

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

+ **Crl.Appeal No.679/2009**

% Judgment reserved on :26th July, 2011
Judgment delivered on:13th September, 2011

VIRENDER YADAV @ VICKY @ CHHOTU Appellant
Through: Ms.Rakhi Dubey, Adv.

versus

STATE OF DELHI Respondent
Through: Mr.Arvind Kumar Gupta
APP.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

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

YES

SURESH KAIT, J.

1. Vide the instant petition appellant has challenged the judgment dated 31.07.2009, by which the appellant was held guilty for the offence punishable under Section 397 Indian Penal Code, 1860 in case FIR No.17/2005 registered at police station Ashok Vihar and has further challenged the sentence order of even date, by which he was sentenced to RI for 07 years and to pay a fine of ₹2,000/- in default of fine, to further undergo SI for a period of 03 months. However,

the appellant herein and other co accused Gian Chand were acquitted in case FIR No.19/2005 police station Ashok Vihar under Section 307/186/353/120B/34 Indian Penal Code. But, co-accused Gian Chand has been acquitted by giving him benefit of doubt in both the aforesaid case FIRs.

2. The appellant has prayed in this appeal as under:-

“i) quash/set-aside the impugned order dated 31.07.2009 passed by Shri Alok Agarwal, Ld.ASJ, Delhi in S.C. No.62/2005 titled as State Vs.Virender Yadav & Ors. and acquit the appellant of this case or alternatively;

ii) pass an order modifying the sentence of R.I. for 7 years and fine ₹2,000/- to the period already undergone by the appellant or pass such other order as the Hon’ble Court may deem fit and proper in the interest of justice.”

3. During arguments, learned counsel for the appellant has not pressed the first prayer, therefore, she has argued for the second prayer on the ground that in the present case, no injury has been inflicted on the person of the complainant, therefore, the case under Section 397 Indian Penal Code becomes doubtful, therefore, the

appellant can be convicted under Section 392 Indian Penal Code.

4. It is further submitted that there were three accused in both the abovesaid FIRs. Accused Gian Chand has been acquitted and co accused Ajay Kumar was declared juvenile vide order dated 25.03.2009 by the learned Trial Court. Therefore, only appellant remained in the present case.

5. Before proceeding further, let us recapitulate the facts concerning in both the aforementioned FIRs.

6. On 08.01.2005 Sh.Rajinder Jain, owner of the factory No.A93/1 at Wazirpur Industrial Area, after closing his factory, was going in his Santro car bearing registration No.DL-8CG-4411 along with his partner Shri Kamal Daga, four boys aged between 20-25 years carrying knives and pistol came in front of his said and forced him to stop. One of the boys aimed a pistol at his temple and the other boys carrying knives and asked him to handover the briefcase under threat of killing him. They opened the rear door of the car and picked up the briefcase. On their raising alarm, all

the boys ran away towards the petrol pump along with the brief case. Rajinder Jain also stated that all the bundles of the currency notes contained in the briefcase bear his signature and that he can identify the four boys, if shown to him.

7. On the basis of the above statement, FIR No.15/2005 under Section 394/397/34 Indian Penal Code was registered at police station Ashok Vihar upon sending a rukka from the spot. Site plan is stated to have been prepared at the instance of the complainant.

8. On the next date i.e. 09.01.2005, a secret information is stated to have been received that the persons who had robbed Rajinder Jain on the previous day were scheduled to assemble in a park near the railway crossing at Chander Singh Azad Railway Crossing in order to distribute the looted amount. It is stated that the said information was recorded vide DD No.16 at about 09:20PM. A raiding party is stated to have been formed, reached near the public urinal Railway Colony at about 09:30PM. A *nakabandi* was held and police party distributed into four teams and started moving

