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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 12th March, 2019

+ CRL.A. 931/2005

MANOJ KUMAR

..... Appellant

Through: Mr. Gautam Khazanchi and Mr.
Akhilesh Kumar, Advocates with appellant
in person from JC

versus

STATE

..... Respondent

Through: Mr. Amit Ahlawat, APP with SI
Avinash Kumar

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The appellant alongwith five others stood trial in Sessions case no.101/2004 in the court of the additional sessions judge on the basis of reports (charge-sheets) under Section 173 of the Code of Criminal Procedure, 1973 (Cr.PC) which were submitted upon conclusion of investigation into first information report (FIR) no.53/2001 of police station Chitranjan Park and nos.202-05/01, all of police station Malviya Nagar. The FIR no.53/2001 had been registered on 07.03.2001 at the instance of Vineet Oberoi (PW-1) regarding offences punishable under Sections 392, 394, 397 of Indian Penal

Code, 1860 (IPC). On 08.03.2001 at about 8.20 a.m., the police officers of special staff allegedly arrested certain persons (who were sent up for trial) including the appellant herein from a public park in the area of Savitri Nagar behind Women Hospital, a brief case with currency notes of the total value of Rs.4,10,500/- having been recovered at that point of time, such arrestees also found having in their respective possession, knives and certain fire arms besides live ammunition regarding which FIR nos.202-05/2001 were registered in police station Malviya Nagar, each involving offence under Section 25 of Arms Act, 1959. The said brief case and the currency notes were found, upon investigation, to be part of the property of which PW-1 had been relieved in the course of armed robbery on 06.03.2001.

2. Thus, the charge-sheets arising out of the said five cases were brought before the same court and clubbed for trial, the appellant herein with others being charged with offences punishable under Sections 394 IPC, Section 395 read with Section 397 IPC, a separate charge having been framed under Section 25 of the Arms Act, respecting recovery allegedly made of a country made *katta* from him. The trial concluded with judgment rendered on 27.07.2005, the charge under Section 25 of the Arms Act against four persons including the appellant having been held to have failed, they thus having been acquitted for said offence. The trial court found the evidence led to show complicity of three co-accused namely Devender (A1), Mohd. Yunus (A5), Govind Singh (A6) to be not credible, they having been acquitted upon benefits of doubts being extended. By the same

judgment, the appellant (A4), and two others namely Kishan @ Krishan (A-2), Mohd. Anis (A3), were found guilty and convicted on the charge for offences under Section 394/ 397 IPC. By order dated 29.07.2005, each of the said three convicts were sentenced to undergo rigorous imprisonment for seven years with fine of Rs.500/-, in default further rigorous imprisonment for three months, benefit of set off under Section 428 Cr. PC being extended.

3. The State concededly did not challenge the judgment dated 27.07.2005 in so far as thereby A1 (Devender), A5 (Mohd. Yunus) and A6 (Govind Singh) had been acquitted. A2 (Kishan @ Krishan) challenged the judgment of conviction by Crl. Appeal no.788/2005, the same having been dismissed in default on 30.11.2018. On the other hand, A3 (Mohd. Anis) did not bring in challenge to the judgment of conviction or order on sentence, he having suffered the sentence awarded against him, and released from jail on 20.07.2007. A report to this effect has been submitted by the Station House Officer of police station Chitranganj Park pursuant to the earlier directions.

4. Thus, the appeal at hand is to be considered only qua the findings returned holding the appellant guilty and convicting him with sentence to the above effect having been awarded against him.

5. The case for the prosecution is set out succinctly in the judgment of the trial court thus :-

“2. The case of the prosecution is that on 6.3.2001, PW-1 Vineet Oberoi, proprietor of Soami Service Center, left the petrol pump around 11.30

p.m in his Honda City car bearing No.DLDCJ 7780. He was carrying with him the sale proceeds of 5th & 6th March, 2001 amounting to Rs.4,51,000/- in a brief case. Accused Govind Singh, his driver was driving the car. When the car reached K-Block Chitranjan Park, a cyclist suddenly came in front of the car and fell down. The driver stopped the car and went out to see the cyclist. The cyclist got up and pulled out a knife. He pushed the driver into the car and occupied the seat by the side of the driver. In the meantime two other boys appeared on the scene with pistols in their hands and opened the rear doors. One of them occupied the rear seat on the left side of Vineet Oberoi and the other sat on the right side of Vineet Oberoi's wife. Then the cyclist commanded the driver to take the car towards Lotus Temple. When the car reached a deserted place near the temple, the driver was commanded to stop. The cyclist caused injury on the left thigh of the driver with knife and then the three miscreants got down from the car with the brief case of Vineet Oberoi. Another boy was following the car on a two wheeler scooter. He stopped the scooter and then all the miscreants escaped on the scooter with the stolen brief case. According to prosecution, accused Kishan was the cyclist and accused Anis and Manoj were the two boys who had occupied the rear seat by the side of Vineet Oberoi and his wife. Accused Devender is alleged to be the person who was following the car on a two wheeler scooter.

