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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 08.12.2017

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Judgment delivered on: 04.01.2018

+ **CRL.A. 855/2002**

SANTOSH @ RAVI

..... Appellant

Through: Mr. Anshul Mittal, Advocate (Amicus Curiae).

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP along with SI Gajendra Singh, PS-C.R. Park, for the State.

+ **CRL.A.901/2002**

MANOJ KUMAR

..... Appellant

Through: Mr. Anshul Mittal, Advocate (Amicus Curiae).

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP along with SI Gajendra Singh, PS-C.R. Park, for the State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The present criminal appeals have been preferred by the Appellants Santosh @ Ravi and Manoj Kumar under Section 374 Criminal Procedure Code, 1973 (Cr.P.C.) to assail the judgment and order on sentence dated

24.07.2002 passed by the Learned Additional Sessions Judge (ASJ), Patiala House, New Delhi in SC No. 102/2000 arising out of First Information Report (FIR) No.75/2000, registered at Police Station (PS) C.R. Park under Sections 392/34/397 Indian Penal Code, 1860 (IPC). Both the appellants stand convicted and sentenced to 7 years RI under Section 397 IPC with fine of Rs.1,000/-, in default to undergo SI for two months. They have been convicted and sentenced to 5 years RI under Section 392/34 IPC with fine of Rs.1,000/-, in default to undergo SI for two months. Both the sentences are to run concurrently. They have been given benefit of Section 428 Cr.P.C. in respect of undertrial period. Since the two appeals arise out of the same case, against the common judgment, hence submissions were heard in these appeals simultaneously, and they are being disposed of by this common judgment.

2. The case of the prosecution is that on 27.02.2000 the appellants committed a day light robbery from the office of Jayant Nagia (PW-2), a real estate agent, situated at D-625 C.R. Park and robbed him of Rs.62,000/-. It has been further alleged that the accused person namely Manoj Kumar had brandished a revolver, and Santosh @ Ravi a pistol, during the commission of the said offence.

3. As per the prosecution, on 27.02.2000 at about 10.30 a.m. the complainant (PW-2) received a telephone call from his employee L.K Jha (PW-3) that some people wanted to meet him in his office. On reaching his office the two employees L.K. Jha and Ashok Kumar were present along with both the accused persons. The accused persons evinced an interest in purchasing property and informed that they had come from Janak Puri. Both

these prospective clients were present with the complainant in his cabin when tea was served by his employee Ashok Kumar, who had already been instructed by the accused persons to prepare the same before PW-2 had reached his office. After Ashok Kumar placed the tea on the table, the accused did not allow him to leave the cabin. Accused Manoj Kumar took out a revolver while the other accused Santosh @ Ravi took out a pistol. The accused first informed him that one of their friends had been killed and some people were likely to visit the office of PW-2 and that he should co-operate. Accused Santosh @ Ravi brandished his pistol and showed them it was made in Germany along with 25 cartridges which were stated to have been imported. Thereafter, both the accused persons took PW-2 and his two employees captive in the adjoining cabin where his two employees were tied with a rope. PW-2 was brought back to his cabin and both his legs were tied. The accused then demanded a sum of Rs. 50 Lakhs. He was asked to make adequate arrangements and was threatened with abduction. He was told by the accused that in the event he was kidnapped, his family members would even be willing to pay a sum of Rs. 1.5 Crores. They further threatened that he would not be left alive. PW-2 was then asked to make telephone calls to his business associates in a bid to arrange money. While some of the acquaintances were not available, the others expressed their inability to arrange the money. Thereafter, the accused persons ransacked the office and took out a sum of Rs. 62,000/- which was kept in the drawer. The complainant was physically assaulted by the accused persons. Accused Manoj Kumar then went out to get some eatables while the other kept a watch over the captives. On his return with the eatables, accused persons settled down to eat the food brought by accused Manoj along with whisky, a

bottle which they took out from their bag. The complainant (PW-2) was then told by the accused persons that he should arrange the money within 8-10 days, and they would come to collect it. He should also not inform the police. The two employees tied and confined in a different cabin were then brought to the same room as the complainant, and they were made to ingest five tablets each, while ten tablets were forcibly given to the complainant(PW-2), resulting in their feeling intoxicated. They were then taken away in the car belonging to PW-2. Accused Manoj wanted to take them towards Mehrauli but on reaching the flyover at Chirag Delhi, accused Santosh @ Ravi was of the opinion that they should be left back at the office. Accordingly, they were brought back and left at the office. PW-2 was under the heavy influence of the drug and he was taken to a private hospital. It was only on the next day his statement could be recorded by the police.

