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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 18th May, 2015

+ CRL.A. 75/2012 & Crl. M.B. 901/14

VED PAL

..... Appellant

Through: Mr. Nitin Sangra and Mr. Vishnu
Dutt Sharma, Advocates

versus

STATE NCT OF DELHI

..... Respondent

Through: Ms. Ritu Gauba, APP along with SI
M.P. Saini, PS Mahendra Park

+ CRL.A.830/2012 & Crl.M.B.3243/15

ANIL @ RAJU @ ANU

..... Appellant

Through: Mr. Gautam Chakraverty and Mr.
Manoranjan Gaur, Advocate

Kumar Vaibhav, Advocate for Mr.
Sidharth Aggarwal, Advocate
(DHCLSC)

versus

STATE

..... Respondent

Through: Ms. Ritu Gauba, APP along with SI
M.P. Saini, PS Mahendra Park

+ CRL.A. 817/2013 & Crl. M.B. No. 10001/14

SHAILESH PANDEY

..... Appellant

Through: Mr. Vivek Sood and Mr. Prem
Prakash, Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Ms. Ritu Gauba, APP along with SI
M.P. Saini, PS Mahendra Park

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Vide this common judgment, I shall dispose of Crl. Appeals bearing No.75/2012, 830/2012 and 817/2013 filed by Ved Pal, Anil @ Raju @ Anu and Shailesh Pandey respectively challenging the impugned judgment dated 8th November, 2011 vide which they were convicted for offence u/s 395 r/w Section 397 IPC and order on sentence dated 14th November, 2011 vide which they were sentenced to undergo rigorous imprisonment for 14 years with fine of Rs.2000/- each in default to undergo six months rigorous imprisonment in Sessions Case No. 48/2010 arising out of FIR No. 96/2010 u/s 395/398/397/307/186/353 IPC & 25/27/54/59 Arms Act registered with PS Mahendra Park.

2. Prosecution case, briefly stated is that on 26th April, 2010, HC Ved Parkash received a secret information that some persons while armed will rob a merchant at Mukarba Chowk and said merchant was coming from Hissar to Azadpur Mandi having cash. HC Ved Parkash passed on this information to SI Madan Mohan who further passed on the said information to Inspector Jawahar Singh-SHO of Police Station Mahendra Park. Inspector Jawahar Singh after discussing the matter with ACP Hari Darshan, directed SI Madan Mohan to form a raiding party. Thereafter a raiding party was formed consisting of

ACP Sh. Hari Darshan, SHO Inspector Jawahar Singh, SI Madan Mohan, PSI Deepak Dahiya, PSI Ranbir, PSI Ritesh Raj, HC Ved Prakash, who all were in uniform and HC Chandraveer, HC Anil Kumar, Ct. Anil Kumar, Ct. Baljeet, Ct. Vilas and Ct. Azhar Anwar Zaidi, who were in civil clothes. Raiding party reached at Mukarba Chowk Flyover and took their position. At about 10:45 am, one private bus of Krishna Bus Service stopped and Ashok Kumar having a gray colour briefcase in his right hand de-boarded the bus. Accused persons attempted to rob Ashok Kumar and in that robbery, they used the country made pistol. When the police party tried to apprehend the accused persons, accused Shailesh Pandit fired on the police party but they all were overpowered by the raiding team. Two persons succeeded in fleeing from the spot in Maruti car. In the search of the accused persons, arms and ammunitions were recovered. Sketches of pistols and cartridges were prepared and same were sealed after putting them in pullandas. Statement of the complainant was recorded. They were arrested. After completion of investigation, charge sheet against the accused was filed.

3. Initially vide order dated 13th October, 2010, the accused were charged for offence u/s 392 r/w Section 34 IPC, 397 IPC, 186/353/307/34 IPC. Besides that accused Shailesh @ Pandit and Anil @ Raju were also charged for offence u/s 27 Arms Act and accused Ved Pal was charged for offence u/s 25 Arms Act. Subsequently, vide order dated 2nd September, 2011, all the accused were also charged for offence punishable u/s 395 IPC. All the accused pleaded not guilty to the charge and claimed trial.

