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

+ CRL.A. 115/2005

% **Judgment dated 26.11.2013**

RAJ SINGH @ RAJU & ORS. Appellant
Through: Mr.Sonal Kumar Singh, Amicus Curiae

versus

THE STATE NCT OF DELHI Respondent
Through: Mr.Feroz Khan Ghazi, Adv. for State

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. The present appeal is directed against the judgment dated 9.12.2004 and order on sentence dated 10.12.2004 by which the appellants have been convicted to undergo R.I. for 7 years along with fine of Rs.10,000/- each, in default of payment of fine one year rigorous imprisonment under Section 395 IPC.
2. It is pointed out by counsel for the State that the appellant no.1, Raj Singh has expired and the appeal qua him has been rendered infructuous.
3. The story of the prosecution as noticed by the trial court is as under:

“In the intervening night of 8/9.12.99, at about 2.30 am, Sh. Sheoraj Singh alongwith his family was sleeping in his house in village Mukandpur. Somebody knocked at his door and called him by his name. He opened the door. At that moment five persons forcibly entered his house. One of them put a katta on his neck and asked him not to raise notice. One person was having a knife and other was having an iron rod and the remaining were armed with lathies. On hearing noise, his wife also reached there. He tried to remove katta

from his neck which resulted in pressing of the trigger but the gun did not go off. His wife Vimla embraced him on which the person who was armed with knife, gave her knife blows. Remaining persons started searching his house and took away one box containing Rs.23,000/-, one pair of silver pajeb, one silver chain and clothes. Sheoraj Singh also sustained injuries in the incident. After a short-while same persons carried out two similar incidents in the same colony. Sheoraj and Vimla were removed to Hindu Rao Hospital.

3. SI Gopal Ram alongwith Ct. Baljeet reached Hindu Rao Hospital where statement of Sheoraj Singh was recorded and after making endorsement on the same, instant case was got registered. In the hospital, Investigating Officer collected the MLCs of Sheoraj Singh and Vimla. He also prepared site plan and got the scene of occurrence examined by dog squad and finger-print expert. However, no finger prints were found.

44. In the course of investigation, all the three accused were arrested on 5.1.2000 in FIR no.3/00 u/ 394/34 IPC in PS Samaypur Badli. Their disclosure statements were recorded wherein they disclosed about their involvement in the instant case. Thereafter, all three accused were also arrested in this case and their test identification parade was arranged in which they refused to participate. Investigating Officer recorded the statement of witnesses and completed the investigation.

5. On completion of investigation, charge-sheet punishable U/S 395/397/412 IPC was filed against all three accused in the court of Learned Metropolitan Magistrate, Delhi, on 4.4.2000.

8. In support of its case, prosecution has examined fifteen witnesses in all ”

4. Counsel appearing on behalf of the appellants (Vinod Kumar & Pappu) submits that the order passed by the trial court is based on conjectures and surmises and thus is not sustainable in the eyes of law and is liable to be

set aside. It is submitted that the trial court has not considered the evidence on record in the right perspective and has passed the impugned judgment in a mechanical manner and thus it is liable to be set aside.

5. It is contended that the evidence of PW-1 would show that the appellants were shown to him in the Police Station, thus the identification of the appellants by PW-1 is of no consequence and on this ground alone the appeal is liable to be allowed.
6. Counsel for the appellants further submits that the trial court has failed to appreciate that nothing incriminatory was recovered from the possession of the appellants. The *pajeb* which was recovered was not identified by the prosecution witness and thus the trial court has simply convicted the appellants based on their identification in the court. Counsel further submits that no case is made out against the appellants under section 397 of the Indian Penal Code as the prosecution has failed to establish as to who amongst the three appellants was carrying a deadly weapon which caused injuries on the victim, PW-1 and his wife.
7. It is submitted that evidence of PW-1 is highly contradictory and thus no reliance can be placed on his testimony. It is thus contended that there is no evidence to support the case of the prosecution. Counsel further submits that no weapon was recovered from any of the appellants, and there is nothing to link the appellants with the injuries which were caused on PW-1 and his wife.
8. It is also contended that PW-3, Ram Sagar Pandit was a tutored witness. It is submitted that in case any incident had taken place this witness would have made a police report and thus reliance cannot be placed on the evidence of PW-3. Counsel has also pointed out that the prosecution has failed to examine wife of PW-1, who was present at the spot of incident and was a material witness.