4. The IO SI Arun Tyagi (PW-5) on receiving the intimation by the complainant's cousin brother Vijay Nagia about the incident on 27.02.2000 made the entry of DD No.18 A. The complainant Jayant Nagia was examined and his statement was recorded on 28.02.2000 in C.R Park police station. PW-4 SI Surendra Kumar who was the officer on duty, deposed in respect of registration of the FIR on receipt of the rukka (Ex.PW-4A/A), Steps for preparation of the site plan were undertaken and the site was subsequently examined on 01.03.2000 by the crime team. Two chance prints were lifted and pieces of cotton rope (pyjamas strings) with which the complainant and his employees were tied were taken into possession vide recovery memo EX. PW-5/D . The then IO Arun Tyagi also recorded the statements of the two employees of the complainant and other witnesses,

and had taken steps to trace and apprehend the accused persons though he was unsuccessful in his endeavor.

5. The prosecution further claimed that on 30.06.2000 a raiding party of police station Paschim Vihar was formed as the SHO of the said police station was informed that the office of Jwala Property Dealer, Shubham Enclave was being targeted by criminals. Subsequently, SI Suresh Kumar (PW-6) while posted in Paschim Vihar police station arrested the accused Santosh @ Ravi in case no. 574/2000 under section 25 of the Arms Act and a revolver and 6 live cartridges were recovered from his possession, while the co-accused Manoj Kumar was arrested by SI Surender Kumar (PW-9) in case FIR No. 575/2000, and one pistol loaded with 8 cartridges were recovered from his possession, in the presence of other police staff. On interrogation of both the accused, their disclosure statements were recorded vide Ex.PW-6/A and Ex.PW-9/A. They disclosed that they had committed several offences in different parts of Delhi and it was further disclosed by accused Santosh @ Ravi that he had committed a robbery with his associate, co-accused Manoj Kumar at C.R. Park. SI Suresh Kumar, on making further inquiries was later informed of the present FIR No. 75/2000 which was pending investigation and, thus, duly handed over the disclosure statement and pointing out memo of place of occurrence (EX.PW-6/B) to the I.O at C.R. Park.

6. The IO SI Lalit Kumar (PW- 8) took over the investigation of the case on 01.07.2000 and received information on the same day of apprehension of both the accused persons from police station Paschim Vihar in FIR No. 574/2000 and 575/2000. Later, production warrants for both the accused

persons were issued on 07.07.2000 and they were subsequently arrested in the present case.

7. The Metropolitan Magistrate conducted the TIP proceedings where both the accused persons refused to participate in the proceedings and their statements were recorded and certified as Ex.PW-7/D and ExPW-7/G on 13.07.2000. Both of them individually stated that they had been shown by the police to the witness. Cognizance was taken by Learned M.M. vide order dated 09.10.2000, under Sections 392/34 and 397 of the Indian Penal Code. The accused pleaded not guilty to the charge framed and claimed trial.

8. The prosecution had examined ten Prosecution Witnesses (PWs) in support of its case. They were the following :

(i) **PW-1 Mr. D.S. Negi**, an employee of another property dealer carrying out his business under the name and style of S.P. Mehta property dealers at A1/2 C.R. Park, New Delhi, stated that eleven months prior of the day of his testimony, two persons came in the evening at about 6 p.m. and asked for the owner Mr. Mehta. On the next day he learnt that the same two persons had visited the office of Mr. Nagia and committed a robbery. This witness could not identify the accused persons in court and was cross examined by the Id. Addl. P.P. for the State, as he had resiled from his earlier statement to the police that he could identify the accused persons. The testimony of this witness, therefore, does not appear to be of any relevance.

