

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

+ CRL.A. No. 1461/2011

% Judgment reserved on: 27th February, 2012
Judgment delivered on: 17th April, 2012

MEHBOOB ALI Petitioner
Through: Mr. R.K. Dikshit, Adv.

versus

STATE Respondents
Through: Mr.Naveen Sharma, APP for State

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. The instant petition is being filed while challenging the impugned judgment dated 06.08.2011, whereby the appellant has been held guilty and convicted for the offences punishable under Section 394/34 and 397 Indian Penal Code, 1860.

2. Also challenged the order on sentence dated 08.08.2011, whereby, he was sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.5,000/- for the offences punishable under Section 394 read with Section 34 Indian Penal Code, 1860. He is further sentenced to undergo RI for a period of 7 years for the offences punishable under Section 397 Indian Penal Code, 1860.

3. It is also ordered that the substantive sentences awarded to the convict shall run concurrently.

4. Brief facts of the case are that on 17.01.2010, Joginder along with his friend Tinku were going to her house after purchasing clothes from Seelampur. When they reached near Subway Seelampur, appellant and his associate Rahul met them. Appellant asked about time from Tinku, on which latter took out his mobile phone and told the time to former. Appellant took out knife and snatched mobile make NOKIA 2310 from Tinku. When Joginder intervened, appellant caught hold of him and gave knife blow on his back and left palm. Appellant handed over the mobile to his associate Rahul, who gave beatings to Tinku. When Joginder and his friend raised alarm, both accused persons ran towards police station. They chased them raising alarm “*pakro pakro*” H.Ct. Ravinder apprehended the appellant, while Rahul was apprehended by H.Ct. Ramesh. ASI Mahavir Singh along with Constable Satish also reached at the spot. Thereafter the statement of Joginder was recorded, which became backdrop of the case.

5. During the course of investigation, accused Rahul was sent to Juvenile Justice Board. Investigation against the appellant culminated into a chargesheet, same was filed in the trial court. Charges for offences punishable under Section 397 and 394 read with Section 34 Indian Penal Code, 1860 was framed against the appellant to which he pleaded not guilty and claimed trial.

6. To substantiate the charge, prosecution examined as many as 9

witnesses. Thereafter statement of the appellant under Section 313 Cr. P.C. was also recorded, wherein he stated that the case against him is false and he was lifted from his house and taken to police station, where he was implicated in this case. He sought liberty to lead evidence in his defence. He produced DW-1 Smt. Jarina, wife of Late Sh. Zakir in his defence, who stated that appellant is her son. She further deposed that on 8th April, however she did not remember the year at about 12 Noon appellant was present at her house. Police officials took her son to Police Station. She asked them what was the reason. They told her to come to Police Station. Later on her son was falsely implicated in this case.

7. In cross-examination, she stated that she did not know regarding incident dated 17.01.2010. She did not know as to where her son i.e. appellant was present on that day.

8. PW1 H.Ct. Ravinder Kumar unfolded those very facts which took place in his presence on 17.07.2009, when he was performing duty at Main Gate of DCP/NE along with HC Ramesh.

9. PW2 Ramesh Chand gave confirmation to the facts unfolded by PW1 H.Ct. Ravinder Kumar.

10. PW3 Ct. Satish took Rukka to police Station and got the case registered. He narrated all those investigative steps, which took place in his presence.

11. PW4 Dr. Lawish Aggarwal gave his opinion after seeing surgical record and MLC of Joginder. He proved the endorsement as

Ex.PW4/A on MLC bearing no. C-220/10.

12. PW5 Dr. Arun Kumar prepared MLC of injured Joginder and proved the same as Ex.PW5/A.

13. PW6 H.Ct. Ram Singh recorded FIR and proved the same as Ex.PW6/A.

14. PW7 is the complainant and PW8 Tinku is the friend of the complainant.

15. PW9 ASI Mahavir Singh, Investigating Officer of the instant case deposed those very investigative steps which were taken by him during the course of investigation.