towards the four persons. On finding themselves surrounded by the police, one Ajay Kumar Paswan fired towards SI Sukh Ram Pal from his pistol. Simultaneously, another person namely Virender Yadav (appellant) aimed a pistol at SI Rambhau and fired. Both the bullets misfired their targets. Police party also fired in the air from their service pistols and kept moving ahead to nab the assailants. Two of them managed to slip away due to darkness. However, Ajay Kumar was apprehended by SI Sukh Ram Pal & Virender Yadav(appellant) by ASI Ram Bhau. The pistols in their hands were also snatched by the police party. On search of the accused persons, one live cartridge each was recovered from the right side pant worn by them. From the recovered pistol, the remnants of the fired bullets were also recovered. One briefcase of black colour make (VIP Odyssey) was also found laying there. The briefcase was picked up and checked and same was found to contain ₹9.00 lacs, two cheques of ₹5.00 lacs each drawn on State Bank of Mysore and some visiting cards of Oswal Cable Products.

9. Thereafter, the Investigating Officer prepared the sketches of pistol, live cartridges, and remnants recovered

from the accused Ajay and appellant respectively were prepared and the weapons/ammunitions were sealed in separate cloth parcels before being formally seized. The requisite forms for sending them to CFSL were prepared at the spot and since the police party was also obstructed while performing their public duties, a separate FIR No.19/2005 was got registered at police station Ashok Vihar under Section 307/186/353/34 Indian Penal Code and Section 25 Arms Act by sending a rukka from the spot.

10. After completing the spot investigations, appellant and accused Ajay were arrested in both the said FIRs bearing Nos.17/2005 & 19/2005. During investigation, both the accused were sought to be put to TIP on 13.01.2005, but they refused to participate stating that they have been shown to the people at police station and their photographs have also been taken. The case property namely the briefcase was however got identified by the complainant in the TIP proceedings held on 14.01.2005.

11. In the meanwhile, co-accused Ajay Kumar and appellant had already charge-sheet to the Court separately

in both the said FIRs. On arrest of accused Gian Chand, supplementary charge-sheets were also filed in both the said cases.

12. In case FIR No.17/2005, a charge under Section 392/397/34 and Section 411/34 Indian Penal Code, 1860 was framed against all the accused persons vide order dated 27.05.2003. On the same date, charge under Section 186/353/307/34 Indian Penal Code, was also framed against all of them. Separate charge under Section 25/27 Arms Act, 1959 were also framed against the appellant and accused Ajay Kumar in respect of the pistols allegedly recovered from them in case FIR No.19/2005. All the accused persons including the appellant pleaded not guilty and claimed trial.

13. Vide order dated 17.05.2009 of learned Trial Court, both the cases were clubbed together for the purpose of trial and it was also ordered that the evidence shall be recorded in the file of case FIR No.17/2005.

14. In order to prove both cases against the accused persons including appellant, prosecution has examined in all 17 witnesses during trial.

15. PW-2 Shri Rajender Jain and PW-3 Shri Kamal Daga are the victim and eye-witnesses of the offences of robbery on 08.01.2005. The eye-witnesses of offence in case FIR No.19/2005 and witnesses of recovery of the stolen property and arrest of the accused Virender and Ajay Kumar are PW-1 HC Narender, PW-4 Ct.Manohar Lal, PW-7 Ct.Manoj Kumar, PW-9 ASI Ram Bhau, PW-11 Ct.Deen Dayal, PW-12 ASI Rohtash Singh and PW-15 SI Sukh Ram Pal (Investigating officer).

16. PW-5 Ms.Archana Sinha, learned MM had conducted the TIP proceedings of appellant Virender and accused Ajay on 13.01.2005. She proved the proceedings as Ex.PW5/B and Ex.PW5/C respectively, wherein, both of them had refused to participate the TIP proceedings. PW-8 Sh.Ajay Goyal, Learned MM had conducted the TIP proceedings of the stolen brief case and proved the proceedings as Ex.PW2/C.

