

R-1&2

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

+ CRL.A. Nos. 296/2005 & 297/2005

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Date of decision: 20th August, 2010

PARVINDER Appellant in Crl.A. No. 296/2005.
VIKAS ALIAS ROHIT Appellant in Crl.A. No. 297/2005.
Through Mr. Sumeet Verma, Advocate
versus

THE STATE OF NCT DELHI Respondent
Through Mr. Arvind Kumar Gupta, APP for the
State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

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

ORDER

1. The appellant-Parvinder has been convicted under Section 392 read with Section 397 of the Indian penal Code, 1860 (hereinafter referred to as IPC, for short) and has been sentenced with rigorous imprisonment of seven years and pay fine of Rs.1,000/- and in default undergo further rigorous imprisonment of three months. The appellant-Vikas has been sentenced to undergo rigorous imprisonment of 3 ½ years and pay fine of Rs.1,000/- and in default undergo rigorous imprisonment for 3 months for the offence under Section 392 IPC.

2. On 3rd November, 2003, Mr. Mahesh Kant Jha, who was working as

a security guard at Najafgarh Road was returning to his house at about 9 p.m. via railway track near West Patel Nagar Railway Station along with his nephew Mr. Hem Kant Jha. They stopped near the railway station track as a goods train was passing. While they were standing there, two boys came and robbed them. Mr. Mahesh Kant Jha was threatened with a knife by one of the boys. He was asked not to open his mouth or he would be stabbed. The other boy took out Rs.50/- from the pocket of Mr. Mahesh Kant Jha and Rs.750/- from the pocket of Mr. Hem Kant Jha. Thereafter, these two boys went towards Rama Road and Mr. Mahesh Kant Jha and Mr. Hem Kant Jha returned to their residence. They narrated the incident to their neighbours. Both of them along with neighbours returned back to the spot. One of the boys who had used the knife was found sitting in a park and the two boys were standing at some distance. The boy sitting in the park was recognized by the Mr. Mahesh Kant Jha and Mr. Hem Kant Jha and was overpowered and caught. The other two boys who were standing at a distance managed to escape. The boy who was overpowered was beaten up and sustained injuries. Subsequently, the police was called and it was revealed that the boy who was apprehended was Parvinder, the appellant in appeal no. 296/2005. Parvinder was arrested in FIR No. 50/2003 under Section 392/397/34 IPC Police Station Sarai Rohilla. Subsequently on the basis of secret information, the appellant-Vikas was arrested on 7th November, 2003 at West Patel Nagar Railway Station. The third accomplice could not be traced and was declared a proclaimed offender.

3. Mr. Hem Kant Jha and Mr. Mahesh Kant Jha have appeared as witnesses PW-5 and PW-6, respectively before the trial court. They have narrated the incident in which they were robbed next to railway line. PW-5, Mr. Hem Kant Jha, has stated that when they returned back with neighbours they saw the accused Parvinder along with two others, who managed to

escape but appellant-Parvinder was overpowered. He has stated that there were three boys and the third associate was standing at some distance. PW-6, Mr. Mahesh Kant Jha has stated that he does not recognize his assailants and they were not present in person before the court. He was cross-examined by the learned Public Prosecutor but has stated that it is incorrect that he had apprehended the accused present in the court. Thus, PW-6, Mr. Mahesh Kant Jha did not recognize the appellant-Parvinder. However, PW-2, Constable Vijinder Singh has stated that on 4th November, 2003 he had gone to Patel Nagar Railway Station along with ASI Dilbagh Singh and Head Constable Davinder Singh. The appellant-Parvinder was present and he was arrested and taken to the police station and then to the hospital for medical examination as he had suffered injuries. PW-3, Head Constable Davinder Singh has stated that on 4th November, 2003 at about 12.30 a.m. at night he along with Constable Vijinder Singh and SI Dilbagh Singh had gone to the Patel Nagar Railway Station and thereafter arrested appellant-Parvinder. Arrest memo was also prepared. PW-7, SI Dilbagh Singh has corroborated the said statement and stated that on 4th November, 2003 he was posted at Police Station Sarai Rohilla and after receipt of DD No. 2A, which is Exhibit PW-1/A, he along with Head Constable Davinder Singh and Constable Vijinder Singh reached Railway Station Patel Nagar. A crowd had collected there. Appellant-Parvinder was present. Appellant-Parvinder was arrested and subsequently sent for medical examination. Next day appellant-Parvinder was produced in the court. In view of the statement of PW-5, Mr. Hem Kant Jha and the statements of PW-2 Constable Vijinder Singh, PW-3, Head Constable Davinder Singh and PW-7, SI Dilbagh Singh and the time and manner of arrest of the appellant-Parvinder, his involvement in the said incident of crime is established and proved beyond reasonable doubt.

