

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 4th September, 2014

+ CRL.A.1500/2013
AJAY TIWARI

..... Appellant

Through: Mr. Ajit Sharma, Advocate

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Sunil Sharma, Additional
Public Prosecutor for the State

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

The challenge in this appeal is to the judgment dated 05.10.2013 and order on sentence 08.10.2013 by which the appellant was convicted under Sections 379 of Indian Penal Code (IPC) and was sentenced to undergo rigorous imprisonment for a period of three (3) years and fine of Rs.25,000/- and in default of payment of fine, further nine (9) months simple imprisonment. Out of the fine amount, a sum of Rs.20,000/- was ordered to be given as compensation to the victim under Section 357 of Code of Criminal Procedure, 1973.

2. The prosecution case emanates from the fact that Inspector Gulshan Satija (PW2) got recorded his statement Ex.PW2/A to the Investigating Officer SI Rajendra Dabas stating that on 05.09.2012, he along with constable Anil Kumar and constable Agat Singh was on patrolling at Old Delhi Railway Station. At about 4.30 pm when they were alighting from the stairs of Foot Over Bridge (FOB) towards platform no.14, one person who

was climbing the stairs took a turn after seeing them. On suspicion, he was apprehended after chasing about 20-25 paces. On his cursory search, one red colour old purse was recovered from his pant containing Rs.6000/- (500x12), voters card in the name of Suresh, son of Ramyash, along with some visiting cards, one light pink colour tablet was recovered from the pocket of his shirt and Rs.6400 (100x61, 50x6) which was wrapped in a *lungi* was recovered from his bag which he was carrying. On inquiry, he disclosed his name as Ajay Tiwari. One mobile phone Nokia E-63 was also recovered from the pocket of his pant. On enquiry, he disclosed that he had stolen the said items from one person after administering stupefying substance in tea and thereafter, he led the police party at platform no.14 and pointed out the person to whom he had administered the stupefying substance. It was alleged that one person was found in semi-unconscious condition and he disclosed his name as Suresh Kumar. On being asked, he identified his mobile phone, purse and bag and also identified the accused. Thereafter, accused was brought to the police station Old Delhi Railway Station and was handed over to the Investigating Officer. Injured Suresh was sent to Aruna Asaf Ali hospital for medical examination. After medical examination, doctor handed over one bottle gastric lavage and one bottle of blood sample with the seal of CMO AAA Govt. Hospital NCT of Delhi and one sample seal which were seized. Thereafter, on the statement of Inspector Gulshan Satija, an FIR was lodged for the offence punishable under Section 328/379/411 IPC. During investigation, it was revealed that accused Ajay Tiwari had already been convicted in four other matters namely CC No.1/12 under Section 3 RP (UP) Act, FIR No.956/2000 under Section 411 IPC Police Station NDRS, FIR No.283/2006 under Section 328/379 IPC Police Station NDRS and FIR No.282/2010 under Section 328/379/411 Police Station NDRS. After completion of investigation,

charge-sheet was submitted for offence under Section 328/392/394/411/75 of IPC. The charge, however, was framed for offence under Section 328/394 of IPC to which the accused/appellant pleaded not guilty and claimed trial.

3. In order to substantiate its case, the prosecution examined eight (8) witnesses. On culmination of prosecution evidence, statement of accused under Section 313 of Code of Criminal Procedure (Cr.PC) was recorded wherein he denied all the incriminating evidence put forth by the prosecution and submitted that he has been falsely implicated in this case. He took the plea that while he was coming back from Panipat and was going to Dadri from platform no.1, one police informer met him who knew him previously and told that police had to interrogate him. Accordingly, that person took him to Police Station where he was falsely implicated in this case. In order to prove his innocence, he examined himself as DW1.

4. After considering the evidence led by the parties, learned Trial Court arrived at the conclusion that prosecution has failed to produce any cogent evidence to establish that the injured was administered any poisonous, intoxicating, stupefying substance or any wholesome drug or that he felt giddiness due to consumption of tea and chips. As such, he was acquitted of the charge under Section 328 of IPC. Even as regards offence under Section 394 IPC, it was observed that prosecution failed to establish that accused had either caused hurt or fear of instant hurt to the victim while committing theft of his belongings as such he cannot be held guilty either for the offence punishable under Section 392 IPC or Section 394 IPC. However, since the stolen articles pertaining to the victim were recovered from the possession of the accused immediately after theft, as such presumption

arises that he had committed theft. Accordingly, the appellant was convicted for offence under Section 379 IPC and sentenced as mentioned above.