3. It is further the case of the prosecution that on 8.3.2001 all the six accused were arrested in pursuance of a secret information while they were

sitting on a bench in DDA park behind Gramin Mahila Hostel in Sheikh Sarai Part II. It is alleged that the accused persons had assembled in the park for the purpose of distributing the stolen money among themselves. According to prosecution accused Devender was carrying the stolen brief case. It is alleged that accused Govind Singh was made to open the brief case and an amount of Rs.4,10,500/- was recovered. It is further alleged that accused Anis and Manoj Kumar were found in possession of a pistol and a live cartridge each and FIR 202/01 & 203/01 U/s 25 A.Act were registered against them. Button operated knives are alleged to have been recovered from accused Kishan and Devender and FIR Nos.204/01 & 205/01 were registered against them.”

6. The prosecution examined twenty six witnesses including Vineet Oberoi (PW1) and his wife Neeru Oberoi (PW-8). Their evidence narrates the sequence of events wherein both of them had left their petrol pump in the area of Soami Nagar which was located within the jurisdiction of neighbouring police station of Malviya Nagar at about 11.30 P.M. on 06.03.2001. A6 (Govind Singh) was driving the car, he being an employee engaged for such purposes by PW-1 and PW-8. PW-1 was statedly carrying with him two brief cases containing cash amount of Rs.4,51,000/-, the same representing the sale proceeds of two days from the petrol pump. The said witnesses testified that around 12'o clock in the night when the car had reached the area of K. Block of Chitranjan Park, a cyclist had come in front of the car and fell down due to the impact, A-6 (Govind Singh) having

stopped the vehicle and having gone out to see the cyclist. It is stated that A-2 (Kishan @ Krishan) was identified during the course of identification to be the said cyclist. The witnesses deposed that A2 had got up and pushed A6 back into the car occupying the front seat while two others who appeared at that point of time had entered the car by opening the two doors on either side occupying the rear seat where PW-1 and PW-8 were sitting at that point of time. The persons who had forcibly entered the rear seat were identified, statedly during investigation, to be A-3 (Mohd. Anis) and the appellant herein (A4). As per the deposition of the witnesses, the said persons who had entered the rear seat from either side, inclusive of the appellant, were carrying fire arms in their hands.

7. It is stated by the witnesses that A2 had inflicted injury on the thigh of A6 with a knife in the course of the said incident and after relieving PW-1 of his two brief-cases, the said three persons had exited the car fleeing away on a scooter which was following the car from behind. The investigation statedly revealed that the scooterist was A1 (Devender). As per the prosecution case, the six persons who were brought to trial were apprehended from the public park mentioned earlier in the morning hours of 08.03.2001, A1 (Devender) at that point of time having in his possession the stolen brief case which was opened by A6 (Govind Singh), it leading to recovery of the cash amount of Rs.4,10,500/-. It has been the case of the prosecution as was sought to be proved through SI Om Prakash (PW-20) and ASI Balbir Singh (PW-16) that at the time of being apprehended, four out

of the said six persons were found having in their respective possession of certain arms, which constituted offences under Section 25 of Arms Act, it being attributed to the appellant herein that he had in his possession a country made *katta* with live catridge. It may also be added that prosecution further relied on the testimony of ASI Paramjit Singh (PW-14) but his testimony having remained incomplete, he not having been produced for cross-examination, the trial court declined to act upon the same.

