

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

CRL.A.-513/2020 and CRL.M.(BAIL) 8183/2020 and

Reserved on : 01.12.2021

Date of Decision: 22.12.2021

IN THE MATTER OF:

MOHD. ASIF

..... Appellant

Through: Mr. Salim Malik, Advocate

Versus

STATE

..... Respondent

Through: Mr. Ashok Kumar Garg, APP for State

CRL.A. 557/2020

AAS MOHD. @ ASHU

..... Appellant

Through: Mr. Siddharth Yadav, Advocate

Versus

STATE

..... Respondent

Through: Mr. Ashok Kumar Garg, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. As both the above-noted appeals have been preferred against a common judgment on conviction, they are taken up for hearing together and shall be disposed of vide a common judgment.

2. By way of the present appeals, the appellants have assailed the judgment on conviction dated 29.02.2020 and the order on sentence dated

18.08.2020 passed by the learned Addl. Sessions Judge-03, North-West District, Rohini, Delhi in SC No. 33/18 arising out of FIR No. 216/2017 registered under Sections 392/397/506/34 IPC at P.S. Shalimar Bagh, Delhi, whereby the appellants were convicted for the offences punishable under Sections 397/392/34 IPC and sentenced as follows:-

- (i) for the offence punishable under Sections 397/34 IPC, to undergo RI for a period of 07 years, alongwith payment of fine of Rs.30,000/- each, in default whereof, to further undergo RI for 06 months each, and
- (ii) for the offence punishable under Sections 392/34 IPC, to undergo RI for a period of 07 years, alongwith payment of fine of Rs.30,000/- each, in default whereof, to further undergo RI for 06 months each.

Both the sentences were directed to run concurrently and the benefit of Section 428 Cr.P.C. was also granted to the appellants.

3. Briefly stated, the facts of the case, as summarized in the impugned judgment, are as under:-

“2. The case of prosecution in nutshell is that on 11.06.2017, DD no. 56A was received at PS-Shalimar Bagh that robbery has been committed at gun point near ‘Everbake’ Shalimar Bagh. On receiving the DD entry, the police officials went to the place of incident, where they met complainant Manish Garg, who gave his statement that he alongwith his three friends namely Ankit, Utkarsh and Etanshu were going towards ‘Everbake’, Shalimar Bagh in their car for purchasing the cake for the party. Ankit was driving the car. Before purchasing the cake, they stopped the car near corn vendor. After taking the corn, when they were moving towards ‘Everbake’, at around 8.30 pm, two boys came in front of their car and forcefully made them open the mirror of the driver side of their car. Then the said boy pointed gun towards Ankit, who was driving the car. The other boy came on the left side and they both pointed

gun towards them and threatened them that they would shoot them. Then they took the golden chain and kadas worn by Utkarsh and Manish. The said boys went away. After some time, they called the police at number 100 number and on the basis of the statement of Manish Garg, FIR u/S 392/397/506/34 IPC was lodged against unknown persons.

2.1 That on 25.08.2017, DD no. 36B was received from Special Staff West District that accused persons who have been arrested in case FIR no. 211/17 dated 12.06.2017 PS-Moti Nagar, have disclosed the commission of the offence in the present FIR no. 216/17. Accordingly, both the accused persons were arrested. One pistol and three cartridges were recovered from their possession. TIP proceedings were conducted and they were duly identified by the complainant Manish Garg during TIP. After investigation charge-sheet was filed against both the accused persons u/s 392/397/506/34 IPC."

4. After completion of investigation, the charge sheet was filed against both the appellants under Sections 392/397/506/34 IPC. After hearing arguments on point of charge, charges were framed under Sections 392/397/34 IPC to which the appellants pled not guilty and claimed trial.

5. Learned counsel for the appellant/Mohd.Asif raised the following contentions:-

- (i) The identification of the appellant during the judicial TIP is of no relevance as the appellant was shown to the complainant/Manish Garg in the Police Station prior to the TIP and his identification took place on the basis of his photograph shown to the complainant in the police station.
- (ii) Two eye-witnesses, namely Utkarsh Aggarwal (PW-6) and Etanshu Garg (PW-8), did not identify the appellant during the trial.

