereto, each of the appellants stated that since

the police had already shown them to the complainant (PW1), as well as the other prosecution witnesses, they had refused to participate in the TIP proceedings. The learned APP also submitted that neither was the I.O. (PW11) cross-examined on this issue nor there was any suggestion made to the complainant (PW1) as regards the fact that the appellants had already been shown to him, prior to his being asked to identify them in court.

18.4 The learned APP submitted that there were, as a matter of fact, two constables of the same name, that is, Rajinder Singh. Thus he sought to demonstrate by referring to the belt number. In so far as constable Rajinder Singh (PW10) Belt no. 2321 was concerned, he was responsible for apprehending Gulshan at about 8.15 p.m. on 02.05.2004 along with constable Jagbir (PW6). Whereas Manoharlal was apprehended by another constable with the same name, that is, Rajinder Singh, Belt no. 2545 under the Arms Act in connection with FIR No. 304/04, on 02.05.2004. Therefore, it was not as if, as sought to be represented by the counsel for the appellants, that a near impossible feat was achieved by constable Rajinder Singh in arresting Gulshan and Manoharlal around the same time from two different places. The learned APP also tried to explain another doubt, which the defence had sought to create, which was that constable Rajinder Singh (PW10) Belt no. 2321 had stated in court that Manoharlal was arrested from his house while his arrest, as per the arrest memo, were shown at the police post. It was submitted that as a matter of fact Satish had been arrested from his house, and the seizure memo which was drawn up with respect to the mobile phone, had been witnessed by Manoharlal. He submitted that PW10 perhaps got confused and, therefore, end up stating that Manoharlal was arrested from his house instead of stating that he had been arrested at the police post. In any event, the learned APP submitted that no question whatsoever in cross-examination was put to the I.O. (PW11) to enable him to explain the purported contradiction between the arrest memo and the deposition of Rajinder Singh (PW10) in respect of place of arrest of Manoharlal.

18.5 Mr Amit Sharma, learned APP further submitted that there was no doubt whatsoever that in this particular case the complainant (PW1) had been robbed. The persons, who had robbed the complainant (PW1), had been identified in court. The mobile phone (make-Nokia 3350) and the money, in issue, had also been recovered from the appellants. The fact that the mobile phone had been bought and thereafter gifted to the complainant was proved by C. Sriram (PW4).

18.6 While concluding, the learned APP submitted that there was no reason to doubt the veracity of the testimony of the complainant (PW1) as no case of any animosity vis-à-vis the appellants had been set up by the defence. As a matter of fact he submitted that the MLC (Ex.PW7/A) with regard to injury inflicted on the accused had been proved. He further submitted that a careful perusal of the MLC would show that there was no fresh bleeding, which, according to him, meant that it was not as if the injury was self-inflicted. The learned APP submitted that in any event even if the complainant's testimony, with regard to injury, is disbelieved there is no reason for the court to disbelieve his testimony with regard to the fact that he was robbed. It was the contention of the learned APP that it is well settled that in situation such like this the court can accept at least a part of the testimony which is credible and discard that which is doubtful and not supported by adequate corroborative evidence.

19. I have heard the learned counsel for the appellants as well as the learned APP. In my view there are two aspects to the incident, which occurred on 23.04.2004. The first aspect of the incident is that the complainant (PW1), who is a teacher with the Adhyatmic Ishwariya Vishwavidhalya was, taking a stroll in the Teachers Park on 23.04.2004, when at about 5.15 p.m. he was waylaid by four persons aged between 20-25 years. The four persons, which included the appellants, robbed the complainant (PW1) of cash amounting to Rs 1200/- and a mobile phone (make- Nokia 3350). Immediately upon incident having occurred, the complainant (PW1) made a call to the police station from a nearby house. The incident is recorded in the DD entry no. 28. The DD entry records that the information was received at 6.00 p.m., based on which a

