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

+ CRL.A. 983/2016 & CrI.M.B.1853/2016

AMIT TOMAR

..... Appellant

Through : Mr. Biswajit Kumar Patra, Adv.
versus

STATE

..... Respondent

Through : Mr. Arun Kumar Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

ORDER

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11.04.2017

By the judgment impugned in this appeal, appellant has been convicted under Section 392/34 IPC and Section 397 IPC and sentenced to undergo rigorous imprisonment for 40 months with fine of ₹2,000/- and in default of payment of fine to further undergo simple imprisonment for 6 months under Sections 392/34 IPC; sentenced to undergo rigorous imprisonment for 7 years with fine of ₹3,000/- and in default of payment of fine to further undergo simple imprisonment for 6 months under Section 397 IPC. Both the sentences have been directed to run concurrently.

Co-accused Arun @ Vicky was also convicted under Sections 392/34 IPC and he had also preferred CrI.A. No.74/2016 against the impugned judgment, which was allowed by a bench of co-ordinate jurisdiction vide judgment dated 21st July, 2016 and Arun @ Vicky has been acquitted of the offence under Sections 392/34 IPC by extending benefit of doubt. Reasons

given in the judgment dated 21st July, 2016 reads as under:-

“3. I have heard the learned counsel for the parties and have examined the file. The appellant's conviction is primarily based upon the sole testimony of the complainant. However, many glaring infirmities and discrepancies have emerged in the prosecution case, which make it unsafe to convict the appellant without independent corroboration.

4. The occurrence took place on 07.05.2011 and DO No. 29A (Ex. PW-6/A) came to be recorded at PS Saket on 07.05.2011 at around 11.40 P.M. The investigation was assigned to ASI Suresh Chand. In his Court statement he disclosed that after assignment of the investigation, he along with a constable reached the spot and met the complainant. She was, however, not ready to give her statement due to urgency to go abroad. On 18.05.2011 she came at the police station and recorded her statement (Ex. PW-4/A). The complainant, on the other hand, has given an entirely different and conflicting version. She disclosed that on 07.05.2011, the incident was conveyed to the police at 100 after she raised alarm, by three boys passing through that side. She elaborated that on 07.05.2011 she had given an interim complaint Ex. PW-4/A lodged on 18.05.2011 was not the complaint lodged by her. She even stated that on the day of incident, she had visited the police station and had given an interim complaint. The said interim complaint was not on record. Ex. PW-4/A rather records that incident could not be reported on 08.05.2011 as she was in a hurry to go abroad. In the complaint (Ex. PW-4/A), the victim had disclosed about robbery of many articles including mobile phone make Nokia. However, she did not furnish the IMEI number of the mobile phone; she even did not give the SIM number used in the said mobile. The Call Details Record of the mobile allegedly recovered from the appellant's possession was not collected.

5. The appellant was not acquainted with the complainant. In her complaint (Ex. PW-4/A), she did not give the number of the motorcycle on which the assailants had arrived at the spot. She

also did not give the number of the auto and the name of its driver. She gave ages of the assailants to be in between 25 - 30 years. TIP proceedings record appellant's age as 16 years. In her Court statement as PW-4 she did not categorically and in certain terms identified the appellant to be one of the assailants. She was not very sure if the appellant was the individual who had accompanied co-accused - Amit Tomar who had criminally intimidated her by pointing pistol at her. In her examination-in-chief itself she merely stated that the appellant 'might' be the individual who was driving the bike because she was sure that the said accused was taller than the accused who had shown pistol to her. She admitted in the examination-in-chief that she had not seen the appellant's face completely. It was only the side face which was seen by her. In the testimony of the police officials, it has come on record that the assailants were wearing helmets at the time of occurrence. The incident had taken place at 10.30 p.m. during night hours and it was highly difficult for the complainant to have recognised the broad features of the appellant who did not play any role whatsoever in the incident. Allegations against him were that he was driving the motorcycle. He had not even come face to face with the complainant to confront her.

