

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

RESERVED ON : 8th JULY, 2016
DECIDED ON : 21st JULY, 2016

+ **CRL.A.74/2016 & CRL.M.B. 1036/2016**

ARUN @ VICKY

..... Appellant

Through : Mr.Narender Mann, Advocate with
Mr.Tarun Khawal, Advocate.

versus

STATE

..... Respondent

Through : Ms.Meenakshi Dahiya, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 20.11.2015 of learned Addl. Sessions Judge in Sessions Case No.53/2011 arising out of FIR No.163/2011 PS Saket by which he was held guilty for committing offence punishable under Sections 392/34 IPC. By an order dated 24.11.2015, he was sentenced to undergo RI for forty months with fine ₹2,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 07.05.2011 at around 10.45 p.m. on Press Enclave Road near red light, Malviya Nagar, the appellant – Arun @ Vicky in furtherance of common intention with his associate - Amit Tomar committed robbery

upon Ms.Seema Duhan and deprived her of a bag containing various articles. The incident was reported to the police and Daily Diary (DD) No.29A (Ex.PW-6/A) came into existence on 07.05.2011 at 11.40 P.M. The complainant's statement (Ex.PW-4/A) was recorded on 18.05.2011 and the FIR was lodged. Efforts were made to find out the perpetrators of the crime but to no effect. On 20.05.2011, on the basis of secret information a raiding party was organised and the appellant along with his associate was apprehended at around 11.30 p.m. Certain recoveries were effected from their possession. Statements of the witnesses conversant with the facts were recorded. The appellant and his associate were arrested in this case. They declined to participate in the Test Identification Proceedings. Upon completion of investigation, a charge-sheet was filed against the appellant and his associate in the Court. In order to establish its case, the prosecution examined seven witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. The trial resulted in conviction. It is relevant to note that co-accused – Amit Tomar was also held guilty and convicted for committing offence punishable under Section 392 IPC read with Section 397 IPC. It appears that conviction has not been challenged by him.

3. I have heard the learned counsel for the parties and have examined the file. The appellant's conviction is primarily based upon the sole testimony of the complainant. However, many glaring infirmities and discrepancies have emerged in the prosecution case, which make it unsafe to convict the appellant without independent corroboration.

4. The occurrence took place on 07.05.2011 and DD No.29A (Ex.PW-6/A) came to be recorded at PS Saket on 07.05.2011 at around

11.40 P.M. The investigation was assigned to ASI Suresh Chand. In his Court statement he disclosed that after assignment of the investigation, he along with a constable reached the spot and met the complainant. She was, however, not ready to give her statement due to urgency to go abroad. On 18.05.2011 she came at the police station and recorded her statement (Ex.PW-4/A). The complainant, on the other hand, has given an entirely different and conflicting version. She disclosed that on 07.05.2011, the incident was conveyed to the police at 100 after she raised alarm by three boys passing through that side. She elaborated that on 07.05.2011 she had given an interim complaint Ex.PW-4/A lodged on 18.05.2011 was not the complaint lodged by her. She even stated that on the day of incident, she had visited the police station and had given an interim complaint. The said interim complaint was not on record. Ex.PW-4/A rather records that incident could not be reported on 08.05.2011 as she was in a hurry to go abroad. In the complaint (Ex.PW-4/A), the victim had disclosed about robbery of many articles including mobile phone make Nokia. However, she did not furnish the IMEI number of the mobile phone; she even did not give the SIM number used in the said mobile. The Call Details Record of the mobile allegedly recovered from the appellant's possession was not collected.

5. The appellant was not acquainted with the complainant. In her complaint (Ex.PW-4/A), she did not give the number of the motorcycle on which the assailants had arrived at the spot. She also did not give the number of the auto and the name of its driver. She gave ages of the assailants to be in between 25 – 30 years. TIP proceedings record appellant's age as 16 years. In her Court statement as PW-4 she did not

categorically and in certain terms identified the appellant to be one of the assailants. She was not very sure if the appellant was the individual who had accompanied co-accused – Amit Tomar who had criminally intimidated her by pointing pistol at her. In her examination-in-chief itself she merely stated that the appellant ‘might’ be the individual who was driving the bike because she was sure that the said accused was taller than the accused who had shown pistol to her. She admitted in the examination-in-chief that she had not seen the appellant’s face completely. It was only the side face which was seen by her. In the testimony of the police officials, it has come on record that the assailants were wearing helmets at the time of occurrence. The incident had taken place at 10.30 p.m. during night hours and it was highly difficult for the complainant to have recognised the broad features of the appellant who did not play any role whatsoever in the incident. Allegations against him were that he was driving the motorcycle. He had not even come face to face with the complainant to confront her.

6. The glaring feature of this case is that the driver of the auto in which the victim was travelling at the time of occurrence has not been associated during investigation. His statement has not been recorded. He has not been joined to identify the assailants. Adverse inference is to be drawn against the prosecution for withholding the material witness. The Investigating Officer has not explained as to why the statement of the auto driver was not recorded. His identity has not been established.

7. On 20.05.2011 when the appellant was allegedly arrested along with his co-accused, the complainant was not associated and the appellant was not arrested at her instance. The application for conducting Test Identification Proceedings was moved on 23.05.2011. Only one mobile

make Nokia is stated to have been recovered from the appellant's possession at the time of his arrest. The said mobile has not been connected with the crime as its IMEI number was not mentioned in the complaint. Its call details have not been gathered. It is highly unbelievable that after about 12 days of the incident the appellant would continue to keep the robbed mobile in his pocket without its use and would not dispose it of in the meanwhile. No other article of substantial value belonging to the complainant was recovered from the appellant's possession or at his instance.

8. Considering the above referred deficiencies and infirmities in the case of the prosecution, conviction and sentence recorded by the Trial Court cannot be sustained. The appellant deserves benefit of doubt.

9. Resultantly, the appeal filed by the appellant is accepted. The conviction and sentence are set aside. The appellant shall be released forthwith if not required to be detained in any other case. Pending application also stands disposed of.

10. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent jail for information / compliance.

(S.P.GARG)
JUDGE

JULY 21, 2016 / tr