16. As per the statement of complainant PW7 Joginder, he along with his friend Tinku were going to their house after purchasing clothes from Seelampur. At about 2 PM when they reached at the subway Seelampur, Welcome, appellant along with one other person met them. Appellant enquired time from his friend Tinku, on which he took out mobile phone from his pocket and told the time to the appellant. Appellant caught hold of Tinku. He was having a knife in his hand and snatched the mobile phone from Tinku. When he tried to save Tinku, appellant left Tinku and caught hold of him and gave knife blow on his back and also on his left palm. Appellant gave the mobile phone to his other associate / co-accused, who also gave beatings to his friend. They raised alarm. Appellant alongwith other accused ran towards the police station. They raised alarm “*pakro pakro*” and chased them. Two police officials apprehended them.

They also reached there. At that time appellant disclosed his name as Mehboob. He could not give the name of other accused. From other accused, who was small in height, one mobile phone of his friend Tinku was recovered, while from the possession of appellant knife was recovered by which he caused injuries to him. Meanwhile, local police reached at the spot. Many persons gathered at the spot. He was taken to GTB Hospital, where he was medically examined. The statement was recorded by Investigating Officer of the case, which is Ex.PW7/A. Sketch of knife, which is Ex.PW3/B, was prepared. Knife was kept in a cloth and it was converted into a cloth parcel and also sealed the same. It was taken into possession vide seizure memo Ex.PW3/C. Mobile Phone was also kept in a white cloth and it was converted into a cloth parcel and after sealing the same, it was seized vide seizure memo Ex.PW3/D. Appellant was arrested vide arrest memo Ex.PW3/E and his personal search was conducted vide memo Ex.PW3/F. He identified the knife Ex.P1 to be the same which was used by appellant to cause injuries to him. He also identified the mobile phone make NOKIA 2310, which is Ex.P2 to be the same, which was snatched by appellant from his friend and was recovered from the possession of accused Rahul.

17. Testimony of the above witnesses finds substantial corroboration from PW8 Tinku Kumar, who also deposed that he was residing at D-64, Kondli, Kalyanpuri along with his friend Joginder. He was doing the business of cloths. On 17.01.2010, he along with his friend Joginder were going to house after purchasing clothes from Seelampur. He deposed on the same line as PW7 deposed.

18. Before the Id. Trial Judge, the main challenge was the discrepancy in the testimony of PW7 and PW8. Such as PW7 Joginder deposed that the appellant ran towards the subway and thereafter turned on the left side towards PS-Welcome and there is no temple on the side of subway, whereas PW8 Tinku Kumar deposed that appellant ran towards PS-Welcome side through subway. Probably, there is a temple near the subway.

19. Ld. Trial Judge has further recorded in his impugned judgment that the discrepancy pointed out by Id. Counsel for the appellant are very trivial in nature and did not go to the substratum of the case. On material aspects, both witnesses have corroborated each other. Minor contradictions are bound to occur in the testimony of witnesses due to power of observation and human memory also fades away with the passage of time. Incident takes place on 17.01.2010, while witnesses came to be examined on 11.11.2010 and cross-examined on 15.07.2011. Moreover, Id. Trial Judge has referred the cases of *Krishna Pillai vs. State of Kerala 1981 Cr.L.J. 1743; AIR 1981 SC 1237*, *Sidhan vs. State of Kerala, 1986 Cr.L.J. 470; Ahmed Ali Sardar vs. State 2009 IX AD (Delhi) 71; A. Shankar vs. State of Karnataka, 2011 VII AD (SC) 37; and Bharwada Bogini Hirjibhai vs. State of Gujarat AIR 1983 SC 753*.

20. The ratio decidendi of these cases goes to show that the Court has to see whether inconsistencies goes to the root of the matter and affect the truthfulness of the witnesses while keeping in view that

discrepancies are inevitable in case of evidence of a witness who speaks them after long lapse of time.

21. Ld. Trial Judge has further recorded that in the instant case also infirmities pointed out by ld. Defence Counsel did not go to the root of the matter and affect truthfulness of their version.