(ii) **PW-2 Jayant Nagia** is the complainant. He is the most important witness for the prosecution. In his statement, he gave a detailed account of

the commission of the alleged offence of armed robbery which had taken place in his office on the date and at the time of the incident. He has exhibited his previous statement recorded on 28.02.2000 given to the Police (Exhibit PW-2/A). He also identified the piece of rope (Exhibit P1) with which his legs were tied. This witness was confronted on several points which did not find a mention in the statement EX.PW-2/A - with respect to whether the message was received on his mobile, or whether he had told the police that he had got in touch with his acquaintances to arrange the money on the telephone. He also stated in his cross examination that during the entire investigation by the police at his office, he was present and that the police officials had lifted only finger prints and naada, while the whisky bottle and Pepsi consumed by the accused persons during commission of the crime were left behind.

(iii) **PW-3 L.K. Jha**, is one of the two employees of PW-2, who was present at the time of the incident. This witness confirms being tied up by the assailants. However, he declined to identify the accused persons in the court. In his cross examination he confirms that the assailants had come to the office at about 10 a.m., and he regained consciousness on the next day. He further confirms while one assailant was tall, the other short. He corroborates the testimony of PW-2 to the extent that the accused were armed with a pistol and a revolver, and they were told to keep quiet and were tied and were confined under the staircase, while PW-2 was taken to his cabin by the assailants. In his cross examination by the Id. Addl.P.P., he denies having told the police that the assailants had showed weapons to PW-2 and demanded money, but confirms that the assailants had given them

drug tablets to ingest. He also confirms being tied and being taken away in the car.

(iv) **PW-4 is SI Surender Kumar** who was the officer on duty, deposed in respect of registration of the FIR on receipt of the rukka, and the recording of the statement of the complainant at the police station. He further deposed in respect of the chance finger prints lifted from the spot. His report is Ex.PW-4A/A. During cross examination, this witness confirmed that the chance finger prints could be picked up clearly even after 5 days, provided the scene occurrence was not disturbed.

(v) **PW-5, Arun Tyagi** then IO SI PS C.R. Park, stated that the copy of the DD entry no.18-A was got recorded by Mr. Bhutani and Mr. Vijay Nagia, and that the two aforesaid persons informed him that their cousin Jayant Nagia was administered some sedatives by some unknown person. On being so informed, this witness stated that he alongwith Ct. Narinder went at 12:00 or 12:15 in the night, and found Mr. Jayant Nagia, lying on the hospital bed unfit to make any statements as he was in a state of doiness. Thus his statement was recorded on the next day i.e. 28th February, 2000 in the Police Station, when he was accompanied by his cousin Vinay Nagia. This witness further states that Jayant Nagia made his statement Ex.PW-2/A, on the basis of which he made an endorsement Ex.PW-5/B for registration of the case under section 394/34 IPC. It was handed over to the duty officer (PW-4) for registration. Copy of the FIR Ex.PW-4/B was given to him by the same duty officer. The said witness states that he visited the premises No.E-215 GK-II where he recorded the statement of PW-3 L.K. Jha and Ashok Kumar, and also prepared the site plan Ex.PW-5/C at the

instance of the complainant. The place of crime was kept safe and was examined by the crime team on 01.03.2000 and two chance prints and a piece of cotton rope i.e. nara of white colour - which was lying in the back cabin of the basement, were recovered from the spot vide recovery memo Ex.PW-5/D, which was also signed by himself. He further stated that during the investigation he made all attempts to catch the culprits but could not trace them, and that the case was with him till 4th of April, after which the case was marked to SI Surender Kumar. In his cross examination by accused Manoj, this IO PW-5 states that the MLC of the complainant was produced before him. He also states that he did not visit the hospital of which the medical documents were produced before him, and that the time of admission of the complainant and his discharge from hospital was not investigated. He also stated that he had visited the premises on 28.02.2000 with the complainant at 7 or 8 p.m. On cross examination by accused Ravi, this witness stated that the crime team could examine the spot only on 01.03.2000, as they were busy with a murder case. He further states that he did not seize any article from the spot on 28.02.2000. No chance prints could be lifted from the cups and glasses used for drinking tea as they were washed. No whisky or pepsi bottles, contents of which were consumed by the accused persons, could be found. Neither wrapper of the bottle, nor the tablets administered to the victims could be found. Only some residue of the meat was found lying under the stairs, but the same were not lifted or seized. He stated that he did not seal the crime scene/ premises. He further states that he noticed the table and drawer from which the money was allegedly removed. He made no further inquiries from the acquaintances of the complainant, from whom he claimed to have demanded money. He did not

