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

% *Judgment reserved on : 17.11.2015*
Judgment delivered on : 24.11.2015

+ CRL.A. 1139/2013

JASWANT ALIAS KALE Appellant

Through Mr.Vikas Padora, Amicus Curiae.

versus

STATE (GOVT. OF NCT) OF DELHI Respondent

Through Ms. Neelam Sharma, APP for the
State

+ CRL.A. 1323/2013

JAINUL UMAR Appellant

Through Mr.Vikas Padora, Amicus Curiae.

versus

STATE (GOVT. OF NCT) OF DELHI Respondent

Through Ms. Neelam Sharma, APP for the
State

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 These appeals filed by appellants Jaswant @ Kale and Jainul

Umar have assailed the judgment and order on sentence dated 28.02.2013 and 08.3.2013 respectively wherein the appellants stood convicted under Sections 392/34 of the IPC read with Section 397 of the IPC. Each of them have been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.5000/- and in default of payment of fine to undergo SI for a period of 6 months.

2 Nominal roll of the appellants have been requisitioned. The nominal roll of Jaswant as on date reflects that he has undergone incarceration of almost 5years and 3 months which includes remissions earned by him. So also the nominal roll of Jainul Umar reflects that he has also undergone incarceration of the same period. Their jail conducts are satisfactory.

3 The version of the prosecution was unfolded in the testimony of the complainant Madhusudan (PW-1) who has stated that on 02.6.2011 at about 9.00 – 9.15 p.m. while he was about to close his shop at Gandhi Nagar three boys aged 25-30 years entered the shop. The shutter of the shop was almost closed. Two of these boys were carrying guns and the third boy was carrying a knife. At the point of these arms the complainant was threatened. Rs.4.70 lacs lying in a black bag, a gold

kara weighing 2½ tolas, his driving licence and a visiting card were taken from the shop. His employees Gunjan (PW-9), Pankaj (PW-13) and Shashi Pal were also present. The complainant was perplexed. He did not lodge a complaint on the same day and he returned home. On the following day at about 12.00-12.30 noon he went to the police station, where the FIR was registered. Investigation was set into motion. Apart from the statement of PW-1, statement of other two persons in the shop namely Gunjan and Pankaj were also recorded. They were examined PW-9 and PW-13 respectively.

4 The accused persons had managed to flee. On 03.7.2011 the accused Jainul Umar was arrested in FIR No.178/2011 registered under Section 307 of the IPC and Section 25 of the Arms Act. His disclosure statement was recorded in that FIR by ASI Shiv Murti (PW-4). Jainul Umar disclosed his role in the present case i.e. in FIR No.149/2011. He also disclosed the role of his co-accomplice Jaswant @Kale as also of the third co-accused namely Jahid @ Salim. He however could not be arrested. Pursuant to the disclosure statement of Jainul Umar who was formally arrested in this case on 30.7.2011, the second appellant Jaswant @ Kale was arrested on 07.7.2011. This was in the presence of H.C. Crl. Appeal Nos.1139/2013 and 1323/2013

Subhash Chand (PW-6) and constable Pawan Kumar (PW-2). Accused Jawant @ Kale got recovered the driving licence and the visiting card of the complainant in the name of Shiva Textiles from his residence at Karawal Nagar and these documents were taken into possession vide memo Ex.PW-2/PX3. Accused Jaswant @ Kale also disclosed that from the proceeds of the robbed money of which he had his share, he had purchased a maruti car for Rs.50,000/-. This maruti car was also taken into possession.

5 The accused were put to TIP proceedings vide separate proceedings Ex. PW-7/B and Ex.PW-8/B conducted through Ms.Sunena Sharma, learned M.M. (PW-7) and Mr.S.K.Arora, learned M.M. (PW-8) respectively.

