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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. 1087/2012**

Judgment reserved on : 12th September, 2017
Judgment pronounced on: 12th October, 2017

Rahish @ Ganja Appellant
Through: Mr. S. B. Dandapani, Advocate

versus

STATE Respondent
Through: Mr. Amit Ahlawat, APP for the State.

CORAM:
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

1. The present appeal has been instituted under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against the impugned judgment dated 18.10.2011 and order on sentence dated 24.10.2011 by which the appellant has been convicted for the offence under Section 392 read with Section 397 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC'). The appellant has been sentenced to undergo rigorous imprisonment for a period of 10 years with a fine of Rs. 10,000, in default thereof, to further undergo simple imprisonment for a period of one month.
2. The case of the prosecution as observed by the Trial Court is that:
"... on 04.08.2010 on receipt of DD No.28A. ASI Om Pal Singh along with Ct. Afzal reached at Ring Road in front of Richi Rich Restaurant near Rana Motors and found two motorcycles one of accused and other of victim and other of public persons had gathered there. ASI Om Pal Singh left Ct.

Afzal at the spot and he himself went to India Hospital and collected the MLC of injured Rishabh Sehgal who was under treatment and also recorded his statement. The injured Rishabh Sehgal informed him that he was working with Thomas Cook India Pvt. Ltd. and on 04.08.2010, he was going to his office on his bike bearing No. DL-8S-AC-3598 make Bajaj Discover and when he reached in front of Rana Motors Wazirpur at about 7.30 PM, two boys came on a motorcycle of black colour make Pulsar, who were aged about 30 years and one of them was stoutly built, whereas other was thin. He further informed the police that he tried to overtake them but those boys blocked his way by stopping their motorcycle in front of his motorcycle and got him down and started firstly beating him with the helmets and then also with kicks and fists and blows after which they tried to snatch his bag as a result he fell down on the ground. One of them was having a sharp object who had given the blows with that object on his neck on the right side upto back, on right cheek and right ear and the other boy removed (victim's) his chain from his neck, his wrist watch and Rs. 40,000/- from the pocket of his trousers belonging to his company. The complainant further informed the police that while both the accused were trying to run away and were in the process of starting their bike, he (victim) removed the keys of their bike and in the meantime public persons also gathered there. Finding no option the accused ran away from the spot leaving their motorcycle at the spot itself."

3. The prosecution examined 10 witnesses to prove its case; statement of the appellant was recorded under Section 313 of the Cr.P.C. wherein the appellant denied all the allegations levelled against him, stated himself to be innocent, pleaded false implication and also that nothing has been recovered from his possession; that the officials of the Special Cell kept him in wrongful confinement for

several days and he had been given beatings; that he was forcefully made to sign blank papers, which were then used to incriminate him; that his photographs were taken while he was in police custody at Police Station - Patel Nagar, which were later shown to several public persons.

4. After considering the evidence on record and the contentions of both the parties, the Trial Court found that prosecution was able to prove its case beyond reasonable doubt and thus held him guilty of offence under Section 392 read with Section 397 of the IPC. Hence, the present appeal.
5. The appellant contends that the testimony of PW3 is neither reliable nor trustworthy as PW3 has falsely implicated him in this case owing to the fact that a sudden fight took place between the appellant and the complainant whereby both suffered injuries; that from the testimonies of PW-8 and PW-9, it can be clearly made out that independent witnesses were present at the spot of incident, yet there was not a single independent prosecution witness; that PW-3 was shown the photograph of the appellant before the Test Identification Parade (hereinafter referred to as 'TIP'), hence rendering his TIP infructuous; that there was no recovery of any article or of the sharp object from the appellant, which was allegedly used for inflicting injuries upon PW-3; that the appellant is from a very poor family comprising of his old mother, his wife along with two children, all of whom are dependent upon the appellant.

6. Mr. Amit Ahlawat, learned APP for the state submits that the Trial Court has appreciated the evidence of the prosecution in right perspective, hence, the impugned order does not warrant any interference by this Court. He further contends that the appellant has been involved in a number of criminal cases in the past and does not deserve any leniency with respect to the sentence and the fine imposed on the appellant.
7. I have heard the learned counsel for the parties and have also perused the material available on the record.
8. At this stage, it is necessary to examine the testimonies of the victim PW3 (Rishabh Sehgal), PW4 (Dr. U.K. Ghosh) and PW10 (ASI Ompal Singh).
9. During the examination-in-chief, PW3 Rishabh Sehgal deposed as under:

“On 04.08.2010 I was going to my office on my bike bearing No. DL-8S-AC-3598 make Bajaj discover. When I reached in front of Rana Motors Wazirpur at about 7.30 PM, two boys came on a motorcycle of black color Pulsor aged about 30 years. One of them was stickily built and other was thin. I was in the process to overtake them but they blocked their motorcycle in front of my motorcycle and got down from their bike. After getting down they started firstly beating me with the helmets. They also had beaten me with kicks and fist blows and they tried to snatch my bag as a result I fell down on the ground. One of them was having a sharp object. He had given the blow with that object on my neck on the right side upto back, on right cheek and on right ear. The other removed my chain from my neck and wrist watch. They also removed Rs40 thousand from the pocket of

my trousers. The cash was belonging to my company. Both were trying to run away from the spot and while they were in the process of starting the bike I removed the key of their bike. Public persons also gathered there. Finding no option they ran away from the spot leaving the motorcycle while I and the public persons were raising alarm. The number of their bike is DL-8S-7925. I made call on 00 number. PCR came to the spot and took me to Indian Hospital. Police official also came from the police station. They took my statement in the hospital and same is EX PW 3/A bearing my signature at point A. Vol. I got 200 stiches and also got two units of blood.

xxxxx I remained hospitalized in Indian Hospital for 24 hours i.e. from 04.08.2010 to 05.08.2010 and I was discharged late in the evening on 05.08.2010. My statement was recorded 3-4 times in the present case and the first statement was recorded in the hospital. Police officials met me for the first time on 04.08.10 late in the night at about 1-2 AM. I was not fully conscious when my statement was recorded by the police officials. My parents were present in the hospital when police came there and also when my statement was being recorded. Vol. My father was present there. It is correct that when I was taken to the hospital I was unconscious. Again said I was semi conscious. I was not able understand what was happening around me. Vol. but I knew what was being asked from me and I could answer. It is wrong to suggest that I was totally unconscious when I was admitted in the hospital and could not understand at all what was going around me.”

10. PW4 Dr. U.K. Ghosh deposed as under:

“...On examination I found that he had four very deep cuts, on which he was immediately taken to the operation theatre where I carried out immediate plastic repair of all the injuries. The patient was in serious condition and had to be given blood. He was

also under shock and had to be admitted in the hospital for few days. The MLC of Rishabh prepared by me is Ex PW4/A bearing my signatures at point A. The nature of injuries was sharp and dangerous according to me. The opinion given at point B has not been given by me because it had come to me for opinion. I say that the injurious were not grievous but dangerous because main artery i.e. carotid artery had been damaged which could have been prove fatal to the life of the patient if not treated on time.”

11. PW10 ASI Ompal Singh deposed as under:

*“On 04.08.2010 I was posted at PS Ashok Vihar. On that day on the receipt of DD No.28A I along with Ct. Afzal reached at ring road in front of Richi Rich Restaurant near Rana Motors where we found two motorcycles. One was of accused persons and the other was of victim. I found many public persons standing there but eye witness was not there. I left Ct. Afzal to the spot. I went to Indian Hospital where I collected the MLC of Rishabh Sehgal who was under treatment. After some time when he was fit for giving his statement I recorded his statement which is already Ex PW 3/A bearing signatures of Rishabh Sehgal at point A attested by me and bearing my signatures at point B. Thereafter I came back to the spot and prepared rukka which is Ex PW 10/A bearing my signatures at point A.
xxxxx It is wrong to suggest that even patient was unable to open his mouth because of stiches and pain. I left the hospital at about 9:45 PM. I had noted in the statement of the complainant about the physical features, facial features as well as the color of clothes worn by the assailants at the time of the incident.”*

I. Testimony of complainant (PW-3)

12. The counsel for the appellant contends that the statement of PW3 is neither reliable nor trustworthy as a false FIR was registered against the appellant out of vengeance as a fight had taken place between them. The case set up by the appellant in his defence before the Trial Court was that he has no role to play in the alleged incident and he has been falsely implicated in the present case by the Investigating Officer and the complainant however, later he admitted to the extent that a sudden fight occurred between him and PW-3 wherein certain injuries were received by both the parties.
13. PW-3 and PW-10 deposed on the similar lines and supports the case of the prosecution. The MLC report further fortifies the statement of PW-3. In his examination-in-chief he deposed that 'they first start beating him with the helmets. They had also beaten me with kicks and fist blows that they tried to snatch my bag as a result I fell down on the ground. One of them was having a sharp object. He had given the blow with that object on my neck on the right side upto back, on right check and on right ear'. PW-4, Dr. U.K. Ghosh deposed that he 'examined the patient Mr. Rishabh who was having multiple injuries on his face. On examination, I found that he had four very deep cuts.....'. The statement of the victim Rishabh Sehgal (PW-3) is trustworthy and the allegations against the accused regarding robbery and inflicting injuries with sharp edged weapon stands corroborated and established.

