

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.11.2020

+ **CRL. A. 619/2017 and CRL.M.A. 6306/2020**

GULAM JILANI @ KALLU

.....Appellant

Versus

GOVT. OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Kanhaiya Singhal, Mr Prasanna and
Mr Ajay Kumar, Advocates.

For the Respondent :Mr Amit Gupta, APP for State.

AND

+ **CRL.A. 620/2017 & CRL.M.A. 34451/2019, CRL.M.A.
9008/2020, CRL.M.A. 9009/2020 && CRL.M.A. 9010/2020**

SANDEEP

.....Appellant

Versus

GOVT. OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Adit S. Pujari, Advocate (DHCLSC),
Mr Chaitanya Sundriyal and Ms Tusharika
Mattoo, Advocates.

For the Respondent :Mr Amit Gupta, APP for State.

AND

+ **CRL. A. 621/2017 and CRL.M.(BAIL)1794/2019**

PRADEEP

.....Appellant

Versus

GOVT. OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Kanhaiya Singhal, Mr Prasanna and
Mr Ajay Kumar, Advocates.

For the Respondent :Mr Amit Gupta, APP for State.

AND

+ **CRL. A. 900/2017 and CRL.M.(BAIL) 249/2019**

KHOKAN @ GUDDU

.....Appellant

Versus

STATE (G.N.C.T. OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Anwesh Madhukar and Ms Prachi
Nirwan, Advocates.

For the Respondent :Mr Amit Gupta, APP for State.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellants have filed these appeals impugning a judgment dated 24.05.2017 passed by the learned ASJ-04, Rohini Courts, whereby they were convicted for committing an offence punishable under Sections 392/34 of the Indian Penal Code, 1860 (hereinafter 'IPC'). The appellants also impugn an order on sentence dated 27.05.2017, whereby they were sentenced to undergo rigorous imprisonment for a period of seven years along with a fine of ₹3,000 each and in default of payment of fine, to undergo simple imprisonment for a period of three months.

2. The appellants were charged with committing offences punishable under Sections 392/411/34 of the IPC. In addition, Sandeep (the appellant in CrI. A. 620/2017) was also charged with committing an offence punishable under Section 397 of the IPC. The Trial Court acquitted the appellants of all charges, other than the charge of committing an offence punishable under Section 392 of the IPC, as the court did not believe that the prosecution had established that the goods recovered from the appellants were those that were stolen. Further, the complainant (who was also the eyewitness) resiled from his earlier statement that he had seen the accused Sandeep with the pistol. Before the court, he testified that he had seen the said weapon in the hands of the accused Khokhan @ Guddu (the appellant in CrI.A 900/2017). Accordingly, the accused Sandeep was acquitted of the charge for committing an offence punishable under Section 397 of the IPC

3. Whilst the appellants do not contest that a robbery had been committed, they urge that the prosecution has failed to prove their involvement in commission of the said offence, as the testimonies of the material witnesses identifying them are inconsistent. The appellants further contend that, in any event, the testimonies of the witnesses identifying them as the offenders, are unreliable, as they were shown to the witnesses in the police station and the court premises prior to the TIP proceedings.

4. In the early hours of 17.01.2007, a PCR call was received regarding a robbery at A-12, Industrial Area, Phase-1, Mangolpuri,

Delhi. The information was transmitted to PS Mangolpuri and was received at 3.30 AM by Ct. Surya Prakash, who was on duty at the material time. He entered the same as DD no. 10B (Ex. 4/A). The same was marked to ASI Kewal Singh and Ct Ravinder. They proceeded to the spot (A-12, Industrial Area, Phase-1, Mangolpuri, Delhi) where they met the complainant (Sonu) and recorded his statement (Ex.PW10/A). He stated that he was employed as a Manager with the Transport Agency located at A-12, Industrial Area, Phase – 1 Mangolpuri and his father, Om Prakash, was the owner of the said Transport Agency. He stated that in the intervening night of 16.01.2007 and 17.01.2007, he along with three [sic] of his workers, namely, Krishan, Ishwar @ Minto and Rajesh Kumar @ Bangali were sleeping on the *duchhati* in the office room. In addition, two security guards named Arvind and Devnath were on duty outside the office. They were armed with *lathis*. He alleged that at about 02:00 am, one person was seen bringing the two security guards inside the premises on a gunpoint. He brought the guards near them at the *duchhati*. He stated that the shutter of their office was open and both the security guards were inquiring from the said person as to why they were removing the goods. At that time, they noticed that the said person was aged about 20 to 25 years. He was of a medium built and height and was wearing a black jacket. He pointed the pistol towards them and demanded that all of them to continue lie down where they were and threatened that he would shoot them, if they did not do so. The complainant further stated that the three miscreants, who were loading goods in the tempo in front of the office, were also aged

