

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

Judgment reserved on: January 11, 2011
Judgment delivered on: February 11, 2011

+ **CRIMINAL APPEAL No.581/2008**

PRAVEEN @ SURESH

....APPELLANT

Through: Ms. Ritu Mishra, Advocate/Amicus Curiae.

Versus

THE STATE (GOVT OF NCT OF DELHI) RESPONDENT

Through: Mr. Jaideep Malik, APP.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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 Digest ?

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment of conviction dated 26.05.2008 in Sessions Case No.142/06 FIR No.766/05 P.S. Model Town and the consequent order on sentence dated 27.05.2008 whereby the appellant has been convicted for the offences under Section 394/397/34 IPC and sentenced to undergo RI for the period of seven years and also to pay fine of ₹1,000/-, in default of payment of fine to undergo RI for the further period of one month.

2. Briefly stated, case of the prosecution is that on 09.12.2005 at about 9:30 am, while travelling in a DTC Bus route No.119 near Telephone Exchange, G.T.K. Road, the appellant and his unknown associates, in furtherance of their common intention, robbed complainant Late Prem Nath Mehta of ₹ 6100/- on the point of knife. The co-accused persons managed to escape with the money, but the appellant was apprehended by Anil Kumar, Constable (PW3). It is the case of the prosecution that while trying to escape, the appellant used the knife and caused simple injury on the back of the left palm of Constable Anil Kumar.

3. Intimation of the incident was conveyed to the Police Station by the PCR, which was recorded as DD No.14A dated 09.12.2005 (Ex.PW1/D) and copy of the DD report was entrusted to Inspector Ombir(PW5) for verification. SI Ombir, on receipt of the copy of DD report, reached at the spot of occurrence where the appellant was produced before him by the complainant Prem Nath and Constable Anil Kumar. They also produced the knife stated to have been recovered from the possession of the appellant. Inspector Ombir prepared the sketch of the knife Ex.PW3/A. On measurement, knife was found to be 32.5 cm long with the blade 15.5 cm long. The knife was converted into a sealed packet and seized. Inspector Ombir also recorded the statement of the complainant Prem Nath Mehta Ex.PW5/A and sent it to the Police Station along with his endorsement for the registration of the case.

4. During investigation, Inspector Ombir recorded statements of the witnesses. He arrested the appellant vide arrest memo Ex.PW4/A and conducted personal search of the appellant vide memo Ex.PW4/B. He made efforts to locate the associates of the appellant, but in vain. On conclusion of investigation, appellant was challaned and sent for trial.

5. The learned Additional Sessions Judge charged the appellant for the offences punishable under Section 394/397 read with Section 34 IPC. The appellant pleaded not guilty to the charge and claimed to be tried.

6. In order to bring home the guilt of the appellant, prosecution has examined 5 witnesses namely Duty Officer ASI Seema (PW1), Ramesh Kumar, Conductor of DTC Bus (PW2), Constable Anil Kumar (PW3), Constable Sanjay Singh (PW4), who participated in investigation and the Investigating Officer Inspector Ombir Singh (PW5).

7. The complainant Prem Nath Mehta, who is claimed to have been robbed, could not be examined because of his unfortunate demise during trial. Out of the above witnesses, PW2 Ramesh Kumar and PW3 Constable Anil Kumar are claimed to be eye witnesses. Before proceeding further, it would be useful to have a look upon the testimony of the eye witnesses.

8. PW2 Ramesh Kumar is the conductor of DTC bus route No. 119, registration No. 3101 wherein the alleged occurrence took place. He testified that on the relevant day, he heard the people shouting

"Jebkatra Jebkatra" and the pick-pocket was made to get down from the bus. He however expressed his inability to identify the appellant as the pick-pocket. Learned APP, after seeking permission from the court, cross examined PW2 Ramesh Kumar and in the cross examination, conductor Ramesh Kumar admitted the suggestion that the accused was made to get down from the bus by the passengers. He, however, denied the suggestion that when the accused was apprehended, he was having a knife in his possession or that he heard the passengers saying that two co-accused persons had managed to escape.

9. PW3 Constable Anil Kumar is the star witness of the prosecution. He has testified that on 09th December, 2005, he was travelling in bus route No. 119, a DTC bus having registration No. DL-1-PB-3101. At about 9.30 a.m., when the bus reached at G.T.K. Road in front of telephone exchange, one aged passenger raised an alarm that somebody has picked his pocket. That passenger whose name was later on revealed as Prem Nath Mehta was trying to overpower the appellant, who was having a knife in his right hand. Constable Anil Kumar claimed that he, with the help of public persons, overpowered the appellant and in the process, while making an effort to escape, the appellant inflicted knife injury on back side of his left palm. The knife was taken from the possession of the appellant and Police Control Room was informed. Witness further stated that the appellant was beaten by public persons. Police Control Room van reached at the spot. Inspector Ombir of P.S. Model Town also reached at the spot

along with Constable Sanjay and he handed over the custody of the appellant and the knife to SI Ombir. He further stated that Inspector Ombir recorded statement of the complainant Prem Nath Mehta. He also measured the knife and prepared the sketch of knife Ex.PW3/A. Thereafter, knife was converted into a sealed packet and seized vide seizure memo Ex.PW3/B. PW3 claimed that he went to Hindu Rao Hospital where he was medically examined and his MLC was prepared. He has identified the knife recovered from the appellant Ex.P1.