4. Prosecution in all examined 11 witnesses in order to bring home the guilt of the accused. All the incriminating evidence was put to all the accused while recording their statements u/s 313 Cr.P.C. Accused Shailesh Pandey pleaded that he had no role to play in the alleged incident in any manner and he was not present at the spot. He was kept in wrongful confinement at police station prior to the alleged incident and later on was falsely implicated in this case at the instance of ACP examined as PW6 who had ruined his life by implicating him in false cases since the time he became the SHO of PS Ashok Vihar.

5. Accused Anil @ Raju and Ved Pal also took the plea that they were kept in wrongful confinement at Police Station much prior to the incident and later on falsely implicated in this case. Accused Anil also alleged that he was mercilessly beaten by the police officials during his wrongful confinement in the Police Station. Accused Anil examined two witnesses in support of his contention that he was lifted from his house, however, the remaining accused did not prefer to lead any defence evidence.

6. After hearing learned counsel for the parties and scrutinizing the evidence adduced by the prosecution, vide impugned judgment dated 8th November, 2011, the accused persons were convicted for offence u/s 395 IPC and 397 IPC. In view of their conviction u/s 397 IPC, separate order of conviction u/s 25 or 27 Arms Act was not passed. All the accused were acquitted of the charge for offence u/s 186/353/307 IPC. Vide order on sentence dated 14th November, 2011,

the appellants were sentenced to undergo rigorous imprisonment for 14 years and fine.

7. Challenging the findings of the learned Trial Court, learned counsel for appellant Ved Pal submits that the case set up by the complainant in his initial statement is different from his deposition in the Court. The genesis of the incident itself is doubtful inasmuch as the Trial Court acquitted the appellants for offence u/s 186/353/307 IPC. No independent witness has been examined. Moreover, the motorcycle or the Maruti car has not been produced by the prosecution. Prosecution has failed to prove the charge for offence u/s 395 IPC. Assembly of five persons have not been proved. Alternatively, it was submitted that Section 395 provides for only two punishments, i.e., life or 10 years. However, in the instant case, the appellants were sentenced to undergo rigorous imprisonment for 14 years which could not have been awarded. It was further submitted that only Section 115/457/458/392 prescribes the sentence as 14 years. Even for offence u/s 392, the sentence can go up to 14 years if the robbery is committed between sunset and sunrise whereas in the instant case, alleged incident has taken place between the sunrise and sunset.

8. Mr. Vivek Sood, representing appellant-Shailesh Pandey submitted that the incident appears to be stage managed. The story of exchange of fire is a concocted plea. No bullet has been recovered from the spot. Furthermore, although it is alleged that three persons came in Maruti car and accused Shailesh Pandey has disclosed their

names but no efforts were made by the police officials to arrest them. As per rukka, incident took place at about 10:45 AM whereas the FIR was registered at 3:45 PM. During this period seizure memos were prepared wherein there is mention of FIR in the same handwriting. This shows the manipulation in the documents which casts a dent on the prosecution story. Reliance was placed on ***Kalu Ram v. State***, 82 (1999) DLT 286. Furthermore, according to the prosecution, empty cartridges were recovered from the possession of the accused. It is highly improbable that an accused will keep on carrying empty cartridges with him. At the most, it is a case of attempt to commit robbery. Nobody was injured in the incident. Therefore, at the most, punishment could have been awarded for a period of 7 years. It was further submitted that this appellant was involved in two other cases. In case FIR 436/03, he has been acquitted by the High Court whereas in FIR 498/03 he has already served the sentence.

9. Learned counsel for the appellant-Anil adopted the arguments submitted by the learned counsel for the appellants Ved Pal and Shailesh Pandey.

