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

% *Date of Decision: 2nd June, 2016*

+ **CRL.A.919/2015**

RAJENDER KUMAR @ BABBAN Appellant

Through: Mr.M.K.Dua & Mr.Surendra Kumar,
Advocates with appellant in custody

versus

STATE Respondent

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

PRATIBHA RANI, J. (Oral)

1. This appeal has come up for hearing pursuant to the directions issued for expediting hearing in appeals filed by persons in custody (with sentence upto five years).
2. The instant appeal has been preferred by appellant Rajender Kumar @ Babban impugning his conviction by judgment dated 29th May, 2015 and order on sentence dated 4th June, 2015, whereby the appellant has been sentenced as under:-

Under Section 307 IPC	RI for 4 years and fine of ₹2500/, I/D SI for 1 month.
Under Section 393 IPC	RI for 3 years and fine of ₹2500/, I/D SI for 1 month.
Under Section 174A IPC	SI for a period of one month.

3. The appellant has been convicted for committing the offence

punishable under Sections 307/393/174-A IPC by learned ASJ relying on the testimony of the complainant Vikas Anand who identified the appellant to be one of those persons who tried to commit robbery and fired towards him.

4. In brief, the prosecution case is that on 5th June, 2010 Vikas Anand, who was working as a distributor of Tata Tele Services Limited, Shastri Nagar, at about 9.35 p.m. after closing his showroom left for his home in his Innova car No. DL 3C BR 9900.

5. When he reached near his home at about 10 p.m. and parked his vehicle, he along with his laptop bag proceeded towards his house. At the front gate of his house he saw four boys on two motor-cycles and all of them were wearing helmets. They asked him to hand over his bag or they will shoot him. He snubbed them and started running along with his bag, threw the bag in the house of his neighbour and raised alarm. One of those motorcyclists fired towards him but missed the fire. Thereafter all of them fled from the spot. He prayed for legal action against them.

6. On the basis of above statement FIR No.129/2010 under Sections 307/398/506/34 IPC was registered at PS Patel Nagar.

7. After investigation of this case, initially untraced report was sent to the Court on 7th October, 2010.

8. Before submitting the untraced report Sahil @ Babloo @ Azad was arrested and interrogated who in his disclosure statement named the appellant Rajender Kumar @ Babban@ Palta to be involved. The appellant Rajender Kumar was arrested and interrogated but nothing relating to this occurrence could be revealed. The other accused persons except Rajender Kumar were also sent for Test Identification Parade but none of them could be identified by the complainant. Despite the investigation being kept

pending for a long time since there was no material to send it for trial untraced report was filed.

9. On 30th May, 2011, the investigation was re-opened and Inspector Sunil Kumar was handed over the investigation of this case. He collected one CD from the complainant containing the CCTV footage of the incident in question. All the assailants were found wearing helmets and none of them could be identified.

10. Thereafter, the complainant revealed that similar incident had also taken place with his employee Rahul Chaurasia in respect of which FIR No. 306/10 under Sections 392/397/411/34/120-B IPC was registered at PS Keshav Puram and in that case two persons, namely, Ajay @ Tarsen and Surender Pal @ Surender were arrested. Supplementary statement of complainant was recorded wherein he stated that he had over-heard his employee Rahul's conversation on phone that the incident happened with the complainant was the result of information given by Rahul to Surender Pal, Ajay @ Tarsen, Annes Khan and Rajender @ Babloo @ Palta, the appellant herein. Again search was made for the appellant Rajender Kumar but he was not traceable and his mobile was also found switched off. He was declared as proclaimed offender. The other persons named by Rahul on phone which was over-heard by the complainant were also interrogated but nothing incriminating was found against the suspects Surender Pal, Ajay @ Tarsen and Annes Khan hence they were not arrested in this case. However, the appellant Rajender Kumar who was declared as proclaimed offender was arrested as P.O. and produced before the concerned Court on 12th September, 2012 and arrested in this case. His police remand was taken and date for TIP was fixed but he refused to take care in TIP. Later on the complainant Vikas

Anand identified Rajender Kumar in Tis Hazari Court Complex to be one of the person in respect of the incident pertaining to case FIR No.129/2010 PS Patel Nagar.