10. Statement of the appellant under Section 313 was recorded. The appellant claimed to be innocent and stated that he was travelling in the same bus and when he was alighting from the bus, he stepped on the foot of Constable Anil Kumar, which resulted in an altercation and Constable Anil Kumar gave him a beating. Later on Constable Anil, in connivance with the Investigating Officer, got him falsely implicated in this case. Appellant declined to lead evidence in defence.

11. Learned Additional Sessions Judge, after hearing the parties and on consideration of the evidence on record, found the appellant guilty of robbery on the point of knife and convicted him for the offence punishable under Sections 394/397/34 IPC and sentenced him accordingly.

12. Learned Ms. Ritu Mishra, Amicus Curiae appearing for the appellant submitted that the appellant is innocent and he has been falsely implicated in this case. Dilating on the argument, she firstly

contended that in order to establish the guilt of the appellant, the prosecution was supposed to establish beyond doubt that a robbery was committed. She contended that neither the complainant Prem Nath Mehta has been examined in this case nor the alleged stolen property has been recovered, therefore, it is highly doubtful whether or not any robbery was committed and on this count alone, the appellant deserves to be acquitted.

13. Learned APP, on the other hand, submitted that as per the case of the prosecution, robbery was committed by three persons including the appellant and his two associates, who managed to escape with the stolen ₹ 6100/- but this does not mean that no robbery was committed. She further contended that the complainant Prem Nath Mehta could not be produced as a witness though cited in the charge sheet as he expired during the pendency of trial before he could be examined, as such, his non-production is not fatal to the prosecution case. Learned APP submitted that PW3 Constable Anil Kumar has categorically stated that the complainant Prem Nath Mehta, at the relevant time, was saying that the appellant and his two associates have robbed him on the point of knife and this evidence is relevant under Section 8 of the Evidence Act, being the evidence relating to the conduct of the victim of crime immediately after the occurrence. As such, according to her, from the testimony of Constable Anil Kumar (PW3), robbery is established.

14. No doubt, the complainant has not been examined in this case nor the case property has been recovered. It is also true that the complainant could not be examined on account of his unfortunate death during the pendency of the trial. Does it mean that the appellant, if guilty, should go scot-free in absence of the evidence of the victim regarding robbery? The answer of this question is in the negative. If the complainant unfortunately expired before he could be examined as a witness, this can never be a reason to reject the prosecution case, provided there is other reliable evidence to establish the robbery. Thus, it is to be seen whether there is some other evidence on record to establish the offence of robbery.

15. Next contention on behalf of the appellant is that the prosecution case is essentially based upon the other two purported eye witnesses namely Ramesh Kumar, conductor of the bus (PW2) and Constable Anil Kumar (PW3). Out of them, PW2 Ramesh Kumar turned hostile and he has not supported the case of the prosecution. Learned counsel contended that case of the prosecution, thus, essentially rests upon the testimony of PW3 Constable Anil Kumar, who is not a reliable witness, being a police official. Learned Amicus Curiae contended that in fact, the appellant, while getting down from the bus, stepped on the feet of Constable Anil Kumar, due to which Constable Anil Kumar got annoyed and gave beating to the appellant and thereafter, he got the appellant falsely implicated in this case in connivance with the Investigating Officer. Learned counsel further submitted that even the investigation

of this case has not been done in a fair manner, which is obvious from the documentary evidence i.e. DD No. 13A (Ex.PW1/C), DD No. 14A (Ex.PW1/D) and the MLC of Constable Anil Kumar, which has not been proved by producing and examining the doctor concerned.

16. Learned APP, on the other hand, contended that there is no reason to disbelieve the testimony of Constable Anil Kumar, who had sustained injury while apprehending the appellant, which fact finds corroboration from his MLC, wherein it is recorded that Constable Anil Kumar had sustained simple injury with a sharp object on the dorsum of his left hand. Thus, learned APP has pressed for dismissal of appeal.

17. On consideration of the evidence on record, I find merit in the contention of learned Amicus Curiae. Since neither the complainant could be examined in this case nor the case property has been recovered and the case is based upon the sole testimony of PW3 Constable Anil Kumar, the court is required to be on its guard while appreciating the evidence of PW3 Constable Anil Kumar.