5. Feeling aggrieved, the present appeal has been filed by the appellant.

6. Assailing the findings of learned Additional Sessions Judge, it was submitted by Mr. Ajit Sharma, learned counsel for the appellant that the incident is alleged to have taken place at a railway platform. It was admitted by PW2 that CCTV were installed at the platform of Old Delhi Railway Station, however, CCTV footage was not seized by the Investigating Officer of the case. Moreover, as per the case of prosecution, the appellant provided tea and chips to the victim containing intoxicating substance. However, no cup containing tea and chips etc were recovered in order to prove that the appellant intoxicated the victim. Moreover, the blood sample of the victim did not reveal any poisonous substance. Despite the fact that such an incident took place at railway platform and there was no dearth of independent witnesses, but none was joined in the proceeding. The entire case rests on the testimony of the victim which does not inspire confidence inasmuch as according to him, when he was made to eat and drink tea and chips, his belongings were taken by the accused/appellant at that time and if that was so, why did he not raise any alarm. Also, the appellant could not have been convicted on the sole testimony of the victim. Moreover, the appellant was a police informer. Due to some confrontation with the police officials, he was falsely implicated in this case. Alternatively, it was submitted that the appellant has remained in jail for a period of one year and eleven months; he is an HIV patient, as such keeping in view his medical condition, he be released on the period already undergone by him in custody.

7. Countering the submissions, learned Additional Public Prosecutor for the State submitted that present is a case where the FIR was registered on the statement of the police Inspector and not by the victim inasmuch as, as per the prosecution case when the police officials were on patrolling duty at the railway station, on seeing the police party, the appellant/accused tried to run away. Hence, on the basis of suspicion, he was apprehended and on his search, various articles were recovered. Thereafter on the disclosure statement of the accused he was taken to the victim who narrated the entire incident. The victim was not known to the accused from earlier and had absolutely no axe to grind to falsely implicate him in this case. It was further submitted that for non-collection of CCTV footage, there is no ground to disbelieve the testimony of the victim. The conviction can be based on solitary testimony of the witness and in the instant case, the victim has stood the test of cross examination and there is no reason for him to falsely implicate the appellant. The defence taken by the accused is an afterthought. No suggestion was given to any of the prosecution witnesses that he was a police informer or was falsely implicated due to that reason. As regards the submissions that a liberal view be taken regarding the quantum of sentence, it was submitted that earlier involvements of the appellant shows his bent of mind and as such he does not deserve any leniency. The appeal is, therefore, devoid of any merit and the same may be dismissed.

8. It has come in the statement of Victim – Suresh Kumar that on 05.09.2012, he was going to Sultanpur and as such he went to Gurgaon Railway Station. From there, he came to Old Delhi Railway Station. He was going to his village as his son was ill. He reached Old Delhi Railway Station at 12.30 pm and inquiry revealed that the train would go from

platform no.9 at about 8 pm. He went to platform no.1 where the accused met him at about 2 pm and told him that he had to go to Banaras. Thereafter, accused took him to platform no.14 by stating that his train will come on that platform. Both of them sat on platform no.14 where he and the accused took water from his water bottle and had tea and chips brought by accused. After about 30 minutes, he started feeling giddy. Although he noticed accused removing cash amount of Rs.6400/- from his bag wrapped in a *lungi*, red colour purse from the rear pocket of his pant containing Rs.6,000/- cash, Nokia phone E-63 from his shirt pocket but due to giddiness, he was unable to react. Thereafter, accused went away. After about half an hour, three police officials came to him along with the accused and he identified the accused as well as his belongings.

9. His testimony regarding apprehension of accused and recovery of articles from his possession find corroboration from PW2 Inspector Gulshan Satija who deposed that he along with constable Anil Kumar was present at Old Delhi Railway Station. At about 3.30 pm constable Agat Singh met them near RPF Police Station. All of them started patrolling at the railway station. At about 4.14 pm, when they reached West Side FOB (Foot Over Bridge) and were alighting the stairs towards platform no.14, they saw one person who was coming towards them. On seeing the police party, he took a u-turn and started running away. Police officials chased him for 20-25 paces and apprehended him. On inquiry, he failed to give any satisfactory reply. On checking, one red colour purse containing Rs.6,000/- in the denomination of Rs.500/- each, one voter identity card in the name of Suresh, some visiting cards and a Nokia Mobile phone with cover were recovered. One light pink colour tablet was found in the pocket of his shirt. On inquiry, he disclosed that the said articles belonged to one person to