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

7 On behalf of the appellants, it is pointed out that the identity of the appellants has not been established. Jaswant @ Kale had refused to participate in the TIP which was conducted qua him on 12.7.2011 for a valid reason. He stated that he did not wish to participate in the TIP as

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he has already been shown by the SHO in the police station to the witnesses and his photographs had been clicked. No adverse inference for not joining the TIP could have been drawn. So also Jainul Umar refused to participate in the TIP for the same reason. There is no explanation as to why the FIR has been registered on the following day i.e. after a gap of 16 hours at about 12.30 p.m. on 03.6.2011 when admittedly the incident had occurred at 9.00 p.m. on 02.6.2011. It is also difficult to believe that Gandhi Nagar being a well populated area did not have any eye-witness at 9.00 p.m., which is not a time when the streets would have become empty. There is also no explanation as to why the employees of the complainant did not make a PCR call at that point of time itself. The identity of the appellants has not been established. No recovery of any arm i.e. either a pistol or a knife had been effected from either of the appellants. The driving licence and the visiting card of the complainant had been planted upon the appellants and that is why there was no mention in the initial FIR about the said driving licence and the visiting card of the complainant having been stolen; this has only come in the supplementary statement of the complainant. No credence can be placed upon this version. Appellants

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are entitled to a benefit of doubt and consequent acquittal.

8 Arguments have been heard. Record has been perused.

9 The star witness of the prosecution was the complainant. He has been examined as PW-1. He had deposed that on the fateful day i.e. on 02.6.2011 at about 9.00 p.m. when he was present at his shop along with his employees namely Gunjan, Pankaj and Shashi Pal and was about to close his shop three boys carrying pistols and a knife entered his shop. At the point of these arms they robbed a sum of Rs.4,70,000/- which was lying in a black bag and a gold kara weighing 2 ½ tolas. His driving licence and visiting card was also taken. His mobile phone was taken but thereafter it was returned to him. He was perplexed; that is why he could not register a complaint on the same day. He reported the matter to the police on the following day.

10 PW-1 was subjected to a lengthy cross-examination. He denied the suggestion that he is deposing falsely. He also deposed that he could not get the FIR registered earlier as he was confused. He admitted that he did not call 100 number at that point of time and neither of his employees made a call at 100 number. He denied the suggestion that the driving licence and the visiting card were planted upon the appellants

subsequently in order to evidence a recovery.

11 The investigating officer of this case was examined as PW-11. He admitted that FIR was lodged on 03.6.2011. On that day the investigation of this case was handed over to him. He recorded the statement of the complainant Ex.PW-11/A. This had formed the basis of the FIR. Admittedly, in this statement there was no mention that the driving licence and the visiting card of the complainant have been taken away. PW-11 admitted that he had also recorded a supplementary statement of the complainant. This was on the same day i.e. on 03.6.2011. It was in this supplementary statement that for the first time it had been stated that driving licence and visiting card had been taken away by the accused persons.

12 Admittedly, the accused persons had managed to flee. They were not arrested at the spot. On 03.7.2011 in FIR no.178/2011 registered at Police Station Gandhi Nagar accused Jainul Umar was arrested. This FIR had been registered under Section 307 of the IPC and Section 25 of the Arms Act. His disclosure statement was recorded wherein he revealed his role in the present FIR i.e. the FIR No.149 of 2011. Jainul Umar was formally arrested in this case by PW-11. Pursuant to the Crl. Appeal Nos.1139/2013 and 1323/2013

disclosure statement of co-accused Jainul Umar the role of Jaswant @ Kale surfaced. He was formally arrested in this case on 07.7.2011. He made a disclosure statement. Pursuant to this disclosure statement no recovery was effected. There was a second disclosure statement of accused Jaswant @ Kale recorded by PW-11. Pursuant to the second disclosure statement recorded on 15.7.2011 accused Jaswant @ Kale took the police party to his house at Karawal Nagar from where he had got recovered the driving licence and visiting card of the complainant which were seized vide collective memo Ex.PW-2/PX3. The appellant Jaswant @ Kale had also got recovered the car which was purchased from the robbed fund. The same was taken into possession. The TIP of the appellant Jaswant @ Kale was conducted vide proceedings Ex.PW-7/B by PW-7 and these proceedings sheet show that Jaswant @ Kale had refused the TIP proceedings although he was warned that his refusal would go against him. His answer was that he was shown to unknown persons in the police station and his photographs were taken by three police officials. The TIP proceedings of co-accused Jainul Umar conducted on 08.7.2011 (Ex.PW-8/B) shows that he had also refused to join the TIP for the same reason, that he was shown to

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unknown persons in the police station and photographs had been clicked.

