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

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CRL.A. 588/2012

Date of Decision: 05th September, 2013

WASIM PAHARI

..... Appellant

Through: Ms. Anita Abraham, Advocate

versus

STATE

..... Respondent

Through: Ms. Fizani Husain, APP for the
State with SI Mohd. Faizan,
PS Welcome.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This appeal is preferred by the appellant Wasim @ Pahari who has been convicted by learned Additional Sessions Judge in Sessions Case No. 124/2008 arising out of FIR No. 276/2008, PS Welcome for offence under Section 392/394/397 IPC vide impugned order dated 10th March, 2011 and sentenced as under vide order on sentence dated 15th March, 2011: (i) rigorous imprisonment for seven years for

offence under Section 394 IPC and fine of Rs.3000/-, in default of payment of fine to undergo simple imprisonment for six months, (ii) seven years rigorous imprisonment for offence under Section 392 IPC and fine of Rs.3000/- in default of payment of fine to undergo SI for six months and (iii) seven years rigorous imprisonment for offence under Section 397 IPC. Benefit of Section 428 Cr.P.C was given. All the sentences were to run concurrently.

2. The facts leading to this appeal, briefly stated, are that on receipt of DD No. 28A, Ex.PW8/A regarding assault to a boy at Kabir Nagar, 33 Foota Road and he is being taken to G.T.B. hospital Head Constable Birender (PW1) along with Constable Chaman (PW4) reached 33 ft. Road, Gali No. 1, Kabir Nagar where they came to know that injured had been shifted to hospital. As such, they reached hospital where PW-2 Mehraj met them while his brother PW3 Vikar @ Vicky was getting treatment. He recorded statement of Mehraj, Ex.PW2/A wherein he unfolded that on 26th July, 2008 at about 11:00 pm, he along with his brother Vikar @ Vicky was returning back to his tenanted room after finishing the work in the factory. His brother Vikar @ Vicky was ahead of him. When they

took a turn towards their street, then one person stopped his brother and tried to remove money from his pocket. When his brother protested, then that person inflicted some pointed object on left portion of his face. As a result of which, blood started oozing out. In the meantime, he reached near his brother and caught his brother who was about to fall on the ground. That person removed Rs.5000/- from the upper pocket of his brother. While he was managing his brother, then he saw that, that person was resident of Gali No.1, named as Wasim @ Pahari, S/o Zamir, who had inflicted injuries on his brother by some pointed object and had robbed him of money. He removed his brother to GTB Hospital where he was receiving treatment and was not in a position to make a statement. On the basis of this statement, Rukka, Ex.PW-1/A was prepared and was sent to Police Station for registration of the case on the basis of which, FIR Ex.PW8/B was recorded by ASI Vijay Kumar (PW8).

3. It is further the case of prosecution that on 27th July, 2008, accused was apprehended at Kabir Nagar Shamshan Ghat Pulia on the identification of Mehraj. He was arrested and his personal search was conducted vide memo Ex.PW1/C. The accused made a disclosure

statement Ex.PW1/D pursuant to which one 'ustra' was recovered from the side of wall of nala. Sketch of the 'ustra', Ex.PW1/E was prepared and it was taken possession vide memo Ex.PW1/F. During the course of investigation, blood stained shirt of injured Vikar @ Vicky was seized vide seizure memo Ex.PW1/G. The accused pointed out the place of incident vide Ex.PW1/G-1. During search of accused, Rs.2,200/- in cash out of robbed amount of Rs.5000/- was recovered which were seized vide memo Ex.PW1/H. After completing investigation, charge sheet was submitted against the accused.

4. Charge for offence under Sections 392/394/397 IPC was framed against the accused to which he pleaded not guilty and claimed trial.

5. In order to substantiate its case, prosecution examined eight witnesses. All the incriminating evidence was put to the accused while recording his statement under Section 313 Cr. P.C. wherein he denied the case of prosecution and pleaded innocence. According to him, he was lifted from his house when he was sleeping. Police obtained his signatures on blank papers. Alleged recovery was

planted upon him. Although initially he stated that he wanted to lead evidence in defence but no witness was examined by him. After hearing learned counsels for the parties, vide impugned order dated 10th March, 2011, the accused was held guilty and convicted for offence under Sections 392/394/397 IPC and was sentenced as stated above. Feeling aggrieved by the same, the present appeal has been preferred.

