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

% *Judgment reserved on : 27.11.2015*
Judgment delivered on : 02.12.2015

+ CRL.A. 1227/2013

ASLAM

..... Appellant

Through Mr.V. Madhukar, Mr. Sachin
Sharma and Mr. Dinesh Sharma,
Advs.

Versus

STATE NCT OF DELHI

..... Respondent

Through Mr. Kewal Singh Ahuja, APP for
the State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 17.8.2013 and 19.8.2013 respectively wherein the appellant stood convicted under Sections 393/307/34 of the IPC. He has been sentenced to undergo RI for a period of 5 years and to pay a fine of

Rs.5000/- in default of payment of fine to undergo RI for 6 months for each of the convictions. Sentences were to run concurrently. Benefit of Section 428 Cr.P.C. had also been granted to him.

2 Nominal roll of the appellant has been requisitioned. This reflects that as on 22.11.2015 the appellant has undergone incarceration of about 3 years and 6 months which includes the remissions earned by him. His jail conduct is satisfactory. The fact that he is 27 years of age and does not have any other criminal antecedents has been noted.

3 The version of the prosecution is that on 08.12.2010 at about 10-10.15 p.m when Nitin Singhal (PW-3) was to start his motorcycle three boys came there on a motorcycle bearing no.DL-6SAE-5269 of which two of them got down and one of them tried to snatch the bag of PW-3. PW-3 raised an alarm. Public persons gathered there. Accused Rizwan stabbed PW-3; while fleeing Rizwan was heard telling another boy that “Bhag Aslam Bhag”. FIR was registered on the complaint of Jogender Kumar (PW-1). Rizwan was arrested. In the course of investigation he revealed the name of the present appellant who was also arrested. The motorcycle used in the commission of the crime was recovered. The third boy could not be arrested. Charge sheet was filed.

4 Prosecution examined 16 witnesses of whom the star witness of the prosecution was the injured examined as PW-3. Complaint was lodged by the friend, Jogeinder Kumar who was examined as PW-1. PW-1 did not fully support the version of the prosecution. Although he had identified the co-convict Rizwan but the appellant before this Court could not be identified by him. He stated that he had only seen his back. Vishal Gupta (PW-4) had removed the injured to the hospital. The victim was examined in the Metro Hospital, Noida by Dr.Nilesh (PW-5) and his discharge summary was prepared by Dr.APS Bedi (PW-6). The injury suffered by the victim was declared to be dangerous by Dr.Sanjeev Chobey (PW-7). The motorcycle in question bearing No.DL-6SAE-5269 was owned by Smt. Rehana (PW-10). Her version is that her husband used this motorcycle occasionally and his workers in the air conditioning business run by her father also used to use it. The Investigating Officer was SI Narender. He was examined as PW-12. Initially the investigation was marked to ASI Gurcharan Singh (PW-16). He in fact arrested accused Rizwan and pursuant to his disclosure statement he arrested Aslam (present appellant) vide memo Ex.PW-15/A.

5 In the statement of the appellant recorded under Section 313 Cr.P.C. he pleaded innocence. His submission was that he has been falsely implicated in the present case.

6 On behalf of the appellant, learned Amicus Curiae submits that the identity of the appellant has not been established and admittedly the appellant has been identified only in the Court and this is clear from the version of PW-3 who alone had endeavoured to recognize and identify the appellant. Identification for the first time in the Court is not an identification in the eye of law. Admittedly, the accused was not known to the appellant and the appellant having been arrested several days after the date of offence such identification has necessarily to be ignored. No recovery has been made from the appellant.

7 Needless to state that the prosecution has rebutted this submission; submission being that the identification done by PW-3 is a valid identification and the appellant having refused the TIP the Court has rightly drawn adverse inference against him. It is further pointed out that pursuant to the disclosure statement of the appellant the motorcycle in question has also been recovered. This additional circumstance fixes the fate of the appellant.

