

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

% Date of Decision: 04.02.2014

+ CRL. A. No.1516 of 2013

PREM KUMAR @ KALU & ANR. Appellants
Through: Ms. Rakhi Dubey, Adv.

versus

THE STATE (GOVT. OF NCT) DELHI Respondent
Through: Mr. Feroz Khan Ghazi, APP.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGEMENT

V.K.JAIN, J. (Oral)

On 31.1.2008, the complainant, Praveen Kumar, came to police post Rajinder Nagar and lodged a complaint Ex.PW2/A. The complainant alleged that on 30.1.2008, he got down from a rickshaw near police station and was thereafter going on foot to his house. At about 9:45 p.m., when he reached New Rohtak Road, opposite Lal Sons Jewellers, he was stopped by 3-4 boys who were standing there. One of them caught him from his back whereas another boy put a toy pistol on his chest. The remaining boys snatched the bag which he was carrying in his hand, which contained his laptop, cash amounting to Rs.16,000/-, and his mobile phone, make J600 touch screen Samsung bearing No.9818762466, besides routine office documents, ATM card, PAN card, etc. An FIR under Section 392/34 of IPC was registered on the aforesaid complaint.

2. The case of the prosecution is that call records of the mobile phone of the complainant were obtained and it was discovered that on 31.1.2008 a call was made from the stolen phone to phone No.98997308XX. The user of the aforesaid phone namely Anoop Singh was contacted who told him that on 31.1.2008 his friend Vishal @ Vicky had come to him with a boy named Aman and he was carrying a mobile phone J600, Samsung touch screen. He further stated that he had used the SIM of his phone in the phone which Aman was carrying, but, since Aman was demanding excess price for the aforesaid phone it was not purchased by him. Thereupon Vishal Sharma @ Vicky was contacted and he offered to get Aman arrested. On 7.2.2008, Vishal Sharma came to the police post and took the police officials with him to the house of Aman bearing No.151/1, Gali No.6, Nehru Nagar, Anand Parbat, Delhi but Aman was not found present in the house. Thereafter Aman and Arun were arrested on being identified by Vishal @ Vicky from under Jakhira Flyover and on search of Aman the stolen mobile phone was recovered from the right side pocket of his pant. This is also the case of the prosecution that on search of Arun a purse containing some currency was found along with voter I-card and certain papers of the complainant.

3. This is further the case of the prosecution that on 8.2.2008 the appellants, Ravinder and Prem Kumar @ Kalu were arrested on being pointed out by Arun Kumar. One country made pistol is alleged to have been recovered from the possession of the appellant Prem Kumar. During the course of investigation both the appellants refused to join TIP.

4. Since Aman had expired before the charge could be framed, the trial court framed charges only against three (3) persons namely Arun and the appellants, Prem Kumar and Ravinder. Arun was charged under Sections 392/34 and 411 of IPC, whereas Prem Kumar was charged under Sections 392/397/34 of IPC and Ravinder was charged only under Section 392/34 of IPC. Since the appellants as well as their co-accused pleaded not guilty to the charge as many as eleven (11) witnesses were examined by the prosecution. No witness was examined in defence.

5. The complainant, Praveen Kumar, came in the witness box as PW2 and stated that on 30.1.2008 at about 9:35/9:40 p.m when he was going on foot to his quarter at Kishan Ganj, Sarai Rohilla and had reached opposite Lal Sons Jewellers on Rohtak Road he found 3-4 boys underneath a tree. One of them held him by his shoulder pointed out a pistol at him whereas the others asked him to give whatever he was carrying with him. They snatched his mobile phone bearing No.9818762466 as well as a bag which contained his laptop, some official papers, personal documents and cash amounting to Rs.16,000/-. After committing robbery those persons went across the road scaling the middle railing on the road and ran away. He further stated that on 18.2.2008 he had reached Tihar Jail for participating in TIP of accused persons, but was informed by the learned Metropolitan Magistrate that the accused persons had refused to participate in the proceedings. Thereafter on 20.2.2008 he was called to the police station where he identified the accused Arun. The witness identified Arun as the person who along with Aman had snatched his mobile phone and bag containing laptop, etc. The complainant also identified the appellant, Prem Kumar as the person who had shown the country made pistol to

him and the appellant Ravinder as the person who had held him by his shoulder. However, he did not produce the mobile phone which he had taken on superdari and claimed that it had been stolen by someone.

