

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

+ **Crl. Appeal No. 257/2000**

% Reserved on: 1st February, 2011

Decided on: 26th April, 2011

KAUSHALENDER Appellant
Through: Mr. Ashwani Vij, Advocate

versus

STATE Respondent
Through: Mr. Manoj Ohri, APP for the State

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. This is an appeal against the judgment of conviction and sentence dated 22nd September, 1999 whereby the Appellant has been convicted for offences punishable under Sections 392/397/34 IPC and directed to undergo a sentence of rigorous imprisonment for seven years and a fine of

₹5,000/-. In default of payment of fine, the Appellant is to undergo simple imprisonment for five months.

2. The facts leading to the prosecution filing the charge-sheet are that on 24th October, 1997 at about 1.45 P.M. PW2 Sri Niwas Pandey who was working in R.N. Distributor at Mehrauli had gone to supply the medicines. While he along with Subhash Chand Pandey were returning towards Mehrauli on their respective bicycles, and reached at Vasant Kunj red light, Sri Niwas Pandey crossed over but Subhash Chand Pandey could not do so in view of the red light and followed him on the next green light. When PW2 reached at B1, Vasant Kunj out of the two boys going on foot, one desired to sit on his cycle. However, PW2 Sri Niwas Pandey refused saying that there was a bundle of medicines on the carrier of his cycle. Thereafter, the co-convict Abhay Raj Mishra gave a push to his cycle and PW2 along with his cycle fell down. The co-convict Abhay Raj Mishra took out a knife and asked him to hand over the money. Sri Nivas Pandey resisted and answered that he had no money with him but later on took out ₹3,500/- from the right side pocket of his pant which the co-convict took away and handed over to the present Appellant Kaushlender. Thereafter, both the accused ran away. In the meantime, Subhash Chand Pandey also came and both of them on their cycles chased the accused persons. As they had raised the alarm, at the gate of B-7,

Vasant Kunj, public persons apprehended Abhay Raj Mishra however, the present Appellant herein managed to escape. Some public person informed the police about the said incident on which the police reached at the spot and apprehended the co-convict Abhay Raj Mishra. The statement of PW2 Sri Niwas Pandey was recorded vide Ex.PW2/A on the basis of which FIR was got registered. The co-convict was arrested on the spot and in pursuance of his disclosure statement and pointing out, the present Appellant Kaushlender was arrested from his house in Village Nawada. The Appellant got recovered a sum of ₹1,500/- from beneath the box in his room. After completion of investigation, the charge sheet was filed

3. Pursuant to the trial the learned Judge convicted the Appellant and the co-accused for the aforementioned offences. The Appellant Kaushlender has filed the present appeal. The appeal qua co-accused Abhay Raj Mishra being Cr. Appeal No. 531/1999 has been decided by this Court vide its judgment date 4th January, 2011.

4. Learned counsel for the Appellant states that there is material contradiction in the testimony of PW2, the Complainant Sri Niwas Pandey as in his complaint he states that the Appellant showed the knife whereas in the Court he alleges that co-convict Abhay Raj Mishra pushed him, showed the knife and removed ₹3,500/- from the right side of his pocket and handed over

the same to the Appellant. Thus, no role in showing the knife has been attributed to the Appellant in the testimony of PW2 before the Court. There are material contradictions between the testimony of PW2, the Complainant, PW3 Constable Shyam Lal and PW6 Assistant Sub-Inspector Vijay Kumar, investigating officer as regards the time when they reached Nawada for arresting the Appellant. PW3 has stated that he came back to the spot after registering the FIR at 11:00 A.M. though the alleged incident is of 1:45 P.M. in the noon. He states that he alongwith investigating officer and accused Abhay Raj Mishra reached Nawada at 6:30 P.M. and returned back to the police station at about 10:00 P.M. Thus, according to PW3, the Complainant had not accompanied the investigating officer PW6 and PW3 to the house of the Appellant. Whereas PW6 has stated that they reached Nawada at about 9:00 P.M. along with Subhash Pandey, Sri Niwas, co-accused Abhay Raj Mishra and Constable Shyam Lal. There is only one witness to the recovery at the instance of the Appellant i.e. PW3 who has not supported the prosecution case. There is discrepancy in the money recovered at the instance of the Appellant and produced in the Court. Neither the currency notes were sealed nor any specific mark given to them nor their numbers were noted. Learned counsel contends that the defence of the Appellant in his statement under Section 313 Cr.P.C. has not been considered. In view of the material

discrepancies in the statements of the witnesses, the Appellant is entitled to the benefit of doubt. Though the co-convict Abhay Raj Mishra has been convicted for offence punishable under Section 394/34 IPC, the case of the Appellant stands on a different footing as he was not apprehended on the spot and he is entitled to be acquitted.