6. The glaring feature of this case is that the driver of the auto in which the victim was travelling at the time of occurrence has not been associated during investigation. His statement has not been recorded. He has not been joined to identify the assailants. Adverse inference is to be drawn against the prosecution for withholding the material witness. The Investigating Officer has not explained as to why the statement of the auto driver was not recorded. His identity has not been established.

7. On 20.05.2011 when the appellant was allegedly arrested along with his co-accused, the complainant was not associated and the appellant was not arrested at her instance. The application for conducting Test Identification Proceedings was moved on 23.05.2011. Only one mobile make Nokia is stated to have been recovered from the appellant's possession at the time

of his arrest. The said mobile has not been connected with the crime as its IMEI number was not mentioned in the complaint. Its call details have not been gathered. It is highly unbelievable that after about 12 days of the incident the appellant would continue to keep the robbed mobile in his pocket without its use and would not dispose it of in the meanwhile. No other article of substantial value belonging to the complainant was recovered from the appellant's possession or at his instance.

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.”

As per the complainant, she was travelling in an Auto-rickshaw on 7th May, 2011 and when she reached near the red light of Press Enclave Road, Malviya Nagar, New Delhi at about 10:45 pm, appellant along with Arun @ Vicky came on a motorcycle and robbed her of a bag containing various articles. Arun @ Vicky was driving the motorcycle; whereas appellant was sitting on the pillion seat. Appellant got down from the motorcycle and sat in the auto-rickshaw in which complainant Ms. Seema Duhan was sitting. He was armed with a pistol which he put on the abdomen of the complainant and snatched her bag. Thereafter, he again sat on the motorcycle and fled with Arun @ Vicky, who was driving the motorcycle. Bag contained two mobile phones. One was SAMSUNG make and the other was NOKIA make. Apart from this, 6,000 Thai currency Bhat, ₹1,800/- in Indian

currency, ATM card, American Library Center's card, PAN card, driving license, RC of Suzuki scooter bearing registration no.HR-20U-1855, UNICEF library card etc. were also in the bag.

On the same set of evidence, Arun @ Vicky has been acquitted by giving the benefit of doubt. The prosecution case, as noted in the above referred judgment, suffers from various inherent and material discrepancies, inasmuch as, there is an inordinate unexplained delay in lodging the FIR. PW-4 has deposed that she had given a complaint on the date of incident but the same has not seen the light of the day, inasmuch as, Investigating Officer has not supported this version.

I find no reason not to extend the benefit of doubt to the appellant. As far as the alleged recovery of SAMSUNG mobile phone from the appellant is concerned, the mobile was not produced in Court. Complainant Ms. Seema Duhan (PW-4) deposed that the said mobile phone was again stolen by someone else but she did not lodge any complaint regarding the subsequent theft. IMEI number and the other details were not given by the complainant in the FIR. Appellant was not arrested from the spot nor was he arrested immediately after the incident. As per the prosecution, he, along with Arun @ Vicky, was arrested on a secret information on 20th May, 2011

received by SI Om Vir in a different case in which appellant had confirmed his involvement in this case as well and thereafter, got recovered the mobile phone and the pistol used by him in this case. It is not the case that the country made pistol was recovered from the appellant at the time of his arrest. As per the Investigation Officer of this case, appellant disclosed that he can get the weapon of offence recovered from the bushes in a Jungle near CISF (HQ), M B Road. This is quite unusual. As per the prosecution, appellant is a habitual criminal. Such a person would keep the weapon with him and not in a jungle so as to go there to take it every time before committing the offence of robbery. It is also unusual that appellant would keep the stolen mobile phone with him for such a long period.

In view of the above discussions, appeal is allowed and the conviction of the appellant is set aside. Consequently, order on sentence is also set aside. Appellant be released forthwith, if not required in any other case. Trial court record be sent back. A copy of the order be sent to the Superintendent Jail for compliance. Miscellaneous application is disposed of as infructuous.

A.K. PATHAK, J.

APRIL 11, 2017/dk