

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

+ CRL.A No.137/2004

% Judgment reserved on: 20th April, 2012
Judgment delivered on : 03rd July, 2012

RAJESH TYAGI

..... Appellant

Through: Mr.Anil Nag, Mr.K.K.Tyagi and
Mr.Iftekhar Ahmad, Advocates.

versus

STATE (N.C.T. OF DELHI)

..... Respondent

Through: Mr.Naveen Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the instant Appeal, the appellant has challenged the judgment dated 13.02.2004, whereby the appellant has been held guilty and convicted for the offence punishable under Sections 365/395 of Indian Penal Code.

2. The appellant has also assailed the order on sentence dated 17.02.2004, whereby he was sentenced to undergo RI for a period of five years and also to pay a fine of Rs.25,000/- and in default of payment, he shall further undergo SI for one year for the offence under Section 365 of Indian Penal Code. He is further sentenced to undergo RI for a period of five years and also to pay a fine of Rs.25,000/- and in default of payment, he shall further

undergo SI for one year for the offence under Section 395 of Indian Penal Code.

3. Both the sentences were directed to run concurrently. Benefit of Section 428 Cr.P.C. also extended to the appellant.

4. Brief facts of the prosecution are that on 17.03.1997, one Suresh Chand Arora was travelling in his FIAT Car bearing No.DEC-9496. He was doing a job of selling of wholesale lottery tickets from his house. He has a servant, namely, Harender. He used to purchase the lottery tickets from Deepak Agency, Moti Nagar and for that purpose he used to go in the evening of everyday for purchasing these tickets and for handing over the winning lottery tickets to him and for that purpose he also used to carry cash with him.

5. On that particular day, i.e. 17.03.1997 at about 7.10 PM when he was going in his FIAT car with carrying a cash of Rs.70-75 thousands and winning lottery tickets of worth Rs.5.25 lakhs in bag, kept in the dickey of the car and his servant was sitting on the back seat of the car. He was driving the said car. When he reached at Palam Road, East Sagarpur, he found that one SUMO vehicle, suddenly came from behind and stopped in front of his car. Three-four boys got down from the SUMO vehicle and so he also had to stop his car. All those boys came towards his car. One boy opened the backside left door of the car and entered. Two boys came to his side and opened the door and entered in the car and one boy pushed him inside the

car. His mouth and neck was pressed and he was pushed down in the car towards the side of the window and one boy sat on the steering wheel of the car. The boy who entered from the left back door of the car overpowered his servant and gagged his mouth and had also pushed him down and they started driving the FIAT car. They turned the car to one road and they travelled for about 20-25 minutes. Meanwhile those boys released him a bit and then he saw that the SUMO vehicle was parked at the place where his FIAT car was stopped by them and all the boys went running to the SUMO vehicle and entered in it and one of the boys was carrying his bag containing tickets and money. At that time his car was stopped at Jail Road, near Tihar Jail gate. He tried to release himself from the clutches of those boys but they used more pressure as a result he received injuries. He also did not find the keys of his vehicle. His servant Harender noted down the No. of TAT Sumo as DL2C 7986. He kept searching for his key for sometimes. Thereafter he took the duplicate key of the vehicle which was lying the papers of the car and went to Tilak Nagar, Police Station. The said Police Station informed that Jail Road fell into the jurisdiction of P.S. Hari Nagar. So he went to P.S. Hari Nagar and lodged his report.

6. The story of the prosecution further goes that upon that FIR was registered and the investigation was entrusted to SI Rakesh Giri, who prepared the site plan and recorded the statements of the witnesses. When he went on medical rest, the investigation was assigned to SI Kuldeep Singh, who seized the TATA Sumo No.DL2C 7986, which was seized under

Section 102 Cr.P.C. at P.S.Hari Nagar and arrested accused Manjeet Singh and Majid Khan including the appellant.

7. Accused Ashok and Manjeet could not be found so processes under Sections 82/83 Cr.P.C. were got issued against them and they were declared proclaimed offenders.

8. Accused Manjeet Singh and Majid Khan refused to participate in the TIP. Appellant Rajesh Tyagi was identified by the complainant and the witnesses in the TIP.

9. After completion of the investigation, the challan for the offences under Sections 392/394/395/120-B/34 of IPC and under Section 365/427 of IPC were framed against the accused.

10. The charges for the offences under Sections 365/34 and 395 of IPC were framed against the appellant and two co-accused, namely, Majid Khan, Manjeet Singh to which they pleaded not guilty and claimed trial.

11. In support of its case the prosecution has examined eleven witnesses in total.

12. PW1, Ranbit has not supported the prosecution case. He was duly cross-examined by learned APP. He, however, has not supported the prosecution even in the cross-examination by learned APP and nothing substantive has come on record from this witness.