between 20 and 25 years. He stated that while they were doing so, another tempo (bearing registration No. HR-56-2576), which was driven by one Bansi, arrived there for transporting goods to Rohtak. He stated that one of the miscreants took the keys of the said tempo and also brought Bansi to them. Thereafter, the said miscreants took away three of their mobile phones with nos. 9312281758, 9213565850 and 9215800964 as well as the mobile phone of the tempo driver, Bansi (No. 09215800953). He alleged that the said miscreants loaded forty-two bags of the silver *karahis* of the make Sunrise, eighteen cartons of inverter parts, four cartons of Action shoes and twenty-three boxes of Boroplus. The robbers then closed the shutter of the office from outside and fled after looting the goods. He also stated that the said accused deflated the tyres of the tempo, which was driven by Bansi. He stated that he could recognize the accused, if they were brought before him.

5. On the basis of this information, a *rukka* was prepared. And, the FIR in question – FIR no. 135/2007, under Sections 392/397/411/34 of the IPC was registered with PS Mangolpuri.

6. On 17.02.2007, the accused (appellants) were apprehended by the Special Staff, South District, on the basis of a secret information. Inspector Naresh Kumar (PW-18) testified that on 17.02.2007, he had a secret information, on the basis of which, they had taken their positions at the given spot. He stated that at about 08:00 pm, three of the accused, namely, Sandeep, Khokhan @ Guddu and Gulam Jilani came to the spot on foot and had stood near the corner of the road

towards the forest. Five minutes later, one Tata tempo 407 (bearing Registration No. DL-1LE-0041) came to the spot from the direction of MB Road and had halted there. Two persons alighted from the said tempo including the accused Pradeep. Thereafter, all the five persons proceeded towards the forest area. On being pointed out by the secret informer, the four accused (the appellants herein) were apprehended. However, their accomplice managed to escape.

7. The accused were arrested in FIR No. 135/2007, under Sections 399/402 of the IPC, registered with PS Okhla Industrial Area. He further stated that during the course of investigation relating to the said FIR, the accused disclosed their involvement in a number of cases including the present case. On the basis of the disclosure statements, certain recoveries were made. In all, two sewing machines of the make Kajal, twenty-eight packets of Boroplus cream and three Power Link UPS were recovered. The Boroplus packets were allegedly recovered at the instance of the accused Pradeep; one sewing machine and one Power Link Home UPS were recovered at the instance of the accused Gulam Jhilani; one sewing machine was recovered at the instance of the accused Sandeep; and one Power Link Home UPS was recovered at the instance of the accused Khokhan @ Guddu.

8. On 19.02.2007 at about 07:20 pm, information was received over telephone from the Special Staff that the accused had been arrested in FIR No. 135/07, registered with PS Okhla Industrial Area. Their disclosure statements had been recorded and recoveries had been made pursuant thereto. The said information was entered as DD

No. 62B. On receipt of the said DD, the IO went to the office of the Special Staff, South District, New Delhi and collected a photocopy of the FIR bearing No. 135/07, under Sections 399/402/34 of the IPC and Sections 25/54/59 of the Arms Act, 1959 registered with PS Okhla, New Delhi on 17.02.2007. Along with the same, he also collected copies of the arrest memos of the accused; the photocopies of the disclosure statements; pointing out memos of the accused person; and seizure memos of the recovered articles and tempo bearing number DL-1LE-0041. The statement of one of the officials of the Special Staff was recorded under Section 161 of the Cr.PC. The production warrants were sought from the concerned court. The accused were then produced in court on 24.02.2007 and they were formally arrested. Their separate disclosure statements were recorded. On the same day, the IO also filed an application for conducting the TIP of the accused but they refused to participate in the TIP proceedings. Thereafter, the IO sought for police custody of the accused for a single day, which was granted. The IO took the accused to the place of occurrence on 27.02.2007. He recorded the pointing out memo and also recorded the supplementary statements under Section 161 of the Cr.PC. The complainant and Ishwar (PW13) identified the accused as the persons, who had committed the crime, on 27.02.2007.

