

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

+ **CRL.A. 206/2010**

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Reserved on: 21<sup>st</sup> February, 2013

Decided on: 30<sup>th</sup> April, 2013

SANJAY SHANKAR SWAMI @

SANJAY KUMAR

..... Appellant

Through: Mr. Ajay Verma and Mr. Shiv Kumar  
Dwivedi, Advocates.

versus

STATE (NCT) OF DELHI

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State  
with SI Shiv Kumar, PS Punjabi  
Bagh.

+ **CRL.A. 873/2010**

RAMESH CHAND @ RAJESH

..... Appellant

Through: Mr. Anish Dhingra, Advocate.

versus

STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State  
with SI Shiv Kumar, PS Punjabi  
Bagh.

**Coram:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

1. By these appeals the Appellants lay a challenge to the judgment dated 3<sup>rd</sup> October, 2009 whereby they have been convicted for offences punishable under Section 392 read with Sections 34 IPC and 397 IPC and the order

dated 7<sup>th</sup> October, 2009 whereby they have been directed to undergo rigorous imprisonment for 10 years along with fine of Rs. 5000/- each and in default of payment of fine to undergo rigorous imprisonment for six months for the offence punishable under Section 397 IPC. No separate sentence was awarded for offence under Section 392 IPC as Section 397 covers Section 392 IPC itself.

2. Learned counsel for the Appellant Sanjay Kumar states that the version of PW5 is concocted as he makes a PCR call at 11.45 PM with regard to alleged incident of taking away of his mobile phone and motorcycle whereas at 9.45 PM at Najafgarh a PCR call is already made with regard to an accident of motorcycle. In the said accident that took place at Najafgarh there was no collide and still it is alleged that the public persons beat Appellant Ramesh. The Appellant was allegedly arrested after 3-4 days of the arrest of the co-convict Ramesh, allegedly on the disclosure statement. PW5 on the one hand states that Sanjay was arrested at his instance on the other hand he states that he came to know about the arrest of Sanjay after 3-4 days. Since no recovery of any weapon of offence has been made from the Appellant Section 397 IPC is not attracted. No TIP of the Appellant was got conducted and thus the identity has not been established. The statement under Section 313 Cr.P.C. is wholly defective and the role assigned to co-convict Ramesh has been put to the Appellant. Hence the Appellant be acquitted or in the alternative he be released on the period already undergone which is more than 7 and a half years.

3. Learned counsel for the Appellant Ramesh contends that the Appellant was justified in refusing the TIP as the Appellant was shown to the witnesses

in the Police station which fact has been admitted by the complainant PW5 in his testimony. The Police custody remand of the Appellant was taken on 25<sup>th</sup> December, 2005 and he was kept in two days Police remand. There is no evidence on record to suggest that when the Appellant was produced before the Magistrate for TIP, he was produced in a muffled face. The Appellant has been acquitted of the charge under Section 25 Arms Act. Hence the recovery of katta cannot be relied upon. The investigating officer of the said case has not been examined. The motorcycle was not in the name of PW5 and on the date of alleged incident it was in the name of one Ashok Kumar Singh and was transferred later on in the name of PW5 on 10<sup>th</sup> February, 2006. The mobile phone recovered from the co-convict has not been identified as neither any SIM number nor EMAI number has been given. No TIP of the mobile phone was conducted. Since the recovery of the weapon is not proved, Section 397 IPC is not made out and the Appellant be acquitted of the charges framed and in the alternate he be released on the period already undergone which is more than 7 and a half years imprisonment.

4. Learned APP for the State on the other hand contends that PW5 has clearly identified the Appellants as the one who caught hold of him, tied him and snatched away his motorcycle and mobile phone. The evidence of PW5 is duly corroborated by PW6, the ASI on the PCR van whom he made the complaint. PW7 Constable Babu has supported the recovery of mobile phone from the Appellant Sanjay. No suggestion has been given to this witness that the recovery was planted. Since Appellant Sanjay was arrested in the presence and at the instance of PW5 at Transport Centre, there was no

need of a test identification parade to be got conducted. Further the Appellant Ramesh was shown to the witnesses on 11<sup>th</sup> January, 2006 after he refused the TIP on 6<sup>th</sup> January, 2006. PW12 has clearly proved the test identification proceedings. There is recovery of motorcycle and katta from Ramesh and recovery of mobile phone of the complainant from the Appellant Sanjay. Sequence of events is well-established by DD entries which has been duly proved and exhibited. Hence the appeals be dismissed.

