

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

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Reserved on: 22nd May, 2018

Decided on: 28th August, 2018

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CRL.A. 132/2016

MANISH DUBEY

..... Appellant

Represented by: Mr. D.K. Pandey, Advocate

versus

STATE (GOVT NCT OF DELHI)

..... Respondent

Represented by: Mr. Amit Gupta, APP for the
State with ASI Karamvir
Singh, PS North Rohini.

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CRL.A. 184/2016

NAVIN

..... Appellant

Represented by: Mr. Siddharth Yadav,
Advocate

versus

THE STATE (N.C.T OF DELHI)

..... Respondent

Represented by: Mr. Amit Gupta, APP for the
State with ASI Karamvir
Singh, PS North Rohini.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Manish Dubey and Navin challenge the impugned judgment dated 16th December, 2015 convicting them for offences punishable under Section 397 IPC read with Section 392/34 IPC and the order on sentence dated 22nd December, 2015 directing them to undergo rigorous imprisonment for a period of seven years each and to pay a fine of ₹2,000/- each, in default whereof to undergo rigorous imprisonment for a period of one month each.
2. Assailing the conviction, learned counsel for Manish Dubey contends

that the appellant was not arrested at the spot. He was arrested in another FIR being FIR No. 3/2012 and on the basis of disclosure statement of Navin, appellant was arrested in the present FIR. There was no recovery from the appellant either of the robbed goods or the pistol. He refused for test identification parade because he was shown to witnesses in the police station. Reliance is placed on the decision reported as 1994 (30) DRJ 291 Anoop Singh v. The State. CCTV footage has not been produced in evidence and no satisfactory explanation has been rendered why CCTV was shut at the time of incident. Furthermore, stating exact robbed amount immediately after the incident was unnatural. Lastly, the appellant has been acquitted in FIR No. 3/2012 and he is not involved in any other case.

3. Learned counsel for Navin urges that no CCTV footage either from the shop or the market has been placed on record and the explanation rendered for non production is not credible. There are contradictions in the testimony of Kabir (PW-1), Manoj (PW-2) and Ankur Arya (PW-10) with respect to CCTV footage. There is difference in time as to how long the police stayed at the spot. There is inconsistency with regard to counting of cash. No independent person from the market or nearby shops was made a witness. No finger prints or chance prints were lifted from the spot. Manoj admitted that the site plan was not prepared at his instance and all the proceedings were conducted in the police station. With respect to TIP proceedings, reliance is placed upon the decisions reported as AIR 2007 SC 2400 State of Madhya Pradesh v. Chamru @ Bhagwandas etc. and 2015 (2) JCC 1022 Arif v. State of Govt. of NCT of Delhi.

4. Learned APP for the State on the other hand submits that the testimony of Kabir and Manoj are clear and categorical. SI Amit Kumar

(PW-12) stated in his testimony that the appellants were produced in muffled face and immediately thereafter, the appellants were sent to judicial custody. No suggestion has been given either to SI Rajeev Bamal (PW-15) or Insp. Mahabir Singh (PW-16) in this regard. Stolen property has been recovered from the appellants. Lastly, the case of the prosecution was that the dossier was first shown and subsequently, Kabir and Manoj identified the appellants.

5. Process of law was set into motion on 27th December, 2011 at around 9:50 P.M. on receipt of information stating that two-three boys came with a pistol and robbed Numero Uno showroom at Rohini Sector 7, Pocket 7. Aforesaid information was recorded vide DD No. 29A (Ex.PW-4/A) and was entrusted to SI Amit Kumar. He along with Ct. Devender Singh (PW-9) reached showroom of Numero Uno, where Kabir and Manoj, employees of showroom, met them. He interrogated Kabir and recorded the statement of Kabir wherein he stated that he was a resident of village Kalyanpur, Kanpur, Uttar Pradesh and since about last 8 months, he was staying at Jahangirpuri as a tenant and working at showroom of Numero Uno at Sector 7, Rohini as salesman. On 27th December, 2011 at about 9:30 P.M., he along with the other salesman Manoj Kumar was present at showroom, when 2 boys aged around 24-25 years, one was about 5'5" in height, strong built, wheatish complexion and the other one was 5'8" in height, thin built, wheatish complexion, came to the showroom. He stated that both were carrying country made pistols (katta) in their hands, which they pointed at them. As soon as they entered the showroom, they threatened them to take out all the cash they had or else they would shoot them. He took out around ₹12,968/-, which were the proceeds of sale for last two days, from the cash counter of