6. PW1, Anoop Singh, stated that his friend Vicky had come to him and shown him a mobile phone No.J600 touch screen make Samsung and he checked the phone by inserting his SIM card in the same. Thereafter he removed the SIM card and handed over the mobile phone to Vicky. Vicky @ Vikas Sharma, came in the witness box as PW4 and stated that on 8.2.2008 one person namely Aman, who met him for the first time on that date, offered a Samsung mobile phone to him for sale. His friend Anoop put his SIM card in the phone in order to check its working. However, no call was made by Anoop who thereafter removed the same card and returned the phone to Aman. However, during cross-examination by the learned Additional PP he admitted that he had gone to Jakhira Bridge along with the Investigating Officer and one person namely accused Aman who had approached him about a week ago with an offer to sell a Samsung mobile phone was found alone sitting there and on his search the said mobile phone was recovered. The witness initially identified his signatures on the document Ex.PW4/A at point 'A' but later denied the said signatures.

7. PW3, Trilok Chand is the father of the complainant, Praveen Kumar. He had accompanied the complainant to the police post on 31.1.2008. He also claimed that the mobile phone which his son had taken on superdari got misplaced and the matter was reported to the police vide report Ex.PW3/A. He also produced a copy of the purchase bill Ex.PW3/B.

8. PW6, Constable Sandeep, stated that in the night of 8.2.2008, they reached under Jakhira Bridge in search of the appellants and found the appellant Prem Kumar @ Kalu and Ravinder sleeping there under the bridge. Both of them were apprehended on being pointed out by Arun and on search of Prem Kumar @ Kalu one country made pistol was recovered from the right side pocket of his pant. He further stated that he had taken the sealed parcel containing the country made pistol to FSL and handed over the receipt to MHCM, after depositing the case property with FSL. He claimed that there was no tampering with the case property so long as it remained in his custody. The witness exhibited the country made pistol as Ex.P1, which according to him was recovered from the appellant Prem Kumar.

PW8 ASI Ram Kishan has stated that on 7.2.2008, he joined the investigation with other police officials and found two boys sitting under Jakhira Flyover. They were apprehended on being pointed out by Vicky. Their names were later found to be Aman @ Rameshwar and Arun. He further stated that in the night of 8.2.2008, they reached Jakhira Flyover in search of the appellants, Prem Kumar and Ravinder and found them sleeping under the said flyover. Both of them were apprehended on being pointed out by Arun and one country made pistol was recovered from under the mat on which Prem Kumar was sleeping.

PW10 Inspector Lekh Raj Singh has corroborated the deposition of PW8 ASI Ram Kishan and PW6 Constable Sandeep, regarding arrest of the appellants, Ravinder and Prem Kumar from under Jakhira Flyover and recovery of a country made pistol from the possession of the appellant Prem Kumar.

9. PW9, Israr Babu is an official from Vodafone Mobile Services Limited and he produced a copy of the application form in respect of Mobile No.9899730889 in the name of Bindu Devi. He also produced the call detail records of the above-referred mobile phone which is Ex.PW9/B. He further stated that as per the record, two calls were made from the above-referred mobile phone on 31.1.2008, one at 6:03 p.m. and the other at 6:14 p.m. He further stated that the aforesaid SIM was used in mobile phone having IMEI No.357172013040590.

PW11 Amit Garg is the shopkeeper who had sold the mobile phone to the complainant, Praveen Kumar vide invoice Ex.PW11/A.

10. In their statements under Section 313 Cr.P.C., the appellants denied the allegations against them and claimed to be innocent. They, however, admitted that they had refused to join TIP during the course of evidence.

11. I do not see any reason to disbelieve the deposition of complainant Praveen Kumar with respect to robbery of mobile phone and cash from him on the night of 30.1.2008. Ex.PW11/A is the photocopy of invoice whereby a mobile phone bearing IMEI number 357172013040590 was purchased by the complainant from M/s. Telecare Network India Private Limited. A perusal of the seizure memo of the telephone Ex.PW4/A which has been duly proved by ASI Ram Kishan shows that the mobile phone had been recovered from Aman @ Rameshwar had the same IMEI number. Therefore, the deposition of the complainant with respect to theft of mobile phone finds corroboration from recovery of the stolen telephone from the deceased accused Aman, about eight days after the theft was committed.

12. There was no enmity or ill-will between the appellants on the one hand and the complainant Praveen Kumar on the other and, therefore, the complainant had no reason to falsely identify them as the persons involved in the commission of the robbery of mobile phone, cash, etc. from him on 30.1.2008.