17. PW-6 HC Tasveer Singh, Duty Officer proved the FIR No.17/2005. PW-13 HC Naresh had proved the FIR No.19/2005. PW-10 Shri K. C. Varshney, Senior Scientific

Officer (Ballistics) has proved his report to the effect that pistols examined by him were fire arms and the live cartridges were ammunition as defined under the Arms Act. He proved his report as Ex.PW10/A. PW-14 Shri Manish Kumar Aggarwal, Deputy Commissioner of Police, North-West District has proved the sanction for prosecution of accused Ajay Kumar and the appellant under Section 39 of the Arms Act.

18. PW-17 HC Jagjeet Singh has proved the confessional statement made by co-accused Gian Chand recorded on 15.04.2005.

19. On completion of the prosecution evidence, all the accused persons including the appellant were examined under Section 313 Cr. P. C., wherein all of them denied the evidence against them.

20. Both the accused persons including the appellant denied their involvement and took a defence that they have been falsely implicated. Appellant has also produced a defence witness as DW-1 Shri Chander Prakash, who

deposed that the appellant was picked up from his house on 09.01.2005 at about 10:00AM in his presence.

21. I note, during course of trial accused Ajay Kumar was declared juvenile, vide order dated 25.03.2009 of the trial Court and thereafter, the case was forwarded to learned Juvenile Justice Board under Section 7A(2) of the Juvenile Justice Act, 2000.

22. To prove the prosecution case in both the aforesaid FIRs against both accused persons, learned public prosecutor contended before the Trial Court that prosecution case stands duly proved by the ocular testimony of witnesses, duly supported by the documentary and circumstantial evidence. PW-2 and PW-3, who, are the victims of the robbery have been narrated the incident and have clearly identified both the accused persons as the robbers. Together with this, the evidence of recovery of the stolen briefcase along with all its contents on the next date from the possession of the accused persons further reinforces their deposition. The testimony of these witnesses are corroborative of each other in all material particulars

including the exact description of the incident and the roles attributed to each of the accused. PWs 1, 4, 7, 8, 11, 12, & 15 are the eye witnesses of the incident on next date i.e. 09.01.2005, when the police party was fired upon and the stolen briefcase was recovered. Their testimonies are also quire consistent and corroborative of each others. The pistol and one live cartridge recovered from the appellant have been proved to be a fire arm and ammunition respectively by ballistics expert report proved by PW-13. Therefore, as was argued that there is no scope for taking other view in the matter and both the accused persons including appellant liable to the convicted for all the offences they are charged with.

23. On the other hand, learned counsel for the appellant assailed the evidence of the prosecution on all counts. He had argued that no such robbery took place and PW-2 Rajinder Jain has falsely implicated the appellant by cooking up a false story of robbery in connivance with the police officials. This, as per the learned counsel, has been done because, he was annoyed with one of the accused persons arrested in the case namely Ajay Kumar, who was

transferred to Learned Juvenile Justice Board, used to sell fruits on the *Thella* in the parking space of the complainant.

24. Learned counsel for accused persons further argued that there are material contradictions in the deposition of the PW-2 and PW-3. Their depositions are not exactly in line with the FIR. According to him, it is highly improbable that the briefcase containing as many as ₹9.00lacs is robbed and the same is recovered on the next date with all its contents intact. Another aspect is that complainant has signed on each and every bundle of currency notes contained in the brief case and all the notes are recovered on the next day. It has been further argued that it is not possible in routine course of business to keep all the bundles of currency notes duly signed. The ringing up the police from PCO is also highly improbable especially when both the witnesses were carrying their mobile phones.

25. In regard to the offences of firing at police party and recovery of the briefcase also create doubts that non-joining of any public witness even though the information was available in advance with the police officials gave

credence to the contention that the alleged encounter was totally fake. It is also pointed out that while four bullets are stated to have been fired at the spot, there is no evidence that the spent bullets were recovered or even searched by the police party.

