

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

% *Judgment Reserved on: 18th November, 2009*
Judgment Delivered on: 23rd November, 2009

+ **CRL.A.28/2008**

BRAHM SINGH Appellant
Through: Mr.G.P.Thareja, Advocate.

versus

THE STATE (N.C.T. OF DELHI) Respondent
Through: Mr.Manoj Ohri, APP.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. D.D.No.6 dated 8.7.1989 Ex.PW-2/A was received in Police Post Okhla, Phase II intimating that driver Kishan Bahadur of Rajeshwar Kumar had been robbed of Rs.1,90,000/-; police force be sent to the spot. Ex.PW-2/A was marked to ACP Rajbir Singh PW-11. PW-11 accompanied by HC Shiv Charan PW-8 and Const.Brahm Prakash PW-4 reached at Y-47, Okhla, Phase II; injured i.e. Kishan Bahadur PW-1 had been removed to the hospital; his statement Ex.PW-1/A was recorded.

2. In Ex.PW-1/A it had been detailed by PW-1 that he is the driver of Rajeshwar Kumar and was residing in his servant quarter. On the fateful day at about 11.45 AM, he dropped his employer on the gate of Y-47, Okhla, Phase II, thereafter parking his car in front of the factory while he was lifting the brown briefcase from the car a boy aged about 22 to 28 years, 5' 6" tall came from behind and snatched the briefcase from his right hand and fled away; PW-1 raised alarm; meanwhile another boy aged about 20 to 22 years having a desi katta in his hand came from front side and threatened PW-1; one Raju had apprehended the first assailant but he managed to flee; the second assailant attacked PW-1 with the butt of his countrymade pistol; PW-1 started bleeding.

3. Endorsement Ex.PW-11/A was made on this complaint Ex.PW-1/A and was handed over to PW-4 who took rukka to the police station. The FIR was registered by ASI Baldev Singh PW-9 Ex.PW-9/A. Site plan Ex.PW-11/B was prepared at the pointing out of PW-1; accused persons, however, could not be traced.

4. On 17.7.1989, pursuant to a secret information a raiding party was organized by PW-11 comprising of himself, Const.Kartar Singh and PW-8. Kanhiya Lal PW-10 a public person was requested to join the raid. Two persons at the pointing out of the secret informer i.e. the accused Brahm Singh and Ajeet Singh were apprehended. Brahm Singh was arrested and his personal

search was conducted vide memo Ex.PW-8/A. His disclosure statement Ex.PW-8/C was recorded. From the possession of the co-accused Ajeet Singh one desi katta and one live cartridge and five other cartridges were recovered which were taken into possession. Pursuant to the disclosure statement of the present appellant, he pointed out his house vide memo Ex.PW-6/B and from a plastic bag lying inside the house a cash amount of Rs.70,000/- was recovered which was taken into possession vide memo Ex.PW-6/C. This cash was seized and sealed with the seal of RBS. Witness to this recovery was PW-10. Yudhister Kumar PW-6 had also joined these proceedings. The personal belongings of the appellant including his pant and shirt worn at the time of the offence were also seized vide memo Ex.PW-6/G.

5. On 18.7.1989 PW-11 moved an application Ex.PW-5/A before the Magistrate for Test Identification Parade of the accused. TIP was fixed for 21.7.1989; PW-1 correctly identified the present appellant in the said proceedings.

6. Accused in his statement under Section 313 of the Cr.PC pleaded innocence. It was submitted that he has been falsely implicated in the present case; the police had detained his family members and his father was forced to deposit Rs.70,000/- which he did so under force.

7. In defence two witnesses were produced; Khadak Singh DW-1 was the father of the co-accused Ajit; Brahm Singh had also

come into the witness box as DW-2; the defence witness had corroborated the version as set up by the appellant in his statement under Section 313 of the Cr.PC.

8. In view of the aforestated evidence collected by the prosecution, Brahm Singh was convicted vide judgment dated 14.12.2007 for the offence punishable under Section 392/34 of the IPC. His co-accused Ajeet Singh had died; proceedings against him stood abated. The third accused Giriraj Singh had been given benefit of doubt and was acquitted.

