

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL NO. 978/2009

% Judgment decided on: 17th March, 2011

IMRAN

.....APPELLANT

Through: Ms. Rakhi Dubey, Adv.
Versus

STATE (NCT) OF DELHI

.....RESPONDENT

Through: Mr. Arvind Gupta, APP for the
State.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J. (Oral)

1. Appellant has been convicted under Sections 394/452/341 IPC by the Trial Court; sentenced to undergo rigorous imprisonment for two years with fine of ₹10,000/- and in default of payment of fine to undergo simple imprisonment for six months under Section 452 IPC; sentenced to undergo rigorous imprisonment for seven years with fine of ₹20,000/- and in default of payment of fine to undergo simple imprisonment for one year under Section 394 IPC. Both the sentences have been directed to run concurrently. Benefit of Section 482 Cr.P.C. has also been given to the appellant. It has been further ordered that

sentences awarded in this case shall run consecutively, that is, after the expiry of sentences awarded to the appellant by the Additional Sessions Judge, Delhi vide order dated 10th April, 2007 in a case arising out of FIR No. 361/2002 under Sections 392/394/397/34 IPC registered at Police Station Bhajan Pura.

2. That is how petitioner is before this Court by way of present appeal. He has challenged his conviction as well as the sentences as awarded to him by the Trial Court.

3. Factual matrix of the case is that the complainant namely Aisha along with one year old son was present in her house on 9th October, 2003. Her husband had gone to his factory. At about 11 AM, appellant along with his two accomplices came to complainant's house on the pretext of installing cable connection. They told her that her husband had asked them to install cable connection in the house. Accomplices of the appellant caught hold of complainant's son and threatened to kill him in case she raised alarm. By showing pistol and knife they forced her to hand over keys of almirah to them. She tried to resist their act and in the process sustained injuries on her hand. Appellant and his accomplices robbed ₹30,000/- and some jewelry and fled away with the same. After the incident police was informed. Investigating Officer (IO) recorded the statement of complainant pursuant whereof FIR was registered. On 9th October, 2003 itself, IO had shown certain photographs to the complainant. She identified the photograph of appellant and told that he was one of the assailants. On

the tip given by the complainant appellant was arrested on 19th October, 2003. Other accused could not be apprehended.

4. After completion of investigation charge-sheet was filed in the court. Charges under Sections 452/392/394/397 IPC were framed against the appellant on 14th November, 2006 by the Trial Court to which he pleaded not guilty and claimed trial. Prosecution examined ten witnesses in all to support its version. Thereafter, statement under Section 313 Cr.P.C. of appellant was recorded wherein entire incriminating material, which had come on record, was put to him. The case of appellant is that of simple denial. He claimed himself to be innocent. According to him, he had been falsely implicated by the complainant Aisha. In his defence, he examined himself under Section 315 Cr.P.C. as DW1. He did not examine any other witness. He deposed that he could not have been present in the house of complainant at the time of incident as he had gone to Dr. S.P.M. Chest Clinic and Hospital, Patparganj, Delhi on 9th October, 2003 at 8:15 am for his medical checkup since he was suffering from chest pain and tuberculosis. He remained in the hospital upto 12 O' clock. He placed on record OPD Card and Out Patient Visiting Card allegedly issued by Dr. S.P.M. Chest Clinic and Hospital as DW1/A and DW1/B respectively. However, his this plea of alibi has not been accepted by the Trial Court in absence of any witness having been examined from Dr. S.P.M. Chest Clinic and Hospital, inasmuch as, DW1/A and DW1/B did not bear signatures of the doctor or any other employee of the hospital.

5. Trial Court found the testimony of complainant Aisha trustworthy, reliable and credible enough to conclude beyond shadow of reasonable doubt that it is the appellant, who along with his two accomplices, had entered in her house and robbed Rs.30,000/- and jewelry on 9th October, 2003 at about 11 am. Trial Court has also returned a definite finding that identity of the appellant had been duly established since he was identified by PW1 in the court as the same person who had entered in her house along with two other persons and had committed robbery. Plea of the appellant that this identification was of no consequence since his photograph had been shown during the investigation to the complainant has been rejected.

6. I have carefully perused the testimony of PW1 Aisha and find her to be trustworthy and reliable witness. Learned counsel for the appellant has failed to point out any material, inherent discrepancy in her testimony so as to discard her version. It is not the case that PW1 was known to appellant or was nursing any grudge against him. If that is so, then why she would depose against the appellant falsely implicating him in a heinous offence of robbery. PW1 has deposed that on 9th October, 2003 at about 11 am she was present in her house with her son; while her husband had left for his factory at about 10 am. Three boys entered in her house on the pretext of installing cable connection. One of the offenders had put dagger on her neck and the other kept a revolver on her temple. They also held her son in their captivity. They demanded keys of almirah from her. When she tried to push the offenders away, she sustained injuries on her hands from the

knife/dagger which they were having in their hands. Offenders removed ₹30,000/- in cash and some jewelry from the almirah and ran away. On her raising alarm, mohalla people came there. Police was informed about the incident. She has categorically deposed that accused present in the court was one of the offenders. Her testimony to this effect has remained unshattered in her cross-examination. There is no reason to disbelieve her version. In my view, Trial Court has rightly accepted her testimony for arriving at a conclusion that it is the appellant who had entered in the house of complainant along with his accomplices and robbed her of her valuable jewelry and cash at the point of knife.