6. I have heard Ms. Anita Abraham, learned counsel for the petitioner and Ms. Fizani Hussain, learned Additional Public Prosecutor for the State and have perused the record.

7. It was submitted by learned counsel for the appellant that PW2 Mehraj, in his cross-examination, has deposed that accused was not known to him from earlier. PW3 Vikar has admitted that there was no light at the time of incident and faces of the persons coming and going were not visible, that being so, there was no possibility to identify the accused. Moreover, his identification for the first time in Court by PW2, Mehraj makes his identity doubtful. No test identification parade was arranged. She further referred to the discrepancies appearing in the prosecution witnesses by submitting

that according to PW2, Mehraj, the accused caused injuries to his brother on right side of his face whereas Vikar has deposed that he received injury on left portion of his face. Moreover, according to PW2 Mehraj, Vikar remained admitted in hospital for about 12 days whereas Vikar deposed that he remained in the hospital for 5-6 days. There is also discrepancy regarding the date, time and place from where accused was arrested, inasmuch as, according to Mehraj, the accused was apprehended by the Police on the same night at 2:30 am from his house whereas according to the police officials, accused was apprehended on the next day at Kabir Nagar Shamsan Ghat Pulia on the identification of Mehraj. Under the circumstances, it was submitted that prosecution has failed to bring home the guilt of accused beyond reasonable doubt. As such, he is entitled to benefit of doubt and be acquitted of the offences alleged against him.

8. Rebutting the submissions of learned counsel for the appellant, learned Public Prosecutor for State submitted that complainant Mehraj has fully supported the case of prosecution and even the victim Vikar has supported the case of prosecution when he was examined on 12th January, 2010, however, thereafter, his cross-

examination was deferred and then he tried to resile from his earlier statement. There is no reason to disbelieve the statement made by him on 12th January, 2010. In the complaint itself, the complainant has given the name and parentage of the accused. That being so, since the accused was known to the complainant from before, there was no need for conducting Test Identification Parade. Slight discrepancy in regard to the date, time and place of arrest of the accused does not cast any dent on the prosecution version. After the arrest of the accused, weapon of offence and part of robbed amount was recovered at his instance/from his possession, which substantiates the case of prosecution. As such, there is no infirmity in the impugned order which calls for interference. The appeal is liable to be dismissed.

9. I have given my anxious thoughts to the respective submissions of learned counsel for the parties and have perused the record.

10. The submission of learned counsel for the appellant that in the absence of conducting TIP proceedings, identification of the appellant for the first time in the Court is highly doubtful is without substance, inasmuch as, a perusal of the complaint goes to show that

immediately after the incident since Vikar had sustained injury and was bleeding profusely, the first endeavour of the complainant was to provide him medical treatment. Therefore, he took him to a local doctor, namely, Dr. Fridi, however, the doctor did not entertain his brother and asked him to go to the hospital. As such, he took his brother to GTB Hospital. Meanwhile, he also made a call to the police at 100 number. The MLC Ex.PW-6/A of Vikar @ Vicky corroborated the version of complainant Mehraj that he got him admitted in the hospital as in the column of “brought by”, name of Mehraj (brother) was mentioned. Since he had also informed the police at 100 number, therefore, ASI Vijay Kumar (PW8) received an information from control room regarding assault on a boy at 33 ft. Road, Kabir Nagar and he recorded DD No.28A, Ex.PW8/A and assigned the same to Head Constable Birender to take action in the matter. On being assigned this DD No. 28A, Head Constable Birender along with Chaman reached the spot but no witness met him there and on coming to know that injured had been shifted to hospital, he reached the hospital where he met Mehraj and recorded his statement Ex.PW2/A. As seen above, in his statement, Mehraj has

specifically mentioned the name of Wasim @ Pahari, S/o Zamir, R/o his Gali No.1 to be responsible for robbing his brother and inflicting injuries on left portion of his face by some pointed object. Since immediately after the incident, before there was any extraneous intervention, the incident was narrated and name of the culprit along with his parentage and address was also given, that being so, there was no need for conducting Test Identification Parade of the accused.