8 Arguments heard. Record has been perused.

9 The complainant was PW-1. He stated that he was running a business of soft drinks and while going out to take a stroll, he heard the shrieks of Nitin (PW-3) who was also running a general store where his shop is situated. On hearing the shrieks of PW-3 he ran towards him. He saw PW-3 being stabbed by a knife. Out of three boys one was apprehended; public persons gave beatings to that boy and that boy was later on identified as co-convict Rizwan. PW-1, as noted supra, could not identify the present appellant stating that since his back was towards him he could not see him.

10 Although this witness was declared hostile but he has stuck to his stand. The injured was examined as PW-3. He also deposed in the manner as related by PW-1 and stated that he was running a general store. On 8.12.2010 at about 10-10.15 p.m. after closing his shop while he was ready to go to his home and he inserted his key in the motorcycle, Rizwan came there and gave him a fist blow. PW-3 sustained injuries. The appellant Aslam caught hold of PW-3 and tried to snatch his bag. Rizwan exhorted saying 'Bhag Aslam Bhag'. Public persons gathered there. The appellant managed to flee. PW-3 was

subjected to a lengthy cross-examination. He stated that on the date of the incident after the incident he had become unconscious and had been taken to the hospital. He remained in the ICU for about one or two days after the incident. He did not remember the date when he was discharged from the hospital. After his discharge he went to the police station to know about the case. On 23.12.2010 he had gone to the police station where he saw accused Aslam and where he had identified the appellant. He however denied the suggestion that he had done so at the asking of the police. He reiterated that the appellant Aslam was sitting in the police station and on seeing him, he stated that he was one of the assailants.

11 It is this version of PW-3 in his cross-examination which has been vehemently argued by learned Amicus Curiae to substantiate his submission that the appellant Aslam was identified by PW-3 in the police station and this was at the asking of the police. This submission of the learned counsel for the appellant has force. As per PW-3 it was on 23.12.2010 that he had seen the appellant Aslam in the police station. Till this time the statement of PW-3 had not yet been recorded. PW-3 was in fact in the hospital till 17.12.2010 and his statement was recorded

by the Investigating Officer only on 23.12.2010, on which date he had seen the appellant in the police station. Refusal of TIP by the appellant on 16.12.2010 was thus of little relevance as it is not the version of the prosecution that on that date PW-3 was to identify the appellant; at the cost of repetition on that date PW-3 was still in the hospital. He had been discharged only on 17.12.2010. His statement was also recorded after an unexplained delay of six days i.e. on 23.12.2010.

12 Thus in this background, the identification of the appellant for the first time in the Court after he had seen the appellant in the police station on 23.12.2010 would not be a good identification and the appellant is entitled to an acquittal on this ground alone. The identity of the appellant has not been established.

13 The second submission of the learned APP for the State that the motorcycle in question (DL-6SAE-5269) had been recovered from the appellant is also not correct. Admittedly in this case, Rizwan was arrested in the first instance and after his disclosure statement the role of the present appellant Aslam was surfaced. Disclosure statement of the present appellant was recorded on 09.12.2010. It is nowhere the case of the prosecution that the motorcycle has been recovered pursuant to the

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disclosure statement of Aslam. The motorcycle had in fact been recovered on 16.12.2010. This motorcycle had been brought to the police station by the father of the appellant and it was not a recovery which had been made pursuant to the disclosure statement of the appellant. This is clear from the versions of Constable Sanjay (PW-15) and the Investigating Officer ASI Gurcharan Singh (PW-16). SI Narender (PW-12) who was also the part investigator of this case has on oath deposed that the motorcycle had been produced by the father of Aslam; this was on 16.12.2010 and the motorcycle was taken into possession under memo Ex. PW-12/A. Thus it is clear that no recovery has been effected from the present appellant.

14 Victim was discharged from the hospital on 17.12.2010 and his statement was recorded on 23.12.2010. There is also no explanation as to why the statement of the injured was not recorded up to 23.12.2010 when admittedly he was discharged on 17.12.2010.

15 This Court is of the view that in this background, benefit of doubt must accrue in favour of the appellant. Prosecution has failed to prove its case to the hilt. Appellant is acquitted. He be released forthwith if not required in any other case.

16 Appeal allowed in the said terms.

17 Copy of this order be sent to Jail Superintendant for compliance.

INDERMEET KAUR, J

DECEMBER 02, 2015

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