

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

% *Judgment Reserved on: 17th December, 2009*
Judgment Delivered on: 21st December, 2009

+ **CRL.A.601/2008 & CRL.M.(Bail)No.940/2008**

RAJESH ...Appellant
Through: Ms.Anu Narula, Advocate.

Versus

STATE ...Respondent
Through: Mr. Manoj Ohri, APP.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. On 29.2.2004 at 9.30 PM Raj Kumar PW-4 was coming on his three wheeler scooter from Rohini side. On the signal of a boy he stopped the vehicle at the Mangol Puri bus stop and agreed to take him along with his two companions to the Uttam Nagar Terminal. At Dholi Piau one of the three boys asked him to stop the vehicle as he was to meet his brother working in the Metro. The said boy then came back. At the same point of time another of those three boys came on the left side of PW-4 and put a knife on his thigh; Rs.595/- was snatched from PW-4; this money was snatched by the boy who had put the knife on the thigh of PW-4; the wrist watch of Pw-4 was also snatched; his TSR was forcibly taken away but on a chase by PW-4, accompanied by a policeman, Constable Mahesh Chand, PW-

5; the TSR was stopped and overpowered; one out of the three boys i.e. the present appellant Rajesh was apprehended at the spot along with knife. The statement of PW-4 Ex.PW-4/A was recorded on which endorsement Ex.PW-6/B was made by SI Jagat Singh pursuant to which the present FIR was registered.

2. The first report of this incident was recorded in DD No.25A. This DD Ex.Pw-6/A was marked to SI Jagat Singh PW-6 at 10.45 PM who reached the spot. PW-5 and PW-4 were already present at the spot. Appellant Rajesh who had been apprehended by PW-5 along with his knife was produced before PW-6; the sketch of the knife Ex.PW-4/D was prepared; it was taken into possession vide memo Ex.PW-4/E. Statement of the complainant Ex.PW-4/A was recorded. Site plan Ex.PW-6/C was prepared. The TSR was also seized vide memo Ex.PW-4/F. Torn shirt and the cut pant of the victim i.e. of PW-4 was taken into possession vide memo Ex.PW-4/B.

3. The co-accused Liyaqat Ali and Rakesh @ Paina were formally arrested in this case on 15.3.2004; they had disclosed about their involvement in the present case pursuant to their arrest in FIR No.130/2004 on 6.3.2004 at police station Kirti Nagar. Appeal of Liyaqat Ali has since been dismissed by a Co-ordinate Bench of this Court; co-accused Rakesh @ Paina was acquitted by the Trial Court giving him benefit of doubt.

4. Appellant before this Court is Rajesh. Version of the prosecution is hinged on the testimony of PW-4 the complainant and of PW-5 i.e. the policeman who had on his motorcycle reached there

by chance. He had helped PW-4 in apprehending Rajesh at the spot and with his help the TSR had also been seized.

5. Vide impugned judgment dated 22.9.2006 appellant had been convicted under Sections 397/392/411 of the IPC. Vide order of sentence dated 5.10.2006 he had been sentenced to undergo RI for a period of seven years for the offence punishable under Section 397 of the IPC; under Section 392 of the IPC he has been sentenced to undergo RI for five years and to pay a fine of Rs.5000/-, in default of payment of fine to undergo SI for six months; for the offence punishable under Section 411 of the IPC he had been sentenced to undergo RI for a period of one and half years. All the sentences were to run concurrently.

6. The nominal roll of the appellant had been called. As on 30.6.2009 he had suffered incarceration of about six years and three months; as on date he would have suffered incarceration of about six years and nine months; fine has not been paid; this appeal has been preferred from the jail.

