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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : MAY 16, 2016

DECIDED ON : AUGUST 08, 2016

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CRL.A.1610/2014 & CRL.M.B.7909/2015

NEERAJ KUMAR SINGH

..... Petitioner

Through : Mr.Dushyant Sisodiya, Advocate.

VERSUS

STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Raghuvinder Varma, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 11.08.2014 of learned Additional Sessions Judge in Sessions Case No.69/1/14 arising out of FIR No.550/2003 registered at Police Station Moti Nagar by which appellant-Neeraj Kumar Singh was convicted under Sections 392 IPC, he has filed the instant appeal. By an order dated 25.08.2014, he was sentenced to undergo Rigorous Imprisonment for five years with fine ₹2,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 18.10.2003 the appellant along with his associates Karan Singh, Ganga Prasad @ Tinkoo and Vijay Kumar @ Radhey @ Shyam @ Pandit Ji hatched conspiracy to commit robbery at Smt.Nisha Goel's house at A-240, Sudershan Park, Moti Nagar, Delhi. On 22.10.2003 at about 4.30

p.m. pursuant to the said criminal conspiracy, they committed robbery at her house using deadly weapons. The incident was reported to the police vide Daily Diary (DD) No.16/A (Ex.PW21/A) on 22.10.2003 at 5.10 p.m. The Investigating Officer after recording victim's statement (Ex.PW.2/A) lodged First Information Report. Statement of witnesses conversant with the facts were recorded. The accused persons were apprehended. Certain recoveries were effected at their instance. Upon completion of investigation, a charge-sheet was filed against all of them in the court. In order to establish its case, the prosecution examined twenty one witnesses in all.

3. Since there was no incriminating evidence against accused Ganga Prasad @ Tinkoo and Vijay Kumar @ Radhey @ Shyam @ Pandit Ji, recording of their statements under Section 313 Cr.P.C. was dispensed with and they were acquitted by a judgment dated 21.07.2014. The appellant and Karan Singh abjured the guilt in their 313 statements. The trial resulted in appellant's conviction as aforesaid. It is pertinent to note that by the said judgment, Karan Singh was acquitted of the charge and the State did not challenge his acquittal. Being aggrieved and dissatisfied, the instant appeal has been filed by the appellant.

4. I have heard the learned counsel for the parties and have assessed the evidence thoroughly. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and failed to take into account serious flaws and vital discrepancies which practically demolished the version of the prosecution. No adverse view can be taken against the appellant for declining to participate in the Test Identification Proceedings (in short 'TIP') as undisputedly, he was shown to the complainant soon after his arrest in the police station. Appellant's

identification by the victim in the court is of no substance for that reason. Recovery of ₹48,000/- being part of the robbed amount at the appellant's instance is highly suspect as no independent public witness was associated at any stage of the investigation. On the same set of evidence, co-accused have already been acquitted. The prosecution was unable to establish if the appellant hatched conspiracy with co-accused. Reliance has been placed on *Shaikh Uma Ahmed Shaikh and Anr.vs.State of Maharashtra* AIR 1998 SC 1922; *Union of India and Ors.vs.Sushil Kumar Paul and Ors.* AIR 1998 SC 1925; *Mohanlal Gangaram Gehani vs.State of Maharashtra* AIR 1982 SC 839; *Sarvesh Narain Mishra vs. The Vice-Chancellor, Aligarh Muslim University Aligarh* AIR 1982 SC 843; *Peerzada Ahmad Saleem Khan vs. The Vice-Chancellor, Aligarh Muslim University Aligarh* AIR 1982 SC 843; *Abbas Zamir vs. The Vice-Chancellor, Aligarh Muslim University Aligarh & Ors.* AIR 1982 SC 843; *Hafiz M.Ilyas and Others The Vice-Chancellor, Aligarh Muslim University Aligarh* AIR 1982 SC 843; *Prahlad Singh vs.State of Madhya Pradesh* AIR 1997 SC 3442; *Rajasthan State Road Transport Corporation vs.Kailash Nath Kothari and Ors.etc.* AIR 1997 SC 3444 and *Ganpat Singh & Ors.vs.State of Rajasthan* (1997) 11 SCC 565. Learned Additional Public Prosecutor urged that no valid reasons exist to disbelieve the complainant's testimony who categorically identified the appellant to be one of the assailants in her deposition before the court. Certain recoveries were effected at the appellant's instance.

5. Robbery took place on 22.10.2003 at around 4.30 p.m. The incident was reported to the police promptly and DD No.16A (Ex.PW21/A) came into existence at Police Station Moti Nagar at 5.10 p.m. In her complaint (Ex.PW-2/A), the complainant-Nisha Goel gave graphic account

as to how and in what manner, she was robbed of cash ₹4,50,000/- and jewellery articles when she was alone at her residence. She described broad features of the assailants and claimed to identify them if shown to her. The victim had no ulterior motive to fake the incident of robbery. The culprits were not named in the FIR. She had no prior acquaintance or familiarity with the appellant and his associates to falsely implicate them in the incident.