the showroom and handed it over to the taller boy. While leaving both the boys also picked up 4 deos, 4 jeans and 4 shirts. Thereafter, he called the owner Ankur Arya and told him about the incident. The owner advised him to call the police, so he called the police. Aforesaid statement was recorded vide Ex. PW-1/A.

6. On the basis of the aforesaid statement of Kabir, FIR No. 366/2011 (Ex.PW-5/A) was registered at PS North Rohini for the offences punishable under Sections 392/397/34 IPC.

7. Further investigation of the case was handed over to Insp. Mahavir Singh. He prepared the site plan (Ex. PW-16/A) at the instance of Kabir. He recorded statement of Manoj and supplementary statement of Kabir as well as statements of police officials.

8. On 28th December, 2011, in the morning, crime team reached at the spot and inspected the spot. Ct. Naveen Kumar (PW-7), Fingerprint Proficient, lifted two chance prints from the place of occurrence and sent it to finger print bureau. Ct. Ravinder (PW-8), photographer from crime team, took the photographs of the place of occurrence. Photographs were proved vide Ex. PW-8/A1-A6 and negatives were proved vide Ex. PW-8/B1-B6. SI Anil Kumar prepared his report vide Ex. PW-3/A.

9. On 3rd January, 2012, one Mohd. Aslam, complainant in case FIR No.3/2012 came to the police station and informed that he was robbed of ₹6,000/- by two persons. Mohd. Aslam identified the appellant Navin Yadav from the dossier uploaded on the computer in the police station. SI Amit Kumar constituted a raiding party consisting of himself, Ct. Devender (PW-9), Ct. Ravinder (PW-14) and driver Ct. Vikram. They went to the house of appellant Navin Yadav at H.No. 183, Village Naharpur where appellant

Navin Yadav was found and was interrogated. Appellant Navin Yadav confessed his involvement in case FIR No. 3/2012 with co-appellant Manish Dubey. Appellant Navin Yadav was arrested vide memo Ex.PW-12/B and his confessional statement (Ex. PW-12/C) was recorded in case FIR No. 3/2012. Appellant Navin Yadav got recovered one motorcycle bearing no. DL 8S ND 0289 which was parked in a gali near his house and then led them to front of H.No. E-482, where katta was recovered from drain. Motorcycle was seized in case FIR No. 3/2012 vide seizure memo Ex. PW-12/J and sketch of the katta was prepared vide Ex. PW-12/D. SI Amit Kumar again interrogated appellant Navin Yadav and recorded his supplementary disclosure statement (Ex. PW-12/F). Thereafter, appellant Navin Yadav took them to Tughlakabad Metro Station, from where appellant Manish Dubey was arrested vide memo Ex. PW-12/G. Appellant Manish Dubey was interrogated and his confessional statement vide Ex. PW-12/H was recorded.

10. SI Rajeev Bamal (PW-15) effected the arrest of both the appellants in the present case vide arrest memos Ex.PW-15/A and Ex.PW-15/B. Disclosure statements of both the appellants were recorded vide Ex.PW-14/A and Ex.PW-14/B. Thereafter, both the appellants, led him, Ct. Ravinder and Ct. Babban to Sector 7, Rohini and pointed out the Numero Uno showroom at dividing road of Sector 7 & 8. On their pointing out, SI Rajeev Bamal prepared pointing out memos vide Ex.PW-14/C and Ex.PW-14/D. Thereafter, appellant Navin led them to his house i.e. H.No. 183, Naharpur Village, Delhi, where two pants and two shirts and one deo lying on a chair on second floor of his house, were recovered. The said articles were taken into possession vide seizure memo Ex.PW-14/E. On 5th January

2012, an application for conducting judicial TIP of both the appellants was moved which was fixed for 7th January, 2012.