13. PW3 is ASI Darshan Lal who was working as a Duty Officer on 17.03.1997. In the morning at about 3.15 AM, he recorded the FIR Ex.PW3/1 of this case on the basis of *ruqqa* handed over to him by SI Ram Kumar of PS Hari Nagar and also made endorsement on the *ruqqa* which is Ex.PW2/1.

14. PW4 is Sh.V.K.Maheshwari, the then learned ACMM, who conducted the TIP of appellant Rajesh Tyagi on 11.04.1997, who deposed that he had hold TIP on 25.03.1997 of accused Manjeet Singh and Majid Khan and that both the accused were produced in muffled face before him and both had refused to join the TIP. He had duly warned them that their refusal could be taken against them. He had also recorded their statements. This witness has proved the TIP as Ex.PW4/1. His signature is Ex.PW4/2 and certificate is Ex.PW4/3 and his order of supplying the copy to appellant Rajesh is Ex.PW4/4. He has proved the TIP proceedings of Majid Khan and Manjeet Singh as Ex.PW4/5 and his order of supplying of copies is Ex.PW4/6.

15. PW5, Constable Anil Tyagi has deposed that on 24.03.1997 he joined the investigation alongwith SI Kuldeep and Constable Shri Bhagwan and went to Pradhan Chowk, Sadh Nagar. Accused Majid Khan and Manjeet Singh were standing in front of shop of a Property Dealer. On the identification of Constable Shri Bhagwan both were arrested vide their personal search memos Ex.PW5/1 and PW5/2.

16. This witness has been cross-examined by the counsels of accused

persons. He has denied to the suggestion that the accused persons were not arrested as stated by him and that they were shown to the witnesses in the Police Post.

17. HC Jaswant Singh PW6, deposed that on 28.03.1997 he joined the investigation and on asking of SI Kuldeep Singh he went to PS Hari Nagar alongwith the copy of DD to take delivery of TATA Sumo bearing No.DL-2C-A 7986 as the vehicle was wanted in this case, which was seized by police of PS Hari Nagar under Section 102 Cr.P.C. He took the custody of vehicle vide RC No.57/21 and the memo in this regard is proves as Ex.PW6/1.

18. This witness has not been cross-examined by counsels of accused despite the opportunity given.

19. PW7, SI Ram Kumar has deposed that on 16.03.1997 he was posted as SI at P.S. Hari Nagar. He was handed over the DD No.20-A by the Duty Officer. Accordingly, he went to the hospital and collected the MLC. Since the injured Suresh Chand was declared fit for statement by the doctor, he recorded his statement Ex.PW2/1 and handed over the statement, copy of DD to Duty Officer, PS Dabri as the place of occurrence fell within the jurisdiction of PS Dabri.

20. This witness is also not cross-examined by counsel for accused persons although the opportunity for the same was given.

21. PW8 Constable Shri Bhagwan deposed that on 16.03.1997, he was on patrolling duty. At about 5 or 6 PM he noticed five persons in a TATA Sumo, out of them he knew Ashok Tyagi and Rajesh Tyagi as they used to sit with a Property Dealer Rambit. The number of the TATA Sumo in whom they were travelling was DL2C 7986. On 24.03.1997, he joined the investigation of this case alongwith SI Kuldeep Singh. They proceeded towards Pradhan Chowk on foot and Constable Anil Tyagi was also with them. On reaching at Pradhan Chowk at about 5.00 PM, they found Manjeet Singh and Majid Khan standing in front of shop of Property Dealer. He identified both the accused as the same whom he saw in the TATA Sumo on 18.03.1997. Both of them were arrested vide their personal search memos Ex.PW5/1 and PW5/2. Both the accused were interrogated and their disclosure statements Ex.PW8/1 and PW8/2 were recorded. They had disclosed that they were also with the appellant at the time of commission of crime.

22. This witness has been duly cross-examined. He denied that accused Majid Khan and Manjeet Singh were picked up from their houses on 18.03.1997. He further stated that he prepared the site plan Ex.PW10/1 on the pointing out of the complainant as he went to the spot with the complainant. He further deposed that he recorded statement of Harender correctly and also recorded statement of Constable Shri Bhagwan. On the next day i.e. 19.03.1997 he met with an accident so investigation was entrusted to some other police officials.

23. PW11 ASI Kuldeep Singh is the second Investigating Officer. He deposed that on 24.03.1997 he alongwith Constable Shri Bhagwan reached at 5.15 PM at Pradhan Chowk, Sadh Nagar. When they were proceeding towards Varun Property Dealer, where they found two boys standing there . On the identification by Constable Shri Bhagwan both were apprehended as Constable Shri Bhagwan told him that these boys were involved in the robbery dated 16.03.1997.

24. He further deposed that their personal search memos Ex.PW5/1 and PW5/2 were prepared and their disclosure statements Ex.PW8/1 and PW8/2 were also recorded. On 25.03.1997, both of them were produced in muffled face before the court and an application Ex.PW 11/1 for their TIP was moved. Both of them had refused to join the TIP.