10. Rebutting the submissions of learned counsel for the appellants, learned Additional Public Prosecutor for the State submitted that offence u/s 395 IPC is duly proved as there was involvement of five persons. However, due to incomplete address, two of the accused could not be arrested. The car was also seized at a distance of 1 KM and no suggestion was given to any of the witnesses that this car was not involved in the commission of offence. As regards insertion of

FIR in the seizure memos, it is submitted that no suggestion was given to any of the witnesses that there was any manipulation in the document. It was a clear case where the appellants along with two of their associates committed dacoity and it was not a case of attempt only. As regards the punishment awarded to the appellants, it is submitted that Section 395 prescribes the punishment with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years. That being so, since the maximum punishment is up to life, therefore, if the learned Additional Sessions Judge has awarded 14 years sentence, no fault can be found in the same. It was submitted that the appellants are habitual offenders having criminal antecedents. That being so, no leniency is warranted. The appeals, being devoid of merits, are liable to be dismissed.

11. I have bestowed my considerable thoughts to the respective submissions of the learned counsels for the parties and have perused the record.

12. The star witness of the prosecution is PW2-Ashok Kumar. This witness has stated that he is a fruit and vegetable merchant and is running his business under the name and style of Baksa Ram and Company at Hissar, Haryana. He used to purchase fruits and vegetables from Azad Pur, Subzi Mandi and used to come to Azad Pur in an interval of 15-20 days to make payment. On 26th April, 2010 at about 5:20 AM, he boarded a bus of Krishna Bus Service from Hissar to Delhi and at that time he was having 4.5 lacs cash and his account book in his suitcase. At about 11:00 AM, he alighted

from the bus at Karnal bypass, Mukarba Chowk fly over. He put his suitcase on the ground and wiped his sweat as it was summer season. Meanwhile one person took his suitcase and boarded on a motorcycle on which one person was already sitting. He snatched his suitcase from the hands of that person. The person from whom he snatched his bag took out a country made pistol. One more person came there. Out of the remaining two persons one more took out a country made pistol. They started pulling him along with his suitcase and the person from whom he snatched his suitcase pointed the *katta* on his forehead. He raised alarm "*loot liya loot liya*". Police also arrived there. He heard the noise of fire. Police apprehended those persons along with the motorcycle and suitcase. He identified the accused Shailesh @ Pandit and Vedpal as the two accused persons who were on motorcycle and pointed out towards Anil stating that he arrived later on. Accused Shailesh had snatched his suitcase and Ved Pal was riding on the motorcycle. His statement Ex.PW2/A was recorded by the police which bears his signatures at point A. At his instance, site plan was prepared. All the three accused persons were arrested. His suitcase along with car and accounts book was taken into possession vide seizure memo Ex.PW2/H. The motorcycle was also seized vide memo Ex.PW2/J. The Investigating Officer prepared the sketch of country made pistols as well as live and empty cartridges recovered from accused Anil and Shailesh which were taken into possession vide seizure memo Ex.PW2/N, Ex.PW2/P and Ex.PW2/Q.

13. This witness was cross-examined by learned Additional Public Prosecutor for the State in regard to some of the facts and admitted

that in the process of snatching, his suit case fell on the road. He, however, could not say if the accused persons fired on police party and in order to save themselves police party also fired. He admitted that during the course of firing, he laid down on the road to save himself. He also admitted that police party gave a *lalkara* to the accused persons and asked them to stand by raising their hands up. He also admitted that two persons, who were in Maruti 800 car, managed to escape from the spot from which accused Anil had alighted. He admitted that he had forgotten some facts due to lapse of time. He was nervous at the time of incident, as such, he was not able to recollect the facts. He also admitted that his mind was also diverted at that time to save himself from the firing and to save his belongings.