- (iii) That the prosecution has failed to establish the ingredients of the offences, inasmuch as neither the robbed articles, i.e. *gold chain* and *kadas*, nor the weapons of offence were recovered during the investigation.
- (iv) The Investigating Officer did not make any efforts to seize the relevant CCTV footage from the spot of the incident.
- (v) That the independent witness, a *challiwala* (corn seller), from whom the complainant, alongwith his friends, had bought *chhalli* (corn) immediately before the incident took place, was not examined.

6. Learned counsel for the appellant/Aas Mohd. @ Ashu adopted the submissions made on behalf of appellant/Mohd. Asif and additionally contended that –

- (i) There are material contradictions in the statement of eye-witnesses, inasmuch as both *Manish* (PW-3) and *Ankit Garg* (PW-9) stated that the car in which the incident took place belongs to them.
- (ii) The appellant was arrested while he was in custody in FIR No. 211/17, P.S. Moti Nagar, however neither the disclosure statement nor the arrest memo was signed by the Jail Officers who were present at the time of formal arrest in the present FIR.

7. Learned APP for the State, on the other hand, supported the impugned judgment on conviction. It was submitted that *Manish* (PW-3) and *Ankit* (PW-9) have correctly identified the appellants and all the victims have supported the case of the prosecution. It was further submitted that the charges have been proved against the appellants beyond reasonable doubt.

8. I have heard learned counsels for the parties and have also gone through the Trial Court records.

9. The prosecution has examined complainant/*Manish* as PW-3, who deposed that on 11.06.2017, he alongwith his friends, namely *Ankit*, *Etanshu* and *Utkarsh* was going to a party in his car. At about 08:30 p.m., they stopped by a *chhalliwala*, when both the accused persons came towards front side of the car and knocked at the windowpanes. His friend *Ankit*, who was sitting on the driver's seat, slightly lowered the window glass of his side. One of the accused persons, who was holding a gun, put his hand inside the car and pointed a gun at *Ankit*. The said accused also lowered the windowpane of the other side. The witness further deposed that the other accused also had a gun with him and both the accused forcibly got removed the *kada* and *chain* worn by him and *Utkarsh*, whereafter the accused persons left the spot. It was stated that a call was given at number 100 by them, whereafter PCR came at the spot, recorded his statement (*Ex.PW-3/I*) and prepared the site plan. He further deposed that on 25.09.2017, he had gone to Central Jail, Tihar, for conduct of TIP of the accused persons. He identified the appellants as the persons who had looted him and his friends on the day of the incident and whom he had also identified earlier in the Jail.

In cross-examination, he stated that both the accused were on foot. It was further stated that neither him nor his friends had received any injury and they had left after both the accused persons ran away. It was also stated that before the windowpane was lowered, the gun was not visible. The witness further stated that after reaching the police station, his statement was recorded by *SI Ajay Singh*, to whom he had described the features of the culprits. The same was signed on 11.06.2017 and exhibited as *Ex.PW-3/I*. After the date of incident, he had gone to Police Station on 12.06.2017 and

then on the day of the TIP. He denied the suggestion that any photograph was shown to him by the police on 12.06.2017 or that any photograph was showed to him in the police station at any stage. He further stated that initially in the TIP proceedings he identified appellant/*Aas Mohd.* He also stated that the site plan was prepared at his instance, which was signed by him, but it did not bear any date.

10. The eye-witness *Ankit Garg* was examined as PW-9. He deposed that he, alongwith his friends, namely *Manish*, *Utkarsh* and *Etanshu*, was going to attend a birthday party on the day of the incident in a car, which was being driven by him. While *Manish* was sitting on the adjacent seat, *Etanshu* and *Utkarsh* were sitting on the back seat of the said car. On their way, they stopped to buy sweet corn. After they had purchased the same and were sitting in their car, all of a sudden a person came in front of the car, started arguing with them and took out a gun. In the meantime, the other accused came and stood near the window of the car where *Manish* was sitting. The accused forcefully got the window glass rolled down and removed the *gold chains* and *golds kadas* worn by *Utkarsh* and *Manish*. The witness further deposed that both the accused had snatched the aforesaid articles at gun point. He correctly identified both the accused persons. By pointing towards appellant/*Aas Mohd.* he stated that it was him who had initially come in front of the car and by pointing towards appellant/*Asif*, the witness stated that he had come on the window side where *Manish* was sitting. It was reiterated that both the appellants were carrying guns in their hands.