25. PW11 has further deposed that on 10.04.1997 appellant had surrendered before the Court. He moved an application Ex.PW11/2 and with the permission of the court he was interrogated and thereafter vide his application Ex.PW11/3 appellant was sent to judicial custody. He also moved an application Ex.PW 11/4 for TIP of the appellant. Accordingly, TIP was duly conducted and appellant was identified by the witnesses. He also made a disclosure statement Ex.PW11/5.

26. This witness has also been duly cross-examined at length by learned counsels on behalf of the accused persons.

27. The complainant/ Sh.Suresh Chand Arora has been examined by the

prosecution as PW2. He has fully supported the prosecution and has proved his report to the police as Ex.PW2/1. He deposed that he went to Jail to identify the assailant and that he had identified the assailants at that time.

28. Further deposed that he identified his assailants from amongst 15-20 persons. He was shown two boys and he pointed out towards accused Manjeet Singh and Majid Khan and he did not identify them as the one involved in the robbery.

29. This witness was cross-examined on these points by learned APP. He denied his statement dated 25.03.1997 to the police and he was confronted with it. Even in cross-examination of learned APP, he was unable to identify accused Manjeet Singh and Majid Khan amongst the boys who had robbed him.

30. The complainant/PW2 also duly cross-examined by counsels for the accused persons. He denied the suggestion that on 10.04.1997 police officials had brought the appellant to his house and asked him to identify him as one of the robbers in the TIP. He has also denied the suggestion that he identified the appellant in the TIP at the instance of the police.

31. PW9, Harender Singh deposed that he was working with complainant/Suresh Chand Arora who was dealing with lottery tickets. On 16.03.1997 at about 7.00 PM they were going in a FIAT car from Pradhan Chowk to Moti Nagar. He was sitting on the rear seat. Lottery tickets and cash were in the bag which was kept in the dickey of the car. He further

deposed that when the car reached near a speed breaker of Sagarpur it was slowed down by Suresh, a TATA Sumo blocked the car and three-four boys got down from the TATA Sumo. Two persons then opened the rear window of the car and came to him and one of them went to Suresh Chand Arora. One of the boys had pounced upon him and pushed his face downward. The neck of Suresh was also caught and his head was also pushed downward. One of the boys had then driven the FIAT Car. Since his face was pushed down so that he was unable to see as to where the car was slowed and where it had been stopped. The car had been driven for about half an hour and thereafter it was stopped. TATA Sumo was following the car. After stopping their car the boy had boarded the TATA Sumo.

32. He further deposed that the number of TATA Sumo was DL2C-6978. All the boys then escaped in TATA Sumo and they also took away the bag containing lottery tickets and the cash. They found themselves near Tihar Jail. They searched for the key of the FIAT car but could not find it. Suresh had a duplicate key. He also told the number of the TATA Sumo to Suresh. Thereafter, they went to PS Tilak Nagar. The said Police Station told that occurrence had taken place within the jurisdiction of PS Hari Nagar. Suresh lodged the report.

33. Thereafter, he went to Tihar Jail for identification of the culprits. He, initially was unable to identify any of the accused and when a specific question was put to him to look at the accused persons present in the court and then to tell the court whether any of the accused was involved in the

incident. Then he looked at the three accused persons and pointed out towards the appellant. He stated that he was one of those culprits and he also identified him in TIP.

34. On the identification of accused Majid Khan and Manjeet Singh, this witness was cross-examined by learned APP. He denied that he identified both of them before the police or that both of them were involved in the occurrence. This witness has also been duly cross-examined by the counsels for the accused persons.

35. On the basis of incriminating evidence against the accused persons, their statements were recorded under Section 313 Cr.P.C. Appellant had denied all the evidence on record and stated that he was innocent. He further stated that SI Kuldeep Singh had taken him to Police Post at 3.00 PM and he was shown to the witnesses. The aforesaid SI also took him to one house and shown to four-five persons who were present there. Those persons were also asked by him to identify him in the TIP and that he was also given beatings and thereafter he was taken to Tihar Jail and lodged.

36. Accused Manjeet Singh and Majid Khan have stated that they were innocent and falsely implicated in this case.

37. Accused Majid Khan has examined one witness Swaroop Singh who stated that accused Majid was his son and he was lifted from the house by four-five police officials and thereafter falsely implicated in this case.

38. Appellant took an opportunity to produce evidence in defence but he did not produce any evidence in defence.

39. On perusal of the impugned judgment, the learned Trial Judge has observed in para -23 that the police has taken the investigation of this case very casually. No promptness was shown to lift the fingerprints from the FIAT car of the complainant in which the complainant, Suresh Chand and Harender Singh were abducted and from there the prized lottery tickets and cash amount of Rs.75,000/- was looted. Although, there were all the chances of finding the fingerprints of the assailants on FIAT car of the complainant Suresh Chand. The Investigating Officer of this case has also not made any effort to trace the owner of TATA Sumo although the number of the TATA Sumo in which the assailants had come and fled away had been supplied to the police. Vital scientific evidence has therefore, not been collected by the investigating agency although they had the opportunity and means to collect it.

