

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl. Appeal No. 442/2011 & Crl. M.B. 583/2011**

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Reserved on: 16th August , 2011

Decided on: 9th September, 2011

KISHORI @ NAWAL KISHORE Appellant
Through: Ms. Sahila Lamba, Adv.
versus
STATE (NCT OF DELHI) Respondent
Through: Mr. Manoj Ohri, APP for State with
Mr. Satinder Mohan, SI, P.S. IGI
Airport.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. By this appeal the Appellant challenges the judgment dated 30th April, 2010 convicting him for offences punishable under Section 394/397/34 IPC and the order on sentence dated 7th May, 2010 directing him to undergo Rigorous Imprisonment for 7 years for offences punishable under Section 394 IPC and 397 IPC and fine of Rs. 2,000/-, further in default of payment of fine to undergo Simple Imprisonment for 1 month for offence punishable under Section 394 IPC.

2. Learned counsel for the Appellant contends that the Appellant has been falsely implicated. No TIP of the Appellant was conducted and there was no light at the place where the alleged incident occurred. Hence the witnesses could not have been in a position to identify the Appellant. The Appellant was not apprehended at the spot. Further the application of TIP of the Appellant was meaningless as the Appellant was first taken in Police custody and shown to the witnesses. Moreover, the Appellant was not brought in muffled face before the Learned Metropolitan Magistrate. The witnesses have not been able to identify the person who was apprehended at the spot. Thus, the identification of the Appellant, of whom only a glimpse if at all was available to the witnesses, was insufficient for identification. Since the main accused has already been acquitted, the Appellant is also entitled to be acquitted. Further there are major contradictions in the statement of the witnesses regarding recovery of the weapon of offence that is knife. It is contended that in the absence of test identification parade and recovery of weapon of offence having not been proved there is no evidence placed on record against the Appellant and hence he is entitled to be acquitted.

3. Learned APP for the State on the other hand contends that the alleged incident took place on the 17th November, 2006 and the Appellant was arrested at the instance of the co-accused on the 18th November, 2006. On

19th November, 2006 an application for TIP was moved when the Appellant was brought before the Learned Metropolitan Magistrate in muffled face. The Appellant refused to join the TIP proceedings on the ground that photos of the Appellant were taken from his wife and shown to the witnesses. No witnesses have been given this suggestion. Further after refusal of the TIP PW1 Rajesh identified the Appellant in the Court. Pursuant to the disclosure of the Appellant recovery of knife was effected and the same was blood stained. PW2 Dr. Sayyed Hassan has proved the MLC and the opinion thereon has been proved by PW4. As per the FSL report proved by PW19 and PW20 the blood on the knife was of 'B' group. There is no contradiction in the testimony of PW2, PW14 and PW18 the recovery witnesses and hence no case for acquittal is made out.

4. I have heard learned counsel for the parties. PW1 Rajesh Kumar the injured complainant in his testimony has stated that on 17th November, 2006 while he was working as a casual labour after finishing his work he took Rs. 2,000/- from his friend and with the other money he was having, a total Rs. 3,200/- were in his pocket. At about 5.30 PM while he was passing through the jungle area of IGI Airport he saw three boys standing in the bushes. They came forward towards him and asked him to stop. He started running but one of the boys apprehended him and the said boy struck him with knife (meat

katne wala chaku) on his head resulting in minor injury. Thereafter the same boy put his knife upon his cheek. In the meantime other two boys also arrived. The said boy started beating him with fists and leg blows. Thereafter one of them being a juvenile M who was tried before the Learned Juvenile Justice Board searched his pocket whom he identified in the TIP proceedings had taken out Rs. 3200/- from his pocket. In the meantime another boy stabbed him with the knife on his left side rib. On the complainant's raising a cry, the said assailant again struck on his left shoulder side. However, M and the present Appellant managed to flee away from the spot. Thus, the Appellant has been clearly identified as the assailant who gave injury to PW1 below his left rib portion and on the shoulder while committing robbery, while other accused robbed him of his belongings. I find no force in the contention of the learned counsel for the Appellant that since there was no electricity and the Police witnesses have stated that when they reached there it was dark, the witness could not have identified the assailants. PW1 in his testimony has clarified that though there was no electricity, however it was the time when the sun was setting. Thus, visibility in the absence of street light was not poor at the time of incident and PW1 could have clearly identified the Appellant.

5. I also do not find any force in the contention of the learned counsel for the Appellant that no TIP was conducted. The Appellant was arrested on 18th

November, 2006 at the instance of the co-accused. An application for the TIP of the Appellant was filed before the Learned Metropolitan Magistrate. However, he refused to take part in the TIP. It is on the refusal of the Appellant to take part in the TIP that PW1 identified him in Court premises. The explanation of the Appellant in his statement under Section 313 Cr.P.C. for refusal to join the TIP proceedings was that he was shown to the witnesses by the Police before TIP after he was picked up from his house. A perusal of the testimony of the complainant PW1 shows that no such suggestion has been given to the complainant when he was examined by learned counsel for the Appellant. All that is suggested is that the Appellant was identified by the complainant at the instance of the Police. Thus, the defence made out is clearly an after-thought. A perusal of the cross-examination of PW1 the complainant reveals that it has been elicited from him that it is only after 5 days that the complainant visited the Police Station for half an hour when he was called to the Court for TIP. The Appellant had already refused the TIP by that time.

6. The Appellant was arrested pursuant to the disclosure made by the co-accused Sunny Dev. Pursuant to the disclosure of the Appellant the knife was recovered from near the bushes at the IGI Airport which was blood-stained at its tip. The opinion of the Doctor in this regard has also been received. The

weapon of offence recovered is also connected to the offence committed as PW1 in his testimony has identified the knife Ex.P1 recovered at the instance of the Appellant to be the same knife with which he was injured by him.

7. The testimony of the injured witnesses is further corroborated by the FSL result Ex.PA (3). As per the result obtained the blood Group found on the weapon of offence recovered from the Appellant was of 'B' group of human origin which was the same blood group as found on the vest, shirt and pant of the injured and the guaze clothes pieces of the injured. Thus, in view of this unimpeachable evidence on record I find that the prosecution has proved its case beyond reasonable doubt against the Appellant for commission of offences punishable under Section 394/397 IPC. Merely because there is no recovery of amount of Rs. 3200/- robbed from the complainant, the same does not render false the otherwise unimpeachable evidence placed on record.

8. I find no merit in the appeal. The appeal and the application for suspension of sentence are accordingly dismissed.

9. The Appellant who is in custody be informed through Superintendent Tihar Jail.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 09, 2011/'ga'