In cross-examination, he stated that when the appellants came in front of the car the AC of the car was on and windows of the car were rolled up,

except the window of the driver's seat which was rolled down. He also stated that *gold chain* and *kada* were removed by *Manish* and *Utkarsh* at the instance of the accused persons. He further stated that though he had asked the police officials to make verification about CCTV cameras, the same were not checked by the police officials in his presence. A suggestion was given to him that he identified the appellants in Court at the asking of the Investigating Officer, but the same was denied.

11. The eye-witness *Utkarsh Aggarwal* was examined as PW-6. He deposed that on the date of the incident, he and his friends *Ankit*, *Manish* and *Etanshu* had purchased *chhalli* from a *chhalliwala* near ICICI Bank, Shalimar Bagh. At about 08:15 p.m., while they were still there, two persons came and got lowered windowpanes of the car at gun point. While one accused was on the right front side of the car, the other accused was on the left front side of the car. He deposed that he was sitting on the rear seat and both the accused had threatened to shoot them and asked them to handover *chain* and *kada*. He further deposed that he and *Manish* were wearing *gold chain* and *gold kadas* which were handed over to the accused persons. After seeing the accused persons in Court, the witness stated that the appellant/*Aas Mohd.* appeared to be the person who was on the driver's side. He also deposed that he was not sure about the appellant/*Mohd. Asif*, as during the course of incident, he was perturbed. Therefore, he was not sure about the identity of the accused persons.

In cross-examination by the learned APP for State, the witness again stated that he was not sure if the accused/appellants were the same persons who had looted them.

In cross-examination on behalf of the appellant/*Mohd. Asif*, he stated that he had not observed any CCTV camera near the spot of the incident and he could not say if any CCTV cameras were installed outside the ICICI Bank. It was also stated that the *chain* and *kada* were given by his grandfather.

In cross-examination on behalf of appellant/*Aas Mohd.*, he denied the suggestion that the appellant/*Aas Mohd.* was not one of the culprits and that he had wrongly put suspicion on him.

12. The eye-witness *Etanshu Garg* was examined as PW-8. He also deposed that on the day of the incident, he was going towards *Pitampura* around 08:30-09:00 p.m. with his friends, namely *Ankit*, *Manish* and *Utkarsh* in the car, which was being driven by *Ankit*. When they stopped to have *chhalli* near a *chhalliwala*, a person came towards right side of the car and forced them to pull down the windowpanes. While *Manish* was sitting on the front side, he was sitting behind *Manish*, and *Utkarsh* was sitting behind *Ankit*. The person who had come to the side of the car had asked *Utkarsh* to take off his *chain* and *kada*, while the other accused had gone to the side of *Manish* and forced to roll down windowpanes. He deposed that both the accused were holding guns in their hands. He also stated that though he was wearing a *kada* he somehow managed to pull it off and threw it under the seat. It was further deposed that the accused had taken *chain* and *kada* of *Utkarsh* and *Manish* before fleeing. The witness however could not identify the appellants and stated that he was perturbed at the time of incident, and also due to lapse of time, he could not identify them.

13. *SI Shiv Kumar* was examined as PW-5. He deposed that on receipt of information about the arrest of accused persons in FIR No.211/2017, PS Moti Nagar, he alongwith *HC Om Prakash*, after seeking permission from the concerned MM, went to Jail No.4, Central Jail, Tihar on 13.09.2017 and formally arrested the appellants vide arrest memos *Ex.PW4/1* and *Ex.PW4/2*.

In cross-examination on behalf of appellant/*Aas Mohd.*, which was also adopted on behalf of appellant/*Mohd. Asif*, he stated that while two jail officers were present at the time of formal arrest of the appellants, they did not sign on arrest memo or the disclosure statement.

14. *SI Dipender Singh* was examined as PW-10. He stated that on 23.08.2017, he had arrested the appellants and on their search one country made pistol three live cartridge each were found from both the appellants.

15. *SI Hari Kishan* was examined as PW-11. He deposed that he took the complainant *Manish* to jail No. 4, Tihar Jail on 25.09.2017 for judicial TIP. He also deposed that he had arrested one *Aman Ullah @ Aman*, who disclosed that he had received the robbed articles. During submissions, it was informed that finding no evidence against *Aman Ullah @ Aman*, he was discharged.

