

\$~9

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

+ CRL.A. 1042/2016 & CrI.M.B. 1965/2016

AMIT TOMAR

..... Appellant

Represented by: Mr. Jivesh Tiwari, Adv.

versus

STATE

..... Respondent

Represented by: Mr. Ravi Nayak, APP with ASI
Onkar Singh, PS Saket.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

12.01.2017

%

1. By the instant appeal, Amit Tomar challenges the impugned judgment dated 31st October 2015 whereby he along with Arun @ Vicky have been convicted for the offence punishable under Section 392/34 IPC. Amit Tomar was also convicted for the offence punishable under Section 397 IPC and Section 25 of the Arms Act, 1959. Vide order on sentence dated 24th November 2015, Amit Tomar was directed to undergo rigorous imprisonment for a period of 40 months and to pay a fine of Rs. 2,000/- for the offence punishable under section 392/34 IPC, rigorous imprisonment for a period of 7 years and to pay a fine of Rs. 3,000/- for the offence punishable under Section 397 IPC and rigorous imprisonment for a period of 2 years for the offence punishable under Section 25 of the Arms Act. Arun @ Vicky has been acquitted in CrI.A.75/2016 vide judgment dated 21st July 2016.

2. Learned counsel for Amit Tomar submits that since the co-accused has already been acquitted, Amit Tomar is also entitled to be acquitted on parity of reasoning.
3. Learned APP on the other hand submits that since the appellant is the main assailant, he cannot claim parity with the co-accused.
4. Process of law was set into motion on 16th May 2011 when Blessing Ovakporaye along with her sister Mrs. Phillips and PW-2 Vijay Gupta came to the police station and gave a written complaint (Ex. PW-8/A) wherein Blessing Ovakporaye stated that on 15th May 2011 when she along with her sister Mrs. Phillips were going back home from Select City Walk Mall in a hired auto around 9:10 P.M., after crossing Malviya Nagar metro station they reached near the red light when suddenly two persons came on a black colour motorcycle and stopped the auto. Thereafter, one of them came towards them and asked for her bag after showing them a gun. They took her black bag and ran away. She stated that her bag was containing her Nigerian passport, ₹7,000/-, \$1,700, her Nigerian driving license, sony camera of blue colour, one brown colour wallet, one nokia company (X2) mobile phone of black colour, one blackberry mobile phone of black colour MTN Nigerian connection, one airline ticket of Emirates airline from Delhi to Lagos and her house keys. She stated that the name of the auto driver was Vijay Gupta and the number of the auto was DL1 RK 5680. On the basis of this complaint, FIR no. 156/2011 was lodged under Section 382/34 IPC at PS Saket.

5. On 20th May 2011, PW-8 SI Omvir Singh came to know from a secret informer about the robbers who used to rob women at the point of weapons. With the help of the raiding team, Amit Tomar and Arun @ Vicky were apprehended. A mobile phone of make blackberry-8320 was recovered from Arun @ Vicky. Robbed articles of different cases were recovered from Amit Tomar also. The weapon of offence i.e. the country made pistol and four fired cartridge cases were recovered at the instance of Amit Tomar.

6. The complainant and her sister could not be examined before the learned Trial Court as they had left the Country. Thus, the prosecution case is based on the testimony of Vijay Gupta, the auto driver and an eyewitness. PW-2, Vijay Gupta who was the auto driver of the auto bearing no. DL 1 RK 5680 deposed that while he was going to Munirka in his TSR to drop two foreign nationals, two boys riding on a motorcycle came near him and said “*gadi kaise chala rahe ho*” to which he replied that he was driving properly. Thereafter, they asked him to park his TSR on the side of the road after which an altercation took place between him and the two boys. He alighted from the TSR. One of the two boys also alighted from the motorcycle, took out country made pistol and pointed towards the two foreign nationals sitting in his TSR. The two boys asked the lady to handover the bag after which they fled away on their motorcycle. He stated to have identified both the boys but in the court he stated that he was not in a position to identify exactly as to which particular accused was having country made pistol and pointed towards the lady during the

incident. During his cross-examination, he admitted that the sketches of the accused persons were prepared by the police with his assistance after 2-4 days of the incident. He also stated that neither he nor the foreigners raised any alarm.

7. The co-convict Arun @ Vicky has already been acquitted vide judgment dated 21st July 2016 in *Crl.A.75/2016* titled as *Arun @ Vicky v. State*. The relevant paras of the judgment are reproduced herein below:

4. I have heard the learned counsel for the parties and have examined the file. At the outset, it may be mentioned that the prosecution was unable to produce the complainant, who was a foreigner, for examination before the Trial Court. It appears that she had already left India before the trial started. It is unclear if her sister – Mrs. Phillips had also left India along with her. The Investigating Officer has not given satisfactory answer. He admitted in the cross-examination that he had not verified the local address of the complainant and her sister. He was not aware if Mrs. Phillips had also left India.