6. During investigation, the appellant was arrested in case FIR No.607/03 Police station Mehrauli. He gave disclosure statement in the said proceedings regarding commission of crime in this FIR. On getting information from the police of Police Station Mehrauli about the disclosure statement, on 6.1.2004 PW-21 (Insp.Satyavir Janola) got his production warrants issued. On 12.01.2004, the appellant was produced from judicial custody in muffled face. After seeking court's permission, he was interrogated outside the court and was arrested vide arrest memo Ex.PW-8/A. He made disclosure statement (Ex.PW.8/B) which he declined to sign. PW-21 (Insp.Satyavir Janola) deposed that on 21.01.2004 after obtaining five days police custody remand, he interrogated the appellant after his medical examination. The appellant pointed out the place of occurrence and pointing out memo (Ex.PW-21/D) was prepared on 22.01.2004. Pursuant to supplementary disclosure statement (Ex.PW.21/E) made on 24.01.2004, he led the police team to House No.E-1293, Dabua Colony, Faridabad to recover the robbed money from one Prem Shankar Tiwari. Prem Shankar Tiwari met them and handed over him ₹48,000/- stating that the accused had given him ₹55,000/- and that was the amount left after he (the appellant) had taken back ₹7,000/-. ₹48,000/- were seized vide seizure memo (Ex.PW5/A).

7. During investigation, application for conducting Test Identification Proceedings was moved. The appellant declined to participate in the TIP proceedings. Adverse inference is to be drawn against him for not participating in the TIP proceedings.

8. Crucial testimony to establish the appellant's guilt is that of PW-2 (Nisha Goel) who proved the version given to the police at first instance without major variation and deposed that on the day of occurrence, she was alone at her residence A-240, Sudershan Park, Moti Nagar on the first floor. When her son aged around two years, was getting down from the stairs, she went behind him to bring him upstairs. In the meantime, at around 4.30 p.m. two 'boys' suddenly arrived; one of them closed the door of staircase and the other put his hand on her mouth. The assailants brought both of them upstairs. After tying her with her saree in the internal room, she was asked to handover the key of the almirah. By chance, the keys were already on the almirah lock.

9. Nisha (PW-2) identified the appellant to be one of the said assailants. She was unable to identify the other one. She further deposed that after the intruders removed two/three artificial sets, three bundles of GC notes of ₹10 denomination, two gold mangalsutra and 3/4 gold rings; they asked for more money by calling her name. Out of the purse kept in the almirah, they took key of the house and took ₹4,50,000/- from the trunk along with 3 or 4 gold sets worth ₹3-4 lacs. They also removed her wearing gold chain. After putting all the articles in a bag, they fled the spot cutting the telephone wires.

She produced the currency notes, collectively exhibited as Ex.P1. She was, however, fair enough to state that she was not aware

whether these were the same notes which were taken on 'superdari' by her husband.

10. In the cross-examination, she, in fairness, admitted that before identifying the appellant in the court, she had seen him in the Police Station, Moti Nagar. She elaborated that before, conducting TIP proceedings, the police had brought the appellant's photograph to her house and had shown it. She informed that after seeing the photograph, the appellant was recognized to be one of the authors of the crime. Thereafter she identified him in the Police Station. She denied the suggestion that her identification was due to his exposé in the Police Station.

11. On scanning the entire testimony of the victim, it reveals that no material discrepancies/infirmities could be extracted to disbelieve her version. The complainant had no extraneous consideration to falsely identify and implicate the appellant to be one of the assailants as there was no previous animosity between them. She was even not acquainted with him. Being the victim, she must be interested to bring the real offender to book. She had direct confrontation with the assailants for sufficient duration during day time and had reasonable and proper opportunity to recognize their broad features to identify them. During her examination in the court, she without any hesitation identified the appellant to be one of the assailants and assigned a specific and definite role to him in the crime. Since she was unable to recognize the other assailant, she fairly declined to identify him; it resulted in his acquittal. As observed above, the appellant was not arrested by the police of Police Station Moti Nagar. It was the police of police station Mehrauli who had arrested the accused in case FIR No.607/03. When the appellant made disclosure statement about the commission of

crime in this FIR, the police of Police Station Moti Nagar got to know about his involvement. Only thereafter, an application for conducting Test Identification Proceedings was moved in which the accused declined to participate. It was not elaborated by the appellant as to when he was shown to the complainant in the police station.

