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

Date of Decision: 14th May, 2015

+ **CRL.A. 545/2013 & CrI. MB 10337/2014**

MANISH @ MANNI Appellant

Through: Mr S.K. Kaushik, Adv.

Versus

STATE Respondent

Through: Mr O.P. Saxena, Additional Public
Prosecutor for the State along with
ASI Jai Prakash Police Station S.P.
Badli, Delhi

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The appellant Manish@Manni impugns the judgment dated 28.03.2012 and order on sentence of the same date whereby he was convicted u/s 392/34,394 and 397 IPC and sentenced as under:-

- (i) Sentenced to undergo R.I for 5 years and to pay fine of Rs.5,000/- in default to undergo R.I for 1 year for offence u/s 392 IPC;
- (ii) Sentenced to undergo R.I for 7 years and fine of Rs.5,000/- in default to undergo R.I for 1 year u/s 394 IPC;
- (iii) Sentenced to undergo R.I for 8 years and to pay fine of Rs.5,000/- in default to undergo R.I for 2 years for offence u/s 397 IPC.

2. Succinctly stated, prosecution case is as follows:-

On receipt of DD No.73B, Ex.PW8A, PW11 SI Satish Kumar along with PW8 Ct. Anil Kumar reached Chadha Nursing Home where he came to know that two of the injured have been removed to BSA Hospital, Rohini. Thereupon, he went to BSA hospital where he collected MLC of Amarjeet s/o Ram Tirath and Rajesh s/o Baldev Singh. Amarjeet was declared fit for statement. His statement Ex.PW11/A was recorded wherein he disclosed that he was working as a tailor with Rajesh at Samaipur Badli Chowk. On 12.10.2009 at about 10 p.m he along with Rajesh went for a stroll after dinner and while strolling they were going to kaccha rasta via Samaipur crossing. At a deserted place, three boys surrounded them and tried to snatch their Manni and mobile. One boy caught him and the other boy caught hold of Rajesh and tried to remove goods from their pockets. He identified them and when he told them that he had identified them, then the third person who was standing in the front hit them with iron rod on their head. Rs.300/- was snatched from his purse while the other boy, with the help of the boy who was having rod, removed the mobile phone and Rs.300/- belonging to Rajesh. When they started raising alarm, some police officials came. Those persons threw the rod at the spot. Two boys managed to escape while the third boy whose name was revealed as Shankar was apprehended by the police at the spot. He also identified two other boys since he used to see them in the market and their name has been revealed as Manni and Manoj.

3. It is further the case of prosecution that on 19.10.2009 at the instance of complainant Amarjeet, accused Manish@Manni was apprehended from his house and at his instance one iron rod was recovered. Manoj could not be traced. Accused Shankar faced trial before

the Juvenile Justice Board and died during trial. Charge sheet was submitted against the appellant Manish@Manni. Charge for offences u/s 392/34, 394 & 397 IPC was framed against him, to which he pleaded not guilty and claimed trial. 15 witnesses were examined by the prosecution to substantiate its case. The case of accused was one of denial simplicitor. According to him, he was lifted by the police from a flour Chakki and implicated in this case falsely. He did not prefer to lead any defence evidence.

4. The learned Additional Sessions Judge scrutinised the evidence adduced by the prosecution and the plea taken by the accused in his statement recorded u/s 313 Cr.P.C and vide impugned judgment convicted him and sentenced as mentioned hereinbefore. Feeling dissatisfied, present appeal has been preferred.

5. Assailing the findings of learned Trial Court, learned counsel for the appellant submitted that the complainant did not identify the accused, even the other injured Rajesh did not identify him. Besides them, there is no independent witness to the incident. Recovery of iron rod at the instance of accused is doubtful. Even otherwise, the iron rod was neither shown to the doctor nor was sent to FSL. The police officials are on inimical terms with the accused as the accused filed complaint against them and enquiry was initiated against the police officials. Under the circumstances, the findings of the learned Trial Court is perverse and the same be set aside.