40. It is further recorded in para-24 of the impugned judgement that the whole case of the prosecution about involvement of the accused/appellant in this incident depends on the oral testimony of Suresh Chand and Harender Singh. Accused Majid Khan and Manjeet Singh were arrested. They made a disclosure statement in which they had disclosed about involvement of other accused persons, namely, Ashok and Sohanlal (who were not arrested) and the appellant. However, the appellant has surrendered in the court on 10.04.1997 and on the same day, Investigating Officer of this case moved an

application for holding his TIP and he was sent to judicial custody. His TIP was conducted at Tihar Jail by learned Magistrate Sh. V.K.Maheshwari, who has been examined as PW4.

41. The Trial Court has observed that the TIP conducted by the learned ACMM does not suffer with any infirmity and both the witnesses has duly identified the appellant in the TIP conducted on 11.04.1997 i.e. after about 20-22 days of the incident. At that time it was natural that the memory of their assailants was fresh in their minds & the lapse of time has not faded it.

42. It is pertinent to mention here that as observed by the Trial Court, in the court when these witnesses were examined, PW2, Suresh Chand has failed to identify the appellant as one of the assailants. However, PW9 Harender Singh has duly identified the appellant as one of the assailants.

43. Mr.Anil Nag, learned counsel appearing on behalf of the appellant has submitted that the appellant was arrested and sent to judicial custody vide order of learned ACMM on 10.04.1997. Appellant was not sent to the lock-up of Patiala House Courts, New Delhi. However, he was taken by the Investigating Officer at various places and shown to the witnesses.

44. Thereafter the appellant moved an application before the learned Metropolitan Magistrate on 15.04.1997 wherein he duly stated that he was not lodged in the Tihar Jail by the Investigating Officer but he had taken him to the various places and kept him in his custody for hours together, thereafter, in the night lodged him in Tihar Jail.

45. Accordingly, an enquiry was conducted by learned Metropolitan Magistrate and a report was called from the Lock-up Incharge, Patiala House Courts, New Delhi, who had given its report that appellant was not produced in the lock-up by the Investigating Officer of the case. He also produced the record from Tihar Jail along with report of Deputy Superintendent, Central Jail No.5, which shows that SI Kuldeep Singh lodged the appellant to Tihar Jail at about 06:20PM.

46. Mr.Nag, learned counsel further submitted that his TIP was conducted on 11.04.1997. During this period, he was shown to various persons who were to identify the accused on the next date and therefore, the prosecution has failed to prove that the appellant was not shown to the witnesses before his TIP.

47. He has further argued that appellant has himself surrendered in the court on 09.04.1997. The learned APP had tried to explain the aforementioned lapse by stating that by the time order for judicial remand for the appellant was made, it was already late and the Investigating Officer had taken the appellant directly to Tihar Jail from Patiala House Courts. It is further submitted that the appellant first appeared in the concerned court and the Investigating Officer had moved an application for TIP of the appellant which was marked by learned Metropolitan Magistrate to Link Metropolitan Magistrate, who fixed the TIP for 11.04.1997. Thereafter, the appellant was again produced before the concerned court of learned Metropolitan Magistrate and by the time he was ordered to be kept in judicial custody, the

Lock-up Incharge of Patiala House Courts had refused to take custody of the appellant and so the Investigating Officer had directly taken the appellant to Tihar Jail and that he was lodged in Tihar Jail by the Investigating Officer at 6:20PM, which was not very late because it takes more than one hour to reach from Patiala House Courts to Tihar Jail and so taking into consideration the time of travelling, it is impossible that Investigating Officer could have taken the appellant to other places.

48. Learned counsel has further argued that explanation given by the learned APP is admitted that the appellant first appeared in the concerned court and the Investigating Officer had moved an application for TIP of the appellant, which was marked by the learned Metropolitan Magistrate to the Link Metropolitan Magistrate, who fixed the TIP for 11.04.1997. Thereafter, the appellant was again produced before the concerned court of learned Metropolitan Magistrate, who ordered the appellant to be kept in judicial custody. It is not the case of the prosecution that the concerned Metropolitan Magistrate had arised and the appellant was produced before the Duty Magistrate. Therefore, the concerned Metropolitan Magistrate was very much available and that was within time, therefore, there was no point of not accepting the appellant by the Lock-up Incharge of Patiala House Courts. Thus, the learned APP misled the court by giving a statement which cannot be believed.