14. As regards the submission that some discrepancies have appeared in the testimony of complainant and his earlier version, it is to be kept in mind that the incident had taken place on 26th April, 2010 whereas the witness came to depose in the Court on 2nd December, 2010, i.e., after about 8 months of the incident. Human memory is bound to lapse due to passage of time and some concession has to be given which occurs due to this passage of time. Moreover, there are catena of decisions to the effect that minor discrepancies and inconsistencies cannot be given undue importance. The Court has to see whether inconsistencies 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 witnesses, who speak thereafter long lapse of time.

15. Hon'ble Supreme Court in ***Gangabhavani v. Rayapati Venkat Reddy and Ors.***, 2013(11) SCALE 132 held:

“9. In ***State of U.P. v. Naresh*** (2011) 4 SCC 324, this Court after considering a large number of its earlier judgments held:

“In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. 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. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

*A similar view has been reiterated by this Court in ***Tehsildar Singh and Anr. v. State of U.P.*** AIR 1959 SC 1012; ***Pudhu Raja and Anr. v. State***, Rep. by Inspector of Police JT 2012 (9) SC 252; and ***Lal Bahadur v. State (NCT of Delhi)*** (2013) 4 SCC 557.*

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored

as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence.”

16. Similar view was taken in ***Sidhan v. State of Kerala***, 1988 Cr.L.J. 470; ***Krishna Pillai v. State of Kerala***, AIR 1981 SC 1237; ***Kurai and Anr. v. State of Rajasthan***, (2012) 10 SCC 433; ***Sohrab v. State of Madhya Pradesh***, AIR 1972 SC 2020; ***Krishna Mochi & Ors. v. State of Bihar***, (2002) 6 SCC 81.

17. On material particulars, this witness has substantiated the case of prosecution. He was subjected to a grilling cross-examination by the learned counsels for the accused but stood the test of cross-examination. Moreover, no animosity has been alleged by any of the accused against him for which reason he will falsely implicate them in this case.

18. Furthermore, testimony of this witness finds substantial corroboration from PW5-Head Constable Chandraveer Singh, PW6-ACP Hari Darshan Dahiya, PW7-Inspector Jawahar Singh, PW8-Head Constable Ved Prakash and PW10 SI Madan Mohan. It has come in the testimony of these witnesses that on 26th April, 2013, PW8-Head Constable Ved Prakash received a secret information that one business man coming from Hissar, Haryana with cash would go to Azad Pur Mandi and would be robbed by some armed persons at

Mukarba Chowk. This information was passed by Head Constable Ved Prakash to SI Madan Mohan who in turn passed this information to SHO, Police Station Mahendra Park and he produced Head Constable Ved Prakash and informer before the SHO. After satisfying himself, the SHO passed on the information to ACP Hari Darshan who directed to constitute a raiding party. Thereafter a raiding party comprising of ACP Hari Darshan, SHO Jawahar Singh, SI Madan Mohan and other police officials was formed. The police officials reached the bus stop over the flyover on Mukarba Chowk at about 9:45 AM. Various passersby were asked to join raiding party but all of them refused. At about 10:45 AM, one private bus of Krishna Bus Service stopped at the bus stop. PW2-Ashok Kumar, wearing white *kurta pyjama* having gray colour suitcase in his right hand alighted from the bus. Meanwhile two boys came there on a black pulsar motorcycle, bearing No. DL 4S BJ 6377. They stopped the motorcycle adjacent to Ashok Kumar and took out a country made pistol/*katta*. Shailesh Pandey snatched the suit case from the hands of Ashok Kumar. Ashok Kumar raised alarm "*loot liya loot liya*". Accused Ved Pal put country made pistol on the temple of Ashok Kumar and started moving after snatching the suit case. Meanwhile one Maruti car of white colour also came there in which there was one driver and two other persons. Accused Anil @ Raju alighted from the said car and he took out a *katta*, fired a shot in the air and said "*Ved Pandit Ji jaldi karo police ne gher liya hai*". SI Madan Mohan gave a lalkaara to them on which accused Anil said "*Vyaapari ko suit case sahit gaadi mein daalo*" and accused Shailesh Pandey started