26. With regard to the incident of 08.01.2005, both the prosecution witnesses i.e. PW-2 and PW-3 who are the victims of incident have deposed that on 08.01.2005 that on 08.01.2005 at about 08:00PM, they were proceeding in Car bearing registration No.DL-8C-G-4411 from their factory at A-93/1, Wazirpur Group Industrial Area towards the house of PW-2 and he was driving the car and PW-3 was also accompanying him. When they reached in front of factory at A-12, Wazirpur, their way was blocked by four persons, who, forced them to stop their vehicle and took positions in front of the doors of the car. Here, PW-2 has stated that out of the two persons, taking position in front side, one had a pistol in his hand and the other had a knife. However, the deposition of PW-3 indicates that both the persons in front had pistols, while both persons at the rear side had knives in their hands. The appellant is stated to be person who had pointed a pistol

at PW-3 . Both the witnesses have also identified co-accused Gian Chand as one of the robbers, who was carrying a knife and had taken position in the other rear door.

27. PW-2 has proved his statement recorded by police as Ex.PW2/A. He has further proved the TIP proceedings in which he has identified his briefcase, cash, cheques and visiting cards before the learned MM. They have deposed that on 12.01.2005 or 13.01.2005, they were called to the Central Jail, Tihar to participate in the TIP, but were told that the accused persons had refused to participate. In the cross-examinations, the witnesses have firmly stood their ground. PW-2 admitted that he and PW-3 both had their mobile phones with them, but has explained that the PCO booth was just at the distance of 5-7 steps away from the spot of the incident. No further questions have been put to him in this regard. In reply to another question, he had testified in his cross-examination that it was his normal practice to sign on the bundles of all currency notes. No suggestion has been given to PW-2 that at any time he had known any of the accused persons or that he had falsely implicated any of the accused persons

because of some enmity or annoyance with them. Similarly, PW-3 has also denied a suggestion that it was a false case or that no incident of robbery took place. Further deposed that entire incident lasted for about 5-7 minutes. He had denied that the robbers had their faces covered at the time of the incident and has firmly reiterated that he could identify a person, if he sees him once in his life.

28. Learned Trial Court after going through the depositions of the witnesses, found that no suggestions put to the witnesses as they had never known any of the accused persons or that they had falsely implicated them due to some enmity. The suggestion has of course been made to the police witnesses including the IO which has been denied by them. In any case, the learned Trial Court was of the view that doubt cannot be raised on the deposition of the victim on the basis of a afterthought story and one of the accused persons, parking his *Thella* in the car parking space of the complainant. Moreover, in his statement under Section 313 Cr. P. C. the concerned accused namely Ajay has not been taken this defence. His defence was that the stolen brief case was recovered on the

date of incident itself and that he has been falsely implicated at the instance of police officials. In reply to other question, in his examination he has further stated that he refused to participate in the TIP because his photographs were shown to the witnesses, which also belies the defence, which was sought to be put up by learned counsel for accused on behalf of other two accused persons.

29. On TIP, learned Trial Judge has relied upon the judgment of Supreme Court in ***Ronny Vs. State of Maharashtra AIR 1998 SC 1251***; as well as ***State of UP Vs. Buta Singh 19791 (1) SCC 31***, wherein, it is held that it was no fault of the victim and in a case like the present one, where the victim and another eye witness have strongly asserted that they had seen the accused as one of the robbers in an incident which lasted over five minutes, there is no reason to doubt their credibility. In ***Ronny (supra)*** it is clearly stated that doubting first time identification of witness is only a rule of prudence and is not statutorily mandated. The Supreme Court has also listed several other exceptions to the rule; one of them being when the witness

knew the accused earlier or when the witness has been the accused in broad day light for a long time.

30. The gist of the judgment on the point of TIP appears to be that absence of the TIP would not matter in case, the accused are known to the witness or where the witness also had some interaction with them, may be at the time of incident itself. It may also not been insisted upon if the other circumstances proved in the case indicate the complicity of the accused and the same can be taken as corroborating evidence of identification. In case of absence of any other corroborative circumstances, however, the evidence, of identification in the Court, for the first time is highly unsafe to rely upon. The Trial Court has relied upon ***Lakhwinder Singh Vs. State of Punjab 2003 Crl LJ 3058*** wherein, it has been held as under:-