22. Besides, these facts, the testimony of these witnesses are sufficient to convict the accused. Record reveals that same finds substantial corroboration from testimony of police officials. PW HC Ravinder Kumar deposed that he along with HC Ramesh was performing duty at Main Gate, DCP Office, North East. At about 2 PM, he saw two persons running from SEM Office Side. One person was having a knife in his hand. Behind these two persons, two other persons were chasing and raising alarm of “*pakro pakro*”. On hearing the noise, he apprehended one person, whose name later on revealed as Mehboob and was having knife in his hand. The other accused, whose name was revealed as Rahul was apprehended by H.Ct. Ramesh and from him one mobile phone make NOKIA was recovered. In the meanwhile, complainant Joginder also reached at the spot. He was having stab injuries on his back and palm. ASI Mahavir Singh and Ct. Satish also reached at the spot. They produced both the accused persons before ASI Mahavir Singh along with knife and the recovered mobile phone. Injured Joginder was taken to hospital along with Constable for his medical treatment. Investigating Officer prepared sketch of knife and get the same in a pulanda and sealed the same.

23. Therefore, ld. Trial Judge was of the opinion that testimony of

these witnesses finds full confirmation from the testimony of HC Ramesh Chand, who has also unfolded the incident. PW9 ASI Mahavir Singh also corroborated the testimony of independent witnesses as well as the Police officials.

24. Ld. Trial Judge has also recorded that ocular testimony of independent witnesses finds corroboration from medical evidence, in as much as PW5 Dr. ARun Kumar who deposed that on 17.01.2010, Joginder was brought before him by Ct. Satish with alleged injury and assault. He medically examined Joginder. On local examination of injured Joginder, he found the following injuries:

1. *Oblique incised wound with clear cut edges 5.0 cm X 1 cm on the base of palmar surface of left hand near waist (medical part).*
2. *Incised wound approximately 1 cm X 0.5 cm on left side back of chest and the depth of this could not be assessed.*

25. Ld. Counsel appearing on behalf of the appellant submitted that the present case is replete with innumerable glaring contradictions, inconsistencies, discrepancies, deficiencies, drawbacks and infirmities which are not minor discrepancies on the fringe and they go to the root of the case and shake the foundation of the prosecution story.

26. Ld. Counsel further submitted that prosecution was not able to prove the vital facts concerning the alleged incident. A knife was used in the alleged incident, but even the medical officer has nowhere mentioned that the injury was caused by knife or surgical blade or broken glass etc. more so the recovery of knife is not witnessed by any

independent material witnesses as well as independent evidence not collected though witnesses were available and hence relied upon. The knife recovered from the possession of the appellant was not sent for expert opinion. Also the knife was not sent to FSL to lift the finger prints and there is no matching with the finger print of appellant to ascertain as to whether the appellant handled the knife and also for testing and determine whether the knife was stained with blood.

27. There is no report from FSL, which can prove that knife was stained with blood and also nowhere the witnesses claimed that the knife recovered from the appellant was stained with blood.

28. Ld. Counsel has pointed that deposition by PW8 Tinku Kumar regarding the measurement of knife was approximately 22-25 inches, means approximate 50-62.5 cm. while as per Ex.PW8/B (sketch of knife) total length of knife was 23 cm. The other witness PW7 Joginder deposed that he could not tell the measurement of the knife. Thus, the prosecution failed to prove that the knife used in the offence was the same knife which was produced before the court and the injury to the victim was caused from the same knife or any other sharp instrument.

29. Ld. Counsel has further pointed out that the recovery of mobile phone was not proved. There was no receipt of mobile phone and even as per the admission of PW8 Tinku Kumar, he had purchased the second hand mobile. PW7 Joginder and PW8 Tinku Kumar admitted during their cross-examination that they would not be able to identify the mobile phone if mixed with other 10 mobile phone of similar make

and as such the conviction of the appellant by the impugned judgment and order on sentence is liable to be set aside.

30. Accordingly, ld. Counsel for the appellant further submitted that PW7 Joginder deposed in cross-examination that when he received injury, the blood *“fell on the floor”* means that when victim sustained injury blood might have fallen on the cemented or concrete ground. Whereas PW9 ASI Mahavir Singh, IO of the case in his cross-examination deposed that *“Blood was not lying at the spot”*.