collect evidence of mobile calls made by the complainant. No complaint was made by the complainant that any of his expensive belongings were stolen. He lastly stated that one Ramesh S/o Mahanand had mentioned to him that he had seen three people run out and decamp in a motor cycle. The cross examination of this witness discloses many loopholes in the investigation.

(vi) **PW-6 SI Suresh Kumar Kaushik**, posted at PS – Paschim Vihar deposed that on 30.06.2000 the accused Santosh @ Ravi had been arrested in a case No. 574/2000 under Section 25 of the Arms Act, as a revolver and 6 live cartridges were recovered from his possession, and that the recovery was made in the presence of other police staff. On interrogation of the accused Santosh @ Ravi, he made a disclosure statement of having committed several offences in several areas of Delhi, including about having committed a robbery with his associate, co-accused Manoj Kumar at C.R. Park. On making inquiries this witness was informed that the case pertaining to C.R. Park had been registered as FIR No. 75/2000, and was pending investigation. The original disclosure statement of accused was in the case file of FIR No. 574/2000 and the photocopy has been exhibited as Ex.PW-6/A. The said accused had also pointed out the place of occurrence which was recorded vide Ex. PW-6/B. He informed PS – C.R. Park vide Ex. PW-6/C. The said documents were handed over to the IO at C.R. Park Police Station.

On cross examination by the accused Santosh @ Ravi the witness reiterated that at the time of arrest, a raiding party comprising of police officials went in two private cars and that Santosh was apprehended from

the office of Jwala Property Dealer, Shubham Enclave, while accused Manoj was apprehended with the motor cycle, by SI Surender Gulia outside the office. The said witness confirms his statement under Section 161 Cr.P.C. was recorded by the IO on 25.08.2000 and reiterates that the other case is pending against the accused persons after recovery was affected from their house.

(vii) **PW-7 is the Metropolitan Magistrate** who was to conduct the TIP proceedings, but both the accused persons refused to participate in such and their statements were duly recorded by this witness who certified the same as Ex.PW-7/D and Ex.PW-7/G.

(viii) **PW-8 is the IO SI Lalit Kumar**, who took over the investigation of this case on 01.07.2000. On the same day he received information from the police station of Paschim Vihar that both the accused persons in this case had been arrested in FIR No. 574/2000 and 575/2000 police station Paschim Vihar wherein they had made a disclosure statement with respect to the present offence. Copy of DD entry with respect to this intimation is Ex.PW-6/A and the copy of the same is Ex.PW-6/C. It was on 07.07.2000 that production warrants were issued for both these accused persons and they were formally arrested in this case. He stated that he had met the complainant when he had gone to the Court for some work and the accused also came out of the Court and were recognized by the complainant Jayant Nagia. He stated that he recorded the Supplementary statement of the complaint in the Court premises on 04.09.2000, and not on 04.07.2000. He stated that the charge sheet was prepared on 10.08.2000, i.e. before recording the supplementary statement of the complainant.

On cross-examination by accused Manoj this witness admitted that the doctor who medically examined Ashok and the complainant PW-2 was not cited as a witness. Medical report was collected by the police from the doctor. He did not contact Madhu Bhutani and Vijay Nagia mentioned in DD No. 18A.

