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

% *Judgment Delivered on: August 17th 2011*

+ **CRL.L. P.No.395/2011**

STATE Petitioner
Through: Ms.Rajdipa Behura & Mr.Manoj
Ohri, APPs for State.

versus

MOHD MAZID & ANR Respondent
Through: NEMO

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment? NO
2. To be referred to the Reporter or not? NO
3. Whether the judgment should be reported in the Digest? NO

SURESH KAIT, J. (Oral)

Crl.M.A.No.9636/2011(exemption)

Exemption is allowed subject to just exceptions.

Criminal M.A. stands disposed of.

Crl.M.A.No.9635/2011(delay)

For the reasons explained, delay of 33 days stands condoned.

Criminal M.A. stands disposed of.

CRL.L. P.No.395/2011

1. The petitioner has assailed the judgment dated 15.03.2011 passed by Id.Additional Sessions Judge/South-East District, Saket Courts, New Delhi, whereby, the accused persons were acquitted from all the charges against them in case FIR No.148/2008 at police station C. R. Park, New Delhi.

2. Learned APP submits that Id.Trial Court has not appreciated the fact that the complainant has identified the accused persons in the Court. He further submits that the accused persons refused to join the TIP proceedings.

3. Additionally, PW1 has categorically deposed that he withdrew Rs.86,000/- from HDFC Bank, GK-II, Masjid Moth, New Delhi. After withdrawing the amount, he reached near his motorcycle No. DL-3S-AR-3818 which was parked in front of the bank. When he was trying to start his motorcycle, a person from the opposite side of the road came and he put a country made pistol on his chest and pushed the trigger twice, but it was misfired. That person was trying to snatch his bag containing the abovesaid amount. He pushed him, as a result

of which, the country made pistol fell down on the ground. He put his leg on the said country made pistol. When the accused could not snatch his bag, he put off his helmet and hit the same on the head of complainant thrice. Thereafter, that person again wore helmet and ran towards the road where one person was sitting on a motorcycle at the road. Thereafter, motorcyclist and that person ran away from the spot. Accordingly, he informed the police. He handed over the country made pistol to police. His statement was recorded which is Ex.PW1/A. Police prepared the sketch of the country made pistol and the cartridges; same is Ex.PW1/C.

4. Ld.APP for state has drawn the attention of this Court to the statement of PW4 SI Naresh Hooda, who deposed that on 07.01.2009 the investigation of the case FIR No.04/2009, police station Kalkaji was assigned to him. On 09.01.2009, he interrogated both the accused persons present in the Court; at that time, the accused persons were in police remand in the said case. The accused persons disclosed about their involvement in case FIR No.148/2008, police station C. R.

Park and he recorded their disclosure statement. Further deposed that HC Harish Chandra was also associated with the investigation and during recording of disclosure statements of accused persons. Information was given to the IO of the present case and regarding disclosure statement of the accused persons.

5. I note that in the cross-examination, he has admitted that when he received the case file, it was containing the disclosure statement of the accused persons recorded by ASI Balbir Singh. Further admitted the suggestion that no recovery pertaining to the present case effected pursuant to the disclosure statements.

6. Ld.Trial Judge has tried both the accused persons for the offence punishable under Section 393 r/w 34 IPC and Section 397 IPC.

7. The case of the prosecution in brief is that:-

On 21.08.2008 at about 02:15PM, complainant Anoop Kumar Batham had withdrawn Rs.86,000/- from HDFC Bank, Masjid Moth. After the withdrawal of this amount, he had kept

it in a bag. He was ready to start his motorcycle bearing registration No. DL-3S-AR-3818, at the same time, one person came over to his direction from the opposite side of the road and put a country made pistol on his chest and pushed the trigger twice, however, the same misfired. The said person also made an attempt to snatch the bag containing Rs.86,000/. The complainant pushed him, as a result of which, the country made pistol fell down and the said person put off his helmet and hit the complainant on the head thrice. Thereafter, he wore the helmet and ran towards the other side of the road where one more person was waiting on the motorcycle and immediately they ran away from the spot. The country made pistol of .315 bore was handed over the police officer, SI K. P. Singh. His statement was recorded and the case was got registered.