dragging Ashok towards car and fired a shot towards the police party with country made pistol. On the asking of SI Madan Mohan, Constable A.A. Zaidi fired two bullets in the air with his service revolver and SI Madan Mohan asked the robbers to stand still after raising their hands up. Meanwhile, the suitcase fell down on the ground. The driver of Maruti car along with one other occupant of the car managed to escape from the spot in the said car. Accused Shailesh Pandey was apprehended by Head Constable Ved Prakash and Constable Baljeet. Accused Ved Pal was apprehended by Head Constable Anil and Ct. Anil and accused-Anil was apprehended by HC Chandraveer and Ct. A.A. Zaidi. One country made pistol was recovered from the hand of accused Anil and one fired cartridge was found in the barrel of the said *katta*. From the left pocket of his wearing pant, four live cartridges were recovered. Country made pistol and cartridges were also recovered from accused-Shailesh and Ved Pal. The Investigating Officer of the case recorded the statement of Ashok Kumar and got the case registered. The proceedings regarding recovery of country made pistol and the cartridges recovered from the three accused were conducted. The robbed amount of Ashok Kumar in the sum of Rs.4,50,000/- , his three ledger books along with the suit case were also seized. All these witnesses were also subjected to lengthy cross-examination but nothing material could be elicited to discredit their testimony.

19. Learned counsel for the appellant submitted that despite the fact that the incident had taken place at Mukarba Chowk but no independent witness was joined either at the time of receipt of secret

information or during the proceedings. Therefore, in view of ***Pawan Kumar vs. Delhi Administration***, 1989 CrL LJ 127, the prosecution cannot be said to have established its case beyond reasonable doubt. This submission is devoid of merit. The appellant does not get any benefit from ***Pawan Kumar***(supra), inasmuch as, that was a case where FIR u/s 302 r/w Section 34 IPC was registered against the accused persons. Besides that, they were separately charged for commission of offence u/s 25 of Arms Act. The accused were acquitted of offence u/s 302 IPC but were convicted for offence u/s 25 of Arms Act. Challenging the conviction of the accused u/s 25 of Arms Act, it was contended by the learned counsel for the accused that the Court had relied upon the evidence of the police officials and no public witness was joined. Even though the place of arrest was a main thoroughfare and number of persons were present. The case property was also not the same which was allegedly recovered from the accused. The authenticity of the documents prepared at the spot was also doubtful. On facts, it was found that no effort was made to join any public witness even though number of them were present and no explanation was forthcoming for not joining the independent witness. It was also observed that there is an apathy on the part of the general public to associate themselves with the Police raids or the recoveries but that apart at least, I.O. should have made an earnest effort to join the independent witnesses. Various other infirmities were noted in the case and, as such, the appeal was allowed.

20. However, things are entirely different in the instant case as it has come on record that several persons were asked to join

proceedings but none agreed. Moreover, the prosecution case does not hinge upon the testimony of the police officials alone as besides the police officials, there is the testimony of a totally independent witness, viz., PW2-Ashok Kumar who has supported the case of prosecution in all material particulars. He has given a vivid and cogent narration of the entire incident and on his testimony implicit reliance can be placed. Under the circumstances, the testimony of the police officials finds substantial corroboration from the independent witness.

21. Moreover, three of the accused persons were apprehended at the spot. Three country made pistols, live and empty cartridges were recovered from their possession. Same were sent to FSL and as per the detailed report Ex.PW11/A given by Sh. Punit Puri, Sr. Scientific Officer, the country made pistols were fire arms and the cartridges were ammunition as defined in Arms Act, 1959. All the three country made pistols were found to be in working order. Except for one cartridge, it was opined that the cartridges were test fired through the country made pistols recovered from the possession of accused persons.

