

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

+ **CRL.A. 764/2001**

%

Reserved on: 3rd February, 2012
Decided on: 20th March, 2012

MANOJ TOMAR @ LALA

..... Appellant

Through: Mr. M.S. Khan, amicus curiae.

versus

STATE

..... Respondent

Through: Mr. Manoj Ohri, APP for the State.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal the Appellant lays challenge to the judgment dated 10th September, 2001 convicting the Appellant for offences under Sections 392/394/34 IPC and order on sentence dated 17th September, 2001 directing him to undergo Rigorous Imprisonment for a period of four years for each offence punishable under Sections 392/34 IPC and 394/34 IPC.

2. Learned counsel for the Petitioner contends that complainant/PW1 Jai Singh the star witness of the prosecution case in his first statement has leveled no allegation of robbery. The only allegation leveled is that the accused put his hand in the pocket of the complainant and when he caught hold the hand, the accused and co-accused pulled him down from the bus and the co-accused stabbed him with knife. PW1 did not know the Appellant before the incident. However, strangely on the next day of the incident, he comes to the police station and states that the accused is standing at a particular place and he be arrested. PW1 has not fully supported the

case of the prosecution in the Court. Thus he was cross-examined by the learned APP. In the cross-examination, learned APP put leading questions to him. A suggestion was given by the prosecution that he failed to identify the Appellant as he was won over which he denied. Thus, there is no identification of the Appellant by the alleged injured witness. Despite this, the learned Trial Court erroneously held that the Appellant was sufficiently identified. The MLC has not been exhibited by the Record Clerk. Further PW1 states that he fell unconscious at the place of the incident and regained consciousness after three hours. The MLC immediately after 45 minutes of the incident records that PW1 was conscious and oriented. As per the MLC, there was no evidence of active blood leak. An adverse inference should be drawn against the prosecution for not examining the doctor as this opinion could only have been proved by the doctor after appearing in the witness box in terms of Section 114 (g) of Indian Evidence Act. No TIP was conducted. Further there are contradictions in the testimonies of PW5 and PW6 with regard to the manner of arrest of the Appellant.

3. Learned APP for the State on the other hand contends that the testimony of PW1 clearly prove, against the Appellant, offences under Sections 392/394/34 IPC. The charge sheet was filed for offences punishable under Sections 394/307/34 and 397 and 398 IPC. However, the charge framed against the Appellant was for offence punishable under Sections 392/394/34 IPC and the co-accused Sanjay Negi was, in addition to above offences, charged for offence under Section 397 IPC. The statement of PW1 is consistent and there is no material improvement as PW1 in his supplementary statement has stated that on the next day after checking he

came to know that Rs. 210/- had been robbed from his pocket thus there is no improvement in the statement of PW1. The Appellant was arrested at the instance of the Complainant, thus no TIP was required. PW5 who is the witness of arrest also corroborates the arrest of the Appellant. The MLC has been properly exhibited and proved by the record clerk. The MLC shows number of injuries on the chest etc. However, since the Appellant has not been convicted for offence under Section 307 IPC, no benefit from non-examination of the doctor can be derived by the Appellant for offence under Sections 392/394/34 IPC. Thus the appeal be dismissed.

4. I have heard learned counsel for the parties.

5. Briefly the case of the prosecution is that on 5th April, 2000 at about 8.30 A.M. PW1 the complainant Jai Singh Negi boarded a bus from Bhishm Pitamah Marg within the jurisdiction of P.S. Kotla Mubarakpur. Immediately after his boarding the bus, a person put his hand in the pocket of shirt of the Complainant. As PW1 objected to the same, he was pulled down by that person and PW1 fell on the ground. The associate of that person inflicted three/four knife blows on different parts of body of PW1. On PW1 raising hue and cry nobody came forward and he fell unconscious. On the next day, PW1 came to the police station at about 7.30 P.M. and stated that he had seen the Appellant near House No. C-346, Basti Nanak Chand, Kotla Mubarakpur and on his pointing out, Appellant was arrested. After the trial, the Appellant was convicted as above and the co-accused Sanjay Negi was also convicted for offence under Section 397 IPC for which he was awarded sentence of imprisonment for a period of seven years. Sanjay Negi had undergone the sentence when this Court dismissed his

appeal being Crl. Appeal No. 290/2003 for non-prosecution on 17th August, 2010.

6. A perusal of the testimony of PW1 shows that PW1 supported the prosecution version however, in his examination-in-chief stated that he could not properly identify that the accused persons present in the Court are the same who had committed the above incident. In view of this statement of the Complainant, the learned APP cross-examined him. PW1 in his cross-examination admitted that he had joined the investigation on 6th April, 2000 in order to arrest the culprits. He further admitted that he had accompanied the Investigating Officer to House No. C-346, Basti Nanak Chand, Kotla Mubarakpur where he pointed out towards a person involved in the above robbery and that person was arrested by the Investigating Officer whose name was known as Manoj Tomar. He further admitted about the arrest, disclosure and that on the day of arrest he correctly identified the Appellant, who was arrested but he was not sure when he appeared in the witness box that he was the same person. In view of the fact that the Complainant/PW1 admitted that he had identified the Appellant at the time of arrest, I find no error in the judgment of the learned Trial Court in coming to the conclusion that the Appellant was correctly and sufficiently identified by PW1. Since the arrest was at the instance of the Complainant PW1, there was no need of getting the test identification parade conducted. The Hon'ble Supreme Court in *Dana Yadav Alias Dahu and others v. State of Bihar*, (2002) 7 SCC 295 observed :

“11. This question was the subject-matter of consideration before different High Courts as well as this Court. It is well settled that no test identification parade is called for and it would be waste of

time to put him up for identification if the victim mentions name of the accused in the first information report or he is known to the prosecution witnesses from before. Reference may be made in this regard to the cases of *Dharamvir v. State of M.P. (1974) 4 SCC 150* and *Mehtab Singh v. State of M.P. (1975) 3 SCC 407.* ”

7. As regards the non-exhibiting of MLC, it may be noted that the same has been exhibited as Ex. PW4/A by PW4 Jai Prakash, the record clerk of AIIMS. No objection to the exhibition of this document was raised by the Appellant during trial. In *Phool Kumar v. Delhi Administration, (1975) 1 SCC 797* their Lordships’ held that the objection regarding proving of a document has to be taken at the first available opportunity. Further the Appellant has not been convicted for offence under Section 307 IPC and thus the same would have no relevance so far as the the Appellant is concerned.

8. I find no material contradiction in the testimony of PW5 and PW6, as pointed out by learned counsel for the Petitioner. Both PW5 and PW6 have stated that the Appellant was arrested at the pointing out by the Complainant when they reached at the said place, that is, House No. C-346, Basti Nanak Chand, Kotla Mubarakpur.

9. Further the contention of the learned Appellant that no case for robbery is made out as in the first statement the Complainant/PW1 has not alleged that any money was taken is also misconceived. It may be noted that PW1/Complainant was badly injured and was taken to hospital. Thus in his initial statement though it was not stated that any money was taken out however, in the supplementary statement recorded on the next day, he clearly stated that Rs. 210 had been taken out from his pocket. Thus the statement

of the PW1 before the learned Trial Court is not an improvement warranting demolition of the prosecution case.

10. In view of the aforesaid discussion I do not find any merit in the appeal. Appeal is dismissed. The bail bond and the surety bond are cancelled. Appellant will surrender to undergo the remaining sentence.

(MUKTA GUPTA)
JUDGE

MARCH 20, 2012
VKM