7. Learned counsel for the appellant has next contended that appellant was not known to complainant. He was identified in court by the complainant for the first time. This identification for the first time in Court was valueless. Complainant had admitted that she was shown photograph of appellant by the IO. This fact has even been admitted by the IO. In view of this, appellant was justified in refusing to participate in Test Identification Parade (TIP) and no adverse inference can be drawn against the appellant on account of his refusal to participate in TIP since his photograph had admittedly been shown to the complainant. I do not find any force in this contention of the learned counsel. It is not the case that after appellant was arrested his photographs were taken and shown to the complainant. In this case, appellant has been arrested at the instance of complainant. Even prior to his arrest, photographs of some bad characters of the area had been

shown to her. She identified the photograph of appellant amongst those photographs and confided in IO that appellant was one of the assailants. It is on the tip given by her that appellant had been arrested. In this scenario, identification of appellant by the complainant in court is acceptable and is not hit by Section 9 of the Indian Evidence Act. Identity of the accused is a relevant fact as per the said Section and the testimony of the witnesses before a court is substantive evidence. TIP belongs to investigation stage and is relied for the purpose of corroboration. In ***Munshi Singh Gautam v. State of M.P. (2005) 9 SCC 631*** Supreme Court has held that substantive evidence is the evidence of identification in court. TIP is conducted during investigation stage to eliminate the possibility of the accused being shown to the witness prior to his evidence being recorded in court. The purpose of prior identification is to test and strengthen the trustworthiness of the evidence recorded in court. It is a safe rule of prudence to generally look for corroboration of the sworn testimony of witness in court. But in an appropriate case dock identification can be relied upon without corroboration. In ***Laxmi Raj Shetty Vs. State of Tamil Nadu (1998) 3 SCC 319***, Supreme has held “.....In the world as a whole today, the identification by photographs is the only method generally used by the Interpol and other crime detecting agencies for identification of criminals engaged in drug trafficking, narcotics and other economic offences as also in other international crimes. Such identification must take the place of a test identification.” In this case identification of the appellant by photograph was done even prior to his

arrest. After looking at the photographs of several persons complainant had identified appellant as one of the assailants. Identity of the appellant was within the knowledge of the IO even prior to arrest of appellant. In fact, appellant was arrested after his identity was established. Thus, identification of the appellant in court by the complainant is valid and legal.

8. PW1 has categorically deposed that assailants were armed with knife and pistol. During the robbery she had sustained injuries by a knife which assailants were carrying. MLC Ex. P-A of complainant corroborates her this version. Section 394 IPC provides that if any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. In this case, it could not be conclusively proved as to whether appellant was armed with knife or pistol as the complainant has given wavering statements on this point. At one stage she had stated that appellant was armed with knife while at other stage she has stated he was not armed with knife but revolver. However, the fact remains that during robbery appellant and his accomplices were carrying knives and complainant had sustained injuries by a sharp edged weapon. Section 394 IPC envisages that if during the robbery victim sustains injury not only the person who had caused such injury but other persons who are concerned in committing robbery shall also be liable to be punished

under this provision. Thus, Trial Court was right in convicting the appellant under Section 394 IPC. As regards challenge to the conviction of appellant under Section 452 IPC is concerned, same has not been pressed during the arguments.

9. In view of the above discussions, conviction of appellant under Section 394/452 IPC is upheld.

10. Learned counsel for the appellant has then contended that leniency be shown in sentence. Appellant is serving sentence of ten years in a case arising out of FIR No. 361/2002. The sentence awarded in this case may, thus, be directed to run concurrently with the sentence awarded in the said case. If no such order is passed appellant shall have to remain in incarceration for seventeen years. Appellant is involved in only two cases. He has no other criminal record. Appellant is a young man. He has to support his old mother, wife and two unmarried sisters. If he remains in incarceration for seventeen years his whole family would suffer immensely. I have considered contentions of learned counsel on this point. Section 427 Cr.P.C. provides that when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. Discretion vests in the court to order that subsequent sentence shall run concurrently with the previous

sentence. Keeping in view the totality of the circumstances, order on sentence is modified to five years from seven years under Section 394 IPC. Sentence awarded under Section 452 is maintained. It is further ordered that sentences awarded in this case shall run concurrently with the sentence awarded in the previous case.

11. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

March 17, 2011

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