team of police officers was despatched to the site of the incident. The statement (Ex. PW1/A) of the complainant (PW1) was recorded. This was the first statement that the complainant had made to the police. In this statement the core aspects of the incident have been alluded to, in particular, with respect to the time of the incident, which is mentioned as 5.15 p.m.; the fact that the complainant (PW1) had been waylaid by four persons in the age group of 20-25 years; and that he had been robbed of Rs 1200/-, and a mobile phone [make- Nokia 3350, No. 9899240315, and a sim card no. 20001982478]. Based on the statement the FIR (Ex. PW3/A) was registered at around 8.10 p.m. on the same day. A perusal of the FIR would show that there is a reference to both the mobile phone, which the complainant was robbed of, and the other mobile phone, which was evidently given as a contact number to the police. On reading the statement (Ex. PW1/A), given by the complainant to the police, in the first instance, and the FIR (Ex. PW3/A), I do not find that there is any inconsistency. The prosecution has also been able to prove the fact that a mobile phone had been bought by C. Sriram (PW4) which he had gifted to the complainant (PW1). PW4 had proved the cash bill (Ex. P-1) as well as the warranty card (Ex. P-2). The fact that the mobile phone had been gifted by PW4 to the complainant (PW1) has also been proved by the prosecution. The fact that the said exhibits, that is, the cash bill (Ex. P1) and the warranty card (Ex. P2) were submitted much after the date of the incident would not impact the case of the prosecution for the reason that it is not unnatural that where articles like mobile phones, which are quite common, are gifted often the original invoice and warranty card remain with the persons who has made the gift. PW4 in his cross-examination, specifically denied the suggestion that in reality he had in fact lost the mobile phone, and to cover up the same he had weaved the story of having bought the mobile phone from Kuala Lumpur and then gifted the same to the complainant (PW1) in January, 2004. The I.O., ASI Rajinder Singh (PW11) has testified in court that on receiving a copy of the FIR (Ex. PW3/A) he alongwith constable Vinod Kumar went to the site of the incident where he was met by the complainant (PW1) as well as H.C. Hemraj. On reaching the site of the incident, he

prepared a site plan (Ex. PW11/A), which was proved by him as also the signatures at point 'A'. This site plan was obviously prepared at the instance of the complainant (PW1). PW11 also testified that on 02.05.2004, H.C. Chetrapal and H.C. Hemraj informed him that they had arrested the accused Manoharlal and Gulshan in separate cases, who had disclosed their involvement in the commission of offence in the Teachers Park. As a matter of fact, Manoharlal in his disclosure statement had also alluded to the fact that he could get the mobile phone (which they had robbed of the complainant) which was at his house. The photocopies of the documents concerned with the case, that is, FIR No. 303/2004 and 304/2004, registered in police station Ashok Vihar, as per the testimony of PW11, were also handed over to him by H.C. Chitrapal and H.C. Hemraj. He identified Manoharlal and Gulshan, who were present in court. PW11 also deposed that both Manoharlal and Gulshan were then formally arrested by him vide arrest memos Ex. PW8/B and Ex. PW10/B respectively. PW11 categorically stated that the other accomplice Satish was arrested by him from his house vide arrest memo (Ex. PW10/E). He proved the aforesaid arrest memos and his signatures on them. PW11 also proved the personal search memo pertaining to three appellants, that is, Ex. PW10/A, Ex. PW10/D & Ex. PW8/C and his signatures on them at point 'B'. The factum of recovery of the mobile phone (make- Nokia 3350) from the house of Manoharlal, that is, K-123, J.J. Colony, Wazirpur, Delhi was also adverted to by PW11 in his testimony in court. PW11 testified that, on recovery, the mobile phone was taken possession of by him vide seizure memo (Ex. 10/H) which bore his signatures at point 'B'. He further stated that the said mobile phone was put in a packet and sealed with his seal 'RVS'. PW11 also testified that on 18.05.2004 the cash bill and the warranty card were seized by him vide seizure memo (Ex PW1/B) which bore his signatures at point 'B'. He also deposed that the MLC (Ex. PW7/A), pertaining to the complainant (PW1) was placed on record after the same had been submitted by the complainant. It is pertinent to note that, he categorically stated that the applications for conducting T.I.P. proceedings in respect of the appellants was moved before the concerned magistrate, and that all appellants had