Evidence

9. In order to prove its case, the prosecution examined twenty-one witnesses. The defence did not examine any witnesses. The evidence of the witnesses that were at the spot (A-12, Industrial Area, Phase-1,

Mangolpuri, Delhi) at the material time are relevant and briefly noted below.

10. Krishan was examined as PW-6. He stated that in the intervening night of 16.01.2007 and 17.01.2007, he was present at the office of Om Transport Agency along with Rajesh, Mintu and Sonu. All four were at the ground floor. Two security guards were also present. At about 2/2:15 a.m., two persons came upstairs along with the guards and one of those persons had a revolver in one hand and a sword in the other. The other person also had a sword in his hand. The two persons pointed the revolver and told him (PW-6) and the other persons to remain quiet. One driver named Bansi came with his tempo. The other persons brought Bansi upstairs and snatched the keys of the tempo. They also deflated the tyres of that tempo. He (PW-6) identified the four accused in court. He testified that the accused Pradeep had a revolver and sword and the accused Gulam had a sword in his hand. He stated that accused persons took some cartons of Boroplus, aluminium *karahi*, inverters and other cartons, which he could not recall. The accused also took their mobile phones. In his cross-examination, he affirmed that he was not working at the said transport office and he would sleep there at night since the agency belonged to his uncle (*fufa*). He would help his uncle with his work. He affirmed that the guards did not lock the shutter since they sit near them. The guards were armed with *lathis*. He was confronted with his statement (Ex. PW6/DA), where the fact of the sword was not recorded in the same. He stated that Bansi had come after about 15

minutes after the accused persons had started loading the goods. He affirmed that Bansi was brought down from his tempo on knifepoint. He could not recall if he had stated this in his statement to the IO. He stated that Sonu informed the police on a mobile that he had borrowed from the neighbour and that person was present, when the police was informed. He affirmed that he had seen the accused persons in court after the incident and not before that.

11. Arvind, the security guard, deposed as PW-7. He stated that in the intervening night of 16.01.2007/17.01/2007, he was on duty along with Devnath. At about 2-2:30 a.m., four persons came to the gate of the *godown*. One person had a revolver and pointed the same at him and Devnath, and thereafter, told them to take the four persons inside the *godown*. Inside the *godown*, three workers were sleeping and they were awoken by the assailants. The assailants took their phones. One of the assailants took out a knife and threatened them that if they raised an alarm they would kill them. He stated that he could not identify the assailants as their faces were muffled. At this stage, the learned PP cross-examined PW-7, as he was resiling from his earlier statement. PW-7 affirmed that the person holding the revolver was wearing a black coloured jacket. At the time of the incident, Sonu, Krishna, Ishwar and Rajesh were sleeping on the second floor of the *godown*. He affirmed that Bansi, a tempo driver, came there and his mobile was also taken away by the assailants. He affirmed that he had told the police that he could identify the assailants but could not do so anymore due to lapse of time.

12. Bansi Lal deposed as PW-9. He stated that on 16.01.2007/17.01.2007, he had come to Mangolpuri at Om Transport for loading *parchune* in his tempo, at about 2-2:30 a.m. Two persons asked him to come down from his tempo. One of them had a knife and one had a revolver. They took him to the roof of the agency where there is one room. There, a blanket was put on him and they snatched his mobile. The *chowkidar* was also present there. In his cross-examination, by the PP, he affirmed that the persons who asked him to get down from the tempo, were about 20 to 25 years of age. One of their associates was inside the agency, when they took him inside. He was wearing a black jacket. He could not identify the accused present in court, on the day of his deposition. In his cross-examination, he stated that he had not seen the accused persons present in court prior to the date of his deposition.