6. On the other hand, supporting the findings of the learned Additional Sessions Judge, learned Additional Public Prosecutor for the State submitted that the prosecution had succeeded in bringing home the guilt of the accused beyond reasonable doubt and the entire evidence was

scrutinised with care by the learned Additional Sessions Judge which does not call for interference, as such the appeal be dismissed.

7. As regards actual incident is concerned, the most material witnesses are PW1 Rajesh and PW13 Amarjeet Singh. It has come in the statement of PW1 Rajesh that on 12.10.2009 he along with his worker had gone towards Badli station for stroll after taking dinner. It was around 10 p.m when two persons came and caught hold of both of them. When they resisted, one more person who was standing at some distance also rushed there. Amarjeet knew that third person who tried to hide his face. That third person took out one rod and hit him as well as Rajesh. Both Rajesh and Amarjeet received blows on their head with iron rod. They fell down, then all three accused persons gave beatings to them and they were robbed of their mobile and a sum of Rs.300/- each. The other two persons were also armed with rod. When they shouted for help, people collected at the spot. All the accused tried to run away. However, one of them whose name was revealed as Shankar was apprehended at the spot. Police had also reached the spot and took Shankar into custody. He and Amarjeet went to Chadha Nursing Home at Badli where after administering first aid, they were taken to BSA hospital. He remained admitted in hospital for 10-15 days and thereafter in Bhagwati hospital.

8. PW-13 Amarjeet has corroborated the testimony of PW1 Rajesh regarding the fact that when they were strolling and reached near kaccha raasta, they were surrounded by 3-4 boys who robbed them of their mobile phone and Rs.300/-. He also deposed that they were beaten and sustained injuries on their head. He also admitted that statement Ex.PW11/A bears his signature.

9. PW3 HC Kiran Pal along with PW6 Ct. Nehru Lal were on patrolling duty in the area of Samaipur Badli, near railway station. Both these witnesses have deposed that at about 10 p.m when they were standing near the railway station they were informed by one person that 2 - 3 persons were beating two persons and committing robbery. On receiving this information they reached Peer Ka Majar and saw three persons beating two boys and snatching Manni from their pockets. They rushed towards those boys but two of them managed to escape and one was apprehended at the spot. They identified accused Manish as the same boy who had run away from the spot. Both these witnesses knew accused previously, as he was involved in several other incidents of robbery in the area.

10. Under the circumstances, from the testimony of PW1 and PW13, which find corroboration from PW3 and PW6, the incident of robbery stands proved.

11. The ocular testimony of PW1 and PW13 regarding sustaining injuries during the course of incident find corroboration from the medical evidence. PW4 Bhavana Jain of BSA hospital examined patient Rajesh who was brought to casualty for medical examination with alleged history of assault at 11 p.m. She examined him and prepared his MLC Ex.PW4/A. On local examination, she noticed CLW size 2.5 x 1x 1.5 cm over right parietal region with pain and bleeding from mouth. She referred him to surgery and dental department for further treatment. On the same day, she also examined patient Amarjeet and prepared his MLC Ex.PW4/B. On local examination, she noticed CLW size 2.5 x 1 x 0.5 cm on mid occipital region. He was also referred to surgery for further treatment.

12. PW10 Dr. Rajeev Ranjan proved the report Ex.PW10/B prepared by Dr. Ruchi Goel on patient Rajesh, who as per the X-ray report found fracture on mandible. PW12 Dr. Sanjay Sharma identified the handwriting and signatures of Dr. Ashutosh who examined patient Rajesh and opined the nature of injuries as grievous. Dr. Ashutosh also examined Amarjeet and opined the nature of injuries as simple. PW14 Dr. Kunwar Sanjay Kumar has deposed that patient Rajesh was referred to dental treatment where he was examined by Dr. Sumit, S.R. Dental who opined the nature of injuries as grievous. From the testimony of PW1 duly corroborated by PW13 Amarjeet, coupled with the medical evidence, the incident of commission of robbery on PW1 and PW13 stands proved. Further it stands proved that at the time of commission of robbery, the assailants were armed with deadly weapons and inflicted injuries on the person of PW1 Rajesh as well as PW13 Amarjeet. The injuries suffered by Rajesh was grievous while that of Amarjeet were simple.