It has come in evidence that both the appellants had refused to join TIP during the course of investigation. The aforesaid refusal has been admitted by them in their statements under Section 313 Cr.P.C. They had refused to join TIP on the ground that before producing them in the court, the Investigating Officer had taken their photographs and had also shown them to the witnesses. However, there is no evidence of the photographs of the appellants having been taken and shown to the complainant. When the complainant was examined in the Court, he clearly stated that he had seen only Arun in the police station and that too on 20.02.2008, whereas the appellants had refused to join TIP three days earlier than 18.2.2008. Thus, neither of the appellants have been able to substantiate the plea that the photographs were taken by the Investigating Officer and were also shown to the complainant before they were produced in the Court.

13. If the accused refuses Test Identification Parade without any justifiable cause, he does at his own peril and the Court will, in such circumstances, be justified in drawing an inference that had the appellant participated in Test Identification Parade he would have been identified by the witnesses and that precisely was the reason why he refused to join the TIP. Similar view was taken by the Hon'ble Supreme Court in Suraj Pal vs. State of Haryana (1995) 2 SCC 64. Since the appellants refused to join the TIP without any justification, it can be

safely presumed that had they participated in the TIP, the complainant would have identified them and that precisely is the reason why they refused to join TIP. It has come in the deposition of the complainant that he was able to have a good look at the offenders due to light by the moving traffic as also from the light bulbs installed outside Lal Sons Jewellers. Therefore, he could have no difficulty in identifying the culprits, when he was examined in the court. The identification of the appellants by the complainant during the course of trial coupled with their refusal to join TIP without any justification is sufficient to establish their identity as two of the four boys who committed robbery of mobile phone and other articles from the possession of the complainant on 30.1.2008.

14. As far as appellant – Ravinder is concerned, he has been convicted only under Section 392 IPC, there is no ground for interfering with his conviction. As far as appellant – Prem Kumar is concerned, since there is no evidence of his having used any deadly weapon in the commission of robbery, he could not have been convicted with the aid of 397 of the Penal Code. The onus was upon the prosecution to prove that the appellant Prem Kumar had used a deadly weapon in the commission of robbery. However, in the complaint itself, the complainant Praveen Kumar clearly stated that only a toy gun was shown to him. The same was the deposition of Praveen Kumar during the course of the trial. No evidence has been led by the prosecution to prove that the country made pistol, which is alleged to have been found in possession of the appellant Prem Kumar when he was arrested in the night of 8.2.2008, was the same pistol which was used in the commission of robbery. In fact, considering the emphatic deposition of

the complainant that the pistol shown to him was a toy pistol, the country made pistol, alleged to have been found in possession of the appellant – Prem Kumar could not have been the weapon used in commission of robbery. Obviously, when the complainant knew that the pistol being shown to him was a toy pistol, there can be no question of his considering it to be a deadly weapon and getting scared. In my view, when a person to whom a weapon is shown, knows that the pistol being shown to him was a toy pistol; there is no evidence to prove that he had wrongly mistaken the weapon to be a toy pistol though in fact it was a real pistol, no offence attracting the applicability of Section 397 of IPC can be made out. In Gorakh Pandurang Mare and Lahu Maruti Gaudse Vs. The State of Maharashtra 2010 (112) Bom. LR 3353, the Bombay High Court *inter alia* observed that it is a settled position that even though the person has used a toy pistol for threatening the victim while committing robbery still such toy pistol cannot be treated as a deadly weapon and therefore Section 397 IPC cannot be invoked. In Babulal Jairam Vs. State of Maharashtra 1993 CrL LJ 281, the Bombay High Court *inter alia* observed that the weapon used has to be a deadly weapon and not assumed or mistaken to be a deadly weapon. Noticing that the accused Michael in that case was using a toy pistol, the High Court held that his conviction was warranted only under Section 392 of IPC. In the case before this Court even the complainant did not presume the weapon shown to him to be a real pistol since he clearly stated in the complaint itself that a toy pistol was shown to him. Therefore, the case of the appellants stands on a stronger footing. Therefore, the appellant – Prem Kumar ought to have been convicted under Section 392 and not under Section 392 read with Section 397 of IPC.

15. The nominal roll of the appellant – Prem Kumar does not show that he is involved in any other case. The same is the position with respect to the appellant, Ravinder who is stated to be on bail. Considering all the facts and circumstances of the case, both the appellants are sentenced to undergo RI for three years each and are also sentenced to pay fine of Rs.1,000/- each or in default to undergo SI for 15 days each.

The appellant – Ravinder shall surrender forthwith to undergo the remaining sentence, if any. If he doesn't, the trial court shall take steps to procure his presence and commit him to prison, to undergo the remaining sentence, if any.

The appeal stands disposed of accordingly.

On copy of this order be sent to the concerned Jail Superintendent for necessary action.

Trial court record be returned along with a copy of this order.

FEBRUARY 04, 2014
b'nesh/rd

V.K. JAIN, J.