11. Moreover, in his deposition before the Court, the witness has correctly identified the accused. Even the victim PW3 Vikar has also fully supported the case of prosecution by narrating the incident succinctly and identifying the appellant as the assailant of the crime when his examination-in-chief was recorded on 12th January, 2010. Record reveals that his cross-examination was deferred at the request of learned defence counsel and, thereafter, he was recalled for cross-examination on 14th February, 2012. At that juncture, he tried to resile from his earlier statement regarding the identity of the accused by deposing that there was no light at the time of incident. Faces of the persons were not visible and the accused did not cause any injury to him nor robbed him. He went on stating that his deposition on 12th

January, 2010 was at the instance of one police official who had tutored him outside the Court. Thereupon, this witness was re-examined by learned Public Prosecutor and admitted that on 12th January, 2010, he had deposed before the Court after taking oath. He also admitted that he met mother of the accused Wasim @ Pahari on that day (i.e. 14.02.2012) outside the Court. He, however, denied the suggestion that in order to save the accused at the instance of his mother, he is deposing falsely. Thereafter, the witness was not cross-examined by learned counsel for the accused.

12. It is settled law that evidence of a prosecution witness cannot be rejected *in toto* merely because the prosecution chose to treat him as hostile and cross-examines him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof as held in ***Ramesh Harijan v. State of Uttar Pradesh*** (2012) 5 SCC 777; ***Balu Sonba Shinde v. State of Maharashtra*** (2002) 7 SCC 543; ***Ganga Kanojia and Anr. V. State of Punjab*** (2006) 13 SCC 516; ***Radha Mohan Singh @ Lal Saheb v. State of U.P.***, AIR 2006 SC 951, ***Sarvesh Narain Shukla v.***

Daroga Singh and Ors., AIR 2008 SC 320 and *C. Muniappan and Ors. v. State of Tamil Nadu* , AIR 2010 SC 3718.

13. *Khujji @ Surendra Tiwari vs. State of Madhya Pradesh*, (1991) 3 SCC 627 is a direct authority on the point. In that case also, the witness had correctly identified the accused when his examination-in-chief was recorded on 16th November, 1976. After one month, when he was cross-examined then, he stated that he had seen the accused from back, as such, could not see their faces. It was held by the High Court that during the one month period that elapsed since the recording of his examination-in-chief, something transpired which made him shift his evidence on the question of identity to help the appellant. His statement in cross-examination on the question of identity of the appellant was a clear attempt to wriggle out all what he had stated earlier in his examination-in-chief. As such, there was no reason to doubt the testimony of the witness. The reasoning was approved by Hon'ble Supreme Court.

14. In the instant case also, as referred above, when the witness was examined on 12th January, 2010, he gave the exact version of the incident and also named and identified the accused, who robbed him

on the point of 'ustara' and inflicted injury on his person. It was only thereafter when he was recalled for cross-examination on 14th February, 2011 that he tried to resile from his earlier statement by deposing that the appellant was not the person who caused injury to him or robbed him. This statement of the witness, in itself, is contradictory because, if according to him, there was no light at the time of incident and faces of the persons coming and going through place of incident were not visible, then how could he say with exactitude that accused did not cause any injury to him or robbed him. In fact, his plea that he has identified the accused on 12.01.2010 at the instance of the police official is devoid of merits, inasmuch as, when he was re-examined by learned Public Prosecutor, he admitted that he met the mother of the accused Wasim @ Pahari and the possibility of his being won over by her on that date cannot be ruled out. Moreover, no complaint was made by him during this intervening period that the statement made on oath on 12.01.2010 was not voluntary or was result of tutoring. He has not even named the police official who tutored him. As such, his statement in cross-examination on the question of identity of accused was a clear