(ix) **PW-9 SI Surender Kumar** has deposed that on 30.06.2000 while he was posted at police station Paschim Vihar he and SI Suresh Kumar Kaushik (PW-6) were informed by the SHO that an intimation was received that the office of Shubham Property Dealer was being targeted by criminals. Accordingly, a raiding party was organized and accused Manoj Kumar was apprehended with the help of police staff. The other accused Santosh @ Ravi was apprehended by SI Suresh Kumar Kaushik. One Pistol loaded with 8 cartridges was recovered from the possession of accused Manoj Kumar and was duly arrested in case FIR No. 575/2000. On recording of his disclosure statement Ex.PW-9/A, the accused Manoj Kumar mentioned the commission of the crime at C.R. Park besides the other incidents. A copy of the same was handed over to the IO of the case at Paschim Vihar.

In his cross examination by the accused Manoj, he confirms that the sketch of the pistol was prepared and it was duly described as being made in Germany. He did not inform the PS – C.R. Park after recovery of the pistol. No investigation was carried on by him with respect to the procurement of the firearm by the accused, as the investigation was taken up by SI Suresh Kumar Kaushik (PW-6). He confirms that he informed the Police Station C.R. Park on 30.06.2000 and that his statement was recorded by the I.O. in that case on 25.08.2000.

9. Statement of the accused persons were recorded under Section 313 C.r.P.C. and the entire evidence was put forth to them. They denied the same and pleaded innocence, that they had been falsely implicated in this case.

10. The Id. Trial Court found the testimony of the PW-2 – the complainant, trustworthy and as one inspiring confidence. As far as the other witnesses were concerned, PW-3 had corroborated the entire sequence of events of the incident, but only refrained from identifying the accused persons in Court. He only stated that one of the robbers was short, while the other was tall, which matched the physical description of the accused persons. Consequently, vide judgement dated 24.07.2002 the accused persons were convicted under section 392/34/297 Indian Penal Code, and sentenced as aforesaid.

11. Mr. Anshul Mittal, the learned Amicus representing the appellants submits that the identity of Appellants – as being the culprits is not established, as their names were not stated in the FIR. The accused persons were not identified by either PW-1, or PW-3.

12. Learned counsel submits that Ashok Kumar - who was, as per prosecution case, present at the spot throughout the incident, and was instructed by the assailants to prepare tea for them and was subsequently tied up and stopped from leaving the cabin, was not examined as a witness. In the given circumstances, it was incumbent upon the prosecution to have produced him, so as to clear the cloud of suspicion with regard to the

identity of the assailants. He places reliance on *Pratap Singh & Anr Vs. State of Madhya Pradesh*, AIR 2006 SC 514 (Para 12), wherein it was held:

*“The High Court, in our opinion, further committed an error in not drawing an adverse inference for non-examination of Shivrajsingh and Motiram. It was for the prosecution to prove its case. Even if in the First Information Report their names were not disclosed but if during investigation materials came to the notice of the Investigating Officer that apart from Mangal Singh two other witnesses had also witnessed the occurrence, he was duty bound to show the places wherefrom they had witnessed the occurrence in the site plan prepared by him and also record their statements under Section 161 of the Code of Criminal Procedure. **We do not see any reason as to why adverse inference should not have been drawn for non-filing of the said statements before the Court along with the charge sheet.** We have noticed hereinbefore the adverse remarks made as against the Investigating Officer. The High Court may or may not be correct in making those remarks but we only intend to point out that a site plan is not prepared at the instance of the witnesses but is done as a part of the investigation. If a site plan has been prepared and **if during investigation it has been brought to the notice of the Investigating Officer that there were some other witnesses whose evidence would be material for the purposes of proving the prosecution case namely, witnessing the occurrence by two independent witnesses; we do not see any reason why evidence of such witnesses should not have been recorded.** It is correct that it is the duty of the Investigating Officer to produce the said statements with the charge sheet but, if the same had not been done, the benefit thereof must be given to the defence and not to the prosecution. **The High Court therefore in our opinion committed a serious error in this behalf.**” (emphasis supplied)*