9. Counsel for the State submits that the appellants were duly identified by PW-1, PW-3 and PW-4. It is submitted that the contradictions in the testimony of PW-1 do not go to the root of the matter and in fact reading of the evidence of PW-1 as a whole would show that he is a truthful witness and he himself has testified that due to passage of time he had got confused. Counsel further submits that simply because the wife of PW-1 was not cited as a witness that by itself would not have an adverse effect on the case of the prosecution as it settled law that it is not the number of the witnesses which are relevant but the quality of the evidence which is to be considered by the Court.
10. Counsel further submits that appellant, Vinod Kumar has clearly been identified by PW-3 and PW-4, whereas the appellants no.2 (Pappu) has been identified by PW-1. Counsel also submits that the appellants had committed dacoity in three houses in the neighbourhood in a span of one hour; investigation was conducted; charges have been framed accordingly; the prosecution has been able to establish its case beyond any element of doubt.
11. I have heard counsel for the parties and considered their rival submissions and also the evidence placed on record. PW-1, PW-3 and PW-4 are the material witnesses. According to the prosecution on 9.12.1999 PW-1, Shiv Raj Singh was sleeping in his house along with his family when at about 2:30 a.m. 5 persons entered his house. As per the evidence of PW-1, 5 persons, who entered in his house were armed with a small pistol (*Desi katta*), knife, danda and iron rods. PW-1 has testified that appellant, Pappu who was present in court put a *katta* on his neck and asked him to go inside the house; on hearing the alarm his wife, Bimla Devi also woke up and other accused persons searched the house and removed one gold chain, a pair of silver *pajeb* and cash of Rs.23,000/- and clothes. One of

the accused persons inflicted injuries on the right hand of wife of PW-1 with the knife; one of the accused persons gave blows with the butt of the pistol on his mouth; and after robbing them, all the accused persons ran away. PW-1 and his wife went to the hospital and they also lodged a report, Ex.PW-1/A. PW-1 has also testified that when he had gone to the police station, he had seen accused persons. It is also testified that he had also seen the accused persons in Tis Hazari Court premises; however they had refused to join identification on 3.2.2000. Thereafter PW-1 categorically identified all the three accused persons. This witness also deposed that there was electricity light in his house and thus he was able to identify the accused persons correctly. This witness was cross-examined by the Public Prosecutor as well. During cross-examination by learned APP for the State the appellant described the person, who was holding *katta* between the age group of 30-32 years, wheatish complexion, thin beard and height of about 5'x3". The language spoken by him was of Atta Mainpuri. Although he went on to depose that it may not be possible that the appellant, Pappu was not the person, who was holding *Katta* and entered the house, he could be the person holding *lathi*. PW-1 has thereafter denied the suggestion that he had seen the appellants in the police station when he was confronted with his statement PW-1/A wherein he had so stated that he had seen the appellants in the police station.

12. Reading of the evidence of PW-1 as a whole would show that although there are some contradictions, he has deposed that he has got confused, and thus, he was giving contradictory version. Although there is confusion as to who is the person holding which weapon but as far as the identification of the appellants are concerned, it is clear that the appellants were the persons, who had entered the house and committed robbery.

PW-3, Ramn Sagar Pandit has also deposed as under:

“On 9.12.99 at about 3:30 AM, I along with my wife Rasila Devi were present at my house, and were sleeping. Suddenly 4/5 persons had entered into our house, amongst them accused Vinod today present in the court was one, who was armed with a country made pistol. Accused Vinod had made me and my wife to sit in the corner of the room, after pointing his country made pistol upon us and rest of the other persons accompanying the accused had taken away my suit case containing clothes of my wife and myself and have also looted one pair of silver pajeb, one pair of silver ear-ring and one golden nost (sic, ‘nose’) pin of my wife. After looting these articles accused Vinod along with other accomplices had threatened me not to raise alarm, otherwise he would kill us and then left my house, after bloting (sic. ‘bolting’) the same from outside.

xxxxxx by Shri Mohd. Aslam, Ld. Counsel for all accused.