whom he had administered stupefying substance in tea at platform no.14. Thereafter, he led the police party to the said person. The police officials met one person who disclosed his name as Suresh Kumar who was in semi-unconscious state. The recovered articles were shown to him and he identified the same as belonging to him. Thereafter, the victim and the accused were brought to GRPF Police Station. SI Rajender Dabas took the victim to hospital and thereafter his statement Ex.PW2/A was recorded which culminated in registration of FIR. After the victim was declared fit for making statement, his statement was recorded.

10. Much emphasis has been laid by learned counsel for the appellant for submitting that PW2 in his cross examination admitted that CCTVs are installed at platform of Old Delhi Railway Station, but the same were not seized by the Investigating Officer. Although, it is true that CCTV footage would have been a corroborative piece of evidence to prove the culpability of the accused. However, non-seizure of the same at the most may tantamount to a lapse on the part of the investigating agency, but there are catena of decisions to the effect that merely because there is defect in the investigation or lapse on their part to conduct the investigation aptly, it is no ground for acquittal of the accused. If an accused is acquitted solely on that ground, it would tantamount to putting premium on the inappropriate conduct of the incompetent investigating officers at the cost of the victims which will amount to grave injustice.

11. Supreme Court in *Hema v State thr Inspector of Police, Madras* 2013(1)SCC192 held that:

"10. It is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect

has been considered in various decisions. In **C. Muniappan and Ors. v. State of Tamil Nadu**, 2010 (9) SCC 567, the following discussion and conclusion are relevant which are as follows:

55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.

11. In **Dayal Singh and Ors. v. State of Uttaranchal**, 2012 (8) SCC 263, while reiterating the principles rendered in **C. Muniappan (supra)**, this Court held thus:

18... Merely because PW 3 and PW 6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground....

12. In **Gajoo v. State of Uttarakhand**, 2012 (9) SCC 532, while reiterating the same principle again, this Court held that defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused

should not be an aspect of material consideration by the Court. Since, the Court has adverted to all the earlier decisions with regard to defective investigation and outcome of the same, it is useful to refer the dictum laid down in those cases:

20. *In regard to defective investigation, this Court in Dayal Singh v. State of Uttaranchal while dealing with the cases of omissions and commissions by the investigating officer, and duty of the court in such cases, held as under: (SCC pp. 280-83, paras 27-36)*

27. Now, we may advert to the duty of the court in such cases. In Sathi Prasad v. State of U.P. this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in Dhanaj Singh v. State of Punjab, held: (SCC p. 657, para 5)

5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

12. The other submission that there was no independent witness despite the fact that the incident had taken place at railway station. Such a plea was also taken before the learned Trial Court and was rightly brushed aside on the ground that the incident had taken place sometime between 3.45 pm to 4.15 pm. PW2 along with his team reached there alongwith the accused at 4.30 pm. Then he was taken to Police Station and from there the victim was taken to hospital. From the testimony of the victim it was clear that no other train was stationed at the platform no.14 at the time of incident except one

empty train. Moreover, even if some public persons were present at the railway station, there was nothing to suggest that they had witnessed the incident. In any case, PW1 is the victim in the case and he had no acrimony with the accused and his testimony appears to be trustworthy and the same could not be discarded merely on the ground that the Investigating Officer failed to get any independent witness who may corroborate his version.

13. The last submission of learned counsel for the appellant that the appellant could not have been convicted upon the solitary testimony of PW1 – Suresh Kumar, is devoid of any substance, inasmuch as there are catena of decisions on the point that conviction of an accused can be founded on a sole testimony, if the same is found to be reliable and free from any infirmity.

15. In *Sunil Kumar vs. State of Govt. of NCT of Delhi* (2003) 11 SCC 367 Hon'ble Supreme Court repelled a similar submission observing that as a general rule, the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the courts will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

16. In *Namdeo v. State of Maharashtra* (2007) 14 SCC 150, Hon'ble Apex Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact.

The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

17. Similar view has been reiterated in *Brijbasilal v State of M.P.* 1991Supp(1)SCC200; *Jagdish Prasad vs. State of M.P.*, AIR 1994 SC 1251; *Vadivelu Thevar vs. State of Madras*, AIR 1957 SC 614 and *Kunju @ Balachandran vs. State of Tamil Nadu* AIR 2008 SC 1381.

