

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

% *Judgment reserved on : 08.05.2014*
Judgment delivered on : 15.05.2014

- + CRL.A.188/2006
PARVEZ alias BABLU CHIKNA Appellant
Through Mr.Abhay Kumar, Advocate.
versus
STATE Respondent
Through Mr.Varun Goswami, APP.
- + CRL.A.195/2006
ARUN GUPTA alias MONU Appellant
Through Mr.A.S.Rajput, Advocate.
versus
STATE Respondent
Through Mr.Varun Goswami, APP.
- + CRL.A.196/2006
FURKAN alias SONU Appellant
Through Mr.A.S.Rajput, Advocate.
versus
STATE Respondent
Through Mr.Varun Goswami, APP.
- + CRL.A.227/2006
DILAWAR alias DILSHAD Appellant
Through Mr.A.S.Rajput, Advocate.
versus
STATE Respondent
Through Mr.Varun Goswami, APP.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 There are four appellants before this Court i.e. Parvez @ Bablu

Chikna, Furkan @ Sonu, Arun Gupta @ Sonu & Dilawar @ Dilshad. They are aggrieved by the impugned judgment and order of sentence dated 18.02.2006 and 20.02.2006 respectively wherein they have been convicted under Section 392 read with Section 34 of the IPC and each of them has been sentenced to undergo RI for a period of 5 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo RI for one year. Benefit of Section 428 of the Cr.PC had been granted to the appellants.

2 Nominal rolls of the appellants have been requisitioned. They reflect that as on date when Arun Gupta @ Sonu, Furkan @ Sonu and Dilawar @ Dilshad had been granted bail, they had suffered incarceration for 5- ½ months; co-convict Parvez @ Bablu Chikna, on the date of grant of his bail, has suffered incarceration for 5 months.

3 Version of the prosecution is that on 26.04.2002 on a PCR call, the local police of PS Anand Vihar had reached the house of Meena Goyal (PW-2); robbery had been committed in her house; her household articles were lying scattered. Her statement (Ex.PW-1/A) was recorded. She disclosed that at about 11:30 am when she along with her servant Surender Kumar (PW-3) and Birju were at home, the door bell rang; she

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asked PW-3 to open the door through which four boys forcibly entered; one boy put a pistol on her head and asked her to handover the almirah keys; the accused persons ransacked her valuables; she was tied down and confined in the bathroom.

4 It was on this statement (Ex.PW-1/A) that the present FIR (Ex.PW-4/A) under Sections 392/397 read with Section 34 of the IPC had been registered through HC Devender (PW-4). Investigation was initially marked to SI Meghraj (PW-1). Crime team had been called. Site plan (Ex.PW-1/C) was prepared. Statement of Surender (PW-3) was also recorded. On 12.05.2002, the subsequent investigating Officer SI Dinesh Arya (PW-10) along with HC Chandervir (PW-9), on the basis of a secret information, arrested Dilawar @ Dilshad, Furkan @ Sonu, Arun Gupta @ Sonu from ISBI Anand Vihar. Their arrest memos (Ex.PW-9/D, Ex.PW-9/E and Ex.PW-9/F) were prepared. Their disclosure statements (Ex.PW-9/A1, Ex.PW-9/B1 and Ex.PW-9/C1) were recorded. Pursuant to the disclosure statements of Arun Gupta @ Sonu and Dilawar @ Dilshad, certain articles of clothing were recovered which were seized vide separate memos (Ex.PW-9/D1 and Ex.PW-9/E1).

5 The TIP of the aforementioned three accused persons was conducted through Rakesh Kumar, learned MM (PW-6) which had initially been fixed for 15.05.2002 and thereafter re-fixed for 17.05.2002. All the aforementioned accused persons had refused TIP although they had been warned that their refusal would lead to drawing of an adverse inference against them. These TIP proceedings have been proved as Ex.PW-6/B to Ex.PW-6F. After the date of refusal of TIP, PW-10 had taken one day police remand of accused Dilawar @ Dilshad; this was on 18.05.2002; Dilawar @ Dilshad led the police party to the place of incident i.e. the house of the complainant where the complainant identified Dilawar @ Dilshad as one of the persons who had committed robbery in her house.