22. The submission that no fire bullet was recovered from the spot and, as such, the case of prosecution regarding exchange of fire is a concocted one is devoid of merits as at the most it may tantamount to a lapse on the part of the Investigating Officer but that itself is not sufficient to return the verdict of acquittal in favour of the appellants.

23. The submission that insertion of FIR in the seizure memo even before the registration of FIR casts a dent on the prosecution version also has no merit, inasmuch as, learned counsel for the appellant fairly conceded during the course of arguments that no specific question was put to the Investigating Officer of the case as to at what time the FIR number was mentioned in the seizure memo. That being so, no adverse inference can be drawn against the prosecution.

24. Mere fact that the appellants were acquitted of the charge for offence u/s 186/353/307 IPC does not mean that the genesis of the incident becomes doubtful. The appellants were acquitted of these offences primarily for the reason that the complainant Ashok Kumar did not supported the case of prosecution regarding causing of obstruction to the police official in discharge of their duties by the accused persons. Moreover, none of the police officials sustained any injury, therefore, while granting them benefit of doubt, the accused were acquitted. However, as regards, the incident of committing robbery, the complainant has fully supported the case of prosecution and it is not even a case of attempt to commit robbery as the accused had initially succeeded in snatching the suit case of the complainant containing Rs.4,50,000/- and ledger books, however, the complainant mustered courage and snatched the suit case from the accused and thereafter when the police official intervened, the suitcase fell down and the three accused were apprehended at the spot. Although they could not succeed in taking away the same but that itself is not sufficient to arrive at a conclusion that it was only an attempt to commit robbery/dacoity.

25. The submission of learned counsels for the appellants that offence u/s 395 IPC is not made out, inasmuch as, only three accused were arrested, is without substance as more than sufficient evidence is available on record to show that three of the accused were apprehended at the spot while two managed to escape and even subsequently they could not be arrested due to incomplete address but that itself is not sufficient to arrive at the conclusion that offence u/s 395 IPC is not made out, inasmuch as, in order to attract Section 395 IPC, prosecution is required to prove that robbery is committed by five or more persons. All such persons who are present or “aid in its commission” are responsible for offence of dacoity. It has come on record that initially accused Shailesh Pandey @ Pandit and Ved Pal came on the motorcycle and snatched the suit case containing cash and account books belonging to the complainant, however, the complainant managed to snatch the same from Shailesh Pandey. Thereafter accused Anil came in a car in which there was one more person besides the driver. Anil alighted from the car and he even fired a shot in the air and said “*Vyapari ko suitcase sahit gaadi mein daalo*”. Accused Shailesh then started dragging the complainant towards the car. However, on seeing the police party, the driver and the other person sitting in the car managed to escape. It clearly reflects that the two persons who managed to escape in the car were “aiding in the commission of robbery”. That being so, even if they could not be arrested subsequently, it cannot be said that offence u/s 395 is not made out.

26. The prosecution had succeeded in establishing its case beyond reasonable doubt from the testimony of PW2-Ashok Kumar which was corroborated by PW5, PW6, PW7, PW8 and PW10. The three accused along with their two associates committed robbery and at the time of committing robbery/dacoity, the accused persons used deadly weapons, i.e., country made pistols, as such, the accused were rightly convicted for offence u/s 395 and 397 IPC.

27. Coming to the quantum of sentence, the appellants have been sentenced to undergo rigorous imprisonment for 14 years and fine. Although it is true that the appellants have criminal antecedents and were/are involved in other offences as well but the sentence seems to be on higher side. As such, while maintaining the quantum of fine, substantive sentence is reduced to 10 years.

With this modification, the appeals are dismissed. Pending applications, if any, also stand disposed of.

The appellants be informed through the Superintendent Jail. Copy of the judgment along with the Trial Court record be sent back.

(SUNITA GUPTA)
JUDGE

MAY 18, 2015

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