

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

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

+ CRL.A.75/2016 & CRL.M.B. 1047/2016

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. Aggrieved by a judgment dated 31.10.2015 of learned Addl. Sessions Judge in Sessions Case No.52/2011 arising out of FIR No.156/2011 PS Saket whereby the appellant – Arun @ Vicky was convicted for committing offence punishable under Section 392 IPC, he has preferred the instant appeal. 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 15.05.2011 at around 09.25 p.m. on Press Enclave Road near red light, Malviya Nagar, the appellant in furtherance of common intention with his associate - Amit Tomar committed robbery upon

Ms.Blessing Ovakporaye and deprived her of a bag containing various articles.

3. In her written complaint (Ex.PW-8/A) lodged on 16.05.2011 complainant - Ms.Blessing Ovakporaye gave graphic account as to how and in what manner, she was robbed by two assailants who had arrived on a motorcycle, while she was travelling along with her sister – Mrs.Phillips in an auto on 15.05.2011 at around 09.10 p.m. Efforts were made to find out the assailants 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 were 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 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 nine witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. DW-1 (Kanti) appeared in his defence. 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.

4. I have heard the learned counsel for the parties and have examined the file. At the outset, it may be mentioned that the prosecution was unable to produce the complainant, who was a foreigner, for examination before the Trial Court. It appears that she had already left India before the trial started. It is unclear if her sister – Mrs.Phillips had also left

India along with her. The Investigating Officer has not given satisfactory answer. He admitted in the cross-examination that he had not verified the local address of the complainant and her sister. He was not aware if Mrs. Phillips had also left India.

5. Appellant's conviction is primarily based upon the sole testimony of PW-2 (Vijay Gupta), the auto-driver. In his Court statement, he identified the appellant and his associate - Amit Tomar to be the assailants. On scrutinising the entire testimony of the complainant, certain glaring infirmities have emerged making it unsafe to place implicit reliance upon him. Admittedly, he was also a suspect in the incident and was called several times at the police station for enquiries. The occurrence took place on 15.05.2011 at around 09.25 p.m. Neither the complainant nor PW-2 (Vijay Gupta) lodged First Information Report soon after the occurrence. PW-2 (Vijay Gupta) did not raise alarm at the spot or attempted to apprehend the assailants. Despite having a mobile, he did not inform the police or PCR. He conveniently took the complainant and her sister to their place of residence. Only on 16.05.2011, he was allegedly called by the complainant and asked to accompany her to the police station. It is unclear as to how the complainant was aware of his contact number to remain in touch on 16.05.2011. The complainant in her complaint (Ex.PW-8/A) did not give any specific reason as why the incident was not reported to the police promptly particularly when she had lost her valuable articles including pass-port and air-tickets. In her complaint (Ex.PW-8/A), the complainant did not disclose the number of the motorcycle upon which the assailants had arrived at the spot. She did not give broad features of the assailants with whom she had direct confrontation. She did not claim to

identify the assailants if shown to her. The report is silent if the assailants were wearing helmets at the time of occurrence. IMEI number of the Blackberry mobile allegedly robbed was not mentioned in the complaint. She did not furnish any document regarding its ownership. The SIM number being used in this mobile was also not disclosed. Call Detail Record of this mobile were not collected.

6. On 20.05.2011 at the time of alleged apprehension of the appellant and his associate on the basis of secret information, PW-2 was not associated. The assailants were not apprehended at his instance. In his statement under Section 161 Cr.P.C., he also did not disclose the number of the motorcycle on which the assailants had reached the spot. In his 161 Cr.P.C. statement recorded on 16.05.2011, he disclosed the appellant's age as 25 years. In the Test Identification Proceedings (Ex.PW-8/I and Ex.PW-9/B), appellant's age has been described as 16 years. The prosecution has failed to reconcile the conflicting ages.

7. In his Court statement also PW-2 did not disclose the number of the motorcycle. The Investigating Agency did not collect any document as to whom the said motorcycle belonged and how it came into appellant's possession at the time of his arrest. Recovery of Blackberry phone (Ex.PW-6/B) from appellant's possession seems suspicious as after five days of the incident, he is not expected to keep the robbed mobile in his pocket without its use. No other recovery was effected from the appellant's possession or at his instance subsequently. Initially, PW-2 (Vijay Gupta) was not sure as to who was the assailant who had intimidated the complainant at the point of pistol. Subsequently, he recalled that it was Amit Tomar who had used the pistol to threaten the complainant. He admitted to have visited the police

station where number of accused persons arrested by the police were shown to him and he was able to identify the appellant as one of the assailants. In his examination-in-chief, he did not disclose if the appellant wore helmets and how he was able to recognise both of them particularly when the appellant had not played any role in the incident. He was also not categorical to state if the motorcycle recovered on 20.05.2011 was being driven by the appellant at the time. The post-event conduct of the witness is unnatural as he kept / maintained complete silence. His visit to the police station on 16.05.2011 along with the complainant and his sister is suspect.

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*