

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

% *Judgment reserved on :30.07.2015*
Judgment delivered on : 05.08.2015.

+ CRL.A. 575/2013

MANOJ KUMAR

..... Appellant

Through Mr.Sushant Mukund, Adv.

versus

STATE

..... Respondent

Through Mr Pramod Saxena, APP for the
State

+ CRL.A. 1374/2013

RAVI ALIAS RETAL

..... Appellant

Through Mr. Vikas Padora, Adv.

versus

STATE

..... Respondent

Through Mr Pramod Saxena, APP for the
State

+ CRL.A.1376/2014

VICKY ALIAS DEEPAK

..... Appellant

Through Mr. Madan Lal Kalkal, Adv.

versus

STATE

..... Respondent

Through Mr Pramod Saxena, APP
for the State

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 There are three appellants before this Court. They are Ravi @ Retal, Manoj Kumar and Vicky & Deepak. They all stand convicted under Sections 392/394 of the IPC. Each of them has been sentenced to undergo RI for a period of five years for each of their separate convictions and to pay a fine of Rs.5,000/- each and in default of payment of fine to undergo RI for a further period of six months. The sentences were to run concurrently. Benefit of Section 428 of the Cr.PC had been granted.

2 Nominal roll of the appellants has been requisitioned. It reflects

that as on date, each of the appellants has undergone incarceration of about 3 years which included their remission.

3 The version of the prosecution was unfolded in the testimony of Raja Khan (PW-1) the complainant. His complaint was to the effect that on the fateful day i.e. on 07.11.2011 while he was returning home from duty at the Kalyanpuri bus terminal at about 09:30 PM, he was accosted by 2-3 boys. They took him to the park and robbed him of Rs.1,200/- and his mobile phone. On his objecting one of the boys stabbed him with a sharp edged weapon. They thereafter fled away.

4 No eye witness could be found.

5 Admittedly the identity of the accused was unknown to the victim. As per the version of SI Rahul Kumar (PW-7) while he was investigating FIR No. 404/2010 under Sections 382/34 of the IPC, the accused Ravi @ Retal, Vicky and Manoj had made a disclosure statement about their involvement in the present case. They were accordingly arrested vide arrest memos Ex.PW-7/A to Ex.PW-7/C. They had been produced before the learned MM Mr. J.P. Nahar (PW-3) on 23.01.2011 for test identification parade but all of them while proceedings (Ex.PW-3/D) had refused TIP. The complainant had

CrI. Appeal Nos.575/2013, 1374/2013 & 1376/2014

identified the accused. The complainant was examined by Dr. Waseem Ahmed (PW-5). Injuries suffered by him were grievous in nature.

6 On the basis of the aforementioned evidence, both oral and documentary, the accused persons were convicted and sentenced as aforementioned.

7 On behalf of the appellants, arguments have been addressed by the learned amicus curiae. The main thrust of the argument of the learned counsel for the appellants is that the identity of the accused has not been established; in the absence of which the accused could not have been convicted; benefit of doubt has to accrue in their favour. Attention has been drawn to the version of PW-1. It is pointed out that admittedly it is the case of the prosecution that PW-1 did not know the accused persons who were stranger to him. The accused persons had not been arrested at the spot. They had been arrested in a connected FIR and even as per the version of PW-7, he had wrongly stated that he had arrested accused Manoj in that FIR. PW-7 had later on clarified that Manoj was not involved in that FIR. Additional submission being that the identification of the accused for the first time in the dock by PW-1 suffers from a grave infirmity and as such identification is no

Crl. Appeal Nos.575/2013, 1374/2013 & 1376/2014

Page 4 of 14

identification in the eyes of law. Accused are entitled to benefit of doubt and a consequent acquittal.

8 Needless to state that the learned APP for the State has refuted this argument. The main submission of the learned Public Prosecutor is that the accused persons had refused TIP for which an adverse inference has to be drawn against them as there was no valid reason for the refusal. The impugned judgment calls for no interference.

9 Arguments have been heard and record has been perused.

10 The complainant had given his complaint Ex.PW-1/A at 09:30 pm on 07.01.2011. In this complaint, he has described the number of accused persons as 2-3. Admittedly it was a winter night i.e. the month of January and the time of incident was 09:30 pm. It was an isolated area i.e. at the Ambedkar Park. No eyewitness had also been found. It has come in the testimony of PW-1 that it was a foggy night and there was little public movement being night time. Admittedly in this complaint (Ex.PW-1/A) no detail of the accused persons had been mentioned. Neither their height and nor their features. It had however been stated that the accused persons would in the age bracket of 20-22 years. The victim was not sure whether they were 2 or 3 persons. At one

point, he had stated that there were 2 or 3 persons but at later point of time, he had stated that they were three persons. It is also an admitted version of the prosecution that there was no eyewitness and the entire version is hinged upon the testimony of PW-1.