13. Sonu (the complainant) deposed as PW-10. He stated that in the intervening night of 16.01.2007/17.01.2007, he along with three of his workers namely Krishan, Rajesh and Ishwar were sleeping on the *duchatti* of the transport agency. Two security guards were on duty outside the office. At about 2/2:10 am, he heard one of the guards saying “*why you are loading goods*”. He woke up and saw that one person was bringing both the security guards, on the *duchatti*, towards him on gunpoint (revolver). Thereafter, that person pointed the revolver at him and threatened him. Three other persons were loading the goods from the transport into a tempo. They loaded the goods and went away. While loading the goods, one tempo driven by Bansi

came. The accused snatched his mobile and brought him to where PW-10 and the others were. He stated that he went to the nearby Chaudhary Transport and made a call at 100 number. He also called his brother, Vinod. PW-10 identified the accused in open court. He stated that on 27.02.2007, the police had come to their office and all four accused were in their custody. After seeing them, he told the police that they had taken the goods from the office. In his cross-examination, by the PP, he stated that he had not told the police that on 27.02.2007, the accused Sandeep was carrying a pistol. He then stated that he had told the police that the accused Khokhan was carrying the pistol on the day of the incident. In his cross-examination, he stated that he did not maintain any register regarding the booking and dispatch of goods. He stated that the shutter of their agency was kept open. He stated that the local police had prepared the site plan at his instance. On 27.02.2007, the police officials had come along with the accused to his office, at about 04:00 pm.

14. Devnath was examined as PW-11. He stated that in the intervening night of 16.01.2007/17.01.2007, he along with his nephew were on duty at Om Transport Office, Industrial Area, Mangolpuri, as security guards through Vishal Security. At about 02:30 am, four persons entered the factory premises with weapons. They took him inside the office. The assailant showed his pistol and threatened them. The assailants covered the faces of those present in the office with blankets and snatched their mobile phones. One driver brought a Tata truck into the premises for loading the material. One of the assailants

confined the driver of that truck in the same room and punctured the tyre of the truck. He stated that he could only identify the assailant, who was holding the pistol. PW-11 identified the accused Khokhan in court and stated that he was the person who had shown him the pistol. He stated that he could not identify the others since they had covered their faces with a cloth. In his cross-examination, conducted by the PP, he denied that he could identify all the robbers. He stated that he had told the police that the robbers had their faces covered. He denied that the accused Pradeep, Sandeep and Ghulam were the same persons who came with the accused Khokhan. He stated that it would be wrong to suggest that the description of the accused Pradeep, Sandeep and Ghulam are matching with the robbers who had come along with accused Khokhan. In his cross-examination, he stated that he saw a weapon only in the hand of one person, the accused Khokhan and the other accused were empty handed. He stated that the transport office has only one floor and there was nothing constructed on its roof. He stated that the police came to the agency at about 05:30/06:00 am.

15. Rajesh Kumar deposed as PW-12. He stated that in January, 2007, he was working at Om Transport Agency as a sweeper. On the intervening night of 16.01.2007/17.01.2007, five-six persons entered the agency and out of them, one person had a country made pistol and two had knives in their hands. The assailants showed the gun to the guards and brought them towards the *duchatti*. PW-12 identified the accused in court and stated that the accused Khokhan had a country made pistol in his hand. He stated that one or two persons had covered

their faces. In his cross-examination, he affirmed that the police never recorded his statement. He stated that the police came at about 02:30 am.

16. Ishwar @ Mintu deposed as PW-13. He stated that in January, 2007 he was working as a supervisor at Om Transport Agency. He stated that at 02/02:30 am they were asleep on the *parchati*. The guards were brought there by the assailants and they were covered with a blanket and were made to sit in a corner. One of the assailants had a knife in his hand. He stated that he could identify the assailants. The accused person who was carrying the weapon was called by one of the other assailants ('*Khokhan jaldi aa jaa*'). He identified the accused Khokhan in court as the person who had a country made *katta*. He could not identify the accused other than Gulam and Khokhan. In his cross-examination, by the PP, he affirmed that his statement was recorded by the police twice – on 17.01.2007 and on 27.02.2007. He affirmed that he had stated to the police that he could identify all the accused, if shown to him. On 27.02.2007, the police had brought four persons with them and he and Sonu identified all the four persons who had committed the robbery and their names were revealed to be those of the appellants. He affirmed that Sandeep had shown them the *katta*. He affirmed that he knew the accused Sandeep and Pradeep by face. He later changed his statement to state that he had seen the gun in Khokhan's hand and not in the accused Sandeep's hand. In his cross-examination, he stated that he could not tell if the assailant guarding them was holding a gun or a knife or a sword.