“36. It is not in dispute that on the date of occurrence i.e. 24th December, 1996 the informant PW. 14 did not know the names of any of the gunmen who had taken part in the assault. Similarly, PW. 15 also did not know the names of the gunmen of Ranjit Singh and his father. Admittedly PW. 14 came to know of their names

3-4 days later. We have earlier noticed that despite the fact that they did not know the names of any of the gunmen, the name of Paramjit Singh finds place in the first information report as well as in the marginal notes of the site plan, both prepared at the instance of PW. 14. That apart, since the assailants were not known to this witness by name, there appears to be no reason why a test identification parade was not held. It is not in dispute that no test identification parade was held to identify the assailants and this also is a serious lacuna in the case of the prosecution.”

31. In the instant case, the appellant had refused to participate in the TIP, therefore, his identification by the eye-witnesses in the Court cannot be rejected on the ground of absence of the identification in TIP. In **Munna Vs. State AIR 2003 SC 3058**, it has been held as under:-

“9. In a case where an accused himself refuses to participate in a test identification parade, it is not open to him to contend that the statement of the eye-witnesses made for the first time in Court wherein they specifically point towards him as a person who had taken part in the commission of the crime, should not be relied

upon. This plea is available provided the prosecution is itself responsible for not holding a test identification parade. However, in a case where the accused himself declines to participate in a test identification parade, the prosecution has no option but to proceed in a normal manner like all other cases and rely upon the testimony of the witnesses, which is recorded in Court during the course of the trial of the case”.

32. In the case of appellant, both the witnesses have identified him and have attributed a specific role of pointing a pistol on the temple of the PW-3 Shri Kamal Daga. He also refused to participate in the TIP on 13.01.2005. PW-5 Ms.Archana Sinha, learned MM has proved the TIP proceedings in respect of appellant as Ex.PW5/C, as per which, he had refused to participate on the ground that his photographs had been taken at police station Ashok Vihar and have been shown to number of public persons.

33. I note that no particular defence has been raised by him in his examination under Section 313 Cr. P.C. and no defence evidence has been led, therefore, there is no

explanation on record as to why two public witnesses would falsely implicate the accused persons or appellant.

34. As regards the offence of firing at police officials, as per prosecution case, during same transaction, two of the persons, who, had assembled at park across the railway line at Phase – II, Ashok Vihar, fired at the police party, therefore, a separate case being FIR No.19/2005 under Section 307/186/353/120B/34 Indian Penal Code, 1860 was registered on 09.01.2005.

35. Witnesses to this effect are PWs-1, 4, 7, 9, 11, 12. They all had deposed that on 09.01.2005, PW-15 SI Sukhram Pal received the information that the persons who had committed robbery on the previous night would gather near the *mazaar* at the railway line, Ashok Vihar, for the purpose of distribution of the looted amount. The SHO, police station Ashok Vihar was informed and a raiding party was formed consisting of SI Sukhram Pal, ASI Ram Bahu, ASI Rohtash, HC Naresh, Ct. Manohar, Ct. Manoj, Ct. Narender and Ct. Din Dayal. The raiding party reached the spot at about 09:30PM. The party was divided in four groups who took positions on

different sides in the park. They challenged the four persons present in the park, upon which Ajay and appellant fired shots on the police party with the country made pistol. SI Sukhram Pal also fired twice in the air while moving towards the said boys; the four teams of the police party surrounded them. Two of those four boys managed to escape. While, co accused Ajay and appellant were apprehended. A country made pistol was stated to have been recovered from their possession and on opening each pistol remnants were of the spent cartridges and one live cartridge each was found in their pockets. One briefcase was also found laying on the ground, where, the said four boys were present. As per the witness, one lock of the briefcase was damaged, but on opening the briefcase, all the contents as mentioned by the complainant were found intact.