16. The statement of *Shri Kashmir Singh*, learned counsel on behalf of both the appellants was recorded on 28.03.2019, wherein without admitting the veracity of the TIP, he admitted the TIP proceedings conducted and reported vide *Ex.PW3/3* and *Ex.PW3/4* and made a statement that prosecution need not examine the learned MM for the same.

17. The statements of the appellants were recorded under Section 313 Cr.P.C. Both of them stated that they were innocent and had been falsely implicated in the present case. They further stated that nothing was recovered from their possession or at their instance.

18. As per the statement of eye-witnesses, the incident is stated to have occurred at around 08:30 p.m. on 11.06.2017. On the same day, DD No. 56A was recorded at 08:45 p.m., wherein it was mentioned that near DAV School, Shalimar Bagh two persons have taken *gold chain, kada* and other possessions of the victims at gun point. The FIR was also registered on the same day at around 10:45 p.m.

19. On a perusal of the testimonies of the four victims/eye-witnesses, it is noted that while *Manish* and *Ankit* have identified the appellants as the accused persons, the testimonies of *Utkarsh* and *Etanshu* on the aspect of identification are lacking. In fact, both *Manish* and *Ankit* have not only correctly identified the appellants, but also deposed about the specific roles of the appellants as to who robbed whom. It is noteworthy that no prior enmity has been claimed between the eye-witnesses and the appellants. Rather, the parties were strangers to each other prior to the incident. For this reason, the averment that the appellants have been falsely implicated in the present case loses merit.

In addition, barring the aspect of identification, the testimonies of *Manish* and *Ankit* find full support from the testimonies of *Utkarsh* and *Etanshu* who deposed that the incident occurred on 11.06.2017 around 08:30 p.m., when two accused persons robbed *Manish* and *Utkarsh* of their *gold chain* and *kada* at gunpoint. Further, it was stated that information about the

incident was immediately given to the PCR, which was recorded vide DD No. 56A at 08:45 p.m. The said information was received within 15 minutes of the incident and the FIR was registered on the same day within three hours of the incident. All four eye-witnesses have stood the test of cross-examination. In view of the aforesaid, this Court finds the testimonies of both *Manish* and *Ankit* to be trustworthy and reliable.

At this stage, reference is taken of the decision in Raja v. State by the Inspector of Police reported as **(2020) 15 SCC 562**, where it has been observed that if the eye-witness account in respect of an offence is found to be trustworthy and reliable, it can safely be relied upon by the Court:-

“24. As has been repeatedly laid down by this Court, what is important is the identification in court and if such identification is otherwise found by the court to be truthful and reliable, such substantive evidence can be relied upon by the court. Considering the totality of circumstances on record, the presence and participation of Accused 1 to 6, in our view, stood proved through the eyewitness account. We do not find any infirmity in the evidence of identification by PWs 1 to 5.”

20. The first contention raised on behalf of the appellants is that the judicial TIP of the appellants is not to be believed. However, the judicial TIP proceedings have been proved on record. The appellants have also been identified by both *Manish* and *Ankit* in the trial. It has been deposed that at the time of incident, the appellant/*Aas Mohd.* came first in front of the car and pointed the gun at *Ankit*, who was sitting in the driver's seat. The appellant/*Mohd. Asif* had gone to the side where *Manish* was sitting. As such, both the eye-witnesses had sufficient opportunity to see both the appellants. It is also worthwhile to note that a suggestion given to eye-witness *Manish* that he was shown photograph of the appellants in the Police

Station prior to the TIP, was denied. As such, this Court finds no merit in the contention and the same is rejected.

21. The next contention that the appellants were not identified by eye-witnesses *Utkarsh* and *Etanshu* is also meritless, considering that both the appellants were correctly identified by eye-witnesses *Manish* and *Ankit*. The appellant/*Aas Mohd.* had initially approached the driver's seat where eye-witness *Ankit* was sitting, while appellant/*Mohd. Asif* had approached the side where eye-witness *Manish* was sitting. Eye-witnesses *Utkarsh* and *Etanshu* were in the rear seat. Thus, eye-witnesses *Ankit* and *Manish* had enough chance to remember the accused persons, who were correctly identified by them during the course of trial.