18. PW1 is absolutely an independent witness who was unknown to the accused from before. The accused himself is not alleging any enmity or ill-will or grudge on the part of the victim for which reason he would falsely implicate him in this case. As such, there is no reason to disbelieve the graphic description of the entire incident given by him as to how he was taken to platform no.14 by accused and thereafter was offered tea and chips after consuming which he felt giddiness and then accused removed his belongings which were ultimately recovered from his possession. Furthermore, the accused was a stranger to the victim and as such it was hard to believe that the victim, who was going to see his ailing son, would cancel the programme in order to falsely implicate the accused.

19. Coming to the defence of accused in his statement recorded under Section 313 Cr.P.C, he has stated that he was coming back from Panipat and was going to Dadri from platform no.1, one police informer met him who knew him previously and told that police had to interrogate him.

Thereafter, he (accused) was taken to Police Station where he was falsely implicated in this case. However, when he examined himself as witness, in cross examination he deposed that the secret informer was not known to him from before. Moreover, this plea taken by the accused in his statement recorded under Section 313 Cr.PC or in his deposition is completely an afterthought as it has seen the light of the day for the first time in his statement under Section 313 Cr.PC or when accused examined himself after seeking permission under Section 315 Cr.PC. No such suggestion was given to any of the prosecution witnesses. As such, the defence version does not inspire confidence.

20. After meticulously examining the entire evidence, the learned Trial Court rightly convicted the appellant for offence under Section 379 of IPC inasmuch as the accused was found in possession of the stolen articles immediately after the commission of theft and, therefore, a presumption under Section 114(a) of the Indian Evidence Act, 1872 arises against him.

21. Hon'ble Supreme Court in ***Ganesh Lal v. State of Rajasthan***, (2002) 1 SCC 731 elaborately discussed regarding the presumption laid down under Section 114 Evidence Act:

“12. Section 114 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public private business, in their relation to facts of the particular case. Illustration (a) provides that a man who is in possession of stolen goods soon after the theft may be presumed by the Court to be either the thief or one who has received the goods knowing them to be stolen, unless he can account for his possession. The presumption so raised is one of fact rather than of law. In the facts and circumstances of a given case

relying on the strength of the presumption the Court may dispense with direct proof of certain such facts as can be safely presumed to be necessarily existing by applying the logic and wisdom underlying Section 114. Where offences, more than one, have taken place as part of one transaction, recent and unexplained possession of property belonging to deceased may enable a presumption being raised against the accused that he is guilty not only of the offence of theft or dacoity but also of other offences forming part of that transaction.

22. Under the circumstances, no fault can be found with the order of conviction.

25. As regards, the quantum of sentence, it was not disputed by learned counsel for the appellant that the appellant had been previously convicted in case FIR No.956/2000 under Section 411 IPC; FIR No.283/2006 under Section 328/379 IPC; and FIR No.282/2010 under Section 328/379/411 of IPC. All these FIRs were registered at Police Station NDRS which proves the *modus operandi* of the appellant whereby he used to steal the belongings of innocent passengers at railway station. Furthermore, the conduct of the appellant reveals that he has failed to mend his ways during the period 2000-2012, as he was arrested in case FIR No.956/2000 and lastly in the present case in the year 2012. Under the circumstances, antecedents of the appellant are not clean. However, it is urged that the family of the appellant consists of old aged ailing father and one younger brother who is still studying and there is none in the family who can earn and arrange for the livelihood. Moreover, appellant himself is suffering from HIV Positive. Hence liberal view be taken. Report from Medical Officer, Incharge, Central Jail, Tihar has also been received regarding medical status of the appellant and it is reported that the “patient is HIV

positive with history of extra pulmonary tuberculosis”.

26. Considering all the aspects while upholding the conviction of appellant u/s 379 IPC and while maintaining the sentence of imprisonment for three years, the fine is reduced to Rs.10,000/- in default to undergo SI for three months. Fine, if realised, be paid as compensation to the victim.

The appeal is disposed of in above terms. Pending applications, if any, are also disposed of.

Copy of judgment along with the Trial Court record be sent back. Copy of the judgment be also sent to Superintendent Jail for information.

(SUNITA GUPTA)
JUDGE

SEPTEMBER 04, 2014

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