6 On 19.07.2002, the fourth accused Parvez @ Bablu Chikna had surrendered before the Court and he was formally arrested vide memo (Ex.PW-10/A). His TIP was conducted on 22.07.2002 through PW-6; he also refused to participate in the TIP although PW-10 had specifically informed him that his non-joining of TIP would lead to drawing of an adverse inference against him. These proceedings have been proved as Ex.PW-6/J to Ex.PW-6/K.

7 The accused persons in their statements recorded under Section CrI. Appeal Nos.188/2006, 195/2006, 196/2006 & 227/2006

313 of the Cr.PC had denied the allegations made against them stating that they are innocent and have been falsely implicated in the present case.

8 No evidence was led in defence.

9 In view of the aforementioned evidence which was brought on record, all the accused persons were convicted and sentenced as aforementioned.

10 On behalf of the appellants, arguments have been addressed in detail. It is pointed out that the impugned judgment convicting the appellants suffers from a grave illegality as the identity of the appellants was not established and in the absence of which the conviction which has followed is liable to be set aside. It is pointed out that three of the accused persons had been arrested on 12.05.2002 and the fourth accused persons had been arrested on 22.07.2002 but PW-2 and PW-3 who are the eye-witnesses have categorically stated that they had seen the accused persons in the police stations prior to their identification and as such the appellants had rightly refused to join TIP proceedings and the trial Court drawing an adverse inference for not joining TIP has again committed an illegality. Learned counsel for the appellants has placed reliance upon a judgment of the Apex Court reported as AIR 2007 SC CrI. Appeal Nos.188/2006, 195/2006, 196/2006 & 227/2006

1729 Ravi @ Ravichandran Vs. State as also AIR 1979 SC 1127 Kanan and others Vs. State of Kerala to support his submission that the test identification parade is an important piece of evidence and especially in those cases where the accused are unknown persons; this safeguard is necessary for the purpose of testing the veracity of the witness with regard to his capacity to recognize such persons who are otherwise unknown to him. It is pointed out that in this case the assailants who are alleged to be robbers were admittedly unknown to the victim and her servant. Thus these witnesses having identified the accused persons for the first time in Court and the Court relying upon such an identification which is a useless identification has committed a great error. Learned counsel for appellant Parvez @ Bablu Chikna in the alternate has prayed for leniency in sentence. His submission is that in case this Court is not inclined to interfere with the order of conviction, this Court may think it fit to sentence the appellant for the period already undergone by him and for this proposition, reliance has been placed upon 2004 (1) SCALE Aslam Vs. State of Uttar Pradesh.

11 Arguments have been refuted by the learned public prosecutor. It is pointed out that on no count does the impugned judgment call for any
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interference. Submission being that there is no doubt that the evidence of identification in TIP is an important piece of evidence but it is only for the purposes of corroboration and it is not a substantive piece of evidence and whether the victim or eye-witness had seen them (as in this case to note the features of the assailants), their identification for the first time in Court is valuable. That apart the trial Judge had rightly drawn an adverse inference against the appellants for not having joined the TIP; submission being that testimony of PW-2 and PW-3 nowhere suggests that the accused persons had been shown to the complainant party prior to holding of the TIP.

12 Arguments have been heard. Record has been perused.

13 PW-2 is the complainant. She has on oath detailed the manner in which the incident had occurred deposing that on 26.04.2002 at about 11:30 pm when she was present in her house along with her servants Surender Kumar (PW-3) and Birju, the appellants had rung the bell; on her servant opening the door, four persons forcibly entered the room; one had a pistol and placed at her on her temple; the other assailant caught hold of her servant; remaining two assailants went upstairs. She was forced to hand over the keys of the almirah; she had deposed that