7. On behalf of the learned counsel for the appellant, it has been pointed out that PW-4 is a hostile witness and he has not supported the version of the prosecution in any manner. In Court on oath he has categorically deposed that he cannot identify his assailant; he has refused to identify the appellant. In these circumstances the Trial Court had gravely erred in convicting the appellant. The version of PW-5 who had reached the spot subsequently cannot supercede the version of PW-4 and although PW-5 had supported the case of the prosecution yet his version has to be tested in the

light of the fact that he is a police official and he would have every interest to ensure that the trial ends in a conviction; it is in this light that the version of PW-5 has to adjudge. The entire incriminating circumstances as has been alleged by the prosecution had not been put to the accused in his statement under Section 313 of the Cr.P.C.; it has not been put to the appellant that at the point of knife the victim had been overpowered; his shirt had been torn; he had been chased; in the absence of this, these circumstances cannot be read against the appellant. The appellant had not been medically examined. The MLC of PW-5 shows that it had been conducted at 1.35 AM which does not match the time as given in the DD NO.25 which was the first information given to the police about the present incident which is timed at 1.45 AM. This also throws out the case of the prosecution as the prosecution has failed to explain as to how PW-5 was examined prior in time to the information of the incident having been reported at the local police station.

8. The last three submissions are factually incorrect. Question Nos. 2, 4, 5 and 7 were the incriminating circumstances put to the appellant in his statement under Section 313 of the Cr.P.C. MLC of the appellant was prepared at 10.50 P.M. on 01.03.2004; he was again reviewed on 03.03.2004. This is testified by Constable Jai Vir Singh, PW-2. Further DD No. 25-A was recorded at 10.45 P.M. not at 1.45 A.M.

9. Arguments have been countered by the learned public prosecutor. It is pointed out that the Co-ordinate Bench of this Court had appreciated the same submissions and the same evidence and

has dismissed the appeal of the co-accused Liyaqat Ali; judicial propriety demands that on the same set of evidence a different view cannot be taken. Attention has been drawn to the seizure memo Ex.PW-4/B of the shirt and the pant which shows that the shirt had been torn at one place and the pant also had a cut mark; it is submitted that although PW-4 is hostile qua the identity of the appellant in Court, yet he had admitted that he had given his statement Ex.PW-4/A in which the role of the present appellant has clearly been recited; PW-4 in Court has also identified his shirt and his pant; it is obvious that PW-4 had been won over by the accused in this intervening period i.e. from the date of the registration of the FIR to his deposition in the Court; in such circumstances the Courts have time and again held that reliance can be placed upon such a hostile witness as well; version of PW-5 fully corroborates the version of the prosecution.

10. Arguments have been heard; submissions and the counter submissions have been noted; record has been perused.

11. PW-4 is the complainant; he has on oath deposed that on the fateful day i.e. on 29.2.2004 at 9.30 PM while he was going on his TSR he was stopped by one person and the said person along with the other persons boarded his TSR near Dholi Piau; one person alighted and one of the three persons at the point of knife, from the left side, attacked PW-4; PW-4 was robbed of his wrist watch and Rs.595/-; his TSR had also been snatched; a police man PW-5 reached the spot; they chased the TSR; PW-5 overpowered the accused. PW-4 has resiled from his earlier version i.e. the complaint

Ex.PW-4/A and has on oath stated that he cannot recognize the appellant in the Court as the person who had been overpowered by PW-5. He has, however, admitted his signatures on the arrest memo Ex.PW-4/C. Ex.PW-4/C depicts that the appellant Rajesh had been arrested on 1.3.2004 i.e. at 1.35 A.M. and this document had been attested by PW-4. In his statement under Section 313 of the Cr.P.C. appellant has admitted this document; it has thus come on record that the appellant was apprehended at the spot and was taken into custody in the early morning hours of 1.3.2004 vide Ex.PW-4/C.

12. PW-4 has further admitted that he had given his complaint Ex.PW-4/A; PW-4 has also identified his torn shirt and his cut pant which had been taken into possession vide memo Ex.PW-4/B. This piece of evidence leaves no manner of doubt that PW-4 for some ulterior purpose or motive was not supporting the version of the prosecution qua the identity of the appellant in the Court.