The accused had entered into my house, as in the mid night my wife had gone out of house to urinate, and after defecation (sic. ‘defecation’), when she came back the accused persons had followed her. My wife had even raised the alarm, but once we were threatened by the country made pistol and we were directed to sit in the corner of the room. It is incorrect to suggest that accused Vinod was not amongst those robbers, but it is correct that I am seeing this accused for the first time in the court after the incident. My statement was recorded on 9.12.99 at about 8 PM at my house by the police.

However, I did not inform the police. It is incorrect to suggest that I am deposing falsely.”

13. Reading of evidence of PW-3 would show that PW-3 clearly identifies, Vinod, as the person, who has asked him and his wife to sit in a corner and he pointed a country-made pistol on them.
14. PW-4, Sita Devi has testified as under:

“About 2 years back, when it was winter season, I was present at my residence and was sleeping in the night alone as my husband was away to his office for night duty. At about 3 AM of that night, however, I do not remember the exact date or exact month or the year, when somebody had knocked the door, but being odd I did not open the door, then from the noises I came to know that somebody had climbed the wall of my house from behind, and entered my house and entered into my room, where I was sleeping. Then it was accused Vinod today present in the court, who had entered into house forcibly along with 4 other persons, and then started beating me and started snatching my wearings, which I was wearing at that time. It was accused Vinod who had then managed to snatch my ear-rings, none pin and pair of pajeb and a silver chain. At the same time, accused had also picked Rs.2 thousand, which were lying in my clothes box and then ran away with the articles and the cash, after bolting the house from outside.

xxxx by Shri Mohd. Aslam, Ld Counsel for all accused.

When my door was knocked, I questioned as to who was there, but none responded, so I did not open the door. My house is a single storey house, but there is no stairs from outside. The accused had entered into my house through the roof of the adjacent house as the adjacent house is lying vacant at that time. Out of the four persons, 3 were with muffled face, but the fact of the accused Vinod is not muffled. I have told to the police about the description of the weapons, being carried by the robbers. one was armed with a Derati. I did not tell to the police that one was armed with a country made pistol. (confronted with Ex.PW-4/DA from point A to A, where it is so recorded). In the morning, the police had recorded my statement, and the police had come to my house for the same. Nothing was recovered during the investigation of the case. It is further incorrect that accused Vinod was not amongst the robbers. it is correct that I am seeing the accused for the first time in the court after the incident. It is further incorrect that I am deposing falsely.”

15. Reading of the evidence of PW-4 would also show that she has identified Vinod. According to her the other persons were in muffled face and thus she was unable to identify the other persons. The submissions made by counsel for the appellants that in view of the fact that the victim, PW-1 had seen the appellants in the Police Station, thus the identification in court cannot be a ground for conviction, is without any force.
16. In case the appellants were shown to the victim in the police station it may be a justifiable ground for the appellants to refuse the TIP, but this by itself cannot be a ground to reject the evidence of PW-1 with regard to the identification of the appellants in court.
17. The contradictions in the evidence of PW-1 are *primarily* with respect to the possession of weapon by the appellant concerned, and not the presence and identification of the appellants. PW-1 has identified all the appellants, whereas PW-3 and 4 have identified the appellant, Vinod Kumar, as the person, who had a *katta* in his hand and who was present at the spot of the incident along with the other persons.
18. In my view non-citing of the wife of PW-1 as a witness is not fatal to the case of the prosecution as her husband PW-1 was also present at the spot and has given his evidence. Although wife of the PW-1 has not been examined, the exhibited MLCs placed on record would show that the victims were injured at the incident which occurred on 9.12.1999.
19. Since the prosecution has failed to prove with regard to the appellant, Pappu, the nature of weapon in his possession, no case is made out against the appellant, Pappu under section 397 IPC, however, evidence of PW-3 and PW-4 clearly establishes that the appellant, Vinod Kumar was carrying a Katta.
20. For the above reasons, the appeal is dismissed, except with the modification that no case is made out against the appellant, Pappu under

Section 397 IPC.

21. The appellants (Vinod Kumar & Pappu) are on bail. The bail bonds be cancelled and appellants (Vinod Kumar & Pappu) shall surrender by 15.12.2013.
22. Amicus curiae shall be paid the fee as per the schedule of the Delhi High Court Legal Aid Services.

G.S.SISTANI, J

NOVEMBER 26th, 2013

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