9. Vide order of sentence dated 18.12.2007 the appellant was sentenced to undergo RI for three years and to pay a fine of Rs.2000/-, in default of payment of fine to undergo SI for two months.

10. On behalf of the appellant it has been pointed out that the judgment of the Trial Court suffers from a grave infirmity and infallibility.

(i) Distinction between Section 392 and 379 of the IPC has not been appreciated. Attention has been drawn to the definition of 'robbery' as contained in Section 390 of the IPC. It is submitted that the essential ingredients for this offence is either to cause or attempt to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint. Attention has also been drawn to the first illustration i.e. Illustration

(a) appended to this Section. It is submitted that the testimony of PW-1 has categorized the role of the present appellant as the person who had snatched the brief case from PW-1; appellant was admittedly unarmed; even presuming the version of PW-1 is taken as the gospel truth at best the ingredients of the offence as contained in Section 379 of the IPC are made out and not an offence under Section 392 of the IPC.

- (ii) For an offence under Section 379 of the IPC the maximum penalty imposed is imprisonment which may extend three years or with fine or with both. Intention of the legislature in promulgating this provision clearly shows that this offence is punishable either with an imprisonment or with fine and keeping in view the fact of the instant case is more than 20 years old; the appellant has since become an advocate and is practicing at the bar since the year 2000; he is a first offender; having no criminal background; benefit of probation as contained in Section 4 and 6 of the Probation of Offenders Act be extended to him. Reliance has been placed upon N.M.Parthasarthy v. The State of by S.P.E. AIR 1992 SC 988, Hira Lal @ Vicky v. The State 2003 Cri. L.J. 1009 (Delhi), State vs. Maharashtra v. Nababai Ahdul Hasan & Anr. 1989 Cri.L.J. 1283 (Bombay), to support this arguments for grant of probation. Reliance has

also been placed upon *Bishnu Deo Shaw v. State of West Bengal* AIR 1979 SC 964. It is stated that the provisions of Section 360 and 361 of the Cr.PC which are provisions dealing with the release of an offender on probation of good conduct necessarily postulates that, when not granting probation the special reasons for not adhering to this provision have to be so stated at the time of judgment. This manifests the intention of the legislature that reformation and rehabilitation of the offender and not mere deterrence are the foremost objects of the administration of criminal jurisprudence in our system. In these circumstances, the observations of the Supreme Court that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. In this background appellant is entitled to the benefit of grant of probation.

- (iii) Trial Court has relied upon the TIP proceedings Ex.PW-5/B where the appellant had been allegedly identified by the complainant. It is submitted that TIP had been conducted on 21.7.1989. PW-1 has admitted that he had gone in the jail on 21.7.1989 and there was every possibility of the

accused persons having been shown to PW-1 at this time; TIP loses its sanctity.

- (iv) The recovery of Rs.70,000/- is belied; PW-10 has not supported the version of the prosecution of this count; PW-6 is also hostile. This sum of Rs.70,000/- had been claimed by the appellant as his money and in fact an application to the said effect had been moved before the magistrate. This money had thereafter been returned to PW-2 conditionally only subject to the final judgment.
- (v) This case property of Rs.70,000/- did not have any identification mark; the said notes were neither produced and nor exhibited in the court.
- (vi) Accused has produced two witnesses in defence including the father of co-accused Ajit and himself. Defence witnesses have to be given the same treatment as that of the prosecution.
- (vii) It is a fundamental rule of the criminal jurisprudence that the prosecution has to prove its case beyond reasonable doubt; correspondingly the accused only has to create a dent in the version of the prosecution. A preponderance of probabilities in his favour is sufficient for him to obtain an order of acquittal.