11. After completion of the investigation charge-sheet was filed against him.

12. After considering the testimony of the prosecution witnesses learned ASJ convicted the appellant for committing the offence punishable under Section 393/394/34 IPC as well under Section 25 of the Arms Act and sentenced as above. Learned ASJ also sent the copy of the judgment to DCP (Central) with the direction to take action against the IO SI Ramesh Chand for the casual approach adopted by him in not getting his Test Identification Parade conducted.

13. I have heard learned counsel for the appellant and learned APP for the State. The appellant who has been produced in custody has also been heard. He was arrested in this case as a PO and prior to that this case has been sent as untraced after interrogating him. He had no reason to abscond when the case was already sent as untraced. He contends that he was wrongly got declared as proclaimed offender in this case and that he was not aware of the re-opening of the case.

14. The complainant in his statement has as nowhere stated that he had seen the face of the any of the motorcycle borne robbers. The incident had taken place at 10 p.m. and as per the complainant all of them were wearing helmets so there was no occasion of seeing and identifying the person involved in the occurrence nor he stated so in the FIR.

15. The case has been re-opened on the basis of supplementary statement made by the complainant Vikas Anand that he has over-heard his employee

Rahul Chaurasia talking on phone that the incident with the complainant had happened on the basis of information given by him to Surender Pal, Ajay @ Tarsen, Annes Khan and Rajender @ Babloo @ Palta, the appellant herein. Even as per the prosecution on interrogation all these suspects were interrogated but there was no material to connect them with that occurrence. So far as Rajender Kumar, the appellant before this Court is concerned, cross-examination of Vikas Anand, PW-1 is to the following effects:

“I had left the shop at about 9:45 p.m. along with our Manager Mr.Sanjiv Bajaj. At that time no employee was present at our office. The distance between the shop and my residence is about 6 kms. I reached near our residence at about 9:55 p.m. There is a gali in between the Gurdwara and my house. The gun fire shot took place diagonally opposite my house. It is incorrect that I had not seen the faces of the accused. They were wearing helmets without any glass. The helmets covered only their heads and the chin in the front. Confronted with the statement, which is marked as PW1/A where it is not so recorded. I had not noted down the registration number of the vehicle of the accused persons. However, I can tell the colour of the motorcycles. Confronted with the statement, which is marked as PW1/A where it is not so recorded. The accused had not told me to hand over the bag to me otherwise he will shoot me. I was about 5-6 ft. away when the gun fire shot took place. When the gun fire shot took place I had not fled to my home. When the gun fire shot took place my family members comprising of father, mother, brothers (one real brother and one cousin), sister-in-law (bhabhi) and sisters, were present at my home. I had not called for help from my family members at the time of gun fire shot. I had not made any call to 100 number. However, my neighbour had called the police at no.100, who was passing through the said place at the time of gun fire shot. My bag contained cash amount of ₹ 6,00,000/-. I had told the police regarding the cash lying in the bag. (Confronted with the statement Ex. PW1/A where it is not so recorded). Local Police reached within 15-20 minutes and PCR van reached after 10 minutes of reaching of local police. The police official did not

find any fired bullet/cartridge at the spot. I am not aware if the police had recorded the statement of other witnesses at the spot because I had left the spot for my residence. Police remained at the spot for about 1 ½ hours. I am not aware as to what proceedings were conducted by the police at the spot. I had shown the CCTV footage to the police but did not supply its recording to the police at that time. I had supplied the recorded to the police about 1 or 1 ¼ month later on the notice of SI Ramesh Kumar. I cannot tell the date of supply of the recording of CCTV footage. It is correct that the faces of the accused persons were not visible in the CCTV footage. Vol. They were wearing helmets. It is wrong to suggest that CCTV footage is manipulated. The police had asked me to produce the recording of CCTV footage and photographs developed from the recording of the CCTV footage.