13. The only question which is really left for consideration is whether the appellant was one of the assailants. PW1 Rajesh was initially examined on 06.12.2010. At that time the witness had identified the accused Manish@Manni as one of the persons who had initially apprehended him and Amarjeet. He further deposed that the accused was known to him from earlier as he had seen him roaming near his shop and that he lived in Yadav Nagar. He also deposed that Amarjeet had also identified the accused. This witness was cross examined by learned APP for the State in regard to some of the facts and he admitted that all the three accused persons had surrounded them and looted them of their mobile and cash. Two persons who had caught them from behind were armed with rod and the accused Manish@Manni was the third accused who came from front and he was also armed with rod and he had hit Rajesh and Amarjeet with

rod. He also admitted that he and Amarjeet identified accused Manish and told him that they have identified him and he should not rob them, upon which he hit them with rod. This witness was not cross examined on this day despite opportunity given. Pursuant to an application u/s 311 Cr.P.C moved by the accused, the witness was recalled for cross examination on 15.02.2012 and on that day although he reiterated that when they were caught by the two accused persons, the third accused was standing at a distance of about 25 ft and iron blow was given on his head but went on stating that he had not seen the accused Manish earlier and he had seen him for the first time in Court. PW13 Amarjeet was examined on 17.01.2013 and although this witness narrated the entire incident of commission of robbery by 3-4 boys but at one stage deposed that accused Manish was not the boy who robbed him but then went on stating that he could not see the face of the person as he had attacked them from the back and it was also dark.

14. On a careful consideration of evidence of PW1 and PW13, it becomes crystal clear that PW13 had accompanied PW1 to the place of incident. In the incident that occurred, both PW1 and PW13 sustained injuries. Their presence at the spot, therefore, cannot be doubted. Immediately after the incident, both the witnesses initially went to Chadha Nursing Home from where they were taken to BSA hospital. PW11 SI Satish Kumar went to BSA hospital where both the injured were found. PW13 Amarjeet was declared fit for statement and his statement Ex.PW11/A was recorded. It is true that the first information report is not substantive evidence but the fact remains that immediately after the incident and before there was any extraneous intervention, PW13 not only narrated the incident but also named the assailants. The first information report is a detailed document and it is not possible to believe that the

investigating officer imagined those details and prepared the document Ex.PW11/A. The detailed narration about the incident and the assailant in the first information report goes to show that the subsequent attempt of PW13 to disown the document, while admitting his signature thereon is a shift for obvious reasons. As per record brought by PW9 HC Vishal, accused is involved in various other cases. PW13 was so scared that after 3-4 days of the incident, he had even left Delhi and went to his village. Even when he came to depose before the Court on 17.01.2013 i.e. after about four years of the incident, he came from the village only. Similarly, PW1 who was initially examined on 06.12.2010 had supported the case of prosecution and identified the accused as one of the assailants. Not only that, he knew him from before as he was resident of Yadav Nagar and he used to see him roaming near his shop. It was only subsequently when he was recalled for cross examination on 15.02.2012 that he resiled from his earlier statement only to the extent that he had not seen this accused earlier and saw him for first time in Court. A careful reading of his evidence goes to show that his statement in cross examination on the question of identity of the appellant is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. During this period of 06.12.2010 to 15.02.2012, something transpired which made him shift his evidence on the question of identity to help the appellant which is further fortified by the fact that PW13 who appeared on 17.01.2013 tried to give a shaky version regarding identity of appellant.