13. Learned counsel further submits that the appellants who, as per the prosecution, were apprehended by the officials of PS-Paschim Vihar and were booked for the offences under Arms Act – after a revolver and a pistol were recovered from them, allegedly gave a disclosure statement stating that they had previously used those very arms to commit the robbery in CR Park area, and that the IO of the present case PW-8 had deposed that he checked the said arms and found them to be same which matched the description given by PW-2 – the complainant. Learned counsel, however, submits that these arms were not produced before the Court in evidence. Neither PW-2, nor PW-3 identified the said arms as the ones used by the accused during the robbery. Learned counsel places reliance on the judgement of the Supreme Court in *Mussauddin Ahmed Vs. The State of Assam*, AIR 2010 SC 3813. The relevant paras 13 and 15 are being reproduced hereunder:

“13. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such a material evidence is withheld, the Court may draw adverse inference under Section 114 illustration (g) of the Evidence Act notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide Gopal Krishnaji Ketkar vs. Mohamed Haji Latif & Ors., AIR 1968 SC 1413).

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15. The torn clothes were not recovered by the Investigating Officer. The I.O. did not make any effort to take the semen, blood samples etc. from the appellant which could have given the prosecution an opportunity to obtain medical reports of the appellant as it was necessary to establish the guilt of the appellant. No person has been examined from the hotel to identify the appellant or the prosecutrix as the I.O. has only seized the register of the hotel to establish that room No.102

was booked in the name of appellant Mussauddin Ahmed and Marzina Begum as husband and wife. Admittedly, the name of the prosecutrix was not Marzina Begum. Therefore, some person from the hotel should have been examined to identify her as well as the appellant.” (emphasis supplied)

14. Learned counsel for the appellants submits that the original disclosure statements were never produced on record, and that the chance prints lifted from the spot on which the prosecution places reliance did not match with the finger prints of the appellants. Also, there has been no recovery of the alleged looted money, nor has the prosecution proved the medical documents, or the medical condition of PW-2. The concerned doctor who is claimed to have examined the complainant was never examined before the Court. Thus the Id. Trial judge had proceeded on false premises as the ingredients of Section 494 and 497 of IPC had not been made out.

15. The appellants, thus, pray that the impugned judgement be set aside.

Respondent's submission

16. Respondent's whole case rests on the testimony of complainant Jayant Nagia (PW-2). As per the respondent State, PW-2 supported the prosecution story and also identified both the accused in Court. Learned Counsel further submits that PW-3 – the employee of the complainant, confirmed being tied by “NARA”, Ex P1, which was seized by Police during the investigation. It was further submitted that testimony of PW-2 inspires confidence and is natural. His testimony has been corroborated by PW-3 with respect to material facts.

17. Learned counsel further submits that conviction can be sustained on the sole testimony of an injured eyewitness, i.e. PW-2. Reliance has been placed on ***Abdul Sayeed v. State of Madhya Pradesh***, (2010) 10 SCC 259; the relevant part whereof reads as under:

“The Law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

18. It was further submitted that non-examination of doctor who treated the injured victim is not fatal to the prosecution case, if the testimonies of the eye-witness, otherwise, inspire confidence. Reliance was placed on ***State of M.P. v. Dayal Sahu***, (2005) 8 SCC 122.

19. Learned counsel further submits that the evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such a witness cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. Reliance was placed on ***Khuji @ Surendra Tiwari v. State of Madhya Pradesh***, AIR 1991 SC 1853.

20. It was further submitted that conduct of accused and their involvement in other criminal activities draws adverse inference against

them. It was submitted that even after being convicted in the subject case, the accused persons have formed another gang along with persons they met in jail, with accused Manoj acting as their gang leader. Manoj was arrested in FIR No. 255/09 PS Saket U/s 392/397 IPC, a case involving armed robbery of Rs.55 lakhs. It was also submitted that appellants are also absconding in the present proceedings before this Court.

21. Having perused the impugned judgment, the evidence brought on record, the submissions of learned counsel and the decisions relied upon, I am of the considered opinion that the prosecution has failed to establish the guilt of the appellants/accused beyond reasonable doubt that the impugned judgment and order on sentence cannot be sustained. There are, in my view, several gaping holes in the case of the prosecution in the present case.