49. Learned counsel has pointed out that the Trial Court has wrongly recorded in its impugned judgment that the prosecution has taken all the

precautions that the witnesses could not be able to see the appellant before 11.04.1997 when they had participated in the TIP before the learned ACMM. Had the appellant been shown to these witnesses, then he would have been immediately reported this matter to the learned ACMM, who conducted the TIP. He voluntarily participated in the TIP with full cooperation.

50. It is further recorded that he had taken this plea with the intention of taking advantage of the conduct of IO SI Kuldeep Singh, who inspite of lodging the appellant in the lock-up of Patiala House Courts had taken him directly to Tihar Jail. His contention in the application which was made after ten days of his holding the TIP is clearly and after thought. He seems to have taken this defence in order to take advantage of lapse/irregularity on the part of IO SI Kuldeep Singh. This irregularity on the part of SI Kuldeep Singh itself *ipso fact* tend to show that the appellant had not been taken by the aforesaid SI to the house or shop of the witnesses. Therefore, no such presumption can be raised. No such presumption can also be raised only because SI Kuldeep Singh had been casual enough in lodging the appellant in the lock-up of Patiala House Courts and instead he took him directly to Tihar Jail.

51. It is further recorded that the distance from Patiala House Courts to Tihar Jail takes more than one hour to reach there. There is nothing on record to show and it cannot be said by the preponderance that appellant was taken by SI Kuldeep Singh from the concerned court of learned Metropolitan

Magistrate at Patiala House Courts at any time before 5.00 PM. A judicial notice can be taken of the fact that Metropolitan Magistrates of the Patiala House Courts remain busy with the bail matters and other miscellaneous work till 4.30/5.00 PM. Although their working hours are only till 4.00 PM, but they are required to finish the work before leaving their courts. Therefore, it cannot be assumed that the learned Metropolitan Magistrate had passed the order of sending the appellant to judicial custody before 4.00PM.

52. Mr.Nag, learned counsel has asserted that the observation given by the learned Trial Judge is without summoning the learned Metropolitan Magistrate whether on that day the appellant was produced at or after 5.00 PM and, therefore, this explanation is totally imaginary and cannot be accepted in the criminal jurisprudence. Even taking the appellant to judicial lock-up has not been accepted by the Incharge, Lock up of Patila House Courts, New Delhi.

53. He further submitted that the alleged incident took placed on 16.03.1997 at 7.20 PM and at the statement of Suresh Chand Arora, FIR was lodged on 17.03.1997 under Sections 382/34 Indian Penal Code, 1860 at 2.15 AM in PS Dabri. On 15.04.1997, Investigating Officer, instead of lodging the appellant in the lock-up of Patiala House Courts invented an innovative method of frustrating the precautionary steps for a fair TIP, not to keep the appellant fully muffled so that he could not be seen by the witnesses. However, he took the appellant in his own vehicle and lodged

him in the Central Jail, Tihar at about 6.20 PM.

54. The appellant was produced, for the first time before the learned Trial Court on 15.04.1997 and on very that day an application was moved by the appellant/accused making specific averments of having been shown to the witnesses as he was never sent to the judicial lock-up of Patiala House Courts upon his remand in judicial custody.

55. To strengthen his arguments, learned counsel for the appellant has relied upon annexure P (Colly) which is at page 24 onwards to the application moved by the appellant, wherein it is stated that the appellant was taken by the Investigating Officer and kept with him for hours together and in the night, he was lodged in the Central Jail, Tihar, New Delhi. During this period, the Investigating Officer took the appellant to various places in unmuffled face. He was shown to various persons. He was also shown to the witness, who was to take part in TIP on 11.04.1997.

56. On explanation, Inspector Lock-up, Patiala House Courts gave his explanation vide communication dated 19.04.1997 to the concerned Metropolitan Magistrate, wherein it is stated that the appellant was not handed over to the staff of Lock-up on 10.04.1997 as revealed from the register maintained for this purpose.

57. The Deputy Superintendent, Central Jail No. 5, Tihar, New Delhi has stated in its communication dated 19.04.1997 that as per the record available, appellant was lodged in jail at 6.20 PM on 10.04.1997 in case FIR

No.160/97, PS Dabir vide UT No.2188.

58. Learned counsel has referred the statement of complainant Suresh Chand Arora, PW2. The relevant extract of PW2's testimony is as under:-

"Since it was dark at that time and the occupants of the sumo(the three boys) had come all of a sudden, therefore, I am unable to identify today."

"In jail I put my hand by guess that may be this boy who had involved in this case. Today I cannot recognize that boy whom I recognize in jail by guess."

"I had been shown the boys (the witness has pointed out towards Manjeet and Majid) in the police post. However, I had not identified them in the police post as the persons who were involved in the robbery (at this stage, Ld. APP requests to cross examine the witness as he is resiling from his statement recorded u/s 161 Cr.P.C. Heard. Allowed."