22. On the issue of non-recovery of the weapons of offence from the accused/appellants, it is noted that the Supreme Court in Rakesh and Another v. State of Uttar Pradesh and Another reported as **(2021) 7 SCC 188** has observed that recovery of the weapon of offence is not a *sine qua non* for convicting an accused. Albeit under Sections 302/34 IPC, the Court in this case also opined that it was not possible to reject the ocular evidence of eye-witnesses to the incident, who were reliable and trustworthy.

Such is the situation in the present case. All the eye-witnesses have consistently stated that the accused persons were carrying guns in their hands, on pointing of which they robbed articles, i.e., *gold chain* and *kadas* belonging to *Manish* and *Utkarsh*. Both *Manish* and *Ankit* have correctly identified the appellants as the accused who committed the offence. In view of the positive identification by eye-witnesses *Manish* and *Ankit*, whose

testimonies are found trustworthy and reliable, the contention raised does not weigh with this Court and is rejected.

23. On the aspect of whether non-recovery of robbed articles or of the weapons of offence is material for proving offence under Section 397 IPC, this Court deems it apposite to refer to the decision rendered in Shehzad v. State, **CRL.A. 1206/2015**, wherein it was observed that non-recovery of weapon of offence is not fatal to the prosecution case. In the said case, reference was made to the decision in Ashfaq v. State reported as **(2004) 3 SCC 116**, where the Supreme Court has held that the word ‘uses’ in Section 397 IPC is satisfied if the accused at the relevant time was armed with a deadly weapon, which was visible to the victim and put him under fear. Relevant excerpt from Shehzad (Supra) is as under:-

*“37. In Ashfaq v State, reported as **(2004) 3 SCC 116**, where the accused persons were armed with country made pistol and knives. The conviction of the accused persons was upheld for the offence punishable under Section 397 IPC despite the fact that the knives were not recovered. It was held that:*

“8. Thus, what is essential to satisfy the word “uses” for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of the victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

9....the others were also armed with and used their knives and that knife is equally a deadly weapon ,for the purposes of Section 397...”

24. Insofar as the contention with respect to non-examination of the *challiwala* is concerned, the same does not weigh with this Court either as

both the appellants were positively identified by eye-witnesses *Manish* and *Ankit*. Moreover, it has come in the cross-examination of *Manish* (PW-3) and *Utkarsh* (PW-6) that they had neither made any complaint to the *chhalliwala* nor made any noise.

25. It was also contended on behalf of the appellants that the Investigating Officer did not make any efforts to seize CCTV footage from near the site of the incident. In this regard, it is noted that it has come in the cross-examination of *Ankit* and *Utkarsh* that only a suggestion was given to the police officials to verify from CCTV cameras near the spot of the incident. However, no material has been placed on record to suggest, much less establish, that CCTV cameras were installed near the place of the incident.

26. Another contention raised on behalf of the appellant/*Aas Mohd.* was that the arrest memo and disclosure statement recorded at the time of formal arrest of the appellants in the present FIR were not signed by the concerned Jail Officers. With respect thereto, it is noted that the factum of non-signature does not put a dent on the prosecution case as the aspect of arrest of the appellants from Central Jail, Tihar has not been disputed on their behalf.

27. Lastly, it was contended that there is contradiction in the statements of eye-witnesses as to whom the car belonged to, however, the same bears no relevance, as all the eye-witnesses have stated that the incident took place on 11.06.2017 at around 08:30 p.m. when they were sitting in a car. The eye-witnesses also uniformly deposed as to what seat was occupied by them.

28. In view of the analysis undertaken hereinabove, this Court concurs with the conclusion arrived at by the Sessions Court. The testimonies of the eye-witnesses are consistent, trustworthy and reliable. The appellants have been correctly identified by eye-witnesses *Manish* and *Ankit* and all eye-witnesses have consistently deposed that the appellants '*used*' guns to rob *gold chain* and *kadas* from the victims.

29. Accordingly, both the appeals are dismissed. Miscellaneous application is disposed of as infructuous.

30. The Registry shall supply certified copies of this order to the appellants forthwith.

31. A copy of this order be also communicated to the Sessions Court forthwith.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 22, 2021
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