22. The incident is alleged to be of 27.02.2000 when the complainant PW-2 received a telephone call from his employee L.K. Jha (PW-3) that some people wanted to meet the complainant in his office. As per the case of the prosecution, two employees of the complainant (PW-2) were present in the office when the complainant reached the said office, namely, L.K. Jha (PW-3) and Ashok Kumar. According to the complainant, he, L.K. Jha (PW-3) and Ashok Kumar were present and saw the accused. Pertinently, L.K. Jha (PW-3) failed to identify the accused, and Ashok Kumar was never produced as a witness.

23. According to the case of the prosecution, the accused Santosh @ Ravi brandished his pistol and showed that the same was made in Germany. He had 25 cartridges which were stated to be imported. Even though the police

claimed to have recovered the said German made pistol from the accused, the same was never produced in evidence by the prosecution and was not identified by either the complainant or L.K. Jha (PW-3). PW-2 – the complainant claimed that he made telephone calls to his business associates to arrange the money. He also claimed to have made the said calls to his acquaintances, some of whom were contacted and stated that they could not arrange the money. Pertinently, none of these so-called acquaintances who were called by PW-2 were identified/examined or produced as witnesses; and even the fact that such calls were made was not established by the prosecution. The call details records of the phone of PW-2 were never collected or led in evidence. The complainant claimed that he was physically assaulted by the accused persons. However, no MLC was got conducted. Though, the prosecution claimed that the appellant Manoj Kumar went out of the shop to get eatables, no investigation was carried out from the shops in the area wherefrom the eatables may have been bought. No evidence of Manoj Kumar having bought any eatables from the area was led, and he was not identified by any of the shop keepers nearby. Though the prosecution claimed that accused consumed whiskey which they had bought with them, there was no forensic evidence led to establish the said claim. Though, the prosecution claimed that the accused persons forcibly ingested tablets in the mouth of the complainant and his two employees, namely, L.K.Jha (PW-3) and Ashok Kumar which resulted in their feeling intoxicated, the same was not established by leading any medical evidence. Pertinently, PW-3 in his statement Ex. PW-3/A states that he was forcibly made to consume sedatives, but PW-2 in his statement Ex. PW-2/A does not even say that. Even though PW-2 also claimed to have been given tablets

due to which he lost consciousness and regained the same only on the following day, no medical evidence of this witness was also produced. The statement of PW-5 that he went along with constable Narender at 12 or 12.15 in the night of 27.02.2000, and found the complainant lying on the hospital bed - unfit to make any statement as he was in a state of dizziness, is not corroborated by medical evidence. The prosecution claimed that the accused took the three victims in the car belonging to PW-2 – the complainant, towards Mehrauli, but on reaching the flyover at Chirag Delhi, the accused Santosh @ Ravi opined that they should be left back at the office. Accordingly, they were brought back and dropped at the office of the complainant. The place of incident is on a busy street. It is highly unlikely that the two accused would have been able to force three persons, i.e. the complainant, PW-3 L.K.Jha and Ashok Kumar into the vehicle of PW-2 – the complainant, in broad day light in a busy area without raising any doubt or alerting any other person in the area. Even on this aspect, there is no evidence led of any neighbour or eye witness who may have seen the complainant and his two employees leave with the accused in the car of the complainant – PW-2. The medical report of PW-2 obtained from a private hospital is not duly proved on record by its author, and therefore, cannot be read in evidence. Pertinently, the statement of the complainant – PW-2 was recorded only on 28.02.2000 at C.R. Park Police Station, whereas the incident took place in the first half of 27.02.2000. The said delay has been sought to be explained by claiming that the complainant was drugged and not in a position to make his statement on 27.02.2000. However, there is no medical evidence to the effect that the complainant was not in a position to make a statement on the date of the incident itself. Pertinently, the crime