36. Learned counsel for the accused persons has argued before the Trial Court on the grounds as under:-

a) After registration of FIR of robbery of a huge amount of ₹9.00lacs, the robbers would not assemble on the next date at a public place, very near to the police station, to distribute the booty;

b) It is highly improbable that all the contents of the robbed briefcase would be intact although there was an intervening night between the incident of robbery and the distribution.

c) The story of the robbers firing at the police party is also highly improbable. Four shots are stated to be fired in all, but there is no evidence that the police party had recovered or even searched for the fired bullets.”

37. The Trial Court has noted from the record that none of the persons arrested by the police is a resident of Ashok Vihar. There is no record to show that they have been conducting any business or operating any criminal activities from that area. In these circumstances, the story of their assembling to distribute the looted amount very near to the same police station, where, the FIR of robbery has been registered just on the previous night and was under active investigation appears to learned Trial Court to be totally unbelievable.

38. Learned counsel for accused persons also argued before the Trial Court that out of the four persons, only two of them having country made pistols and which can only fire one bullet at a time, if they are as seasoned criminals as they are made out to be, would never fire at the police party comprising of 12 police officials, who can be presumed to be carrying their service revolvers. He also pointed that the witnesses have admitted in their cross-examination that the members of the police party were in uniforms and some of witnesses stated that the area was illuminated by public lights.

39. The Trial Court has observed that all seven witnesses have deposed consistently about the incident of firing and of recovery of arms and ammunitions and their stolen briefcase on 09.01.2005. However, because of the inherent improbabilities of the incident itself, there would always be a lingering doubt over the same. Non-joining of the public witnesses at the time of the raid and no efforts being made to recover spent bullets, from the ground only aggravates the suspicion. No other independent circumstances have been proved which could corroborate

the testimonies of official witnesses in this regard. There is no injury to any person.

40. In the above circumstances, the Trial Court has acquitted all the accused persons under Section 307/186/353/120B/34 Indian Penal Code, 1860 allegedly committed by them on 09.01.2005 in case FIR No.19/2005 of police station Ashok Vihar, Delhi. Ultimately, the Trial Court has held that prosecution has been able to prove that the appellant on 08.01.2005 at about 08:30PM along with some of his associates committed robbery of a briefcase containing ₹9.00lacs, from the possession of the complainant Rajinder Jain by pointing a pistol at the temple of his partner Kamal Daga, therefore, the appellant has been convicted under Section 397 Indian Penal Code, 1860, whereas the appellant has been acquitted all other charges in both the FIRs on benefit of doubt.

41. Co-accused Gian Chand has been acquitted in both the cases from all the offences.

42. It has been argued by learned counsel for appellant, that admittedly, there is no injury received by any

of the witnesses and the Trial Court has wrongly convicted under Section 397 Indian Penal Code, 1860. The facts and circumstances of the case do not fulfil the contents, as are enumerated in Section 397 Indian Penal Code, 1860. For convenience it is reproduced as under:-

“397. Robbery, or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.”

43. The recovery of the weapon is totally doubtful, therefore, the ingredients of Section 397 Indian Penal Code, 1860 i.e. uses of any deadly weapon, or causes grievous hurt or attempts to cause death or grievous hurt is missing in the present case, therefore, the instant case does not fall under Section 397 of Indian Penal Code, 1860, however, offence falls under Section 392 Indian Penal Code, 1860.

44. The contents of said Section 392 of Indian Penal Code, 1860 are as under:-

“392.Punishment for robbery.--Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years”.

45. Admittedly, the instant case is not committed on a highway between sun set and sun rise, therefore, in the absence of this fact the punishment should be, to the extent of maximum to ten years and fine.

46. The appellant is in Jail since his arrest i.e. 09.01.2005, therefore, he has completed 06 years 08 months.

47. Therefore, in the circumstances, I modify the impugned judgment dated 31.07.2009 to the extent that the appellant is convicted under Section 392 Indian Penal Code, 1860 and order on sentence of the same date to the extent that appellant shall be released on the sentence to the period already undergone.

48. The Jail authorities are directed to release the appellant henceforth, if not warranted in any other case.

49. Criminal Appeal No.679/2009 is partially allowed.
50. No order as to costs.

SURESH KAIT, J

September 13th, 2011

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