II. Recovery of the weapon

14. The learned counsel for the appellant contends that the prosecution failed to recover any sharp object from the appellant which was allegedly used for inflicting injuries upon PW3.
15. In ***Ranjeet and Ors. Vs. State (Crl.A. No.214/2016)***, it was observed by this court that non-recovery of the weapon used is of no consequence.
16. In ***Sanjay Shankar Swami @ Sanjay Kumar Vs. State (NCT) of Delhi (Crl. A. 206/2010)***, this Court held that,

“9. Learned counsel for the Appellants have further contended that Appellant Ramesh has been acquitted for offence under Section 25 Arms Act and thus it will have to be deemed that there was no recovery of weapon of offence from him, further the alleged knife shown by Appellant Sanjay Kumar has not been recovered. In the absence of proof of recovery the Appellants cannot be convicted for offence under Section 397 IPC. In the present case the testimony of PW5 is amply clear wherein he stated that Appellant Ramesh showed him katta and Appellant Sanjay Kumar showed him a knife. Thus, there is use of weapons. Conviction under Section 397 IPC is not based on the consequential recovery but on the user. If the Court is satisfied that a deadly weapon is used then Section 397 IPC is clearly attracted. In view of the testimony of PW5, I find no infirmity in the learned Trial Court convicting the Appellants for offence under Section 397 IPC and Section 392/34 IPC.”

17. In the present case, though no sharp object was recovered but deep cuts were found on the body of PW-3. PW4 proved the MLC Ex.PW4/A and opined that injuries were dangerous enough to

prove fatal if he had not been treated on time and the weapon used to inflict injuries on PW-3/complainant was sharp in nature. In view of the above facts and circumstances, it is abundantly clear that PW3 was attacked by a sharp weapon. Thus, the contention raised by the learned counsel for the appellant that no sharp weapon was recovered from the appellant holds no ground.

III. TIP of the appellant

18. The learned counsel for the appellant further submits that PW3 was able to identify the appellant during the TIP as he has already been shown his photograph before conducting the TIP, rendering the TIP proceedings infructuous.
19. On perusal of the testimonies, it is clear that the TIP was held on 11.11.2010 and PW3 had given his statement to PW10 on the date of incident/04.08.2010, wherein he described the appearance as well as the colour of the clothes worn by the assailants when he was attacked. It is amply clear that PW3 was able to describe the physical appearance of the appellant on 04.08.2010 and that he participated in the TIP proceedings and correctly identified the accused/appellant.
20. Further, it is a settled principle of law that if from other circumstances the accused is proved to be guilty then non-identification will not vitiate the case of the prosecution. In ***Prakash v. State of Karnataka*** reported in (2014) 12 SCC 133, the Supreme Court observed that:

“16. However, if the suspect is known to the witness or victim or they have been shown a photograph of

the suspect or the suspect has been exposed to the public by the media no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In Visveswaran v. State it was held:

“The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence.”

21. In view of the above, the ground urged on behalf of the counsel for the appellant/accused regarding TIP proceedings, does not hold any merit.

III. No independent witness

22. The another contention raised on behalf of the appellant/accused that though many public persons were present at the spot but none has been made a witness by the prosecution, cannot be accepted in view of the decision rendered by the Apex Court in ***Ajmer Singh vs. State of Haryana*** reported in **2010 (2) SCR 785**, which reads as under:-

“16. The learned Counsel for the appellant has submitted that the evidence of the official witness cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned Counsel. It is clear from the testimony of the prosecution witnesses PW-3 Paramjit Singh Ahalwat, D.S.P., Pehowa, PW-4 Raja Ram, Head Constable

and PW-5 Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. In the present case, both the trial court and the High Court by applying recognized principle of evaluation of evidence of witnesses has rightly come to the conclusion that the appellant was arrested and Charas was recovered from the possession of the appellant for which he had no licence. We find no good reason to differ from that finding.”

23. It is a trite law that in the event of non joining of independent witness during trial, the testimonies of the other prosecution witnesses should be scrutinized with a fine-tooth comb. In

Kalpnaath Rai Vs. State (through CBI) reported in ***AIR 1998 SC 201***, it was observed by the Apex Court that :

“91. There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of the police officer is found acceptable it would be an erroneous proposition that court must reject the prosecution version solely on the ground that no independent witness was examined.”

24. The mere fact of non-joining of a public witness, would not *ipso facto* make the evidence of the police witnesses unreliable or untrustworthy but the fact that no public person joined cannot vitiate the case of the prosecution in entirety
25. Thus, this contention of the learned Counsel is fallacious and hence is rejected. Further, it is apparent on record that the appellant is a habitual offender and 18 other criminal cases are registered against him.
26. For the reasons abovementioned, the impugned judgment does not call for any interference. The conviction and the sentence awarded to the appellant by the Trial Court, is thus, upheld.
27. Accordingly, the present appeal is dismissed.

SANGITA DHINGRA SEHGAL, J

OCTOBER 12, 2017

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