refused to participate in the T.I.P. proceeding. He also identified the mobile phone (Ex. P3) as the one he had recovered from Manoharlal; on the sealed packet being opened in court. He further stated that on completion of investigation a chargesheet was prepared by him and filed in court. It is important to note that, curiously, as indicated hereinabove, PW11 was not cross-examined by the defence. In these circumstances, I have no reason to disbelieve the case set up by the prosecution as regards the fact that the complainant was robbed by the appellants. This is more so in view of the fact that the mobile phone (make- Nokia 3350), in respect of which the complaint had been lodged by the complainant (PW1), had been recovered from the house of Manoharlal, and the appellants were identified by PW1. Thus, the prosecution has been able to establish beyond reasonable doubt the appellants' connection with the offence of robbery. For these reasons, I have no doubt that the offence of robbery had been committed by the appellants, and in executing the offence there was a prior common intention in so far as the appellants are concerned. As a matter of fact, the learned counsel for the defence did not even attempt to make any submissions with regard to the prosecution having not been able to establish its case under Section 34 of the I.P.C.

20. The discrepancies referred to by the learned counsel for the appellants that PW2 and other police personnel reached the site of the incident at 5.30 p.m. while the DD entry records the time of the incident as 6.00 p.m., is in my view, a minor discrepancy. The fact remains that the incident occurred between 5.00 pm to 6.00 pm. There may have been some approximation adopted while communicating the time of the incident to the police station which was recorded as 6.00 pm in the DD entry.

21. This brings me to the other objection taken by the appellants with regard to admissibility of statement made by Manoharlal while in custody of the police. Section 27 of the Evidence Act lifts the prohibition contained in Sections 25 and 26 of the Evidence Act only with respect to proof of information given by an accused while in custody which results in a discovery of a fact. Manoharlal made a disclosure statement (Ex. PW8/A) while he was in the custody of the police. Manoharlal's statement led to a

discovery of the fact that the mobile phone, which he alongwith his accomplices had robbed of PW1, was in his house. PW8 and PW11 in their testimony have proved the information received from Manoharlal which led to recovery of the 'mobile phone' of PW1. The mobile phone is undoubtedly connected with the commission of the offence. Therefore, I do not see any merit in the submission of the learned counsel for the appellants with regard to inadmissibility of the disclosure statement of Manoharlal with respect to that part of the information which led to the discovery of fact that the mobile phone was in his house. [See *Pulkuri Kottaya vs Emperor AIR 1947 PC 67*; *Jaffar Hussain Dastagir vs State of Maharashtra (1969) 2 SCC 872* and *Pandurang Kalu Patil vs State of Maharaastra (2002) 2 SCC 490*]

22. The argument of the appellants' counsel that the provisions of Section 294 of the Cr.P.C. were not followed in so far as the T.I.P. of Manoharlal is concerned, is also without merit. Sub-section (3) of Section 294 of the Cr.P.C. makes it clear that where the genuineness of a document is not disputed, such a document can be read in evidence in any enquiry, trial or proceeding without any proof of signatures, at the discretion of the court. The order dated 26.04.2005 passed by the trial court categorically notes that the learned counsel for the defence had no objection to the T.I.P. of Manoharlal being removed from the sealed cover and marked as Exhibit PY. There was thus no prejudice caused to the appellants as averred or at all.

