

other persons in house No.14/36, Gali No.1 in front of Arvind Rickshaw Garage, Arya Nagar. He is native of Distt. Madhey Pura, Bihar. On 05.09.2009, after having dinner at Dhaba in Jagat Puri, he was returning home and when he was walking on the pavement of drain (nala) side across Parwana Road, at about 10.00 or 10.15 pm, one motorcycle No.DL-13S-A-2134 stopped near him and two boys, whose names were subsequently revealed as Varun Kumar and 'R' (name withheld being juvenile), showed him a knife and made him to sit on the motorcycle. While Varun Kumar was driving the motorcycle, 'R' was sitting behind him with a knife on his back and they took him to Manglam Marg, AGCR colony. They stopped in front of the house next to Manglam Hospital and after getting down from the motorcycle, they started beating him with belt. Varun also took knife from 'R' and showed the same to him and thereafter 'R' also started beating him with belt and asked him to handover whatever he had or otherwise he would be killed. When Varun tried to put his hand in his pocket, the complainant also put his hand on his pocket and in the meantime, police arrived and saved him. He prayed for legal action against the offenders.

3. A knife was also recovered from the spot. On the basis of endorsement made by ASI Shankar Lal, who alongwith Ct. Satender Kumar reached the spot on receiving DD No.38-A Ex.PW5/A, case FIR no.505/2009 under Sections 365/323/506/34 IPC was registered at PS Preet Vihar and after completion of investigation, chargesheet was filed. The appellant was charged by the Trial Court for the offence punishable under Sections 392/511/34 r/w 397 IPC and Section 367/34 IPC.

4. In order to prove its case, the prosecution examined five witnesses

in all i.e. PW-1 HC Johnson – the Duty Officer, PW-2 Mr.Sheel Sharma – the public witness, PW-3 – the complainant/victim, PW-4 HC Satender Kumar who accompanied the IO to the spot and PW-4 ASI Shankar Lal – the Investigating Officer.

5. During his examination under Section 313 CrPC, the appellant/accused has taken the plea that on 05.09.2009 at about 8.00 pm when he was going to Preet Vihar, he was stopped by the police at Jagat Puri Barricade and was asked to show the documents. As he was not having the documents, he was sent home to bring the documents. When he reached the police station alongwith the documents to take back his bike, on his inability to pay Rs.3,000/-, he was put in lock-up and falsely implicated in this case.

6. Believing the testimony of the prosecution witnesses especially the public witness i.e. PW-2 Mr.Sheel Sharma and the complainant PW-3 Mohd. Irshad, learned Trial Court was of the view that the testimony of PW-2 and PW-3 did not suffer from any infirmity and guilt of the accused was proved beyond any reasonable doubt.

7. On behalf of the appellant, it has been submitted that the entire testimony of prosecution witnesses has to be discarded for the reason that material contradictions have appeared on record which are sufficient to disbelieve them. It has been submitted that the manner in which PW-2 Mr.Sheel Sharma has behaved, that itself gives rise to the suspicion that he is a planted witness. Not only that, the complainant has also deposed in an unnatural manner. The MLC of the complainant revealed that there was no fresh injury at the time of his medical examination, so the testimony of the complainant that he was given beating with belts and

attempt to rob him at knife point, has to be rejected in view of the fact that as per the police witnesses, a knife was recovered from the hand of Varun whereas the statement of the complainant PW-3 Mohd. Irshad is that knife was thrown and later on searched by the police officials and recovered. It has been further submitted that about the place of occurrence also there are material contradictions as to whether attempt to rob him was made near drain (nala) or near Manglam Hospital and apart from that while PW-2 has referred to presence of other police officials also near Bus Stand, Jagat Puri when the local police has arrived, no such police official has been examined or cited as a witness by the prosecution. The manner in which the entire story has been concocted makes it unbelievable and appellant is entitled to be acquitted.