15. Substantially similar facts were involved in *Khujji alias Surendra Tiwari v. State of Madhya Pradesh*, (1991)3 SCC 627. In that case the examination-in-chief of witness was recorded on 16.11.1976 when he identified the assailants by name. His cross examination commenced on 15.12.1976 wherein he stated that the appellants had their backs towards

him and hence he could not see their faces. The High Court came to the conclusion that during one month period that elapsed since the recording of his examination-in-chief, something transpired which made him shift the evidence on the question of identity to help the appellant. In appeal, Hon'ble Supreme Court upheld the view by observing that his statement in cross examination on the question of identity of the appellant is a clear attempt to wriggle out of what he had earlier stated in his examination-in-chief. It was held that the evidence was acceptable regarding the time, place and manner of incident as well as the identity of the assailants. It was further observed that the evidence of a witness, declared hostile is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. Reference was made to the earlier decisions rendered in *Bhagwan Singh v. The State of Haryana*, 1976 CrL.L.J.203, *Shri Rabindra Kumar Dey v. State of Orissa*, 1977 CrL.L.J 173 and *Syad Akbar v. State of Karnataka*, 1979 CrL.L.J 1374 that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witness cannot be treated as effaced or washed of the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

16. In view of this legal position, coupled with the evidence which has come on record it is manifest that the appellant was known to both the injured from before as they used to see him in the market. At the time of incident also, they recognised him and thereafter when PW12 Amarjeet made statement to the police, he not only described the incident but spelled out the names of the assailants. The other injured Rajesh also initially supported the case of prosecution. It was only subsequently when he was recalled for cross examination that he refused to identify the accused. Similar is the fate of complainant PW13 Amarjeet, but in view of the

discussion made above, the identity of the accused being the assailant stands proved.

17. Moreover, according to PW11 SI Satish Kumar, PW5 HC Satbir and PW7 HC Surender, on the basis of information given by the complainant Amarjeet on 19.10.2009 regarding presence of accused Manish@Manni at his house they reached at D-27, Yadav Nagar at the house of accused and apprehended and arrested him in this case. Pursuant thereto he led the police party and got the iron rod recovered which was used in the commission of crime. Recovery of iron rod at the instance of this accused has not been believed by learned Trial Court but that itself is not fatal to the case of prosecution. At best, it can be said that weapon of offence was not recovered. Recovery of weapon of offence is not the sine qua non for proving the incident of robbery by use of deadly weapon. This is more particularly so in the instant case as both the witnesses have deposed that at the time of committing robbery, deadly weapon i.e iron rod was used which find corroboration from the medical evidence that PW1 Rajesh sustained grievous injuries while Amarjeet sustained simple injuries.

18. The submission of learned counsel for the appellant that the accused had made complaints against the police officials for which departmental enquiry was conducted against them, as such he was falsely implicated in this case is not substantiated in as much as a suggestion was given to PW3 HC Kiran Pal and PW7 HC Surender that accused made some complaints against the police officials and in order to take revenge he was falsely implicated in this case but the suggestions were denied by both the witnesses. When the statement of accused was recorded u/s 313 Cr.P.C, no such plea was taken by him except for stating that he was picked up from a flour chakki and was implicated in this case falsely. Neither any

complaint against the police officials for taking any action against them has been alleged by the accused in his statement nor proved. On the other hand, no animosity, ill-will or grudge has been alleged against the complainant or the victim Rajesh for which reason they would falsely implicate him in this case. As such the findings of the learned Trial Court regarding conviction of the appellant for the offences alleged against him, no interference is called for.

19. However, as regards sentence of the appellant, same seems to be on a higher side, as such, same is modified to the extent that sentence awarded u/s 392 IPC is reduced to three years with fine of Rs.1,000/- in default one month S.I; sentence awarded u/s 394 IPC is reduced to 5 years and fine of Rs.2000/- in default two months S.I and sentence awarded under Section 397 IPC is reduced to 7 years and fine of Rs.3,000/- in default 4 months SI.

20. With this modification, the appeal is dismissed. Appellant be informed through Superintendent Jail. Pending application, if any also stands disposed of. Trial Court record be sent back along with copy of judgment.

(SUNITA GUPTA)
JUDGE

MAY 14, 2015
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