59. He further submitted that PW9 Harender Singh deposed on 17.01.2001 and the relevant extract of PW9's testimony is as under:-

"I have seen the three accused persons present in the court today. None of them was amongst those who were involved in the occurrence. I am unable to identify them."

60. Even PW11 SI Kuldeep Singh deposed that he did not remember the time of obtaining the judicial remand of the appellant.

61. Learned counsel has pointed out that in para 13 of the impugned

judgment, it is observed by the learned Trial Judge that the complainant Suresh Chand Arora has fully supported the prosecution and has proved his report to the police as Ex. PW 2/1 whereas in the same para it is recorded that he was shown two boys and he pointed out towards accused Manjeet Singh and Majid Khan in the Police Post and that there also he did not identify them as one involved in the robbery. Even in cross-examination of learned APP, he was unable to identify accused Manjeet Singh and Majid Khan amongst the boys who had robbed him.

62. Learned counsel has argued that PW9 Harender Singh was initially unable to identify any of the accused and when a specific question was put to him to look at the accused persons present in court and then to tell the court whether any of the accused were involved in the incident. This witness looked at three accused persons and pointed out towards the appellant and stated that he was one of those culprits and further stated that he also identified in the TIP. On the identification of co-accused Manjeet Singh and Majid Khan, he denied to identify both of them.

63. Mr.Nag has argued that PW9 had given no description about the appellant and made statement as a tutored one.

64. Learned counsel has submitted that as observed by the learned Trial Judge that the investigation in the present case has been done in a casual manner as no fingerprints were lifted and even the ownership of TATA Sumo was not traced.

65. The whole case of the prosecution rests on the oral testimony of PW2 and PW9. No precautions for holding the TIP were taken by the Investigating Officer, on the contrary, the Trial Judge has observed in para 24 that all precautions for holding TIP were taken by the Investigating Officer. The plea of the appellant of having been shown to the witnesses, not lodging in the judicial lock-up of Patiala House Courts and not taken directly to Tihar Jail was considered and rejected as an after thought. However, the learned Trial Judge while rejecting the same has observed that his contention in the application was made after ten days of his holding TIP, which is clearly an afterthought.

66. The inability of PW2 to identify the appellant in the court is impossible because of his being examined in court in the year 2001. PW9 initially hesitated in identifying the appellant but when asked by the court, he was able to identify the appellant which is not proper and against the criminal jurisprudence. The courts are not to fill the lacuna of the prosecution as it has to deal the case with fairty.

67. He has asserted that the appellant was arrested on the disclosure of the co-accused Manjeet Singh and Majid Khan as both the witnesses (PW2 and PW9) deposed that the accused were shown to them in Police Station. Co-accused Manjeet Singh and Majid Khan were acquitted whereas appellant was convicted for an offence punishable under Sections 365/395 of IPC on the same set of evidence.

68. To sum up his arguments, he has submitted that no description of the appellant was mentioned in the FIR. No recovery of lottery tickets and cash was effected. No fingerprints were lifted from FIAT car and no owner of the TATA Sumo was traced.

69. Plea of the appellant having been shown to the witnesses on 10.04.1997 is probabilized by not having sent to judicial lock-up of Patiala House Courts. The appellant was arrested on the disclosure statements of co-accused Manjeet Singh and Majid Khan but the said co-accused were acquitted. PW2 Suresh Chand Arora failed to identify the appellant in the court and he was also declared hostile by the prosecution. PW9 Harender Singh also failed to identify the appellant and only on a specific question identified the appellant/accused. However, even PW9 could not specify the role assigned to the appellant. He was also declared hostile by the prosecution. Therefore, the appellant wrongly convicted by the Trial Court only because of the fact as mentioned in the order on sentence that there were three cross-cases against him which were registered due to land dispute with his family members and village members but they have been compromised and appellant has been acquitted in all those cases. Due to the aforesaid land dispute, at the instance of the villagers, a case under TADA was also registered against the appellant and his father but the same has been withdrawn by the Government.

70. Learned counsel for the appellant has relied upon the case of **Wakil Singh and Ors. Vs. State of Bihar: AIR 1981 SC 1392**, wherein in para 2

it has been observed as under:-

“2. In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. For these reasons, therefore, the trial court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial court. The High Court, however has chosen to rely on the evidence of a single witness, completely over-looking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3½ months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness.”

71. In the case of **Bollavaram Pedda Narsi Reddy and Ors. v. State of Andhra Pradesh : (1991) 3 SCC 434**, it was observed by the

hon'ble Supreme Court that :-

“9. In the present case, the appellants are admittedly persons with whom the two witnesses had no previous acquaintance. The occurrence happened on a dark night. When the crime was committed during the hours of darkness and the assailants are utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance. The necessity to have the suspects identified by the witnesses soon after their arrest also arises. According to the prosecution, the attack on the deceased was sudden and simultaneous and the assailants slipped away in no time. Both PWs 1 and 2 had deposed that they were attracted by the explosion and when they turned back, the assailants surrounded the deceased and inflicted the stab injuries. PW-1 was pushed aside.