13 In this context the testimony of PW-11 is relevant; he was the Investigating Officer. He has formally arrested Jainul Umar on 03.7.2011 and accused Jaswant @ Kale on 07.7.2011. TIP proceedings of both the appellants were conducted on later dates. TIP of Jainul Umar had been conducted on 08.7.2011 and TIP of Jaswant @ Kale had been conducted on 12.7.2011 i.e. after a gap of 5 days in each case. In the intervening period evidence of PW-11 reflects that accused Jainul Umar was produced in Court on 04.7.2011. Jaswant @ Kale was formally arrested on 07.7.2011. He was taken to the police where his disclosure statement was recorded. Testimony of PW-11 further reflects that the testimony of all other witnesses was recorded on the same day. Accused Jaswant @ Kale was produced in Court on 08.7.2011 and he was then remanded to judicial custody. Although PW-11 has stated that the accused persons had been produced in Court in muffled face yet a categorical suggestion has been given to PW-11 that refusal to participate in the TIP by the accused was for the reason that they had been shown in the police to unknown persons and their photographs had

been clicked in the police station. PW-1 in this context has stated that he had visited the police station 2-3 times after the lodging of the FIR but he does not remember the dates when he had visited the police station. He further stated that on an earlier date he had met the police when he had to go to Tihar Jail to identify the accused.

14 This version of PW-1 cast shadows of doubt on the investigation; PW-1 had visited the police station 2-3 times after the date of the FIR; version of the accused that they were shown to unknown persons in the police station and their photographs were clicked in the police station is thus not wholly unwarranted; further admission of PW-11 that he had gone to Tihar Jail to identify the accused clearly shows that the accused persons had been shown to PW-1 and thus there was a valid reason for them not to participate in the TIP. Identity of the accused persons was in grave doubt.

15 Refusal to participate in the TIP proceedings for a valid reason would not lead to the drawing of an adverse inference against the accused. In this background the refusal to join TIP being for a just reason, the Trial Court has committed a grave illegality in holding that the identity of the accused stand established. There are grave shadows

of doubt cast upon their identity.

16 In the context of necessity of TIP the Apex Court in AIR 2007 SC 2425 Heera Vs. State of Rajathan had held as under:

“The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade at that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity.”

17 The record also further shows that no recovery has been effected from Jainul Umar. He was arrested more than one month after the date of the incident in another FIR and in the present case apart from his disclosure statement there was no other evidence to connect him with the offence. Qua Jaswant @ Kale recovery of driving licence and a visiting card belonging to PW-1 has been shown but admittedly this recovery was effected on 15.7.2011 when Jaswant @ Kale was arrested on 07.7.2011. Thus recovery made eight days after his arrest also casts shadow of doubt. In this context the Apex Court while relying upon a decision reported as Sanwat Khan Vs. State of Rajasthan AIR 1956 SC 54 had held that even otherwise convictions based on recoveries alone

should not be rendered, unless corroborated by other reliable evidence.

18 Such a recovery is also doubtful. Moreover PW-1 all along had been suggested that this driving licence and the visiting card had been planted upon him; this driving licence and visiting card also did not find mention in the initial FIR; it was only in the second supplementary statement of the complainant that it was noted by the Investigating Officer that the driving licence and the visiting card of the complainant had also been stolen. If this recovery is disbelieved as this Court is inclined to do so there is nothing to connect appellant Jaswant @ Kale also with the crime.

19 Giving benefit of doubt to the appellants, they are acquitted. They be released forthwith, if not required in any other case.

20 Appeal is allowed.

INDERMEET KAUR, J

NOVEMBER 24, 2015

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