5. I have heard learned counsel for the parties. Briefly the facts of the case are that FIR No. 1080/2005 was registered at PS Punjabi Bagh under Section 392/397/34 IPC on the complaint of PW5 Harender Singh Yadav. PW5 the complainant before the Court stated that in the year 2005 he was working with Amar Tax Industries Ltd. as Commercial Head. On 20<sup>th</sup> December, 2005 while he was coming back from his office situated at Karol Bagh and going towards his residence at Mangolpuri, at about 9.00 PM he reached near Punjabi Bagh Flyover towards Rani Bagh when his mobile rang. He was on motorcycle No. UP-14V-0725 which he stopped and attended the call. After attending the call he went to the road side to urinate when 3 boys came there and one of them pushed him downwards. The complainant fell down and he was taken towards the bushes. The other boy was having a katta in his hand and the third boy was having a knife. They pointed out katta and knife towards PW5 and directed him to give away whatever he was carrying. He handed over his purse containing ATM cards, some cash and mobile phone make LG 2030. They demanded the key of the motorcycle which the PW5 replied that the same was in the motorcycle. They tied him with one rope and one boy took away the motorcycle and the

other two boys remained there. He identified the Appellant Ramesh as the one who took away the motorcycle. One of the two boys who remained there was identified as Appellant Sanjay who stayed back and had knife with him. After some time the other two persons also left leaving PW5 in a tied condition. PW5 was able to untie some of the knots and thereafter went towards the PCR van under the flyover and reported the matter to the officials. Wireless message was flashed by those officials. PW5 was medically examined. After some time he came to know that an accident had been caused by Ramesh with his motorcycle.

6. Learned counsel for the Appellant Sanjay Kumar has contended that there is contradiction with regard to arrest of the Appellant inasmuch as PW5 states that after 3-4 days it came to his knowledge that accused Sanjay has been arrested by the Police, whereas in his cross-examination he admitted that he had seen the accused Sanjay at Transport Centre as he was taken there by the I.O. when he went to Police station Punjabi Bagh for enquiring the case.

7. A reading of the testimony of PW7 Constable Babu Lal reconciles the issue wherein it is stated that on 27<sup>th</sup> December, 2005 he was joined in the investigation of this FIR and the complainant and the informer were with them. They reached the Transport Centre bus stop Punjabi Bagh where Appellant Sanjay was present and apprehended at the instance of the secret informer. He was arrested vide arrest memo Ex.PW5/B. His personal search was conducted and one mobile phone LG 2030 was recovered from his possession and seized vide memo Ex.PW5/C by the I.O. The mobile phone was identified by the complainant. It is thus apparent from the

testimony of the two witnesses that PW5 the complainant had joined the investigation on 27<sup>th</sup> December, 2005 when he along with the I.O. Constable Babu Lal and the informer went to Transport Centre Punjabi Bagh where the Appellant was apprehended and the robbed mobile phone was recovered from him. The seizure memo, the arrest memo and jamatalashi has all been signed by the complainant. This fact is also stated by PW9 ASI Mahinder Singh, the investigating officer of the case. He has stated that he along with Harender, Constable Babu Lal on a secret information reached Punjabi Bagh bus stand and at the instance of complainant, Appellant Sanjay Kumar was arrested. Since the Appellant Sanjay Kumar was arrested in the presence of PW5 the complainant, no further test identification proceedings were required to be conducted. Hence the contention of the learned counsel for the Appellant that no TIP was conducted, and hence the identification in the Court for the first time should not be relied upon, is misconceived.

7. As regards the next contention of the learned counsel for the Appellant that Appellant Ramesh was justified in refusing the TIP, it may be noted that Appellant refused TIP on 6<sup>th</sup> January, 2006 whereas both the accused were produced before the Court for judicial remand and at that time the complainant who was present in the Court identified the accused and his statement was recorded. There is nothing on record to suggest that while Appellant Ramesh was in custody in other cases, PW5 identified him. There is no suggestion given to PW5 that when he visited PS Nangloi on 22<sup>nd</sup> December, 2005 on the information that his motorcycle has been traced/recovered, the Appellant Ramesh Kumar was shown to him. This witness clearly stated in his cross-examination that the second accused

namely Ramesh was seen by him after the occurrence in the Court in the month of January, 2006 and he identified him at that time and the date may be 11<sup>th</sup> January, 2006. Thus, the refusal of the TIP by Appellant Ramesh Kumar was wholly justified.