He fell on the fence of the barbed wire of the transformer, received scratches. His dhoti stuck to the wire. He left it there and ran to the police station in utter confusion. His statement Ex. P-1 does not disclose that PW-2 accompanied him, though PWs 1 and 2 stated before court that they went together. The possibility of the companions of the deceased having been scattered and gone in different directions cannot be ruled out. Even in Ex. P-1 statement what PW-1 said is that six persons attacked the deceased; they were villagers; they were wearing dhoti and kurta. One was about 45 years of age and of dark complexion, another was 30 years of age lean and yet another was also a lean person. These may be the vague

impression the witness had on seeing the assailants suddenly. It is not however in evidence that the description given by PW-1 in Ex. P-1 fits in with the description of any one of the appellants. When the magistrates recorded the statements of the witnesses, they could not give any characteristic feature of any one of the assailants. The entire case depends on the identification of the appellants and the identification is founded solely on the test identification parades.

10. Therefore, in the absence of cogent evidence that PWs 1 and 2 by reason of the visibility of the light at the place of occurrence and proximity to the assailants had a clear vision of the action of each one of the accused persons in order that their features could get impressed in their mind to enable them to recollect the same and identify the assailants even after a long lapse of time, it would be hazardous to draw the inference that the appellants are the real assailants. There is no whisper in Ex. P-1 that there was some source of light at the scene. The omission cannot be ignored as insignificant. When the Investigating Officer has visited the scene, he made reference to the street lights, petrol bunk light etc. Whether the street lights and the petrol bunk/ light had been burning at the time of the occurrence and the spot where the incidence happened was so located as to receive the light emanating from these sources are required to be made out by the prosecution. When this significant fact is left out in the earliest record, the improvement in the course of the investigation and trial could be of no avail. The fact that there had been no proof regarding the identity of the

assailants until 18.8.1974 would suggest that even persons who collected at the scene in the course of the incidence or soon thereafter were not in a position to identify any one of the assailants. Since the Investigating Officer arrived at the scene the same night and the inquest was held in the next morning, it would have been possible for the investigating agency to collect information regarding the identity of the assailants earlier to 18.8.1974, if they had been really identified by any one of the witnesses examined in the case. When no natural light was available and the street light was at a distance it is unlikely that the eye witnesses by momentary glance of the assailants who surrounded the victim had a lasting impression and the chance of identifying the assailants without mistake. The credibility of the evidence relating to the identification depends largely on the opportunity the witness had to observe the assailants when the crime was committed and memorize the impression. This aspect of the matter had been stressed by the trial court in appreciating the evidence of PWs 1 and 2. The High Court has ignored the inherent infirmity and failed to deal effectively with every important circumstance in the evidence which weighed with the trial court to disbelieve the prosecution case.”

72. On the other hand, learned APP has submitted that PW2 Suresh Chand Arora and PW9 Harender Singh both have identified the appellant in the TIP Ex. PW4/3 conducted on 11.04.1997. PW9 also identified the appellant in the court. PW9 has fully supported the case and the appellant was also involved in other criminal cases, therefore, he has been a habitual

offender. There is no fault found in the TIP as the Investigating Officer has taken all precautions. Since he was late, therefore, Lock-up Incharge, Patiala House Courts refused to take custody of the appellant and the Investigating Officer took him directly to Tihar Jail and lodged him and the application moved by the appellant was an after thought. This may not be taken into consideration.

73. Learned APP has relied upon a case **Asharfi & Anr. Vs. The State: AIR 1961 Allahabd 153 (V 48 C 48)**, wherein it has been observed as under:-

“47. WITNESS UNABLE TO GIVE REASONS FOR IDENTIFICATION: Sometimes defence counsel ask a witness the reasons why he identified a particular accused or article, and when he fails to do so argue that his identification cannot be trusted. In reply we may cite In re Govinda Reddy AIR 1958 Mys 150 wherein it has been held that many a witness would not be able to formulate his reasons for the identification of a person or thing since it is based upon general untranslatable impressions on the mind and that it would be fatuous to discredit such identification on the ground that reasons were not being formulated for them.

48. NON-IDENTIFICATION BY OTHER WITNESSES: It has been suggested that since in the jail parade the appellant Asharfi was identified by only seven out of twelve witnesses and Ram Dhani by only six out of nine, in judging their guilt we should counter-balance the identifiers by those

who failed to identify them. The decision in Sunder v. State: AIR1957All809, with which we are in respectful agreement, shows the argument to be ill-conceived. Therein their Lordships stated that it cannot be said that the number of witnesses who failed to identify an accused should be set-off against those who identified him so that if an accused was identified by two but not by two others he should be deemed to have been identified by none; and they emphasised that a witness should be judged on the strength of what he himself has seen and not on the inability of somebody else to see it.