When he saw the assailants, their faces were not covered with any cloth. He stated that the person who remained with them guarding them had a *katta* in his hand. One of the assailants had called him and said “*Khokhan jaldi aa jaa*”. He stated that he had told the police that the person guarding them had a weapon like a knife. However, the same was not recorded in his statement to the police. He stated that the police arrived at about 03:45/4:00 am on 17.01.2007 and remained there for about one hour, thereafter.

Reasons and Conclusion

17. The Trial Court evaluated the testimony of all the witnesses and held that it was evident from the testimony of the various witnesses that the incident of robbery had taken place as alleged.

18. Insofar as recovery of articles is concerned, the Trial Court held that the prosecution had failed to establish beyond any reasonable doubt that the articles recovered from the possession of the accused were the same articles that were robbed. The court reasoned that the articles recovered were in small quantity; there were no identification marks on the recovered articles and the same were readily available in the market. The said reasoning cannot be faulted. Vinod Kumar (the brother of the complainant and the son of the owner of the Transport Agency) had furnished bills/GR, which were seized by ASI Kewal Singh (PW-21) and the seizure memo (Ex.PW2/A) was prepared. However, the said documents (Ex.PW5/1 to PW5/8) do not clearly established the identity of the goods in question. It is also relevant to

note that none of the said documents pertain to Om Transport Agency. Ex.PW5/2 is the consignor's copy of a document generated by Krishna Brothers Transport Company and it mentions the number of packages as 23 and the contents as "cosmetic Boroplus". The weight is mentioned as 230 Kgs. Ex.PW5/1 is a cash/credit memo issued by M/s B.C. & Sons for 8160 pieces of "BORO PLUS AN.CREAM 19 GM" and 1680 pieces of "BORO PLUS AN. CREAM 40 GM". Ex.PW5/3 is a document generated by Krishna Transport Company (Titu) indicating the name of the consignee as self. The said document refers to three Bgs of "EL Wire". Ex.PW5/5 is a retail invoice/cash memo/bill of Powercell Electronics in respect of three separate articles including 24 pieces of "Home UPS 600 VA". Ex.PW5/6 is a document generated by Krishna Transport Company (Titu) in respect of "*Fourty Two Katta Alu Kadhai*". The name of the sender is referred to as "Keshav Kumar C/o Duli Chand Om Prakash" and the name of the consignee is referred to as "Garg Bartan Bhandar". The said document also mentions that it is a driver's copy. Ex.PW5/7 is a document generated by Lion Transport Co. mentioning the description of the goods as "S.Machine". Ex.PW5/8 is a document captioned as a "repairing bill" issued by M/s Dhawan Electronics in respect of 10 machines (Kajal). None of the documents mention the name of Om Transport Agency and there is no document to indicate that the said consignment was being transported by Om Transport Agency.

19. As noticed above, the document pertaining to sewing machines is a "repairing slip". None of the documents refer to any specific

markings of packaging details including batch numbers or serial numbers of the products being transported. Clearly, on the basis of the aforesaid documents, the goods allegedly recovered from the accused cannot be stated to be those that were allegedly robbed from Om Transport Agency.

20. One Sh. Amit Dhawan was examined as PW-8. He testified that he was engaged in the business of dealing in sewing machines by the name of Dhawan Electronics. He testified that he had purchased 15 sewing machines of brand Kajal from Ludhiana and out of the said machines, he had sold five machines from his shop and he had booked 10 machines for Palwal with Lion Transport for one Sanjay. He stated that the private mark of Sanjay was RK/PL and he had put the same on the cartons containing the sewing machines. The Additional PP had sought permission to put certain leading questions to the witness, which were allowed and he confirmed the serial numbers of the sewing machines. He also stated that he could identify the sewing machines if shown to him. At that stage, a sealed parcel was opened and one sewing machine of the make Kajal along with the cardboard box was taken out. The said witness identified the sewing machine. However, in his cross-examination, he conceded that this carton did not have any private mark as testified by him earlier. He was confronted with the document exhibited as Ex.PW5/8 and he clarified that it was not a bill but only a slip. He also conceded that there was no mention of any name of the purchaser or the serial numbers in the said slip or in the bulky (Ex.PW5/7). He also stated that the

transporters had not issued any document in respect of the booking of the goods to him.

