

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

% Reserved on: 18th October, 2016
Decided on: 22nd March, 2017

+ **CRL.A. 596/2016 & CrI.M.B. 1266/2016**

VICKY Appellant
Represented by: Mr. Dhan Mohan with Ms.
Tanu B. Mishra, Advs.
versus

THE STATE (GNCT OF DELHI) Respondent
Represented by: Ms. Rajni Gupta, APP for the
State.

+ **CRL.A. 650/2016 & CrI.M.B. 1355/2016**

HARISH @ ZAHAR Appellant
Represented by: Ms. Manika Tripathy Pandey
with Mr. Ashutosh Kaushik,
Advs.
versus

STATE Respondent
Represented by: Mr. Ravi Nayak, APP for the
State

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Convicted for offence punishable under Sections 395/34 IPC Vicky and Harish @ Zahar challenge the impugned judgment dated 10th May, 2016 and the order on sentence dated 16th May, 2016 directing them to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹20,000/- each.
2. Assailing the conviction, Learned Counsel for Vicky submits that

there is contradiction in the examination-in-chief and cross examination of PW-7 Pawan Bishnoi. He stated that he saw the accused persons for the first time in PS Ashok Vihar on 30th August, 2014 in morning hours. He belied the time of arrest as it was shown as 7:30 P.M. on 30th August, 2014 in the arrest memo. No public witness was associated at the time of arrest though the area wherefrom Vicky was allegedly arrested is a crowded area. Vicky and Harish were forcibly removed from their respective houses and falsely implicated. The MLC does not specify the probable time of injury. Further as per the opinion of the doctor injury could be by fall as well. Alternatively, it is prayed that the appellants be released on the period already undergone.

3. Learned Counsel for Harish @ Zahar submits that the offence punishable under Section 395 IPC is not made out as the prosecution has failed to prove that there were five persons. In the FIR presence of 4-5 persons is mentioned. Onus was on the prosecution to prove that five or more persons were involved in the alleged offence. Thus, benefit of doubt be granted to the appellants. There are material improvements in the testimony of Pawan Bishnoi with respect to the amount of money and description of the accused persons. Harish did not refuse to undergo test identification parade. The alleged recovery from Harish and his identification are doubtful.

4. Learned APP for the State on the other hand submits that Vicky had refused to undergo test identification parade. Further, the phone recovered belonged to the complainant which fact has been proved. Pawan Bishnoi in his deposition specifies the role of Vicky and Harish and states that they were accompanied by three other persons. Thus, offence under Section 395 IPC has been proved beyond reasonable doubt by the prosecution.

5. Process of law was set into motion on 29th August, 2014 when a PCR call was received at about 10:56 P.M. from a mobile number 9868146726 stating that "*lekhram park, quarter police colony, Ashok Vihar, 7-8 Paidal Ladke, chain purse aur phone chhin kar le gaye*". On receipt of DD No. 35A, PW-3 Ct. Mahesh along with PW-10 SI Sandeep reached the place of incident where they got to know that the injured had been taken to BJRM Hospital. PW-10 SI Sandeep recorded the statement of the injured Pawan, who stated that on 29th August, 2014 around 10:45 P.M., his friend Mukesh dropped him in front of the Gurudwara near Lekh Ram Park. When he was going home through the park, 4-5 boys came and surrounded him. Those boys asked him to hand over his chain to them. When he refused, all of them started beating him, took the helmet from his hand and also beat him with his helmet. Thereafter, they snatched his chain and the wallet which contained his voter ID card, 2 ATM cards, metro card, ₹7000-8000/- and his mobile phone of make OBI S520 having numbers 9891300029 and 9599600029. On the basis of the statement of Pawan Bishnoi exhibited as Ex.PW-7/A, FIR No. 523/2014 was registered under Sections 394/34 IPC at PS Ashok Vihar. On 30th August, 2014, Vicky, Harish @ Zahar, 'R' and 'A' were apprehended at the instance of secret informer. One mobile phone of OBI make was recovered from Vicky. Vicky and Harish @ Zahar were charge-sheeted. Qua 'R' and 'A' who were found to be juveniles, inquiry was conducted by the Juvenile Justice Board.