8. The trial court has disbelieved the prosecution case as to the evidence respecting the date, time and place of arrest of the six persons including the appellant and also about the recovery of the weapon from him. The reasons set out in the impugned judgment may be quoted verbatim :-

“8. As regards accused Mohd Yunus, the only incriminating evidence against him is that he was found with the other accused in DDA Park where they had allegedly gathered to distribute the stolen money among themselves. PW-17 ASI Balbir Singh and PW-20 SI Om Prakash are the only witnesses on this aspect. Their testimony does not sound very convincing. PW-17 ASI Balbir Singh claims to have apprehended Kishan but he could not identify Kishan amongst the six persons standing in the dock. PW-20 SI Om Prakash said in the examination in the chief that the accused had entered the park from the side of the hostel but on cross examination he stated that they had come from the other side. These two witnesses also contradict each other on some points. While PW-17 ASI Balbir Singh states that the police

party had gone to the park in a Tata Sumo and a private maruti car, PW-20 SI Om Prakash says that Tata Sumo was not used at all. Further, PW-17 ASI Balbir Singh states that the bench on which the accused persons were found sitting was at a distance of only 5/6 steps from the wall of the hostel but according to SI Om Prakash the distance was 60/70 meters. Moreover, PW-20 SI Om Prakash has admitted on cross examination, that the park where the accused had gathered was at a distance of 200 yards from the petrol pump of PW-1 Vineet Oberoi. It does not appeal to reason that the robbers would assemble in a open place so close to the petrol pump within 30 hours after occurrence. Then SI Om Prakash has stated that the accused persons were produced before the magistrate on 8.3.2001 itself. The remand papers corroborate his statement. Thus accused persons must have been in judicial custody on the night of 8.3.2001. PW-1 Vineet Oberoi, however, states that after receiving information about the arrest of robbers he had gone to police station Chitranjan Park in the evening on 8.3.2001 and he was asked by the IO to identify the culprits. This statement is obviously incorrect because the accused persons could not have been present at the police station on the evening of 8.3.2001. It appears that Vineet Oberoi did see the accused persons at the police station but he does not remember the correct date when he saw them. The possibility can not be ruled out that the accused persons were shown to Vineet Oberoi at the police station at some earlier stage. Therefore a serious doubt arises that the investigating agency has not truthfully disclosed the time and place of arrest of the accused persons. So the evidence of arrest and recovery of the stolen property cannot be the sole basis of

conviction. Vineet Oberoi has no doubt stated the Mohd Yunus used to work at a puncture workshop near the petrol pump. He has also stated that the electric supply to the said shop from the petrol pump had been discontinued five days before the occurrence. This statement of Vineet Oberoi cannot in any manner show the involvement of Mohd Yunus in robbery.

9. Similarly in the case of accused Govind Singh, the only incriminating circumstance against him is his alleged presence in the DDA park alongwith the other five accused at the time of recovery of stolen money on 8.3.2001. I have already observed above that the prosecution evidence regarding the arrest of the accused person and recovery of stolen money is not very reliable. PW-20 SI Om Prakash has stated that the brief case was opened in the park by accused Govind by using combination of numbers. PW-1 Vineet Oberoi has however, admitted on cross examination that the secret numbers of the lock of brief case were not known to Govind Singh. He could not have opened the brief case in the park as claimed by PW-20 SI Om Prakash. This infirmity persuades me further to presume that the time and place of arrest of the accused person has not been truthfully disclosed by the prosecution. If the evidence regarding presence of accused Govind Singh in the park with the other accused at the time of recovery is excluded from consideration, nothing is left to show his involvement in the commission of robbery. There is absolutely nothing suspicious in his behavior either on the night of occurrence or afterwards. When a boy came suddenly in front of the car near K-Block Chitranjan Park, the driver could have no alternative but to stop the car and accused Govind Singh behaved in the same

manner any other person in his place would have done. It is also in evidence that one of the robbers caused injury on the left thigh of the Govind when they left with the stolen money near Lotus temple. The MLC Ex.PW3/1 shows that the injury on the left thigh of Govind Singh was 3 cm deep. Then it is mentioned in the statement of Ex. PW1/1 of Vineet Oberoi that when he returned to Lotus Temple with the police, he found Govind Singh sitting in the car and there was lot of blood on the driver seat. If Govind Singh had been an accomplice of the robbers, they would not have inflicted such deep injury. I can understand that the robbers may have pretended to cause injury to Govind Singh to show his innocence but in that case the injury would have been superficial and it would not have been 3 cm deep. Further PW-1 Vineet Oberoi admits on cross examination that accused Govind Singh reported for duty on the next day after the occurrence and remained at the petrol pump till 8 p.m. Thus the conduct of accused Govind Singh at the time of occurrence and even the subsequent conduct indicate that he was probably not privy to the conspiracy of robbery and he deserves the benefit of doubt.