22.1 The related issue that the identification in court of the appellants is a weak form of evidence is also untenable in the facts of the present case. It is not disputed by the appellants that they refused T.I.P. on the ground that they had been shown to PW1 at a prior point in time; though there is nothing on record which will have me doubt the prosecution's version, which is, to the contrary. The appellants' were identified in court by PW1. The incident happened in broad day light. PW1 had every opportunity to recognize the faces of the appellants. The appellants refused T.I.P at their own risk. Therefore, in this case the testimony of PW1, identifying the appellants, cannot be

discarded. Identification in court is a substantive piece of evidence; T.I.P. only corroborates the sworn testimony of witnesses in court. [see *Suraj Pal & Ors vs State of Haryana (1995) 2 SCC 64* and *Malkhan Singh & Ors vs State of M.P. (2003) 5 SCC 746*]

22.2 I also tend to agree with the submission of the learned APP with respect to the explanation given vis-à-vis the apparent inconsistency in the testimony of PW8 and PW10 as to the place of arrest of Manoharlal, as also how PW10 could be at two places at the same time. These have been referred to by me in paragraph 18.4 above, and hence, I do not find any merit in the submission of the counsels for the appellants.

23. The other aspect of the case that in committing the offence the complainant (PW1) had been inflicted with injury or that there was any attempt to cause death or grievous hurt, in my view, has not been proved by the prosecution beyond a reasonable doubt. My reasons for coming to this conclusion are that in the instant case, first and foremost, the prosecution has not been able to produce the weapon of offence, that is, the knife. What casts a doubt on the prosecution's case is that the complainant (PW1) neither alluded to the fact that he had been injured on the date he first made a statement to the police, that is, 23.04.2004 nor was his injury noticed by any of the other police personnel who met PW1 on the date of the incident. As a matter of fact, all prosecution witnesses stated in court that they did not notice any injury on the person of the complainant. If there was any such injury, the complainant would have been in discomfort. It is quite unnatural that a wound inflicted by a knife would neither cause discomfort or go unnoticed. Even if the knife caused a simple injury, there is bound to be some bleeding. The contention of the learned APP that since the MLC (Ex.PW7/A), had been proved, the necessary inference that the complainant received the injury during occurrence of the incident on 23.04.2004; cannot be accepted. PW7 in his testimony, in court, has clearly stated that it is quite possible that the injury is self-inflicted. Therefore, in my view, even though the fact that the complainant (PW1) was injured is proved, what is not proved is that the injury was caused on 23.04.2004 and not

thereafter. In view of the fact that there was no recovery of the weapon, purportedly used in committing the offence of robbery, nor was the prosecution able to establish that an injury had been inflicted on the date of the incident, in my opinion, the appellants could not have been convicted for offences under Sections 394 and 397 of the I.P.C. The benefit of doubt must go to the appellants. I must, however, make it clear that for the purposes of conviction under Section 397 of the I.P.C., it is not a necessary ingredient that the victim should have been inflicted with an injury; an attempt to cause injury would suffice. However, in this case an attempt to cause injury by itself would not suffice because the case set up by the prosecution was that the injury in fact had been inflicted on the complainant (PW1). In these circumstances, I am of the opinion that all the appellants ought to have been convicted under Section 392 read with Section 34 of the I.P.C., and not as held in the impugned judgment by the trial court. Accordingly, the appellants are convicted in respect of offences under Sections 392 and 34 of the I.P.C.

24. Keeping in mind: the young age of the appellants; the fact that they have spent nearly 3 ½ (three and a half) years in incarceration; and lastly, that nearly five years have passed since the offence was committed – I am of the opinion that it would serve the interest of justice if the sentence of the appellants is reduced to period already undergone. In the event the appellants have not paid the fine, as ordered by the trial court and they do not deposit the same within two weeks from today, they shall undergo imprisonment for a further period of three months, as imposed by the trial court. The captioned appeals are, thus, partly allowed.

RAJIV SHAKDHER, J

DECEMBER 15, 2009

mb/kk