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Parvez @ Bablu Chikna had taken away her gold ornaments; accused Arun Gupta @ Monu was present and searched the almirah of the house; he had consumed almonds in her house; accused Dilawar @ Dilshad had slapped her on her resistance. Furkhan @ Sahu has also committed robbery. In her cross-examination which was lengthy, she had stuck to her stand. In one part of her cross-examination, she had stated that the Investigating Officer (PW-10) had brought accused Dilawar @ Dilshad in custody to her house on 29/30.04.2002. In another part of her cross-examination, she had stated that this was one week after the date of the incident meaning thereby that it would approximately be on 03/04.05.2002. Accused Dilawar @ Dilshad was not covered when he was brought before her. It is this version of PW-2 which has been highlighted by the learned counsel for the appellants to substantiate his argument that accused Dilawar @ Dilshad was shown to the complainant prior to the TIP as the TIP of Dilawar @ Dilshad in this case was admittedly held on 17.05.2002. In another part of her cross-examination, PW-2 has stated that she had met many criminals during the period of investigation but she had identified only the accused persons now present in Court. She denied the suggestion that she is

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identifying the accused persons for the first time in Court.

14 Relevant would it be to state that in her complaint Ex.PW-1/A while detailing the incident, PW-2 had stated that she could identify the accused persons if they are brought before her. This is also evident from her narration which shows that accused persons had stayed in her house for sometime; they had entered the house at 11:30 pm; they committed robbery by putting pistol to her head; they also consumed almonds and were dancing; they had put on the music; they ransacked the house not only on the ground floor but also on the first floor at leisure. In was in this context that Ex.PW-1/A had recorded that PW-2 would be in a position to identify the accused persons if they are brought before her.

15 PW-3 was another eye-witness. He has corroborated the version of PW-2. In his lengthy cross-examination, he has also stuck to his stand. In one part of his cross-examination, he has stated that he had seen Parvez @ Bablu Chikna when he was brought by the police after his arrest admitting that the police had asked him to identify him and on the same breath denied the suggestion that he had identified the accused Parvez @ Bablu Chikna at the instance of the police. He admitted that the police had not called him to identify the accused persons.

16 It is these versions of PW-2 and PW-3 which have to be scrutinized to answer the submission of the learned counsel for the appellants as to whether the appellants had been shown to the complainant party prior to their TIP.

17 Record further shows that three of the appellants Furkan @ Sonu, Arun Gupta @ Sonu & Dilawar @ Dilshad had been arrested on 12.05.2002. This is clear from the version of PW-10 (SI Dinesh) who had been accompanied by HC Chandevir (PW-9). Their arrest memo Ex.PW-9/D, Ex.PW-9/E and Ex.PW-9/F have also been perused which show that the arrest had taken place on 12.05.2002. No suggestion has also been given to any of these witnesses that the aforementioned three accused persons were not arrested on that day. The fourth accused Parvez @ Bablu Chikna had been arrested later on; he had surrendered in the Court and he was formally arrested on 22.07.2002. His arrest memo has been proved as Ex.PW-10/A. No suggestion has been given to this witness either that he was not arrested on the said date.

18 The TIP now becomes relevant. The TIP of the appellants Furkan @ Sonu, Arun Gupta @ Sonu & Dilawar @ Dilshad had been conducted on 17.05.2002 although the initial date was 15.05.2002.

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These proceedings have been proved as Ex.PW-6/B to Ex.PW-6/E. They evidence that all the appellants have been produced in muffled face. All of them refused TIP. Arun Gupta @ Sonu refused TIP stating that he had been shown to the witnesses before; Furkan @ Sonu had refused TIP stating that his photograph had already been shown to the witnesses and that is why he was not ready to join the TIP. Dilawar @ Dilshad also refused TIP on the ground that his face had been shown to the complainant prior in time. TIP of the fourth appellant Parvez @ Bablu Chikna had been conducted on 23.07.2002 vide Ex.PW-6/J to Ex.PW-6/K; he had also refused TIP on the ground that his photograph had been shown to the complainant.