8. On behalf of State, it has been submitted that the prosecution case has been duly supported by the statements of public witness i.e. PW-2 Mr.Sheel Sharma and complainant PW-3 Mohd. Irshad. Although there are minor contradictions in the statement of prosecution witnesses but the same are not fatal to the prosecution case.

9. Learned ASJ has convicted the appellant for the offence punishable under Sections 365/398/34 IPC believing the testimony of the complainant PW-3 Mohd. Irshad as well the public witness PW-2 Mr.Sheel Sharma. A perusal of the testimony of these two witnesses would reveal that all material aspects including the place of occurrence where the offence was committed, there are material contradictions.

10. As per PW-2 Mr.Sheel Sharma, he was going in his Car bearing registration No.DL-1C-F-0277 and at about 10.15/10.30 PM when he reached near Bus Stand, Jagat Puri, he saw two boys forcibly taking one

boy on the point of *khukhri* on motorcycle No.2134 make Hero Honda Splendor of blue-black colour. He informed the PCR at number '100' and PCR reached. Local police from PS Preet Vihar also reached and they started searching the assailants in the direction in which they had left that place. Across the drain (nala) at some distance they saw both the boys (appellant and the juvenile) giving beating to that boy who was taken away forcibly and both the boys were apprehended. Some other police officials also came there who conducted the proceedings. Police recovered the *Khukri* with wooden cover from the possession of accused Varun Kumar and sealed and seized the same. He also stated that all the writing work was done in the police station. From his statement, the vital details regarding the incident are :-

- (i) He had seen two boys taking away third boy when he reached in his car near Bus Stand, Jagat Puri.
- (ii) He saw from the running car that a boy was being taken on the point of *Khukri* and note complete registration number of the motorcycle i.e. DL-13S-A-2134 make Hero Honda Splendor of blue-black colour as recorded in DD No.38-A (Ex.PW5/A)
- (iii) He did not raise any alarm or made an effort to save the victim from the offenders, instead, he preferred not to chase them from safe distance, rather the three left the spot and he continued waiting at the same place for the police to arrive and then the police party and he left in search for them in the direction in which they left.
- (iv) When he witnessed the occurrence, the victim was given beating by the offenders before taking him away forcibly.
- (v) *Khukri*/knife was recovered from the possession of the appellant

Varun Kumar.

11. Statement of PW-3 Mohd.Irshad, the complainant is to the effect that he was a rickshaw puller. On 05.09.2009 at about 10.00/10.15 pm after taking meal from a *Dhaba*, he was returning home. When he reached near Bus Stop across the road near drain, two boys came there on motorcycle. Appellant Varun Kumar was carrying a knife who slapped him and made him to sit on the motorcycle. He also handed over the knife to his associate who put the knife on his (PW-3) back and took him towards AGCR Colony at Manglam Marg where appellant Varun Kumar gave beating to him with belt. While giving beating to him, the appellant and his associate asked him to handover the money and whatever he was carrying.

12. At that point of time, the police arrived at the spot, apprehended the appellant and his associate, took the keys of the motorcycle and recovered the knife with cover from the pocket of accused Varun Kumar. Thereafter all of them were taken to the police station. He also stated that he made statement under Section 164 CrPC Ex.PW3/B before learned Magistrate.

13. In cross examination, PW-3 Mohd. Irshad has stated that the distance from the place he was taken on the motorcycle and the place where he was beaten is about **750 meters** and there was no public person present there. The statement under Section 164 CrPC made by this witness regarding the occurrence is to the effect that when he was returning after having his food, he was stopped by two persons on motorcycle. The younger boy asked him as to what he was seeing and he replied that he was simply going. The younger boy gave him two-three

slaps and the latter one took out a knife and asked him to sit on the vehicle. He was forced to sit on the vehicle. He raised alarm '*bachao-bachao*' but he was told that nobody would come to save him. Then the younger boy was handed over the knife and the elder one drove the vehicle. The younger boy continued putting knife on his back and he was brought to Manglam Marg Road, Industrial Area where he was made to get down and beaten with belts 2-4 times. They demanded the money and when he said that he was not having the money, he was shown the knife. After half-an-hour, police arrived and he was saved. On seeing the police, the knife was thrown behind. When he informed the police about the knife, police made search for the knife and thereafter they were brought to the police station.