attempt to wriggle out of what he stated in his examination-in-chief. There is no reason to disbelieve his statement made on 12.01.2010. Moreover, in the face of voluminous evidence which has come on record and will be discussed hereinafter, there is no reason to doubt the identity of the appellant as the assailant of the crime who was named in the FIR by Mehraj at the first available opportunity and thereafter was also identified in the Court. Accused is not alleging any enmity, ill-will or grudge against the complainant, or the victim for which reason they would falsely implicate him in this case. Rather, since the appellant is residing in the same gali and therefore, known to the witnesses, therefore, the victim in fact tried to exonerate him by not identifying him during his cross-examination but as stated above, that must have been at the instance of mother of the appellant, who was present in the Court when this witness came for his cross-examination. The fact remains that he was named at the very first available opportunity when the complaint was made by Mehraj which became bedrock of investigation and thereafter duly identified in the Court. Despite lengthy cross-examination, nothing material could be elicited to discredit the testimony of the witnesses for which reason

they would falsely implicate him in this case. As such, identity of the accused being assailant of the crime is duly established.

15. It further stands proved from the testimony of prosecution witnesses that accused was apprehended on the identification of PW Mehraj. Thereafter he was arrested. During the course of interrogation, he made a disclosure statement Ex.PW1/D and got recovered the weapon of offence i.e 'ustra' from the side of nala. Out of the robbed amount of Rs.5,000/-, a sum of Rs.2,200/- was also recovered from his possession. Recovery of 'ustra' and Rs.2,200/- stand proved from the corroborative testimony of PW5 ASI Rajpal and PW1 HC Birender. Mere fact that they are police officials is no ground to discard their testimony. The testimony of police personnel have to be treated in the same manner as testimony of any other witnesses and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies, as much in favour of police personnel as of other person and it is not a proper judicial approach to distrust and suspect them without good ground. It will all depend upon the facts and circumstances of each case and no

principle of general application can be laid down as held in *Karanjit Singh Vs. State (Delhi Admn.)* 2003 5 SCC 291, *C. Ronald & Anr. Vs. Union Territory of Andaman & Nicobar Islands*, (2001) 1 SCC (Crl.) 596; *Sunil Clifford Daniel vs. State of Punjab*, 2012 11 SCC 205.

16. Record reveals that no ill-will or animus has been alleged against any of the police officials for which reason they will falsely implicate the accused. Under the circumstances, recovery of 'ustra' at the instance of appellant and recovery of Rs.2,200/- out of the robbed amount from his possession stands established.

17. The ocular testimony of PW2 Mehraj and PW3 Vikar that while committing robbery, accused used a deadly weapon and inflicted injury on left portion of his face find corroboration from medical evidence inasmuch as it has come on record that PW2 Mehraj took his brother PW3 Vikar initially to Dr. Fridi, a private doctor who refused to entertain him and asked him to go to a hospital. Thereupon, Mehraj took him to GTB hospital. His MLC Ex.PW6/A was prepared by Dr. Phunstok. As per MLC, injured was having incised wound on left mandible 12 cm x 2 cm. Injuries were opined

to be simple by Dr. Sameer vide his opinion Ex.PW6/A. It has further come in the statement of complainant and victim that victim had to remain hospitalised for number of days and received 22 stitches. Testimony of injured regarding sustaining injuries by deadly weapon when incident of robbery took place goes unrebutted and unchallenged, inasmuch as, with regard to the incident, he was not cross-examined at all.

18. Coming to the discrepancies referred by learned counsel for the appellant, same does not go to the root of the matter. Dealing with the discrepancies and minor inconsistencies, in *Sidhan Vs. State of Kerala, 1986*, Cr.L.J. 470, it was held :--

“Minor discrepancies regarding minute details of the incident including the sequence of events and overt acts are possible even in the versions of truthful witnesses. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their evidence. If, on the other hand, these witnesses have given evidence with mechanical accuracy that must have been a reason to contend that they were giving tutored versions. Minor discrepancies on facts which do not affect the main fabric need not be taken into account by the Courts if the evidence of the witnesses is found acceptable on broad probabilities.”

“The principles that can be culled out from the aforesaid decisions are minor discrepancies and inconsistencies cannot give (sic) importance. The Court has to see whether

inconsistencies can go 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 rustic and illiterate villagers, who speak them after long lapse of time.”