21. In view of the patchy evidence relating to the goods recovered from the accused, the Trial Court had acquitted the said accused of committing an offence punishable under Section 411 of the IPC. This Court concurs with the said view as there is little evidence to establish that the goods allegedly recovered from the accused were the same that were robbed from Om Transport Agency. Further, the quantity of goods recovered is a small fraction of the goods that were allegedly robbed. The disclosure statements made by the accused during the course of investigation pertaining to FIR No. 135/07 (Ex.PW17/A to Ex.PW17/D) also does not inspire any confidence. This is for the reason that the number of persons disclosed to be involved in commission of the crime does not conform to the number of persons alleged to have committed the robbery. Further, the goods allegedly robbed and those as disclosed in the disclosure statement, are also not the same. In the disclosure statements of the accused, goods such as speakers, DVD Players are also mentioned and it is not anybody's case that the said goods were robbed on the date of the incident.

22. The accused Sandeep was also charged with committing an offence punishable under Section 397 of the IPC. However, since none of the witnesses had identified the accused Sandeep wielding a pistol/country made *katta*, the Trial Court found that there was no evidence to convict him for committing an offence punishable under

Section 397 of the IPC. Accordingly, the court acquitted him of the said charge. This Court finds no fault in the said decision as well.

23. To be noted, the State has not preferred any appeal against the accused being acquitted of an offence under Section 411 of the IPC and the accused Sandeep being acquitted of an offence punishable under Section 397 of the IPC. Thus, in substance, the Trial Court's finding that the prosecution had not proved the recovery of stolen articles beyond reasonable doubt and that the accused Sandeep had used a deadly weapon in committing the robbery has been accepted by the State.

24. The only question that remains to be addressed is whether there is sufficient evidence to establish that the appellants were involved in committing the offence of robbery punishable under Section 392 of the IPC.

25. Mr Pujari, learned counsel appearing for the accused Sandeep (the appellant in CRL.A. 620 of 2017), submitted that the identification of the accused person in court could not be relied upon because it was not corroborated by any independent evidence. He stated that none of the witnesses had described the accused or provided any evidence as to their identity prior to their identification in court and therefore, their deposition in court identifying the accused was insufficient to convict them. Next, he submitted that the Trial Court had erred in drawing an adverse inference on the count that the accused had not participated in the TIP. He submitted that the accused

had given a justifiable reason for not doing so as they had been shown to the witnesses in the police station as well as in the Rohini Court Complex. He submitted that this was evident from the fact that the IO had moved an application for their TIP on the same day when they were produced in court. He submitted that this would clearly indicate that the witnesses, who were to identify the accused, were present in the court at the time when they were produced and had seen them. He stated that although the faces of the accused for the TIP may have been muffled but they were brought to the lock-up and from there to the court room and during this period, their faces were not muffled. Thus, the witnesses had the opportunity to see their faces. He relied on the decision of a Coordinate Bench of this Court in *State (GNCT of Delhi) v. Sandeep: CRL. L.P. 620/2019*, wherein this Court had observed that if an accused person has a justifiable reason to refuse TIP, no adverse inference can be drawn. He further stated that the accused were also shown to PW-10 and PW-13 subsequent to the TIP proceedings and therefore, their testimony identifying the accused in court could not be relied upon.

26. Next, he submitted that the entire procedure adopted by the investigation agency of filing an application under Section 267 of the Cr.PC for production of the accused and for the purposes of interrogating them, formally arresting them and conducting their TIP was contrary to the provisions of law. He submitted that powers under Section 267 of the Cr.PC could be used only when the accused person was required to answer before a court to a charge or for any

proceedings against him or to examine such person as a witness. He relied upon the decision of a Coordinate Bench of this Court in ***Harshad S. Mehta v. Central Bureau of Investigation: (1992) 24 DRJ 392***, in support of his contention that the police could not use the procedure under Section 267 of the Cr.PC for ensuring the attendance of an accused in one case in order to arrest him in another case.