31. Ld. Counsel further submits that appellant was falsely implicated in this case. PW9 ASI Mahavir Singh admitted in his cross-examination that he did not mention in Rukka Ex.PW9/A regarding apprehension of accused persons. The said Rukka written at 4 PM while PW9 ASI Mahavir Singh reached at the spot at 2.15 PM, then why the Rukka was not sent immediately regarding the apprehension of the accused person? Why there is a gap of 2 hours by the PW9 to inform his superior regarding the incident. There is no mention of the apprehension of accused persons from the spot in Rukka, however indicates that till then the appellant was not nabbed by the police official. It proves that the appellant was lifted from his house and taken to the police station and FIR was lodged against him and same has been proved by DW-1 Jarina, mother of the appellant.

32. On the other hand, ld. APP submits that all the prosecution witnesses have proved the case fully. The appellant was arrested at the spot on being chased. PW5 Dr. Arun Kumar has proved the injuries received by PW7 and for the offences punishable under Section 397

Indian Penal Code, actual use is not required only symbolic use is sufficient, therefore, Id. Trial Judge has rightly convicted the appellant under Section 397 Indian Penal Code along with Section 392 and 34 Indian Penal Code.

33. I have heard Id.Counsels for the parties.

34. On perusal of the testimony of PW7 Joginder/injured and PW8 Tinku Kumar goes to show that their testimonies are consistent, coherent, cogent and inspire full confidence. Moreover, the complainant and other witness Tinku Kumar were not known to accused persons from before. The appellant did not allege any enmity, ill-will or grudge against both witnesses mentioned above for which reason they will falsely implicate him in such a serious case.

35. Record reveals that same finds substantial corroboration from testimony of police officials. PW1 HC Ravinder Kumar also deposed that he along with HC Ramesh was performing duty at Main Gate, DCP Office, North-East. At about 2 PM, he saw two persons running from SEM Office side. One person was having knife in his hand. Behind these two persons other persons were chasing and raising alarm “pakro pakro”. On hearing the noise, he apprehended appellant, who was having a knife in his hand. The appellant used that knife and sustained the following injuries to PW7 Joginder:-

1. *Oblique incised wound with clear cut edges 5.0 cm X 1 cm on the base of palmar surface of left hand near waist (medical part).*

2. *Incised wound approximately 1 cm X 0.5 cm on left*

side back of chest and the depth of this could not be assessed.

36. Therefore, from ocular testimony of PW7 Joginder and PW8 Tinku Kumar, which finds substantial corroboration from testimony of PW1 HC Ravinder Kumar and PW2 Ramesh Chand stands established beyond reasonable doubt that the appellant in furtherance of his common intention along with his co-accused Rahul (juvenile) committed robbery of mobile NOKIA make 2310 belonging to PW8 Tinku Kumar. It is further proved from the medical evidence that at the time of committing robbery, he voluntarily caused hurt to PW7 Joginder. The appellant while committing robbery, used a deadly weapon i.e. knife and caused hurt to Joginder.

37. Regarding his false implication, does not inspire any confidence in as much as he has neither alleged any enmity or ill-will or spite either against the appellant or other independent witnesses or police official for which reason he would be falsely implicated in this case. Moreover, his plea of lifting from his house is contrary to record, in as much as, he was apprehended at the spot itself. The testimony of his mother DW1 Jarina also does not help him in as much as according to her, her son was lifted from house on 8th April, whereas the incident took place on 17.01.2010. Even the said DW was not aware at the time of incident where the appellant was.

38. Keeping in view the above discussion and submission of Id. Counsel appearing on behalf of the parties, I find no discrepancy in the impugned judgment and order passed by Id. Trial Court. Therefore, I

conquer the same.

39. Consequently, Crl. A. 1461/2011 is dismissed.

40. Trial Court record be remitted back to the court concerned.

41. No order as to cost.

SURESH KAIT, J

APRIL 17, 2012

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