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

% *Date of Judgment: 20.11.2015*

+ CRL.A. 1360/2013 & Crl. M. (B) No.7626/2015
KANHAIYA

..... Appellant
Through Mr. Rajender Chhabra and
Mr. Upender Yadav, Adv.

versus

STATE

..... Respondent
Through Mr. Tarang Srivastava, APP for
the State

CORAM:

HON'BLE MS. JUSTICEINDERMEET KAUR

INDERMEET KAUR, J. (oral)

1 This appeal is directed against the impugned judgment and order on sentence dated 12.03.2013 and 15.03.2013 respectively wherein the appellant stands convicted under Section 392/34 read with Section 397 of the IPC and was sentenced to undergo RI for 7 years and to pay a fine of Rs. 5,000/- in default SI for 6 months. For his second conviction under section 394/34 of the IPC he has been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs. 5,000/-. Benefit of section 428 of Cr.P.C. has been granted to the appellant.

2 Nominal roll of the appellant reflects that as on date, he has undergone incarceration of 5 years and 8 months. His jail conduct is satisfactory.

3 At the outset, learned amicus-curiae submits that the identity of the appellant has not been established. There is nothing to connect him with the crime. The Trial Court has erroneously relied upon the refusal by the appellant to join TIP which was for a valid reason as it has come in the evidence of the complainant (PW-3) that he had seen the accused at Karkardooma Court and it was for this reason that the appellant had refused to join TIP; the appellant already having been shown to the complainant (PW-3) no purpose would be served in conducting TIP. The identity of the appellant not having been established, the judgment suffers from a clear illegality. It is liable to be set aside. This is the only argument which has been addressed before this Court.

4 Needless to state that the learned APP for the State has refuted this submission.

5 The version of the prosecution is that the victim Kailash (PW-3) was found in an injured condition on the road. He reported the matter to the Police. His version was that on 11.08.2011 at about 09:30 PM, he had hired a TSR from Tigri, Khanpur to Anand Vihar bus stop. One person was already sitting there. At about 10:30 PM, the TSR driver instead of going to his destination, turned the TSR to Hasanpur. The person sitting on the back seat (the appellant) took out a knife and at the

point of the knife, robbed him of Rs.400/- and a suitcase containing his cloths and cash of Rs.5,500/-. The victim was injured. He was thrown out of the TSR. The TSR driver ran away.

6 In the course of investigation, the appellant along with co-accused Hukam Singh had been arrested. Hukam Singh acquitted vide separate judgment dated 01.12.2010.

7 Record shows that the incident had occurred on 11.08.2001. The appellant had not been arrested on that day. He and his co-accused were arrested on a later date. The appellant was arrested on 01.11.2001 i.e. after three months of the date of the incident where the present accused along with co-accused had been arrested in FIR No. 307/2001, P.S. Mandawali wherein they have disclosed about their involvement in the present case pursuant to which the present appellant was arrested. The fact that the appellant was not known to the victim is an admitted fact.

8 The TIP was conducted by the then learned MM Mr. R.K. Chauhan (PW-7) vide proceedings Ex.PW-7/B and Ex.PW-7/C. The appellant had refused TIP. His reason was that he had been shown to the complainant. The testimony of the complainant (PW-3) is relevant on this score. In his cross-examination PW-3 has admitted that he had seen the accused 2- ½ months after the incident (first week of November) in Karkardooma Court complex but he could not remember the exact date and month; on that date, PW-3 had been called to the Court by the police officials where in Court No. 30, the appellant who had come to

attend the hearing was seen by PW-3 and where he identified him. TIP was admittedly conducted after that date, as the TIP proceedings reflects that the TIP was conducted on 13.11.2001 on which date, the appellant had refused TIP and the reason for refusal was that he had been shown to the complainant and which was for a valid reason.

9 Accordingly, the Trial Court having drawn an adverse inference against the appellant for non-joining the TIP was a wrong finding. TIP was refused for a valid reason.

10 The identity of the accused is squarely in doubt. Record clearly shows that the victim and the appellant were not known to one another; there was no description by the victim of the appellant; the incident had occurred at night between 09:30 pm to 10:30 pm. The victim would have seen the appellant only for fleeting moment. He had admittedly identified the appellant in the Court complex prior to the appellant being put to the TIP which was the reason for the appellant to have refused TIP.

11 In this background, the identification by PW-3 of the appellant for the first time is a useless identification. It has no sanctity in the eye of law.

12 In this context, the observations of the Apex Court in (2009) 13 SCC 417 State of Andhra Pradesh Vs. Sayyaad Siraj Mohammed and Ors. are relevant and read herein as under:-

“ The High Court has noted that before the test identification parade was conducted on 20.3.1991, the witness (PW1) was taken to the central jail where the accused persons were shown to him. That being so, there was really no purpose in holding test identification parade. The High Court rightly disbelieved the prosecution version and directed acquittal of the respondents. In any event, this is a possible view and therefore no interference is called for.”

13 The identity of the appellant not having been established, benefit of doubt must accrue in his favour. He is accordingly acquitted. Appeal is allowed. He be released forthwith, if not required in any other case.

INDERMEET KAUR, J

NOVEMBER 20, 2015

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