11. On completion of investigation, charge sheet was filed. Charge was framed vide order dated 16th May, 2012.

12. Kabir who was examined as PW-1 in Court deposed in sync with his statement made before the police. He further stated that the boy had demanded a big carry bag from him and inquired from them about 28 inch waist jeans. He stated that he told the boy that they didn't have 28 inch waist jeans, but they had 30 inch waist jeans. He stated that the boy took 4 jeans of blue color, 3 shirts (one black, one grey black and one black white) and 4 deodorants. During his cross-examination, he stated that he was taken to the police station in police jeep at about 12:30 A.M. and he remained there the whole night. He stated that his associate Manoj was taken to the police station in a separate gypsy and he was kept in separate room. He also stated that Manoj was called to police station after the arrest of the appellants. He stated that police did not seize the stolen articles in his presence. He stated that he had not counted the cash at the time when he had handed over the same to the appellants. He stated that sale of the showroom was ₹10,000/-, sometimes more than ₹10,000/- and on some days, no sale at all. He stated that usually they keep ₹4,000-5,000/- for day to day expenses and the remaining amount used to be deposited in bank. He stated that police was informed about the exact amount of robbed cash at the showroom, after tallying the sale proceeds. He further stated that whenever they used to take out settlement from the credit card machine, at that time, they used to switch off CCTV camera, however usually CCTV camera was on, when cash was counted. He stated that he saw the appellants first time in the police station

from distance, when he was called to Police Station to identify them. He stated that he was not shown the photograph of the appellants prior to their identification.

13. Manoj (PW-2), Salesman, corroborated the testimony of Kabir. He further stated that on 1st January, 2012, he had identified appellant Navin Yadav from the dossier (Ex. PW-2/A) as one of the accused. He correctly identified the case property. During his cross-examination, he stated that Manager Pushpender was on leave and housekeeper Pankaj left the showroom at about 8:30/8:45 P.M. He stated that when they perform settlement, they remove the wire of the camera, thus camera was not working at that moment. He stated that photograph of appellant Navin Yadav was shown to him on the computer. He stated that he was interrogated whole night by police about the day of the incident.

14. Ankur Arya, owner of showroom, stated that in the year 2011, he was running showroom of Numero Uno at C-7/70, Sector-7, Rohini, Delhi and Kabir and Manoj were working in his showroom as salesman. On 27th December, 2011 at about 9:30/10:00 P.M., Kabir informed him on telephone that two boys had taken about ₹13,000 and some clothes and deodorants. He came next day to shop and on checking found three shirts, four jeans, four deodorants and cash of ₹12,968/- were missing. During his cross-examination, he stated that his employee Pushpender, Manager of the showroom, was on leave on that day and Kabir and Manoj were looking after the work of sale and purchase in the absence of Pushpender. He stated that when Kabir called him, he did not tell him the exact amount. He stated that they didn't maintain separate register for accounts of sale and purchase and that these accounts were kept in the computer. He stated that police

didn't ask him about sale and purchase account statements and they did not seize his computer. He stated that he told the figure of ₹12,968/- to police after tallying the accounts next day. He stated that the average turnover/sale of his showroom was around ₹10,000-15,000/- per day. He stated that at the time of shutting down, CCTV cameras automatically switch off, as electricity is switched off. He stated that the CCTV cameras are on at the time of counting the cash by the employees. He stated that they used to issue bills for the purchase of articles in their showroom and that police had not seized any receipt or bill on that day. He again stated that the police might have seized the bill of the day of the incident.

15. Rajesh Sharma (PW-11) stated that he was the registered owner of motorcycle bearing No. DL 8S ND 0289. He used to park the motorcycle (Ex.P4) in front of his house. The said motorcycle was stolen. He further stated that he had sold the said motorcycle to one Parmod in November, 2011, but due to paucity of time, he had not executed the transfer papers. He got the same released on superdari vide superdarinana Ex. PW-11/B.