10. Accused Kishan, Manoj, Anis and Devender have been identified in court by PW-1 Vineet Oberoi and PW-8 Neeru Oberoi. The role attributed to accused Devender is that he had followed the car of Vineet Oberoi on a two wheeler scooter and when the car was ultimately stopped near Lotus Temple, he facilitated the escape of the other three accused by taking them away on the scooter with the stolen money. PW-1 Vineet Oberoi claims that he had seen the scooterist following the car. On cross examination, he stated that he had seen in the rear view mirror of the car that a scooter was following.

He further admits that the head lights of the scooter were on. He is unable to state whether the person who was driving the scooter was wearing helmet or not. As a matter of fact, he admits that he had not looked at the scooterist while sitting in the car. PW-8 Neeru Oberoi also admits that the three persons who had possibly occupied seats in the car had not permitted them to look backwards. Therefore, dock identification of accused Devender by these two witnesses has no probative value. PW-7 Lekhraj has stated that accused Anis was working as a trainee with him. He further states that Anis had told him that he had given the scooter to Devender. Even if I believe this statement for the sake of argument, it entitled that confession made by a co-accused cannot by itself be the basis of conviction.”

9. As is noted from the afore-quoted further observations in the impugned judgment, a different approach was adopted *vis-a-vis* the three others including the appellant for the reason they were the persons who had actually entered the car during the course of the robbery, there being enough time and occasion, in the opinion of the trial court for PW-1 (Vineet Oberoi) and PW-8 (Neeru Oberoi) to see them from close quarters and to be in a position to identify them.

10. While it does appear that robbery as is narrated by the said witnesses, would have taken sometime to be committed, there being some occasion for the victims to see the perpetrators, the caution to be followed in approaching such evidence will have to be borne in mind.

11. In a case of armed robbery, particularly one committed at the night time, that too in a moving motor vehicle, the victims having

been terrorized, they having possibility only of having fleeting glimpse of the perpetrators – who were total strangers – their word as to identification in the court would need close scrutiny. Undoubtedly, if there has been positive confirmation of identity in a test identification parade (TIP) arranged during investigation and soon after the arrest, there would be some assurance as to the credibility of dock identification. But, conversely, if the circumstances anterior to holding of such TIP gives rise to doubts, as to fairness of the investigative process, dock identification, for the first time at the trial, would be unsafe to act upon.

12. But then, it is argued by the Additional Public Prosecutor for the State that after the appellant had been apprehended on 08.03.2001, the investigating agency, having taken his judicial remand on 08.03.2001, had moved an application with all promptitude for TIP to be arranged. The TIP proceedings were held on 09.03.2001 and presiding Metropolitan Magistrate Sh. Sanjay Garg recorded the proceedings taking note of refusal on the part of the appellant to join the said process on the ground that he had already been shown to the witnesses by the police. In these circumstances, the question of justification of such refusal to join TIP needs to be addressed.

13. The trial court, it may be noted again, as is shown by the observations quoted above, has concluded that the possibility that the accused persons had been shown to PW-1 (Vineet Oberoi) at the police station at some earlier stage cannot be ruled out. This finding resulting in acquittal of three out of the six accused persons has not

been challenged by the State and has attained finality. The said observations, even otherwise, are found to be fully justified in view of the deposition of PW-1 himself testifying that he had been called to the police station for the accused persons to be shown to him on the night of 08.03.2001, the date and time of such endeavour being apparently incorrect for the reason that all the six arrestees as per the record had already been produced before the Metropolitan Magistrate during the day on 08.03.2001 and had since been sent to judicial custody.

14. The trial court disbelieved the evidence of the prosecution as to the date, time and arrest of the appellant. The trial court also declined to act upon the evidence showing the recovery of a firearm from him. The stolen money, as per the evidence, was not even found to be in the possession of the appellant. The person (A1), in whose hands the briefcase was statedly found, has been acquitted. In these circumstances, the finding returned against the appellant holding him guilty of complicity in the offence of robbery only on the basis of dock identification, given the possible justified reasons for refusal to join TIP, seems to be unjust and unfair.

15. The benefit of doubts for the same reasons as extended to three others, should have been extended to the appellant as well. For these reasons, the impugned judgment holding the appellant guilty cannot be upheld. The same is set aside. Consequently, the order on sentence against the appellant is also set aside.

16. The appellant is presently lodged in jail, he having been arrested pursuant to non-bailable warrants which were issued on account of default in his appearance in these proceedings on 30.11.2018. He shall be released from jail forthwith.

17. The appeal is disposed of in above terms.

R.K.GAUBA, J.

MARCH 12, 2019

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