

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

RESERVED ON : 31st MARCH, 2014

DECIDED ON : 4th APRIL, 2014

+ CRL.A.No. 555/2012

MUNIR @ CHOTA Appellant

Through : Mr.S.S.Ahluwalia, Advocate.
versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through : Mr.Lovkesh Sawhney, APP.

RESERVED ON : 21st MARCH, 2014

DECIDED ON : 4th APRIL, 2014

+ CRL.A.No. 556/2012

DULAL Appellant

Through : Mr.Saurabh Kansal, Advocate with
Ms.Pallavi Kansal, Advocate.
versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through : Mr.Lovkesh Sawhney, APP.

AND

+ CRL.A.No. 557/2012 & CRL.M.B.No. 435/2014

HARUN Appellant

Through : Mr.Saurabh Kansal, Advocate with
Ms.Pallavi Kansal, Advocate.
versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through : Mr.Lovkesh Sawhney, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Munir @ Chota (A-1), Dulal (A-2) and Harun (A-3) challenge the legality and correctness of a judgment dated 19.12.2011 of learned Addl. Sessions Judge in Sessions Case No. 37/10 arising out of FIR No. 91/09 PS Harsh Vihar by which they were held perpetrators of the crime under Section 395 IPC. By an order dated 24.12.2011, they were sentenced to undergo RI for ten years with fine ₹ 20,000/-, each.

2. The prosecution case as revealed in the charge-sheet was that on 23.05.2009 at about 01.50 a.m. at House No.A-181, Gali No.6, Mandoli Extension, the appellants and their associates Aftab @ Daboo and Yamin @ Kalia committed dacoity. Daily Diary (DD) No. 7B was recorded at PS Mehrauli on getting information about the occurrence from PCR. The investigation was assigned to ASI Rakesh Tyagi who with HC Rishi Raj went to the spot. He lodged First Information Report after recording complainant – Satender Kumar's statement (Ex.PW-3/A) under Sections 394/34 IPC. Injured – Satender Kumar was taken to GTB hospital where he was medically examined. The complainant disclosed that three / four individuals who had entered inside the house by jumping

over the wall robbed ₹ 19,500/-, gold ring and purse containing his school I-card. The intruders were armed with weapons and on his resistance, he was caused injuries. Efforts were made to find out the culprits but in vain. Further case of the prosecution is that on 25.05.2009, Sakir, Mohd.Rahim, Mohd.Harun (A-3), Mohd.Munir Bada, Dulal (A-2), Munir Chota (A-1) and Kamal were arrested by the police of Special Staff, South District, in case FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli. Various weapons were recovered from them. Their involvement in the instant case emerged in the disclosure statements made by them. Intimation was given to the Investigating Officer of this case and DD no. 2B was recorded. PW-21 (SI Rakesh Tyagi) arrested Rahim, Sakir, Bada Munir, Chota Munir, Kamal, Yamin @ Kalia, Aftab, Harun and Dulal as suspects. After Court's permission, their disclosure statements Ex.PW-21/I [of A-3 (Harun)], Ex.PW-21/J [of A-1 (Chota Munir)], Ex.PW-21/K [of A-2 (Dulal)], Ex.PW-21/L (of Yamin @ Kalia) and Ex.PW-21/M (of Aftab) were recorded. In Test Identification Proceedings, complainant – Satender identified A-1 and A-3. Yamin @ Kalia declined to participate in the TIP. On 09.06.2009 during police remand, Rahim, Bada Munir, Sakir and Aftab led the police party to the place of occurrence and pointing out memos (Ex.PW-13A to Ex.PW-13/D) were prepared. Aftab pursuant to

the disclosure statement, recovered school I-card of the complainant which was seized vide seizure memo Ex.PW-13/E. Statements of the witnesses conversant with the facts were recorded. The exhibits were sent to Forensic Science Laboratory. Rahim, Sakir, Bada Munir and Kamal were got discharged. After completion of investigation, a charge-sheet was filed against A-1 to A-3, and Yamin @ Kalia and Aftab; they were duly charged and brought to trial. The prosecution examined twenty-one witnesses to substantiate the charges against them. In 313 statements, the accused persons denied their complicity in the crime and pleaded false implication. After considering the rival contentions of the parties and appreciating the evidence and other materials, the Trial Court, by the impugned judgment, held A-1 to A-3 guilty under Section 395 IPC. Aftab and Yamin @ Kalia were acquitted of the charges. State did not prefer any appeal against their acquittal. Being aggrieved and dissatisfied, A-1 to A-3 have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the record. The incident in which complainant – Satender Kumar was robbed of ₹ 19,500/- and other valuable articles on the night intervening 22/23.05.2009 at House No.A-181, Gali No.6, Mandoli Extension is not under challenge. Only plea of the appellants is that they

were not the perpetrators of the crime and were falsely implicated in this case. The complainant had no extraneous consideration to fake or concoct the incident of robbery at night time at his residence. He was not only deprived of cash and other valuable articles but was also injured while committing robbery by the assailants. He was taken to GTB hospital and was medically examined. He suffered injuries 'simple' in nature. The occurrence took place at around 01.50 A.M. The First Information Report was lodged at 03.50 A.M. in promptitude after recording complainant's statement (Ex.PW-3/A). The complainant at the first available opportunity disclosed to the police as to how and under what circumstances, three / four boys had entered inside the house and had committed robbery. On raising an alarm, many neighbourers including PW-1 (Naresh Kumar) gathered at the spot and pelted stones at the intruders. To scare them, the assailants fired in retaliation and managed to escape. PW-3 (Satender Kumar), PW-4 (Vimlesh), PW-5 (Rekha) and PW-6 (Rinki) have all given consistent version about the incident of robbery.