14. The MLC of the complainant Mohd. Irshad shows that he was taken to Lal Bahadur Shashtri Hospital, Khichri Pur, Delhi on 06.09.2009 at 7.34 AM with alleged history of assault. In the column 'Name of injuries', the doctor has opined 'Nil Fresh'. From the MLC, it can be gathered that while giving history to the doctor in Lal Bahadur Shashtri Hospital, the complainant Mohd. Irshad did not inform about any beating or assault while committing robbery by the appellant or his associate. Absence of any fresh injury on the body falsifies the statement of the complainant Mohd. Irshad that he was repeatedly given beating with belt by the appellant. Causing injuries with a belt leaves the mark which cannot vanish within 7-8 hours which is the time gap between the occurrence and medical examination. It is relevant to mention here that if three grown up persons are riding on motorcycle, the person on whose back the knife has been put, during driving, the point of knife is bound to

leave some injury mark on the back of the victim especially for the reason that date of occurrence is night intervening 5/6-09-2009 when woolen clothes are not worn and if a person is wearing ordinary summer clothes, while riding on motorcycle with force of knife put on the back by another pillion rider, likelihood of being hurt from the point of knife, are very strong. But as already referred, as per MLC there is no injury mark on any part of the body and there was no fresh injury on the person of Mohd. Irsahd. So the entire case of prosecution regarding use of knife in an attempt to commit robbery is falsified from the MLC.

15. Statement of PW-4 HC Satender Kumar and PW-5 ASI Shankar Lal regarding who reached the spot whether any police official from PCR was also present there at the spot where Sheel Sharma was waiting for the police or when the local police arrived, is also full of contradictions and in total contrast to what PW-2 and PW-3 stated about the proceedings being conducted which as per them was at the Police Station and as per PW-4 and PW-5 was at the spot.

16. It is worthwhile to mention that the DD No.38-A Ex.PW5/A recorded at 10.35 pm at PS Preet Vihar does not contain the name of informant PW-2 Sheel Sharma or his mobile number from which he informed the PCR. Rather DD No.38-A is the information given by Operator through Intercom and from the information recorded, it can be made out that two boys on knife point had taken away towards Preet Vihar. There is no mention of PCR officials leaving for the spot. As per this DD, only ASI Shankar Lal left for the spot to whom this DD was assigned. How the police party reached the spot near Manglam Hospital is again a mystery. As per PW-3 the police arrived there of its own and

saved him. As per the rukka Ex.PW5/B, the time of arrival of the police near Manglam Hospital is 11.15 pm when they apprehended the appellant and his associate while they were beating the complainant.

17. PW-2 Mr.Sheel Sharma in his cross examination has stated that SHO also arrived there in Gypsy. Some police officials were on private motorcycle. One police official sat with him in his car, they left in different directions, the policeman sitting in his car was carrying wireless set and he received the message on wireless set about the apprehension of the appellant and his associate near Manglam Hospital. It is nowhere stated by PW-4 HC Satender Kumar and PW-5 ASI Shankar Lal that one of them was travelling in the car of PW-2 Sheel Sharma or one of them, was carrying wireless set and the other police official conveyed the message on wireless set. The two site plans Ex.PW5/C which is of the place from where the appellant was stated to be apprehended and another Ex.PW5/D which is of the place near Bus Stand, F-Block, Jagat Puri, Delhi have been placed on record. Both are the main roads and place of apprehension is shown in front of house No.A-8 adjoining Manglam Hospital. PW-2 Mr.Sheel Sharma has stated that appellant had already been apprehended before he reached the spot.

18. It is settled that to bring home the guilt, the prosecution must lead evidence of such unimpeachable character that rules out the innocence of the accused. In other words, the claim of the accused must be proved beyond reasonable doubt.