11 The accused persons were arrested in this case on 12.01.2011. This is clear from the version of PW-7. PW-7 was investigating the offence i.e. FIR No. 404/2010 registered at the same police station under Section 380 of the IPC. He deposed that he had arrest Ravi, Vicky and Manoj in that FIR and pursuant to their disclosure statement, they revealed their involvement in the present case. They were thereafter arrested in the present case vide memos Ex.PW-7/A to Ex.PW-7/C. In another part of his cross-examination, PW-7 has admitted that Manoj was not arrested in FIR No. 404/2010. He had not made a disclosure statement in that case. The alleged disclosure statement having being made by Manoj in FIR No. 404/2010 is thus completely effaced. Manoj was not an accused in FIR No. 404/2010; as such there was no disclosure statement made by accused Manoj;

12 Further part of the deposition of PW-7 discloses that the accused persons were put to TIP on 24.01.2011 on an application which he had

Crl. Appeal Nos.575/2013, 1374/2013 & 1376/2014

filed before PW-3 (learned MM) on 23.01.2011. The application is Ex.PW-7/G and the TIP proceedings are Ex.PW-3/D. The application (Ex.PW-7/G) filed before the learned MM, Karkardooma Courts is dated 24.01.2011 and not 23.01.2011 as is the version of PW-7. The TIP proceedings (Ex.PW-3/D) conducted by PW-3 on 24.01.2011 state that all the accused persons had refused TIP on the ground that their photograph was taken by the police on 12.01.2011 on their mobile phone and was shown to the victim. On this ground, they had refused TIP.

13 The defence of the accused persons all along was that their photograph had been taken in the mobile phone by PW-7 on 12.01.2011 when they had been shown arrested in the connected FIR No. 404/2010 and same had been shown to the witness and that is the reason why they had not participated TIP. To the same effect, suggestions had also been given to the witnesses of the prosecution i.e. to PW-1 to PW-7. The learned public prosecutor has pointed out that an adverse inference has to be drawn against the accused persons for not joining TIP. To this limited extent, this proposition of law is correct. However, if a valid reason has been disclosed by the accused for not joining TIP which in

Crl. Appeal Nos.575/2013, 1374/2013 & 1376/2014 Page 7 of 14

this case is also substantiated by the version of ASI Shyam Lal (PW-4), this adverse inference cannot be read against the accused.

14 Testimony of PW-4 is relevant. He was the first Investigating Officer of this case. He had recorded the statement of the complainant and the FIR was registered on the rukka which had been sent through him. Thereafter, he was released from this case on 11.01.2011 as he was on temporary duty due to the Republic Day program. The injured Raja Khan (PW-1) had met him in the Karkardooma Court complex and told him that these were the three accused persons who were involved in this incident; they had been produced from judicial custody. In his cross-examination, he admitted that the injured Raja Khana had identified the accused person in his presence. In another part of his cross-examination, PW-4 has reiterated that he had joined investigation in this case on 22.02.2011 and prior to that, he was not aware of the investigation in this pending matter and the same was being conducted by PW-7. He denied the suggestion that PW-7 had arrested the accused persons in FIR No. 404/2010 and had taken their photographs and shown them to the victim which had led to the identification of the accused. PW-1 has also admitted that he had seen the accused persons on 22.02.2011 in the

Crl. Appeal Nos.575/2013, 1374/2013 & 1376/2014

Court in the presence of PW-4; this was also the version of PW-4. There is no doubt that these versions of PW-1 and PW-4 refer to an incident of 22.02.2011 i.e. after the TIP had been refused by the accused but the TIP proceedings are also suspect. This Court notes that PW-7 had stated that he had filed an application seeking TIP of the accused on 23.01.2011. The application is dated 24.01.2011. That apart, even if the accused were produced on 24.01.2011 and they had given a reason for not joining the TIP i.e. for the reason that their photographs had been taken on the mobile phone of the police on 12.01.2011 in the connected FIR No. 404/2010; even otherwise, the accused persons had to be identified by the complainant but there is no such statement made by PW-7 that the complainant was also present in the said TIP proceedings. The complainant (PW-1) is also silent on this aspect. He has also whispered a word that he had gone to the Court for the TIP of the accused on 24.01.2011. This is inspite of a specific query put to him on this score.

15 It appears that the TIP was only an empty formality carried out by the Investigating Officer for the purposes of completing the paper work.

The proceeding sheets of the TIP also do not disclose that the

complainant was present for the identification of the accused. At the cost of repetition, it is noted that the defence of the accused all along was that they were photographed by PW-7 in proceedings in FIR No. 404/2010 and this was the reason why they had refused to join TIP.