12. Purpose of TIP is to ensure that the investigation is going on the right track and it is merely corroborative evidence. Actual identification must be done in the court and that is the substantive evidence. It is the identification in the court which is of utmost importance. In *Rabinder Kumar Pal @ Dara Singh vs. Republic of India* (2011) SCC 490, the Supreme Court held as under:-

“.....Photo identification and TIP are only an aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of the procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation.”

13. In view of the above, the appellant's contention that identification of the appellant in the court for the first time is of no relevance is devoid of merits. In the judgment *Shaikh Uma Ahmed Shaikh and Anr. vs. State of Maharashtra* AIR 1998 SC 1922 (supra), the identification

by the police officials was not accepted for various reasons detailed therein. Same is not the position in the instant case. The victim had no sound reasons to falsely identify the appellant in the court as she was not having any familiarity with him before the occurrence.

14. The material facts stated by the complainant in her examination before the court remained unchallenged and unrebutted. The accused did not claim his presence at that particular time at any other specific place. The accused did not examine any witness from his family to show if at the relevant time he was present at his residence or place of work.

15. The prosecution has relied upon the circumstance of recovery of ₹48,000/-, part of the booty at the appellant's instance. The Trial Court for the reasons detailed in the judgment did not believe it. PW-6 (Prem Shankar Tiwari) in his deposition admitted that he was acquainted with the accused as his maternal uncle had installed a generator in their bank and the accused used to frequently visit the bank for running it. He further admitted that on 23.01.2004, the accused in custody was brought by the police at Central Bank, Hari Nagar Branch, Badarpur. He, however, opted not to support the prosecution regarding ₹48,000/- to have been given by him to the police. He was declared hostile and was cross-examined by the learned Additional Public Prosecutor. In the cross-examination, he denied to have given statement Mark PW-6/A to the police. He, however, admitted that Ex.PW5/A i.e. seizure memo of ₹48,000/- contained his signatures. The prosecution case as per appellant's disclosure was that initially ₹55,000/- out of the robbed amount were entrusted by him to PW-6 (Prem Shankar Tiwari). Since he had taken back ₹7,000/- from him after about fifteen days from Diwali, remaining ₹48,000/- was handed over to the police by Prem

Shankar Tiwari (PW-6) which was seized vide seizure memo (Ex.PW5/A). This recovery of ₹48,000/- has been proved by PW-21 (Insp.Satyavir Janola). There are no reasons to disbelieve the testimonies of police officials on this aspect. Huge amount of ₹48,000/- is not expected to be planted by the police on their own. There was obvious reason for PW-6 to resile from his previous statement (Mark Ex.PW-6/A) as he did not want to incriminate himself in the occurrence. Nevertheless, it does not discredit the testimonies of the police officials particularly when he (PW-6) admitted his signatures on seizure memo (Ex.PW-5/A). PW-6 did not lodge any complaint against any police officials for getting his signatures on Ex.PW-5/A forcibly. Undisputedly, neither the police officials nor the complainant had any acquaintance or familiarity with PW-6 to falsely rope him in the case. The police was unaware of the role attributed to PW-6. When the appellant made supplementary disclosure statement (Ex.PW-21/E), PW-6's name surfaced and he was later on contacted by the police officials. Thus, discovery of a new 'fact' is a material incriminating circumstance under Section 27 of the Evidence Act to connect the appellant with the crime.

16. Complainant's husband PW-5 (Mahesh Goel) corroborated PW-21's version in entirety. He testified that after the appellant's apprehension, he was interrogated and his disclosure statement came into existence. Pursuant to it, he led them to Central Bank, Hari Nagar Branch, Badarpur where Prem Chand Tiwari met them. Admitting receipt of ₹55,000/-, he produced ₹48,000/- of identical denomination of cash robbed from his house by him. ₹48,000/- were seized vide seizure memo (Ex.PW-5/A) bearing his signatures at point 'B'. This recovery was effected in January, 2004.

17. Acquittal of co-accused persons per se is of no benefit to the appellant. Every case has to be decided on the evidence adduced therein. The said acquittal was primarily due to victim's inability to recognize and identify the other assailants. The court can well understand the mental state of the complainant who was criminally intimidated at the time of incident. Non-identification of co-accused does not absolve the culpability of the present appellant.

18. The impugned judgment based upon fair appraisal and appreciation of the evidence whereby the culpability of the appellant has been proved to the hilt deserves no intervention. Minor inconsistencies or discrepancies highlighted by the appellant's counsel are of no consequence as they do not go to the root of the prosecution case.

19. The appeal lacks merits and is dismissed. All pending application(s) also stand disposed of. Trial Court record along with the copy of the order be sent back forthwith.

(S.P.GARG)
JUDGE

AUGUST 08, 2016/sa