5. Learned APP for the State on the other hand contends that though the recovery of the money at the instance of the Appellant has been disbelieved by the learned trial court as the currency was not sealed, however, on the basis of identification by the Complainant that it was the Appellant along with Abhay Raj Mishra who robbed him by showing the knife , prosecution has proved the commission of offence under Section 392/34 IPC beyond reasonable doubt. Hence there is no merit in the present appeal and the same deserves to be dismissed.

6. I have heard learned counsel for the parties and perused the record. This Court in Criminal Appeal No. 531/1999 filed by the co-convict Abhay Raj Mishra has already held that in view of the discrepancy in the testimony of PW2 Sri Niwas Pandey as to who showed the knife to the Complainant, the learned trial court erred in convicting the Appellant and co-convict for offence punishable under Section 397 IPC. The learned trial court has disbelieved the recovery of currency notes at the instance of the present Appellant for the

reason that they were neither sealed nor their numbers noted. Moreover, as per the seizure memo currency notes worth ₹ 1,500/- were recovered, however, when the same were produced in the Court, they were ₹1,515/-. In addition, PW6 has clarified that he did not seal the currency notes nor noted the numbers because this was his first investigation for offences under Section 397/392 IPC. But the failure of prosecution to prove the recovery of ₹ 1,500/- at the instance of the Appellant cannot dent the otherwise trustworthy evidence of the Complainant. Thus, as regards the present Appellant, the only evidence which requires consideration is; whether the offence punishable under Section 392/34 IPC has been proved in view of the factum of his identification by the Complainant, PW2 Sri Niwas Pandey. This Court in Criminal Appeal No. 531/1999 has already held that the testimony of this victim PW2 is cogent and convincing. He has explained the entire incident. The testimony of PW2 is further corroborated from the fact that the co-convict Abhay Raj Mishra was apprehended at the spot and beaten by the public and was medically examined vide MLC Ex.PW4/A. The present Appellant was arrested on the pointing out of co-convict Abhay Raj Mishra and on the identification by PW2 the Complainant. PW2 had no reason to falsely implicate the Appellant herein. The testimony of PW2 is corroborated by the testimony of PW6, the investigating officer who has stated that after the arrest

of Abhay Raj Mishra, he disclosed about the Appellant and took them to village Nawada along with Sri Niwas Pandey, Subhash Pandey, and Constable Shyam Lal. Merely because PW3 in his testimony had given different time of registration of FIR, leaving to Nawada and returning back to the police station, it would not discredit the otherwise cogent testimony of PW2 and PW6. As per the testimony of PW2 when he crossed the Vasant Kunj red light, two boys were going on the foot and one of them wanted to sit on his cycle but he told that there was a bundle of medicines on his carrier so they cannot sit on his cycle. On this, two boys again insisted and on his refusing, Abhay Raj Mishra gave a push to his cycle and he fell down along with his cycle. Accused Abhay Raj Mishra took out the knife and asked him to hand over the money and when he resisted, the same was taken out from right side pocket of his pant and handed over to the Appellant present in Court. The Appellant is the person who in furtherance of common intention with co-convict Abhay Raj Mishra committed the offence of robbery. I find that the prosecution has proved its case beyond reasonable doubt for commission of offence punishable under Section 392/34 IPC.

The Appellant has undergone sentence of imprisonment for a period of nearly three years and three months. He has faced the ordeal of trial and the present appeal for the last 14 years and thus it would be in the interest of

justice that the sentence of the Appellant is modified to the period already undergone as was done by this Court in the case of co-convict Abhay Raj Mishra.

The Appeal is accordingly allowed modifying the conviction of the Appellant to one for offence punishable under Sections 392/34 IPC and the sentence to the period already undergone. The bail bond and the surety bond are discharged.

(MUKTA GUPTA)
JUDGE

APRIL 26th 2011/dk