13. In (1999) 8 SCC 624 Kolhi Lakhmanbhai Chanabhai vs. State of Gujarat it has been held by Supreme Court that the testimony of a hostile witness can also be read to the extent that it supports the version of the prosecution; evidence of such a witness is not washed of the record completely.

14. Even relying upon this admitted version of PW-4 as deposed to on oath in Court; his this part of the version is corroborated by the testimony of PW-5 who had also reached the spot on his motorcycle. PW-5 had in fact apprehended the appellant and had taken the knife from his possession. In this process PW-5 had also suffered injuries.

PW-5 on oath deposed that on the fateful day i.e. on 29.2.2004 at about 9.45 PM he was proceeding home after his duty hours; near Dholi Piau he saw a person shouting for help; he i.e. the PW-5 was informed that TSR of PW-4 had been snatched; the miscreants were chased; the TSR was apprehended, Rajesh the present appellant was apprehended at the spot; this was after grappling with him; the knife was taken from the possession of the appellant; other two persons had run away. PW-5 had correctly identified the present appellant as the person who had been apprehended by him at the spot. PW-5 has also corroborated that the shirt of PW-4 was torn from the pocket and his pant also had a cut mark; the same were taken into possession vide memo Ex.PW-4/B; his MLC Ex PW 8/A recorded at 1.35 A.M. on 01.03.2004 had noted abrasions on his left knee. Nothing has been elicited in the cross-examination of PW-5 which could shake his version. He has fully withstood with the test of a detailed cross-examination.

15. The knife seized from the appellant was a 'deadly weapon' within the definition of Section 397 of the IPC; the appellant had used this deadly weapon to threaten PW-4 and robbed him of his wrist watch and cash of Rs.595/- as also TSR. The TSR stood recovered and was taken into possession vide memo Ex.PW-4/F. Ingredients of the offence under Sections 397 and 392 of the IPC are made out against the appellant.

16. Section 411 of the IPC necessarily entails:-

(i) Dishonestly receiving or retaining stolen property knowing or having reason to believe the same to be a stolen property.

17. The TSR which was the stolen property had been recovered pursuant to a chase by PW-4 and PW-5; appellant was arrested at the spot along with TSR. The conviction of the appellant under Section 411 of the IPC also calls for no interference.

18. The defence sought to be projected by the appellant in the version of DW-1 who is the mother of the appellant, that her son was forcibly taken away on 29.2.2004 did not find favour with the Trial Judge and rightly so; no such suggestion has been given to any of the witnesses of the prosecution; this defence also did not surface in the statement of the appellant recorded under Section 313 of the Cr.P.C.; it was an afterthought.

19. Conviction under Section 397 of the IPC prescribes a minimum sentence of RI for seven years. The Legislature has with a purposeful intent imposed a minimum punishment for an offence of such a nature. There is no mitigating circumstance in favour of the accused except the fact that the appellant had already suffered incarceration of a period of six years and nine months as on date; this Court does not think this to be a mitigating circumstance as is the submission advanced by the learned counsel for the appellant.

20. The substantive sentence imposed upon the appellant calls for no interference. However, keeping in view the financial penury of the appellant; the fact that the appeal has been preferred from the Jail and the appellant is represented by a counsel for Delhi High Court Legal Services Committee; the submission of the appellant that he is unable to pay the fine amount of Rs.5000/- imposed upon him and in the eventuality that he does not pay the fine he will

suffer a further sentence of six months SI, a modification is called for in the sentence in default of payment of fine.

21. Fine of Rs.5000/- has been imposed upon the appellant for the offence under Section 392 of the IPC which is a mandate along with a term of imprisonment. However, in default of payment of fine the appellant will undergo SI for one month instead of six months.

22. With these modifications, the appeal is disposed of.

(INDERMEET KAUR)
JUDGE

December 21, 2009
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