16. Deepak Wason (PW-13), Metropolitan Magistrate, Saket Court, New Delhi stated that he got conducted TIP proceedings of appellant Navin Yadav vide Ex.PW-13/A and of appellant Manish Dubey vide Ex.PW-13/B. Both the appellants refused to join the TIP as their photographs had already been taken in the police station. He also got conducted the TIP proceedings of the case property vide Ex.PW-1/C and Kabir correctly identified two jeans, two shirts and one deodorant.

17. Statement of appellant Manish Dubey was recorded under Section 313 Cr.P.C. wherein he stated that the recovery had been planted, the recovered articles were shown to the complainant prior to judicial TIP and

that he was innocent and falsely implicated. He stated that he had been acquitted in the case FIR No. 3/2012 of PS North Rohini.

18. Statement of Appellant Navin was recorded under Section 313 Cr.P.C. wherein he also stated that the recovery had been planted, the recovered articles were shown to complainant prior to judicial TIP, he was innocent and falsely implicated. He stated that one police official called him from his house on the pretext that SHO was calling him and when he went to Police Station, he was wrongfully detained in the present case.

19. From the evidence as noted above, it is evident that the case of the prosecution is based on the identification of the two eye witnesses, that is Kabir and Manoj as also the recovery of the articles taken away, that is, two jeans, two shirts and one deodorant. Though Kabir in the identification parade identified the two jeans, two shirts and one deodorant however, it cannot be disputed that in the absence of a particular identification mark the two jeans, two shirts and one deodorant are items of common use which are easily found in the market. Hence the same cannot be used to convict the appellants. Appellant Navin Yadav was arrested in FIR No.3/2012 when the complainant in the said case namely Mohd. Aslam was shown the dossier uploaded in the computer in the police station. Navin Yadav was arrested on 3rd January, 2012 in the present case, whereafter he was taken to various places and recoveries like the motorcycle, katta etc. were made at his instance. He also identified the place of occurrence. At the instance of Navin Yadav, Manish Dubey was also arrested on the same day, that is, 3rd January, 2012 at 7.45 PM. After the arrest both the appellants were taken to the Numero Uno showroom where their pointing out memos were prepared and later at the instance of Navin Yadav, the alleged recovery of two pants,

two shirts and one deodorant were made from his house on the second floor. An application for judicial TIP was made only on 5th January 2012 which was fixed for 7th January, 2012. There is no evidence led by the prosecution to show that before the TIP was conducted the appellants were kept muffled and that the witnesses had no occasion to see the appellants. Hence the refusal of the test identification parade by the two appellants cannot be said to be without any basis. Admittedly the CCTV cameras were switched off when the alleged incident took place. Kabir in his cross-examination admitted that Manoj was called to the police station after the arrest of the accused persons and no stolen articles were recovered in his presence. As per Manoj on 1st January, 2012 he identified Navin Yadav from the dossier as one of the accused, however, the case of the prosecution is that on 3rd January, 2012 on the complaint of Mohd. Aslam FIR No.3/2012 was registered and Mohd. Aslam identified Navin Yadav from the dossier whereafter his arrest was made. In his cross-examination he admitted that police repeatedly called him to identify the accused persons in the police station and that they were shown the photographs of the persons and asked to identify the accused. According to him photograph of Navin Yadav was shown.

20. Considering that the prosecution has not been able to prove that before the appellants refused the test identification parade they were not shown to the witnesses and the articles recovered i.e. two jeans, two shirts and a deodorant are articles easily available in the market, this Court finds it fit to extend the benefit of doubt to the appellants.

21. Consequently, the impugned judgment of conviction and order on sentence is set aside. Appeals are disposed of.

22. Appellants are directed to be released forthwith, if not required in any other case.
23. Copy of this order be sent to concerned Superintendent(s) for updation of the Jail record.
24. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 28, 2018
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