27. Mr Madhukar, learned counsel appeared for Khokhan @ Guddu (the appellant in CRL.A. 900/2017) contended that the present case was a blind case and the prosecution had no leads to apprehend the persons involved in committing the said offence. He stated that in the said circumstances, the appellants had been falsely implicated and articles alleged to have been recovered from them were planted. He read the testimonies of various witnesses and contended that their testimonies could not be relied upon to establish that the appellants were involved in committing the alleged offence.

28. Mr Singhal, learned counsel appearing for Gulam Jilani @ Kallu and Pradeep (the appellants in CRL.A. 619/2017 and CRL.A. 621/2017) reiterated the contentions advanced by Mr Pujari and Mr Madhukar. He further submitted that even if the conviction of the appellants were upheld, the sentence awarded to them was severe and the Trial Court had overlooked the mitigating circumstances. He submitted that the appellants were of a very young age; they had no other criminal antecedents as they had been acquitted in all other cases; and had minor children and families to support.

29. Mr Pujari's contention that the procedure adopted by the investigating agency of filing an application under Section 267 of the Cr.PC for production of an accused before the learned MM, their formal arrest and the request for conducting the TIP was contrary to the provisions of law and therefore, the appellants are liable to be acquitted, is unpersuasive. It is contended that the provisions of Section 267 of the Cr.PC cannot be invoked for producing the accused before the court for the purposes of arresting them in another case.

30. First of all, no such contention was advanced before the Trial Court and the same is clearly an afterthought. Secondly, even if the contention that the procedure under Section 267 of the Cr.PC ought not to have been invoked to produce the appellants before the learned MM for the purposes of their arrest in the present case, is accepted, the appellants have failed to establish that they were unfairly prejudiced by the same. In terms of Section 465 of the Cr.PC, the impugned judgment convicting the appellants cannot be called into question on account of any irregularity in procedure unless it is established that the same resulted in the failure of justice. In the present case, the procedure of producing the appellants before the learned MM for the purposes of this FIR and arresting them when they were produced has not resulted in failure of justice in any manner.

31. The Trial Court had proceeded on the basis that an adverse inference is required to be drawn against the accused on account of their refusal to participate in the TIP. It is contended on behalf of the appellants that their refusal to participate in the TIP were justified as

they had been shown to the witnesses at the police station and in the court. However, there is no evidence on record that the appellants were shown to the witnesses in the police station or in the court prior to the TIP proceedings. The TIP proceedings were conducted on 24.02.2007 and the appellants were specifically warned that their refusal to join the TIP proceedings may lead to drawing of an adverse inference against them. The appellants have not led any evidence in their defence to establish that they have been shown to the witnesses prior to the TIP proceedings. More importantly, they have also not elicited any evidence to the aforesaid effect from any of the witnesses who had identified them. None of the said witnesses had been specifically asked whether they had seen the accused prior to the TIP proceedings.

32. The prosecution had examined seven witnesses – PW-6, PW-7, PW-9, PW-11, PW-12, PW-13 and PW-10 – for the purposes of identifying the appellants as the offenders who were involved in committing the robbery on the date of the incident

33. PW-6 had identified the accused Pradeep and the accused Gulam Jilani as two of the accused who were involved in committing the robbery. He had stated that the accused Pradeep was carrying a sword in hand and a revolver in the other and the accused Gulam had a sword in the hand. His testimony was not accepted by the Trial Court as it was even doubted whether he was present at the spot. PW-6 was not employed with the Transport Agency in question and had no concern with it. He was a nephew of the owner. There is no reason for

him to be present at the spot at the given time. Furthermore, his testimony is materially inconsistent with the testimony of the other witnesses. None of the other witnesses have testified that the accused Pradeep and accused Gulam Jilani were wielding swords. He had also testified that at the material time, he was working for another transporter named Laxmi Pandit and his place of work was about one kilometer from the office of Om Transport Agency. In his statement recorded on the date of the incident (Ex.PW6/DA), he had not alleged that the accused were wielding swords. He testified that he had seen the accused in court for the first time after the date of the incident. He was examined on 16.12.2011, which was almost five years after the date of the incident. Thus, the Trial Court rightly ignored his testimony for the purposes of identification of the accused.