4. Learned counsel for the appellant-Parvinder submitted that there is some discrepancy in the manner of arrest of Parvinder and in this connection referred to the cross-examination of PW-7, SI Dilbagh Singh. PW-7, SI Dilbagh Singh in his cross-examination has stated that Mr. Mahesh Kant Jha during inquiry had told him that accused-Parvinder was first taken to Police Station Patel Nagar but they refused to register a case and he was brought back at the spot. He has stated that he did not contact Police Station Patel Nagar and did not record statement of anyone from Police Station Patel Nagar. Interestingly the said questions or suggestions were never put to PW-6, Mr. Mahesh Kant Jha or to the eye witness/victim PW-5, Mr. Hem Kant Jha. The FIR in this case as noticed above was registered in Police Station Sarai Rohilla and not in Police Station Patel Nagar. In facts of the present case it is immaterial whether appellant-Parvinder after he was apprehended was first taken to Patel Nagar Police Station and as they did not have jurisdiction, he was brought back to the spot and Police Station Sarai Rohilla was informed and they came and arrested the appellant-Parvinder.

5. Learned counsel for the appellant-Parvinder submitted that conviction under Section 397 IPC cannot be sustained as no deadly weapon, i.e., the alleged knife, was recovered; and was not produced before the court. There is merit in the said contention. Knife in the present case was not recovered from appellant-Parvinder. There is no injury on any of the victim. In *Gulshan versus State*, 2010 [1] JCC 562, *Sunil @ Munna versus The State (Govt. of NCT)*, 2010 [1] JCC 388 and *Rakesh Kumar versus State of NCT of Delhi*, 2005 [1] JCC 334, it has been held that if the weapon of offence is not recovered conviction under section 397 IPC cannot be sustained. It is also well-settled that Section 397 IPC is not a substantive Section but prescribes aggravated form of offence under Section 392 IPC

and prescribes a more stringent and harsher punishment. Section 397 prescribes minimum punishment to which a person must be sentenced on a conviction for robbery or dacoity if his offence was attended by use of a deadly weapon. In the present case, therefore, sentence of the appellant-Parvinder is modified from Section 397 to Section 392 IPC. Appellant-Parvinder has already undergone sentence awarded to him under Section 392 read with Section 397 IPC. The sentence is accordingly maintained.

6. The appellant-Vikas as stated above, was not arrested on the night of 3rd/4th November, 2003. He was arrested on 7th November, 2003 at West Patel Nagar Railway Station. Nothing was recovered from the possession of the appellant-Vikas as per PW-4, Constable Jasbir Singh, who had arrested him along with PW-7, ASI Dilbagh Singh.

7. PW-6, Mr. Mahesh Kant Jha had not identified appellant-Vikas and had stated that the appellant-Vikas who was present in the court was not the person who had robbed them. PW-5, Mr. Hem Kant Jha had identified that appellant-Vikas was the person who had taken out money from his pocket and the pocket of his uncle, i.e., Mr. Mahesh Kant Jha. In his cross-examination, however, PW-5, Mr. Hem Kant Jha had admitted that the place of robbery did not have sufficient light. He has admitted that he was not summoned either in jail or in the police station to identify appellant-Vikas prior to that date. Thus, PW-5, Mr. Hem Kant Jha had not been called upon to identify appellant-Vikas in the TIP. PW-8, Ms. Archana Sinha, Metropolitan Magistrate, Tihar Jail Complex had conducted the TIP of the appellant-Vikas. In her evidence, she has stated that TIP was first fixed on 24th November, 2003 but could not be conducted on the said date and it was adjourned to 2nd December, 2003. On 2nd December, 2003, appellant-Vikas was produced from jail but he refused to join TIP stating that he has been shown to the witnesses in the police station and his photographs were

also taken. It appears that PW-6, Mr. Mahesh Kant Jha was taken to the jail for the purpose of TIP as PW-5, Mr. Hem Kant Jha has categorically stated that he was not taken to the court or to the jail for the purpose of identifying appellant-Vikas on any date prior to his appearance in the court for recording of evidence. PW-6, Mr. Mahesh Kant Jha, as noticed above, has refused to recognize Parvinder as well as Vikas.

8. In view of the aforesaid evidence, the appellant-Vikas it is held is entitled to benefit of doubt and his conviction is accordingly set aside.

The appeals are accordingly disposed of.

Mr. Sumeet Verma, Advocate, who was appointed as Amicus Curiae and has appeared in the present appeals, will be paid Rs.10,000/-.

AUGUST 20, 2010
VKR

SANJIV KHANNA, J.