8. Ld.Trial Judge has firstly discussed the site plan of the place of occurrence which was prepared. Later on the accused was arrested in some other case in case FIR No.04/2009 police station Kalkaji, in which they had allegedly

made disclosure statement with regard to their involvement in the present case. The information regarding said disclosure statement was conveyed to the IO of the present case and who arrested the accused persons and again recorded their disclosure statement in the present case. Accused refused to join the TIP proceedings during the investigation. The charge-sheet was filed in the Court after obtaining FSL report with regard to the country made pistol which was recovered from the spot. The said country made pistol was opined to be a 'fire-arm' as defined under the Arms Act.

9. The prosecution had examined seven witnesses in all. In the statement under Section 313 Cr P C accused persons have denied the evidence against them, but had not preferred to lead any evidence in their defence.

10. The Trial Judge has discussed the basic principle of law that the onus lies on the prosecution to prove its case beyond all reasonable doubt and this onus, never shifts. As has been observed in the present case on the question of identity of the accused is of vital importance. Accused persons

were not apprehended at the spot. The incident had taken place on 21.08.2008 and the accused persons were arrested after about six months i.e. on 21.02.2009 in the present case. Accused persons during the investigation had refused to join the TIP proceedings; however, no adverse inference was drawn against them for refusing to participate in the TIP for the reasons that when they were produced in the Court on 21.02.2009, on the basis of the Production Warrants, they were not in muffled face.

11. PW-5 SI Jamil Ahmad who had arrested the accused persons in the present case had admitted in his cross-examination that the accused persons were not in muffled face nor he had moved any application for keeping the accused persons in muffled face, when he sought their judicial custody remand. Therefore, the simple refusal to join TIP proceedings cannot be read in evidence against them.

12. The next question as was dealt with by the Trial Judge was, about the evidentiary value of the identification of the accused by PW1 in the Court. As per his statement, it was

accused Mohammad Ishtiaq, who had put the country made pistol on his chest and pushed the trigger twice, but the same was misfired. Accused Mohammad Mazid was sitting on the motorcycle on the opposite side of the road and thereafter both the accused persons had ran away.

13. I note that in the cross-examination, PW1 Sh.Anoop Kumar Batham has admitted that accused Mohammad Ishtiaq who came come to him, was wearing a helmet, he further deposed that the person who was standing on the opposite side of the road and also wearing helmet. Further he stated that the distance between the motorcycle and the place of incident was about 30-40 meters. There was a divider on the road and the vehicles were plying on the road. So far as the question of identity of the persons who was sitting on the motorcycle on the other side of the road is concerned, there is no cogent evidence that the accused Mohammad Mazid was the person who was sitting on the motorcycle.

14. The Trial Judge has observed that even the make of the motorcycle has not been mentioned anywhere in the

statement nor its registration number has been noticed. Therefore, there was no question of identification of person sitting at a distance of 30-40 meters wearing helmet.

15. Ld.Trial Judge has also dealt with the question of identity of accused Mohammad Ishtiaq. In the examination-in-chief of PW1 Shri Anoop Kumar Batham has deposed that the accused had tried to snatch the bag from him, but he could not snatch his bag and then put off his helmet and hit on his head thrice. In the statement recorded, Ex.PW1/A, however, this fact was not stated by PW1 Shri Anoop Kumar Batham. When he was asked this question in his cross-examination, he stated that he has told to the police that when the accused has come to him, and could not snatch the bag from him, he put off his helmet and hit on his head thrice.

16. Ld.Trial Judge considered this fact to be improvement, as this fact is not mentioned in the statement Ex.PW1/A.

17. The Trial Court has also noted that the improvement made by the witness in their statements. PW1

Shri Anoop Kumar Batham has made vital improvement in the statement on a very crucial aspect of the case as to the identity of the accused. The absence of this fact of accused taking off his helmet and hitting thrice and mentioning the fact in the examination-in-chief PW1 seems to be an effort to nail down the accused in some way or the other. Moreover, the evidence, led by the prosecution with regard to the identity of the accused, is therefore, not found cogent and reliable. Apart from this, there is no evidence on record that the complainant/ PW1 Shri Anoop Kumar Batham had withdrew the sum of Rs.86,000/- from the bank. IO had also did not seize the said currency notes of Rs.86,000/- from the complainant, nor any proceedings has been drawn with regard to this.

18. Keeping the aforesaid discussion into view, the Trial Judge has dealt with all the issues in a proper manner and I find no discrepancy or illegality in the judgment passed by the Ld.Trial Court.

19. Therefore, I am not inclined to interfere with the findings of Ld.Trial Court. I concur the same.

20. The Criminal Leave Petition No.395/2011 is accordingly dismissed with no order as to costs.

SURESH KAIT, J

August 17th 2011

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