18. On perusal of DD No. 13A dated 09.12.2005 recorded at P.S. Model Town (Ex.PW1/C), it transpires that this DD report was recorded at 09.45 a.m. and it records about a PCR call regarding presence of some pick pockets near Shakti Nagar Telephone Exchange. It is mentioned in the DD report that copy of this DD was handed over to Inspector Ombir Singh (PW5) for necessary action, who immediately

left for Telephone Exchange Shakti Nagar along with Constable Sanjay (PW4). Next document in the sequence of events is DD No. 14A dated 09.12.2005 recorded at P.S. Model Town at 10.00 a.m., wherein it is recorded that information has been received from PCR that pocket of a person has been picked in a DTC bus near Shakti Nagar Telephone Exchange and the picket pocket in possession of a knife has been apprehended. This DD report was also sent to Inspector Ombir Singh through Home Guard Constable Suresh. Since Inspector Ombir Singh had left for Shakti Nagar Telephone Exchange on the receipt of DD No. 13A, it can be safely inferred that by 10.00 a.m., he had not reached the spot of occurrence near Shakti Nagar Telephone Exchange when PCR conveyed this information to the police station. If the contents of the DD report are true, then it is obvious that Inspector Ombir Singh and Constable Sanjay reached at the spot of occurrence after 10.00 a.m.

19. PW5 Inspector Ombir Singh has testified that when he reached at the spot of occurrence, complainant Prem Nath Mehta (since deceased) and Constable Anil Kumar (PW3) produced before him the appellant along with the knife stated to have been recovered from the appellant. He measured that knife, prepared its sketch, converted it into a parcel, sealed it with the seal of OSP and took it into the possession vide memo Ex.PW3/B. On perusal of the sketch of knife Ex.PW3/A as well as the seizure memo Ex.PW3/B, it transpires that both these documents are signed by Constable Anil Kumar as witness. Thus, it can be safely

inferred that Constable Anil Kumar remained present at the spot of occurrence till the seizure memo relating to the sealed parcel of knife was prepared. From the "*rukka*" Ex.PW1/B, it is apparent that before the aforesaid investigative procedure, Inspector Ombir Singh had also recorded the statement of the complainant Ex.PW5/A. Obviously, this process must have consumed some time and looking into the neat sketch of knife Ex.PW3/A and the writing work done at the spot, it can be safely inferred that this process must have consumed at least half an hour. Even the Investigating Officer Inspector Ombir Singh (PW5) in his cross examination, has stated that Constable Anil Kumar left the spot of occurrence 20 to 25 minutes after his arrival there. Therefore, it can be safely inferred that Constable Anil Kumar left the spot of occurrence after the formalities of investigation done in his presence sometime after 10.30 a.m. Constable Anil Kumar claims that from the spot of occurrence, he went to Hindu Rao Hospital where he was examined and his MLC was prepared. He must have taken around 10 to 15 minutes in reaching Hindu Rao Hospital. Thus, if the prosecution story is true, Constable Anil Kumar could not have reached Hindu Rao Hospital before 10.45 a.m. This however is belied by the MLC of Constable Anil Kumar submitted along with the charge sheet. It may be noted that though the prosecution was expected to prove the MLC of Constable Anil Kumar by examining the concerned doctor, but it has failed to do so. Be that as it may, the MLC, since it is a relied upon document by the prosecution, can be looked into so far as the defence

of the appellant is concerned. On the MLC, it is recorded that Constable Anil Kumar reached at Hindu Rao Hospital at 10.20 a.m., which is highly improbable if the prosecution witnesses are telling the truth. This circumstance raises a strong suspicion against the fairness of investigation as well as the correctness of the version of Constable Anil Kumar. The doubt is further compounded by the fact that there is no direct evidence of robbery nor has the case property been recovered.

20. Another factor which goes against the prosecution is that according to Constable Anil Kumar, when the knife was seized from the appellant, it was stained with blood whereas Constable Sanjay (PW4) and Inspector Ombir Singh (PW5) have categorically stated that there were no blood stains on the knife. This contradiction also casts a doubt on the correctness of the prosecution story.

21. In view of the discussion above, I do not find it safe to rely upon the uncorroborated testimony of PW3 Constable Anil Kumar to find the appellant guilty of the offence under Sections 397/394/34 IPC. Thus, I find it difficult to sustain the impugned judgment of conviction and consequent order on sentence. Accordingly, the appeal is accepted. Impugned judgment is set aside and the appellant is acquitted of the charge under Sections 394/397/34 IPC.

22. Appeal is accordingly disposed of.

23. Appellant is in jail. He be released forthwith if not required in any other case.

(AJIT BHARIHOKE)
JUDGE

FEBRUARY 11, 2011
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