19 Before this Court, the defence of Arun Gupta @ Sonu and Parvez @ Bablu Chikna is different; although in the TIP they have both stated that their photographs had been shown to the complainant party yet before this Court they have stated that they had been shown to the complainant prior in time. Be that as it may, this Court is not inclined to give any credence to this submission of the learned counsel for the appellants. When three of the accused had been arrested on 12.05.2002 and the TIP had been conducted shortly thereafter i.e. on 17.05.2002

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(although the application had been made on 15.05.2002) and there being nothing on record to suggest that PW-2 & PW-3, during this intervening period, had even been taken to the police station or the accused persons had been shown to them either through face or photograph, the refusal for TIP by all the aforementioned persons was without any valid reason and for which an adverse inference is likely to be drawn against all the aforementioned three appellants. So also qua the convict Parvez @ Bablu Chikna. He had been arrested on 22.07.2002. His TIP was conducted on 23.07.2002. There was no occasion in this intervening one day time for the complainant party to have seen the convict Parvez @ Bablu Chikna. In fact no suggestion has been given either to the Investigating Officer (PW-10) or his accompanying constable (PW-9) suggesting that the accused persons had either been brought to the Court in this intervening period or that the complainant party had visited either the police lock-up or the jail where they could have identified the accused. This defence has only been set up in the course of arguments. This is clear from the fact that the additional argument of the learned counsel for the appellants is that the accused persons had actually been arrested prior to 12.05.2002 but they had thereafter been let off by the Investigating

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Officer and re-arrested only on 12.05.2002. This submission of the learned counsel for the appellants has to be noted only to be rejected. Apart from the fact that there is no such documentary evidence supporting this stand, no cross-examination has been effected of any of the witnesses on this count, even otherwise, it would be a highly improbable situation that the Investigating Officer who is interested in the success of his case would arrest the accused persons and then let them go free hoping that they would come back in his net.

20 This Court is thus of the categorical view that the refusal to join TIP by all the appellants leads the Court to draw an adverse inference against them. Ex.PW-1/A had also noted that the incident had continued for some time. The complainant in her complaint had clearly stated that if the accused persons are brought before her, she would be able to identify them. Where the accused persons inspite of request to join TIP had declined the request, the correct identification of the accused persons in Court by the complainant (PW-2) and the eye-witness (PW-3) in this background would suffer from no vice. The accused persons are not entitled to any benefit on this count.

21 The Apex Court has time and again held that Section 9 of the
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Evidence Act which deals with the relevancy of fact presupposes that the purpose of identification in TIP is to test the observation, grasp, memory, capacity to recapitulate of a witness and where the witness has had a chance to distinguish the features of the accused person in the incident in it had occurred even though the accused was a stranger and thereafter even in the absence of a TIP, the identification in Court would attain value (see:- (1998) 3 SCC 625 Ronny @ Ronald James Alwaris & others Vs. State of Maharashtra).

22 In the present case, the situation is far stronger. It is not as if the TIP has not been held. TIP has been held but the accused persons without any valid reasons had refused the TIP. The versions of PW-2 and PW-3 are cogent and clear. The offence under Section 392/34 of the IPC for which the accused persons had been convicted clearly stand established. As rightly pointed out by the learned public prosecutor that these kind of offence are on rise in the society and some kind of deterrent must be imposed upon such persons who have the audacity to enter houses in day time and commit robbery on helpless senior citizens and women.

23 This Court also notes that the crime relates to the year 2002 and
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more than 12 years have passed since then. The appellants are on bail and as noted supra, out of total period of incarceration of 5 years which has been ordered against each of them, they have suffered incarceration of 5-- 5- ½ months. The Court also notes that the fine has since been paid.

24 This Court keeping in mind the object for which a punishment is to be imposed and balancing both the pros and cons of the factual scenario is inclined to modify the sentence and the sentence of incarceration of 5 years is reduced to RI 3 years. The fine is enhanced and each of the appellants is directed to pay a fine of Rs.20,000/- and in default of payment of fine, to undergo RI for 6 months.

25 Appellants be taken into custody to serve the remaining sentence. Their bail bonds cancelled. Sureties discharged.

26 Appeals disposed off in the above terms.

INDERMEET KAUR, J

MAY 15, 2014

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