16 Another relevant circumstance to be noted is that PW-7 was the Investigating Officer of FIR No. 404/2010. He was also entrusted with the investigation of the present case i.e. of FIR No. 11/2011 and during the short duration when he was carrying out the investigation in this case i.e. between 11.01.2011 to 22.02.2011 (when PW-4 was put on Republic Day duty), he managed to solve the instant case and was able to nab the accused. PW-7 even did not know that Manoj was not an accused in FIR No.404/2010. PW-7 appears to have made a mechanical deposition in Court without even looking at the record. Even his application for conducting TIP is wrongly dated.

17 The necessity for holding an identification parade arises only when the accused was not previously known to the witness. The whole idea being that the culprit who is brought to book is the real culprit and not an innocent person who has under mistaken identity been convicted.

It is a check on the veracity of the version of the identifying witness.

The test identification parade is even however not a substantive piece of evidence. It is only used for the purposes of corroboration.

18 In the instant case, the conscience of this Court does not permit it to hold that the prosecution has been able to nail the real culprit. There is no doubt that an unfortunate incident had occurred with PW-1. It was on a foggy and wintery night of 07.01.2011 at 09:30 PM. Whether there were two assailants or three, the victim was not clear. He had not seen them. He could not detail any feature about them. He had only stated that the accused persons were in the age bracket of 20-22 years. Whether they were tall, short, dark or light complexioned, none of this was disclosed. At the cost of repetition, it was a dark night. There was hardly any time for the victim to have noted the identity of the accused being in the traumatic state of mind that he was. The accused persons were arrested by PW-7 while he was investigating FIR No. 404/2010. Testimony of PW-7 has already been discussed supra. He appears to be an Investigating Officer who was interested in the success of both the FIRs which he was investigating. In FIR No. 404/2010, he did not know even that Manoj was not an accused. He made a statement which was wholly incorrect till it was brought to his notice and then he retracted

from it. That apart, PW-7 was investigating this case for a short duration (when PW-4 was away). On 23.01.2011, he had moved an application for TIP of the accused which was actually dated 24.01.2011. PW-7 was incorrect on the date. Even presuming that this was an innocent mistake on the part of PW-7, the documentary evidence which are the TIP proceedings as also the application filed by PW-7 seeking TIP and so also the version of PW-1 (the complainant) show that the complainant was not present on 24.01.2011 to identify the accused. It appears to be an empty formality which had been carried out by PW-7 to put the record straight. Neither does the ocular testimony of PW-1 and nor the documentary evidence establish that the complainant was present in the Court to identify the accused; the purpose of TIP was to enable to the victim to identify the correct accused. TIP was even otherwise refused by the accused for the reason that their photographs were taken by PW-7 on his mobile phone on 12.01.2011 when he was conducting investigation in FIR No. 404/2010. Accused were identified by PW-1 on 22.02.2011 in the presence of PW-4 when PW-1 had come to Karkardooma Court and where PW-4 (the first Investigating Officer) was also present. Admittedly PW-4 was present in the Court complex on

CrI. Appeal Nos.575/2013, 1374/2013 & 1376/2014

22.02.2011 along with PW-1. That was the time when PW-1 recognized the accused persons for the first time in the presence of PW-4. This has come in his version. Thereafter the identification of the accused in the dock was clearly at the asking of the Investigating Officer who wanted the success of his case. This submission of the learned defence counsel carries weight.

19 In a judgment of the Division Bench of this Court in 2011 (2) JCC 1233 Murari Vs. State, this Court had noted that a similar plea which had been taken by the accused wherein they had also not joined the TIP for the reason that their photographs had been shown to the victim; the Court had noted as under:-

“After the apprehension of the Appellants TIP has to follow when the crime was committed by unknown persons. Associating Constable Rohtash in search of the Appellants casts serious reflection on the fairness of the investigation by the IO. While refusing to participate in the TIP, the five Appellants stated that their photographs were taken through mobile phone and they were shown to the witnesses. This plea of the Appellants cannot be easily brushed aside. Even otherwise, the refusal to join the TIP itself is not sufficient to hold the Appellants guilty.”

20 In 2011 (3) JCC 2041 Vinod Singh Vs. Govt. of NCT of Delhi, where the accused had refused to join TIP, the Court had noted the following observations which would also be useful in the facts and
Crl. Appeal Nos.575/2013, 1374/2013 & 1376/2014

circumstances of this case. They read as under:-

“It is true that the refusal of an accused to participate in TIP without a reasonable explanation may give rise to an adverse inference against him and may be taken as a reason to accept the dock identification of the accused by the witnesses. This however, is not an absolute rule. Before drawing an adverse inference on account of refusal to participate in TIP, the court is under obligation to scrutinize the evidence carefully to satisfy its conscience that there are circumstances justifying the drawing of adverse presumption”

21 This Court is of the view that the prosecution has failed to establish its case to the hilt. The identity of the accused not having being established, they are entitled to a benefit of doubt. Giving them benefit of doubt, they are acquitted. They be released forthwith, if not required in any other case.

22 Appeals are allowed.

INDERMEET KAUR, J

AUGUST 05, 2015

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