8. The sequence of events as discernable from the evidence on record is that PW5 was tied by the rope in the jungle and the Appellant Sanjay Kumar with the other co-accused who could not be arrested kept a watch on him for some time so that Appellant Ramesh Kumar could take away the motorcycle at a distance and when they left after some time, only thereafter the complainant made efforts to untie himself. After doing the same which would have taken some time, he went towards the PCR as he neither had any mobile phone nor any vehicle and thus the PCR call was made at around 11.45 PM on the complaint of PW5 Harender. In the PCR call which was recorded as DD No. 37A it was clearly recorded that a boy named Harender had come and informed that at about 9.00 PM his motorcycle No. UP-14A-0725 and mobile phone have been taken away by three boys and he was tied at the spot. No doubt vide a PCR call at 9.46 PM it is recorded that near Najafgarh Road water tank a motorcycle has met with an accident, however the number of the said motorcycle is not mentioned in the PCR call and it is only after the accident of the motorcycle, as Appellant Ramesh had katta, he was arrested and FIR No. 1250/2005 under Section 25 Arms Act was registered at PS Nangloi wherein he disclosed about the incident of robbery regarding the motorcycle which information was then sent to PS Punjabi Bagh vide DD No. 10A on 21<sup>st</sup> December, 2005. It is clear that the motorcycle was robbed at 9.00 PM from near Punjabi Bagh flyover and the

accident took place at around 9.46 PM near Nazafgarh Road water tank. Thus, no benefit arises to the Appellants on the sequence of events.

9. Learned counsel for the Appellants have further contended that Appellant Ramesh has been acquitted for offence under Section 25 Arms Act and thus it will have to be deemed that there was no recovery of weapon of offence from him, further the alleged knife shown by Appellant Sanjay Kumar has not been recovered. In the absence of proof of recovery the Appellants cannot be convicted for offence under Section 397 IPC. In the present case the testimony of PW5 is amply clear wherein he stated that Appellant Ramesh showed him katta and Appellant Sanjay Kumar showed him a knife. Thus, there is use of weapons. Conviction under Section 397 IPC is not based on the consequential recovery but on the user. If the Court is satisfied that a deadly weapon is used then Section 397 IPC is clearly attracted. In view of the testimony of PW5, I find no infirmity in the learned Trial Court convicting the Appellants for offence under Section 397 IPC and Section 392/34 IPC.

10. Learned counsel for the Appellant Sanjay Kumar has stated that the statement recorded under Section 313 Cr.P.C. is defective inasmuch as the version of the Appellant Ramesh Kumar has also been put to him. No doubt question Nos. 17 to 22 in the 313 Cr.P.C. have been put to the Appellant Sanjay Kumar as if he was Appellant Ramesh. There is certainly non-application of mind by the learned Trial Court on this aspect. However, the issue is whether the same has caused prejudice to the Appellant Sanjay Kumar so as to vitiate the trial. Learned counsel for the Appellant has not been able to show any prejudice caused because the entire material against



the Appellant Sanjay Kumar has also been put to him in addition to these questions which have been incorrectly put. The defence of the Appellant Sanjay Kumar under 313 in question 27 is that he was shown to the complainant and his photographs were taken by the police officials in PS. A perusal of answer to question No.27 clearly shows that though question was framed as if it was being asked to Ramesh Chand, however the Appellant understood the same in its correct perspective qua him.

11. In view of the aforesaid discussion, I find no infirmity in the impugned judgment of conviction. As regards the order on sentence the Appellants have been directed to undergo rigorous imprisonment for a period of 10 years. The offence committed by the Appellants is serious in nature. They have waylaid a person at night and robbed him of motorcycle, mobile phone, ATM Card, cash etc. at gun and knife point, thus calls for no leniency.

12. Appeals are accordingly dismissed. Copy of the judgment be communicated to the Appellants through Superintendent, Tihar Jail.

**(MUKTA GUPTA)**

**APRIL 30, 2013**

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