It is correct that I have been mentioned as a witness in a case of PS Keshav Puram which was registered on the complaint of employee of my office. It is correct that I called the IO of present case and told him that the accused Rajender who is facing trial in the present case, is present at Rohini Court in the case of PS Keshav Puram as mentioned above as accused Rajender was declared as proclaimed offender in the present case. Accused Rajender was arrested on the same day by the police. It was a Court date at Rohini Court complex in the case PS Keshav Puram. I had not heard Rahul talking about the present case with anybody. It is wrong to suggest that I have levelled false allegations against the accused Rajender. It is wrong to suggest that no gun shot was fired by the accused. It is wrong to suggest that no such incident took place or that I was not victimized by the accused. It is wrong to suggest that I have deposed falsely.”

16. The photographs of the CCTV footage are placed on record and the motorcyclists wearing helmets cannot be identified from the photographs as their faces are not visible. The fact that the other suspects arrested in this case and sent for Test Identification Parade could not be identified confirms that face of the none of the offender was seen by the complainant at the time

of incident. Even in the complaint exhibited as PW-1/A, the complainant did not state that he had seen face of any of the offenders. Rather the words used by him are that he could identify them with their height and physique (*kad kathi se pehchaan sakta hoon*).

17. The appellant had already been shown to the complainant by face prior to filing application for TIP which is clear from the above cross-examination wherein he has stated that he informed the IO about the presence of Rajender Kumar in Rohini Court in the case of PS Keshav Puram wherein Rajender was appearing as an accused and thereafter he was arrested on the same day by the police. It only established that the complainant had seen Rajender prior to his appearance in Rohini Court and that is why he could inform the IO and then appellant Rajender was arrested as proclaimed offender. Thereafter his application for TIP was filed for which he refused and rightly so. If the person to be identified during Test Identification Parade has already been shown to the witness, that accused has a right to refused for Test Identification Parade claiming that he had already been shown to the witness(es).

18. It is also worth mentioning here that though the case was sent for trial on the basis of supplementary statement by the complainant about the conversation of Rahul Chaurasia overheard by him but in that case Rahul Chaurasia should have been an accused as master mind/main conspirator but he was not sent to face trial in this case. The complainant has admitted that in respect of the incident with Rahul Chaurasia which was investigated by Special Cell, he had seen the appellant Rajender Kumar in the office of Special Cell. He has also stated that he identified the accused in Tis Hazari Court complex on 16th November, 2015.

19. The appellant had been convicted for the offence punishable under Sections 307/393/174-A IPC without there being any material against him. He had been earlier also interrogated immediately after the occurrence. Despite his police remand, there was no evidence to connect him with the offence pertaining to FIR No. 129/2010 at PS Patel Nagar. Even in the CCTV footage, face of none of the motor-cyclists can be seen. The complainant never claimed, while lodging the FIR, of having seen or even having a glimpse of any of the offender, the appellant being initially arrested on the basis of disclosure statement made before the Special Cell, North West District. There was no material against him to convict him in this case. Hence, the impugned judgment dated 29th May, 2015 and order on sentence dated 4th June, 2015 are set aside.

20. In last para of the judgment, learned ASJ has directed initiation of the departmental action against SI Ramesh Chand for not sending Rajender for Test Identification Parade. These directions have been issued in violation of the principles of Natural Justice without giving an opportunity of being heard to SI Ramesh Chand (Rel. *State of Gujarat vs. Kishanbhai etc (2014) 5 SCC 108*). Otherwise also Rajender had been seen by the complainant in the office of Special Cell. The complainant did not claim in FIR that he could identify the offenders. Other suspects being sent for identification were not identified by the complainant, no departmental action should have been recommended in this case against the IO.

21. Thus, departmental action, if any initiated against SI Ramesh Chand also stands quashed.

22. In the given facts and circumstances of the case and the evidence adduced by the prosecution, I am of the considered opinion that the entire

case of the prosecution is filled with lacunas, contradictions and improbabilities.

23. Thus the prosecution had no material to prove its case against the appellant beyond reasonable doubts.

24. The appeal is allowed. The appellant is acquitted of the charges framed against him. He be released forthwith if not wanted in any other case.

25. TCR be sent back alongwith copy of this order.

26. A copy of this order be sent to the concerned Jail Superintendent for information and necessary compliance.

PRATIBHA RANI, J.

JUNE 02, 2016

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