scene, namely, the shop of the complainant was not sanitised soon after the incident was reported. The premises were left open and available to the complainant, and it was examined by the crime team only two days later i.e. on 01.03.2000. The chance prints lifted from the crime scene did not match with the finger prints of the accused. Though, the prosecution claimed to have recovered the pieces of cotton rope (pyjama strings/*naada*) from the crime scene, which was allegedly used to tie up the complainant and his two employees, there is no evidence to connect the said cotton rope with the accused. Pertinently, the accused were not identified by PW-1 – D.S.Negi, an employee of other property dealer, namely, S.P. Mehta Property Dealers at A1/2, C.R. Park, New Delhi, even though, he claimed that two persons came to him on the previous evening i.e. on 26.02.2000 at 6 p.m. and asked for the owner Mr. Mehta. His testimony that the same persons had visited the office of the complainant Mr. Nagia and committed robbery on the following day is hearsay. In any event, he could not identify the two accused as the persons who had visited the office of his employer Mr. S.P. Mehta, property dealer.

24. An essential ingredient of Section 397 IPC is that the offenders used a deadly weapon while committing robbery or dacoity. In the present case, the deadly weapon, namely, the pistols allegedly shown by the accused at the time of committing robbery have not been proved. Thus, the offence under Section 397 IPC is clearly not made out against the appellants. Reference may be made to ***Ghanshyam @ Bablu Vs. State***, MANU/DE/3149/2009 (Criminal Appeal No. 757/2007 decided on 05.12.2009).

25. The aforesaid lacunae in the case of the prosecution are too serious, and too many, to bring home the guilt of the accused. Pertinently, Ashok Kumar was not examined as a witness though he too was an eye witness of the incident. Non-examination of Ashok Kumar leads to an adverse inference against the case of the prosecution. In this regard, reference may be made to *Pratap Singh & Anr. Vs. State of Madhya Pradesh*, AIR 2006 SC 514; and *Musuddin Ahmed Vs. The State of Assam*, AIR 2010 SC 3813.

26. The prosecution has laid much emphasis on the fact that the accused refused to join the Test Identification Parade (TIP) and that they were identified by PW-2. According to the prosecution, this conduct of the accused reflects of their guilt. The record shows that the incident in question is of 27.02.2000; the statement of the complainant PW-2 was recorded on 28.02.2000 without establishing sufficient justification for the delay; the accused were arrested in another case i.e. Case No.574/2000 under Section 25 of the Arms Act registered at PS Paschim Vihar on 30.06.2000; the application for issuance of production warrants in respect of the accused was moved by the I.O. on 07.07.2000; the production warrants were issued returnable on 13.07.2000; the I.O. was allowed to interrogate the accused in court on the same day; the application for TIP was filed before the court, on which orders were passed by the learned M.M. on 13.07.2000; the accused refused to get the TIP conducted on the ground that they had been shown to the witness by the police; on the same day the accused were formally arrested in the present case; the supplementary

statement of PW-2 was recorded on 04.09.2000 when the accused were allegedly identified by him.

27. At this stage, I may observe that Mr. Katyal has pointed out that on 04.09.2000, the accused were produced in the court for purpose of extension of their judicial remand. I may also observe that though the charge sheet is dated 10.08.2000, the same was actually filed on 09.10.2000. It is for this reason that the supplementary statement of PW-2 recorded on 04.09.2000 forms part of the charge sheet. In this regard, my attention has also been drawn to the statement of PW-2 as well as the statement of I.O. PW-8, who has stated that the supplementary statement was recorded on 04.09.2000, and not 04.07.2000.

28. Though PW-2 may have identified the accused as per the supplementary statement dated 04.09.2000, and though they may have refused the formal TIP, in my view, the aforementioned serious lacunae in the case of the prosecution generate sufficient doubt in the mind of the court, and it cannot be said that the prosecution has been able to establish the guilt of the appellant/accused beyond reasonable doubt.

29. Thus, in my considered view, the conviction of the appellants cannot be sustained. The impugned judgment and order on sentence are accordingly set aside and the appellants stand acquitted by giving them the benefit of doubt.

(VIPIN SANGHI)
JUDGE

JANUARY 04, 2018