5. Appellant's conviction is primarily based upon the sole testimony of PW-2 (Vijay Gupta), the auto-driver. In his Court statement, he identified the appellant and his associate - Amit Tomar to be the assailants. On scrutinising the entire testimony of the complainant, certain glaring infirmities have emerged making it unsafe to place implicit reliance upon him. Admittedly, he was also a suspect in the incident and was called several times at the police station for enquiries. The occurrence took place on 15.05.2011 at around 09.25 p.m. Neither the complainant nor PW-2 (Vijay Gupta) lodged First Information Report soon after the occurrence. PW-2 (Vijay Gupta) did not raise alarm at the spot or attempted to apprehend the assailants.

Despite having a mobile, he did not inform the police or PCR. He conveniently took the complainant and her sister to their place of residence. Only on 16.05.2011, he was allegedly called by the complainant and asked to accompany her to the police station. It is unclear as to how the complainant was aware of his contact number to remain in touch on 16.05.2011. The complainant in her complaint (Ex.PW-8/A) did not give any specific reason as why the incident was not reported to the police promptly particularly when she had lost her valuable articles including pass-port and air-tickets. In her complaint (Ex.PW-8/A), the complainant did not disclose the number of the motorcycle upon which the assailants had arrived at the spot. She did not give broad features of the assailants with whom she had direct confrontation. She did not claim to identify the assailants if shown to her. The report is silent if the assailants were wearing helmets at the time of occurrence. IMEI number of the Blackberry mobile allegedly robbed was not mentioned in the complaint. She did not furnish any document regarding its ownership. The SIM number being used in this mobile was also not disclosed. Call Detail Record of this mobile were not collected.

6. On 20.05.2011 at the time of alleged apprehension of the appellant and his associate on the basis of secret information, PW-2 was not associated. The assailants were not apprehended at his instance. In his statement under Section 161 Cr.P.C., he also did not disclose the number of the motorcycle on which the assailants had reached the spot. In his 161 Cr.P.C. statement recorded on 16.05.2011, he disclosed the appellant's age as 25 years. In the Test Identification Proceedings (Ex.PW-8/I and Ex.PW-9/B), appellant's age has been described as 16 years. The prosecution has failed to reconcile the conflicting ages.

7. In his Court statement also PW-2 did not disclose the number of the motorcycle. The Investigating Agency did not collect any document as to whom the said motorcycle

belonged and how it came into appellant's possession at the time of his arrest. Recovery of Blackberry phone (Ex.PW-6/B) from appellant's possession seems suspicious as after five days of the incident, he is not expected to keep the robbed mobile in his pocket without its use. No other recovery was effected from the appellant's possession or at his instance subsequently. Initially, PW-2 (Vijay Gupta) was not sure as to who was the assailant who had intimidated the complainant at the point of pistol. Subsequently, he recalled that it was Amit Tomar who had used the pistol to threaten the complainant. He admitted to have visited the police station where number of accused persons arrested by the police were shown to him and he was able to identify the appellant as one of the assailants. In his examination-in-chief, he did not disclose if the appellant wore helmets and how he was able to recognise both of them particularly when the appellant had not played any role in the incident. He was also not categorical to state if the motorcycle recovered on 20.05.2011 was being driven by the appellant at the time. The post-event conduct of the witness is unnatural as he kept / maintained complete silence. His visit to the police station on 16.05.2011 along with the complainant and his sister is suspect. 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."

8. Amit Tomar is squarely covered by the reasoning of the coordinate bench of this Court in the appeal of the co-accused Arun @ Vicky. Though as per the prosecution Amit Tomar is allegedly the main assailant in the case, however, the eye witness to the case PW-2 Vijay Kumar could not identify the appellant as the person who showed the pistol. PW-2 Vijay Kumar deposed in court that he was

not in a position to identify exactly as to which particular accused was having the country made pistol and who pointed towards the lady during the incident. Though in cross-examination, he sought to clarify but still his evidence is shaky on the point of identification of Amit Tomar. The complainant and her sister have not been examined by the prosecution. Though, conviction can be based on the sole testimony of PW-2 Vijay Kumar, however, since his testimony is unreliable, this Court allows the appeal of Amit Tomar.

9. The impugned judgment and order on sentence are set aside. The appellant shall be released forthwith by Superintendent, Tihar Jail, if not required in any other case.

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

11. TCR be returned.

MUKTA GUPTA, J.

JANUARY 12, 2017
‘v mittal’