19. Taking into consideration the testimony of PW-2 Mr.Sheel Sharma, PW-3 Mohd. Irshad, PW-4 HC Satender Kumar and PW-5 ASI Shankar Lal, I find that their testimony to the extent that the complainant

PW-3 Mohd. Irshad was taken by the appellant and his associate on knife point, given beating with belts or knife was shown at the time of attempting to commit robbery, is not trustworthy at all. There are material contradictions on all vital aspects so as to make them unbelievable. Even on the point of recovery of knife, different versions have come and it is not even clear whether the knife was searched by the police from the area nearby as stated by the complainant in his statement Ex.PW3/B or it was recovered from the pocket of the appellant or it was being used at the time of apprehension of the appellant from the spot. The evidence against the appellant, so far as offence punishable under Section 398 IPC is concerned, is so weak that no conviction could have been passed by learned ASJ for committing the offence punishable under Section 398 IPC.

20. The appellant has also been convicted under Section 365 IPC which deals with kidnapping or abduction with intent to secretly and wrongfully confine a person. Here the prosecution case and also as per the two site plans Ex.PW5/C and D, the complainant was allegedly taken from near Bus Stand, Jagat Puri. The appellant and the complainant were found seen by the police in front of the house adjoining Manglam Hospital which is a main road leading to Karkardooma Court which is at a distance of 750 meters from Bus Stand, Jagat Puri. Thus, it cannot be said that there was any intention on the part of the appellant to abduct the complainant with intent to secretly and wrongfully confine him. There is no evidence to prove the guilt of the appellant for committing the offence punishable under Section 365 IPC. Even if reference to the Section under which the appellant was convicted is ignored, from the

statement of PW-3 Mohd. Irshad at the most the case of the prosecution falls under Section 385 IPC.

21. Section 383 IPC defines extortion and is as under :-

‘Section 383. Extortion – Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits extortion.’

22. Section 385 IPC reads as under :-

‘Section 385. Putting person in fear of injury in order to commit extortion – Whoever, commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.’

23. In the case ***Biram Lal and Ors. vs. State*** RLW 2007 (1) Raj. 713, it was held as under :-

‘10. Section 383 IPC defines ‘extortion’ whereas Section 384IPC is the penal section for extortion whereas Section 385 PC is for attempt to commit extortion. In order to complete the act of extortion the person who was put in fear, must have been induced to deliver the property. If the act of inducement caused by the wrong doer should bring forth its result at least by the victim consenting to deliver property even if actual delivery does not take place due to any fortuitous circumstances which would constitute extortion, but if it falls to produce the requisite effect, the act would remain only at the stage of attempt to commit extortion. In the instant case, even if the offence of extortion is held to be not made out for want of delivery of the property atleast, the offence of attempt to commit extortion is clearly made out.’

24. The statement of PW-3 Mohd. Irshad at the most proved that while he was returning home after taking food from nearby *Dhaba*, an attempt was made to commit extortion by asking him to handover whatever he had by putting him in fear of injury. So, believing the testimony of PW-3 Mohd. Irshad to the extent that the appellant came near him and after putting him in fear of injury asked him to handover whatever he had but the offence could not be completed because of the arrival of the police near Manglam Hospital, the appellant can be convicted only for committing the offence punishable under Section 385 IPC.

25. In view of above discussion, the conviction of the appellant for committing the offence punishable under Section 365 and 398 IPC is set aside and he is convicted for committing the offence punishable under Section 385 IPC.

26. The maximum punishment provided for committing the offence punishable under Section 385 IPC is two years or fine. The appellant is sentenced to undergo RI for one year for the offence punishable under Section 385 IPC.

27. As per the nominal roll, the appellant has undergone three months and twenty three days in judicial custody with remission of one month and nineteen days, as on 10.02.2012. The appellant be released from custody on the completion of sentence of one year.

28. Appeal stands disposed of in above terms. A copy of this order be sent to the Jail Superintendent for necessary compliance.

PRATIBHA RANI, J

September 14, 2012/'st'