6. PW-7 Pawan Bishnoi deposed in Court in sync with his statement made before the police. He stated that Harish had caught hold of his neck and Vicky robbed his mobile phone. The other accused who was not present in the Court had snatched his gold chain from his neck. During his cross-

examination, he stated that he had not told about the description of the suspects involved in the incident. He clarified that the Police officials had not asked him about the same. He denied the suggestion that he had seen the accused persons for the first time in PS Ashok Vihar on 30th August, 2014 in the morning hours and the police officials told him that they were the same boys who were involved in the incident.

7. PW-5 Shyamadhar Kaushik, who had made the call at 100 number stated that on 29th August, 2014 around 11:00 P.M., when he was walking in the park near the Police Colony, he heard noise of crying at the gate of Lekhram Park. When he reached there, he noticed that 4-5 persons were beating Pawan Bishnoi and on seeing him, they ran away. Pawan Bishnoi told him that 4-5 persons had robbed his mobile, gold chain and purse containing cash.

8. PW-6 Dr. Neeraj Chaudhary, Medical Officer, BRJM Hospital exhibited MLC of Pawan Bishnoi as Ex. PW-6/A prepared by Dr. Akash Sharma. As per the MLC, injuries on Pawan Bishnoi were simple in nature. During his cross-examination, he stated that the injuries sustained by the injured Pawan could be possible if a person falls on hard rough surface.

9. As per the arrest memos Ex.PW-8/B and PW-8/C Harish and Vicky were arrested at 7.45 and 7.30 PM on 30th August, 2014 respectively. Though during the course of arguments it is contended that the appellants were arrested early morning and kept in illegal confinement, however neither from the cross-examination of the witnesses nor in their statement under Section 313 Cr.P.C. the appellants have elicited that they were arrested in the early hours of 30th August, 2014. After their arrest application dated 1st September, 2014 Ex.P-1 was filed for test identification parade of the

appellants. TIP could not be conducted on 3rd and 4th September, 2014. A fresh application was filed being Ex.PW-10/C on 25th September, 2014 for conducting the TIP which was fixed for 1st October, 2014. On 1st October, 2014 Vicky refused to undergo TIP on the ground that his photographs were taken and shown to witnesses. Further TIP of Harish could not be conducted on 1st October, 2014 as he had been shifted to Rohini Jail. As noted above Vicky refused to participate in the test identification proceedings on the ground that Police took his photographs and showed the same to the witnesses. In the statement under Section 313 Cr.P.C. no such fact has been stated. It is not also the claim that on 30th August, 2014 they were arrested in the morning and shown to the witnesses. No doubt there is laxity in the investigation as the TIP ought to have been got conducted immediately after the arrest, however the non-conducting of TIP is not fatal to the prosecution case. TIP is only an aid in investigation. The relevant evidence is the identification in Court qua which no anomaly has been pointed out.

10. The appellants have been convicted for offence punishable under Sections 395/34 IPC which requires participation of five or more accused. Though in the FIR, Pawan stated that there were 4-5 accused, in the Court he stated that there were 5 accused. This is apparently an improvement because if immediately after the incident the victim was not sure as to whether there were 4 or 5 accused he cannot in his statement in Court say with certainty that there were 5 accused. The uncertainty that there were 4 or 5 boys is also evident from the testimony of PW-5 Shyamadhar Kaushik as noted above. Moreover, no description of fifth accused was given nor he was arrested. In view of this evidence of Pawan Bishnoi and Shyamadhar Kaushik, the appellants cannot be fastened with the liability of offence of dacoity

punishable under Sections 395/34 IPC as the prosecution has failed to prove beyond reasonable doubt that there were 5 or more persons. Thus the offence committed by the appellants would fall under Section 392/34 IPC and not Section 395/34 IPC.

11. In view of the evidence on record, conviction of the appellants is modified to one under Section 392/34 IPC and the sentence to rigorous imprisonment for a period of 4 years each and fine of ₹10,000/- each in default whereof to undergo simple imprisonment for a period of three months. In case the fine amount is paid by the convicts the same will be given as compensation to the victim Pawan Bishnoi.

12. Appeals are disposed of accordingly. The appellants will undergo the remaining sentence.

13. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

14. TCR be returned.

Crl.M.B. 1266/2016 in CRL.A. 596/2016

Crl.M.B. 1355/2016 in CRL.A. 650/2016

Since the appeals have been decided the applications seeking suspension of sentence are dismissed as infructuous.

**(MUKTA GUPTA)
JUDGE**

**MARCH 22, 2017
'ga'**