

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of Judgment: 08.01.2018

+ CRL. Appeal 404/2011

SUNIL @ DEV

..... Petitioner

Through: Mr M.L. Yadav, Adv

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr Amit Ahlawat, APP

CORAM:

HON'BLE MS. JUSTICEINDERMEET KAUR

INDERMEET KAUR, J. (oral)

1 This appeal is directed against the impugned judgment and order on sentence dated 30.07.2010 and 16.08.2010 wherein the appellant stood convicted under Section 397 of the IPC as also under Section 392 and 452 of the IPC. The maximum sentence awarded to him was RI for a period 7 years for the offence under Section 397 IPC; under Section 392 he had had been awarded sentence of RI for a period 5 years with a fine of Rs. 200/- and in default of payment of fine to undergo SI for 30 days. For the third conviction to the appellant under Section 452 IPC, he was sentenced to undergo RI for a period of 3 years with a fine of Rs. 100/- and in default of

payment of fine to undergo SI for 15 days; benefit of Section 428 Cr.P.C has been granted to the convict.

2. Nominal roll of the appellant reflects that as on 11.03.2011 the appellant had undergone incarceration of about 5 years and 10 months; he has since been released on bail.

3. On behalf of the appellant it is pointed out that the conviction of the appellant under Section 397 IPC is uncalled for; his conviction at best can be a conviction under Section 392 IPC as it has not been specifically verified by any of the eye witnesses that it was the appellant who was holding the alleged weapon.

4. Record reflects that there were eye witnesses to the present occurrence. PW 3 was present in the house i.e., A-10, Ramdutt Enclave, Uttam Nagar, Delhi along with his wife Anjana Jain and two grand sons Abhi Jain and Naman Jain. The door of the main house was opened; two boys entered of whom one was the present appellant. The earrings of his wife were snatched; the culprits pointed out their pistols towards the victims. The case property was identified in TIP proceedings. In cross examination PW3 denied the suggestion that the accused persons had been seen by him in the police station. In another part of his cross examination he admitted that the

accused was shown to him at the Police Station by the police officer and he was the same person who had committed the crime at his house.

5. PW 4 was the wife of PW3. She deposed on the same lines as PW3. She deposed on oath that the accused was carrying a pistol when he committed robbery in her house. In her cross examination she admitted that she had gone to the police station one or two days after the incident. She admitted that the accused was shown to her in the police station and she was accompanied by her husband at that time.

6. PW 5 and 6 are the grand sons of PW3. They also identified the culprits including the appellant as the person who had committed the crime. PW5, however, did not elucidate that it was the appellant who pointed out pistol towards the complainant family; it is also relevant to note that he speaks of one pistol in the singular form and not two pistols.

7. PW6 has also testified about the two victims carrying one pistol; PW5 like PW6 had not delineated any specific role to the appellant as the person who was holding the pistol.

8. PW9 Inspector Devinder Singh had reported about chance prints having lifted from the spot pursuant to the visit by the crime team. The chance prints did not however advance the version of the prosecution.

9. The Investigating officer was examined as PW11; he had moved an application seeking TIP of the accused which TIP was directed to be held on 23.08.2005 on which date the PW3 and PW4 had reached the Central Jail. The TIP proceedings have been proved as Ex.PW11/D. TIP was refused by the accused for the reason that his face had been shown to the injured witness in the police station Uttam Nagar.

10. This refusal to participate in the TIP appears to be valid in view of the cross examination of PW3 and PW4 who have both admitted that they have gone to the police station where they had seen the accused; both PW3 and PW4 have admitted that they had gone to the police station after 2-3 days of the incident i.e. around 3-4.08.2005. PW 3 and PW4 having seen the accused in the police station on 03-04.08.2005 and the application for TIP having been moved by the investigating officer on 23.08.2005 i.e., three weeks after the date of the alleged incident, the refusal by the accused to participate in TIP was for a valid reason.

11. This court is of the view that the trial court coming to the conclusion that the accused were duly identified is a wrong finding. The admission of PW3 and PW4 that they had seen the appellant /accused in the police station and their identification pursuant thereto in the court is no identification in the eye of law. In 201(3) JCC 2041 Vinod Singh Vs. Govt. of NCT of Delhi a Coordinate Bench of this Court has held as under:

“It is true that the refusal of an accused to participate in TIP without a reasonable explanation may give rise to an adverse inference against him and may be taken as a reason to accept the dock identification of the accused by the witnesses. This, however, is not an absolute rule. Before drawing an adverse inference on account of refusal to participate in TIP, the Court is under obligation to scrutinize the evidence carefully to satisfy its conscience that there are circumstances justifying the drawing of adverse presumption.”

12. The appellant is entitled to a benefit of doubt. Appellant is acquitted. The Bail bond of the appellant stands cancelled. Surety stands discharged.

13. Appeal disposed of.

INDERMEET KAUR, J

JANUARY 08, 2018
SU