34. PW-7 (Arvind) had categorically stated in his examination-in-chief that he “*cannot identify the assailants as they were muffled faces*”. He was cross-examined by the learned APP. In his cross-examination, he conceded that he had told the police that he could identify the assailants if shown to him. However, he volunteered that he could not identify the assailants due to lapse of time. Clearly, his testimony can be of little assistance to the prosecution insofar as the identification of the accused are concerned.

35. PW-9 (Bansi) testified that he had come to Mangolpuri at Om Transport Agency for loading some goods on his tempo. He stated that the two accused had asked him to alight from his tempo, one of them was carrying a knife and the other was carrying a revolver. They had

put a blanket on his head and he categorically stated that he could not identify those persons. He was cross-examined by the learned APP. However, he was firm in his stand that he could not identify the accused. He denied the suggestion that he was not doing so due to fear. In his cross-examination by the learned counsel for the accused, he categorically stated that he had not seen the accused present in the court on the day of the incident.

36. PW-11 (Sh. Dev Nath) also did not support the prosecution's case entirely. He did not identify the accused Sandeep, Pradeep or Gulam Jilani. He stated that their faces were covered with a cloth. However, he did identify the accused Khokhan to be one of the persons who was involved. He alleged that Khokhan had shown him a country made pistol. However, it is not the prosecution's case that the accused Khokhan was wielding any firearm. He was cross-examined and in his cross-examination, he denied the suggestion that the accused Pradeep, Sandeep and Gulam had accompanied the accused Khokhan. He also denied the suggestion that their description was matching the description of the robbers, who had accompanied the accused Khokhan, on the said date. He further denied the suggestions that he had not deliberately identified them because he was threatened or because of lapse of time or that he had been won over by all the accused persons other than the accused Khokhan.

37. PW-12 (Sh. Rajesh Kumar) identified all the accused in Court. He also testified that the accused Khokhan was carrying a country made pistol and had threatened them with it. However, he could not

state which of the accused was carrying a knife. However, it is also important to state that he testified that one or two persons had covered their faces. He also stated that he could not identify the pistol if it was shown to him.

38. PW-13 (Ishwar) identified all the accused. He identified the accused Khokhan as the person who was carrying the weapon (country made *katta*) but he denied that he could identify the other accused who were associates of the accused Khokhan and Gulam. In his cross-examination, he was confronted with the statement recorded on 27.02.2007 and he identified the accused Pradeep and Sandeep. He stated that he had not done so earlier because of lapse of memory.

39. PW-10 (Sonu) identified all the accused. However, he did not support the prosecution's case that the accused Pradeep was carrying a pistol. He stated that the accused Khokhan was carrying the pistol.

40. It is seen from the above that four witnesses (PW-10, PW-11, PW-12 and PW-13) had identified the accused Khokhan to be one of the perpetrators of the offence. The accused Gulam Jilani has been specifically identified by PW-10 as well as by PW-13. The accused Sandeep and Pradeep were identified by PW-10. PW-13 had also identified them *albeit* in his cross-examination by the learned APP. Even if PW-13's testimony, insofar as the identification of the accused Sandeep and Pradeep is ignored, the testimony of PW-10 is unambiguous and he had clearly identified the said accused. Considering the above, coupled with the fact that the appellants had

declined joining the TIP, this Court finds no fault in the decision of the Trial Court in accepting that the prosecution had established that the appellants had been identified as the persons involved in committing the crime.

41. In view of the above, this Court finds no reason to interfere with the impugned judgment convicting the appellants of committing an offence punishable under Section 392 of the IPC. However, this Court is unable to concur with the view that the appellants deserved no leniency. None of the appellants had been convicted of any offence prior to the impugned judgment. This Court has also been informed that they have been acquitted in all other cases. The appellants were very young at the material time. All of the appellants have minor children and their families to support.

42. Considering the above, this Court considers it apposite to reduce the sentence awarded to the appellants to four years of rigorous imprisonment along with the fine of ₹3,000/- each and in the event of failure of payment of fine, to undergo simple imprisonment for a further period of three months. It is so directed.

43. The appeals are disposed of in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

NOVEMBER 09, 2020
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