4. The appellants were arrested along with their associates in FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli, by the police of Special Staff, South District on 25.05.2009.

Their involvement emerged in the instant case on their disclosure

statements recorded therein. The Investigating Officer of this case moved applications for holding Test Identification Proceedings. PW-16 (Ms.Suchi Laler), learned Metropolitan Magistrate, conducted Test Identification Proceedings at Tihar Jail in which the complainant identified A-1 and A-3 correctly. Yamin @ Kalia refused to participate in the Test Identification Proceedings. While appearing as PW-3, in Court statement, Satender Kumar identified A-1 and A-3 without hesitation and specifically deposed that they were among the assailants who had entered inside the house and committed robbery. He denied that both these assailants were shown to him in the police station prior to the Test Identification Proceedings. This submission of the appellants is devoid of merit. They have not given any specific date as to when and where they were shown to the complainant. They had voluntarily agreed to join the Test Identification Proceedings. At that time, no such complaint was lodged with the learned Metropolitan Magistrate conducting TIP. They cannot be permitted to challenge their identification by the complainant in TIP simply because he was able to recognise them as the assailants. PW-3 (Satender Kumar) was fair enough not to recognise and identify Aftab and Yamin @ Kalia in his Court statement stating that they had covered their faces and primarily it resulted in their acquittal.

5. The complainant identified A-2 in his Court statement and pointed towards him stating that he was also the assailant involved in the occurrence. In the cross-examination, he denied the suggestion that A-2 was present outside the house at the time of incident. He volunteered to add that A-2 was inside the house in the room where the robbery was committed. It is true that the Investigating Officer did not move application for conducting TIP for A-2 during investigation. For that lapse of the Investigating Officer, otherwise cogent and reliable testimony of the complainant who had no prior animosity with A-2 cannot be discredited. It is trite to say that the substantive evidence is the evidence of identification in the Court. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (*Amitsingh Bhikamsing Thakur vs. State of Maharashtra*, AIR 2007 SC 676). In the instant case, the Trial Court

observed that the cartridges recovered from the spot were connected with the pistol recovered from the accused in the proceedings in FIR No. 267/2009 under Sections 399/402 IPC and 25 Arms Act, PS Mehrauli. Neither of the appellants claimed their presence at any other particular place on the relevant time and date. They did not examine any of their family members or employers to prove their presence in their respective houses or places of work. The appellants had no reason to be present inside the victim's house at odd hours. Non-recovery of the robbed articles is of no consequence. PW-3 (Satender Kumar), PW-4 (Vimlesh), PW-5 (Rekha) and PW-6 (Rinki) have all deposed about the robbery of the valuable articles from the house. PW-4 (Vimlesh), PW-5 (Rekha) and PW-6 (Rinki) were unable to identify the assailants as they could not see their faces due to fear. Minor contradictions, discrepancies and improvements highlighted by the appellants' counsel do not stake the basic structure of the prosecution case due to clear identification by the complainant who had direct confrontation with the assailants for about ten minutes inside the house and had clear and reasonable opportunity to note their broad features.

6. Initially in the statement (Ex.PW-3/A), complainant – Satender Kumar had not given the exact number of intruders and

described that they were three or four. In his Court statement also, he disclosed their number as three / four. PW-1 (Naresh Kumar), a neighbourer, gave the number of the assailants as five or six but he was unable to identify any of the assailants. PW-4 (Vimlesh) did not state the number of the assailants in her examination-in-chief. Only, in the cross-examination, she disclosed that the intruders were six or seven. She was not able to identify any of the culprits. PW-5 (Rekha) merely stated that her brother was caught hold by three / four individuals. PW-6 (Rinki) gave the number of the assailants four / five. It reveals that exact number of assailants who were involved in the incident could not be ascertained during investigation. Nine individuals were arrested during investigation and four of them were discharged for lack of evidence. The Trial Court did not find cogent evidence against Aftab and Yamin @ Kalia and acquitted them of the charges. Minimum number of assailants required for conviction under Section 395 IPC is five which the prosecution failed to prove beyond doubt. Conviction under Section 395 IPC was not permissible. Since the victim was injured in committing the robbery by the assailants, the offence proved against A-1 to A-3 would be under Section 394 IPC. The conviction is accordingly altered to Section 394 IPC.

7. Nominal roll dated 17.07.2012 reveals that A-1 and A-2 have suffered custody for three years, one month and seven days besides remission for three months as on 17.07.2012. A-3's nominal roll dated 10.02.2014 reveals that he has suffered custody for four years, eight months and eight days besides remission for eleven months as on 10.02.2014. None of them has any previous conviction though they are involved in some other criminal cases. Taking into consideration all the facts and circumstances, the sentence order is modified and substantive sentence of the appellants is reduced to eight years with fine ₹ 10,000/-, each and failing to pay the fine to undergo SI for three months, each under Section 394 IPC.

8. Appeals stand disposed of in the above terms. Pending application also stands disposed of. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to Superintendent Jail for information.

(S.P.GARG)
JUDGE

APRIL 04, 2014 / *tr*