49. WITNESS NOT ABLE TO IDENTIFY AN. ACCUSED IN THE SESSIONS COURT: *It sometimes happens that owing to the delay in holding the sessions trial a witness is unable to identify an accused whom he had pointed out at the jail parade, the lapse of time having resulted in the vision of the witness being affected or the appearance of the. accused having undergone a change. In such an event are we to understand that the value of his identification in the jail parade is nil? The question came up for consideration before a Division Bench of this Court in Abdul Wahab v. Emperor: AIR1925All223. Their Lordships observed:-*

"If the witness at the trial is no longer able to recognise the accused, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the Committing Magistrate may be brought on the record under Section 288 Cr. P. C. This was

the course adopted in Manu/UP/0400/1921. It is only available where the witness was able to pick out the accused before the Committing Magistrate though he could not do so before the Judge. The other method is to elicit from the witness at the trial a statement that he identified certain persons at the jail and that the persons whom he identified were persons whom he had seen taking part in the dacoity. If the witness is prepared to swear this, then it is open to the Court under section 9 of the Evidence Act to establish by other evidence the identity of the accused whom the witness identified at the jail. For this purpose the best evidence will be that of the Magistrate who conducted the identification, and his evidence will be strictly relevant under the provisions of the Evidence Act."

We respectfully concur and we hold that the jail identification by the witness has a positive value, though we agree that the value is reduced by the fact of his non-identification at the trial. Standing by itself the jail identification cannot form the basis of a conviction, but it can be used for augmenting the force of other evidence."

74. I have heard learned counsels for parties.

75. It is emerged that the description of the appellant was not given in the FIR. PW2/ complainant did not even identify the co-accused Manjit Singh and Majid Khan – on whose disclosure statement the appellant was arrested in the instant case. This witness even denied his statement dated 25.03.1997 made before the police. There is no seizure of cash and lottery tickets as allegedly robbed by the appellant.

76. It is also emerged that SI Kuldeep Singh had taken the co-accused Majid Khan and Manjit Singh to the police post at 03:00PM and taken to one house and also shown to 4-5 persons present over there.

77. Learned Trial Judge has observed in para No.23 of the impugned judgment that the police had taken the investigation of this case very casually. No promptness has been shown to lift finger prints from the FIAT car of the complainant in which the complainant and PW9 Harender Singh were abducted and from there prized lottery tickets and cash amount of Rs.75,000/- was looted. Although, there were chances of finding the finger prints of the assailants on the FIAT car; however the investigating officer failed to do so.

78. It is further emerged that on 15.04.1997, IO of the case, instead of lodging the appellant in lock up at Patiala House Courts, lodged him directly to Central Jail, Tihar, Delhi at about 06:20PM in his own vehicle and that too without muffled face. This fact has been agitated by the appellant on the very next date of hearing.

79. As admitted by PW2, it was dark at that time of the occupant of the SUMO (three boys) had come all of a sudden, therefore, he was not able to identify them in the Court. He further stated that in Jail, he put his hands by guess that may be the appellant, who had been involved in this case.

80. PW9 Harender Singh deposed in the Court that he had seen the accused persons including the appellant in the Court for the first time, and

none of them was amongst those, who were involved in the occurrence.

81. Law has been settled in *Wakil Singh (supra)* that none of the witnesses gave any description of the appellant nor did the witnesses gave any identification marks viz, stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for the Courts to convict any person on the basis of the single identification.

82. Law has also been settled in *Bollavaram Pedda Narsi Reddy (supra)* that if the occurrence happened on a dark night, during the hours of darkness and the assailants are utter strangers to the witnesses, the identification of the accused persons assumes great importance. Therefore, in the absence of cogent evidence by reason of the visibility of the light at the place of occurrence and proximity to the assailants had a clear vision of the action of each one of the accused persons in order that their features could get impressed in their mind to enable them to recollect the same and identify the assailants even after a long lapse of time. Otherwise, it would be hazardous to draw the inference that the appellant is the real assailant.

83. Moreover, both the co-accused Majid Khan and Manjit Singh have been acquitted by the learned Trial Court by giving them benefit of doubt. Therefore, the appellant herein, who was arrested on the disclosure statements also, deserves to have the same benefit of doubt in his favour.

84. In view of submission of the parties and the legal position, learned

Trial Judge has not appreciated the evidence available in favour of appellant.

85. The fact remains that appellant remained in custody for about 02 months and 26 days.

86. Therefore, impugned judgment dated 13.02.2004 and order on sentence dated 17.02.2004 are hereby set aside.

87. Consequently, appellant is acquitted from all the charges against him.

88. Bail bond cancelled and surety stands discharged.

89. Accordingly, instant petition is allowed and stands disposed of.

90. Trial Court Record be remitted henceforth.

91. No order as to costs.

SURESH KAIT, J

JULY 03, 2012

SB/MK