19. In *State of U.P v. Naresh*, (2011) 4 SCC 324, this Court observed:

“30. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.....”

20. In *Lal Bahadur and Others v. State (NCT of Delhi)*, (2013) 4 SCC 557, it was held:-

“So far as the contradictions and inconsistencies in the evidence of the prosecution witnesses, as pointed out by the counsel for the appellants, are concerned, we have gone through the entire evidence and found that the evidence of the witnesses cannot be brushed aside merely because of some minor contradictions, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy....”

21. Similar view was taken in *Krishna Mochi vs. State of Bihar*, 2002 6 SCC 81; *Gore Lal vs. State*, 2010 III AD (Delhi) 34; *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*, AIR 1983 SC 753.

22. I have carefully gone through the entire evidence and found that the evidence of the witnesses cannot be brushed aside merely because of some minor contradiction, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy. Not only that, the witnesses have consistently deposed with regard to the offence committed by the appellant and in fact testimony of PW3 Vikar as regards the incident of robbing, snatching Rs.5,000/- from him and inflicting injury upon his left portion of the face with 'ustra', goes un-rebutted and un-challenged, inasmuch as, in regard to the actual incident, he was not cross-examined at all by learned counsel for the appellant. Mere marginal variation and contradiction in the statement of witnesses cannot be a ground to discard the testimony of witnesses.

23. As regards last limb of the argument that the injuries on the person of Vikar were opined to be simple and, therefore, offence under Section 397 IPC is not made out, same is devoid of substance. In order to invoke Section 397, causing of grievous hurt is not the *sine qua non* inasmuch as, an act would fall within the mischief of

this section, if at the time of committing robbery or dacoity, the offender-

- (a) Uses any deadly weapon;
- (b) Causes grievous hurt to any person; or
- (c) Attempts to cause death or grievous hurt to any person.

The word 'uses' was interpreted by Hon'ble Supreme Court in *Phool Kumar Vs. Delhi Administration*, 1975 CrLJ 778 where it was laid down that it is not necessary that deadly weapon must be actually used by the culprit in the robbery or dacoity by way of causing hurt or brandishing the same and that it is 'used' within the meaning of Section 397 if the deadly weapon is merely held out for terrorising or frightening a victim to obtain property.

24. This view was reiterated in *Ashfaq Vs. State*, 2004 AIR (SC) 1253 wherein it was held that what is essential to satisfy the word 'uses' for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of the victim and not that it should be

further shown to have been actually used for cutting, stabbing, shooting as the case may be. In order to bring the case within the four corners of Section 397 IPC, it is not mandatory that grievous hurt is caused to any person. It is sufficient, if a deadly weapon is used. In the instant case, 'ustra' which is a deadly weapon was not only used while committing robbery by the accused but in fact, injuries were also caused on the person of Vikar by inflicting the same on left portion of his face which resulted in profuse bleeding. He had to remain hospitalized and received 22 stitches. Mere fact that injuries were opined to be simple is of no consequence.

25. As such, the prosecution has succeeded in establishing that at the time of committing robbery, the accused used deadly weapon and caused simple hurt to Vikar and thereby committed the offence punishable under Section 392/394/397 IPC. Under the circumstances, the appellant was rightly convicted by the learned Trial Court. The impugned order does not call for any interference.

26. As regards the quantum of sentence, learned counsel for the appellant prayed for a lenient view. Learned Additional Public Prosecutor for the State, on the other hand, referred to the antecedents

of appellant for submitting that he is involved in as many as six other cases and, therefore, does not deserve any leniency. The appellant has, in sum and substance, been sentenced to undergo seven years rigorous imprisonment. Section 397 IPC prescribes the punishment which “shall not be less than seven years”. The word ‘shall’ mandates that sentence cannot be less than seven years, therefore, besides the fact that antecedents of the appellant are not clear, even otherwise, sentence cannot be reduced. That being so, even regarding quantum of sentence, no interference is called for.

27. The appeal, being bereft of merits, is dismissed. Copy of the order along with Trial Court record be sent back.

**SUNITA GUPTA
(JUDGE)**

SEPTEMBER 05, 2013
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