11. Submissions have been countered by the learned PP.

12. Arguments have been heard and the record has been perused.

13. Version of PW-1 the complainant is categorical and clear; incident had occurred at 11.45 PM; statement of the complainant was recorded by mid afternoon and the rukka had been sent at 2.30 PM on the same day. In the first instance i.e. in the complaint Ex.PW-1/A itself a detailed version had been given by the complainant and the role assigned to each of the accused including the present appellant. As per Ex.PW-1/A his brown briefcase was snatched by Brahm Singh who had way-laid him; he had thereupon been attacked by his co-accused with a desi katta which had caused injury on his head; MLC Ex.PW-7/A has advanced this ocular version of PW-1. No ulterior motive or purpose has been ascribed to PW-1 for falsely implicating or maligning the accused persons. Version of PW-1 on oath in court in spite of a long and detailed cross-examination remained clear and cogent. He had described Brahm Singh as the person who had snatched the briefcase from his hand; when PW-1 had raised alarm the appellant grappled with him; meanwhile co-accused Ajeet Singh attacked him with a desi katta.

14. The line of distinction between 'robbery' as defined under Section 390 of the IPC and 'theft' as defined in Section 378 of the IPC is thin but nevertheless distinct. Theft becomes robbery if in the process of committing the theft the offender causes or

attempts to cause either death or hurt or a wrongful restraint. Death is admittedly excluded in this case; 'hurt' has been suffered by the victim; Ex.PW-7/A which is the MLC of PW-1 shows that he had suffered injuries on the back of his head and four stitches were applied thereon. This is encompassed within the definition of 'hurt' as contained in Section 319 of the IPC. 'Wrongful restraint' has been defined under Section 339 of the IPC which necessarily entails a voluntary obstruction of any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed. Testimony of PW-1 clearly has established that he was wrongfully restrained by the present appellant and had been prevented from going towards the factory when his briefcase was snatched by the appellant. Ocular and medical evidence as discussed supra has established the ingredients of Section 390 of the IPC.

15. Section 390 of the IPC in fact contemplates that the accused should have from the very start the intention to deprive the complainant of the property and should for that purpose either hurt him or place him under wrongful restraint. Where A and B were stealing mangoes from a tree, C surprised them, on which A knocked him down senseless with a stick; where a person, in snatching a nose-ring, wounded the woman in the nostril and caused her blood to flow, this offence was committed. Where the accused slapped the victim after dispossessing him of his watch in

order to silence him an offence under Section 390 was made out. These are instances of robbery for which the accused stood convicted. See Husrut Sheikh (1866) 5 WR (Cr) 85, Teekai Bheer (1866) 5 WR (Cr) 95 and Harish Chandra AIR 1976 SC 1430.

16. TIP proceedings Ex.PW-5/B revealed that Brahm Singh along with his co-accused had been produced in muffled face before the Magistrate; seven other persons of similar structure as of the accused had been mixed with the accused persons and had joined these TIP proceedings. Proceedings were conducted in the jail. PW-1 Kishan Bahadur had correctly identified the person as the appellant. These proceedings run into 10 pages. PW-1 was cross examined on this score at length but no suggestion was given to him in his cross-examination that the accused had been shown to the prosecution witnesses; no such submission had also been made by the accused persons who had voluntarily agreed to join the TIP proceedings. This circumstance is a relevant fact under Section 9 of the Indian Evidence Act.

17. The Test Identification Parade is not a substantive piece of evidence. It is done only for the satisfaction of the prosecution that the investigation was moving in the right direction. However, it becomes a substantive piece of evidence when it is corroborated on oath in court.

18. In Suresh Chandra Bahri v. State of Bihar with Gurbachan Singh case (A 1994 SC 2420: 1994 Cri LJ 3271) the Supreme Court observed that:

"It is well settled that substantive evidence of the witness is his evidence in the court but when the accused persons is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial."

19. This piece of evidence was corroborated on oath by PW-1 in his version when he again correctly identified Brahm Singh as his assailant.

20. PW-2 was the employer of PW-1 who had been dropped by PW-1 at the gate of factory before he had been accosted and attacked by the appellant and his co-accomplices. He was not an eye witness; he had reached the spot after the incident was over; he had identified the briefcase Ex.P-1 containing the money as belonging to him; he had seen his driver PW-1 in an injured condition. His version is corroborative of this part of the testimony of PW-1.

21. The accused was apprehended and arrested in this case pursuant to a secret information on 17.7.1989. The disclosure statement of the appellant Ex.PW-8/C was recorded. Pursuant to his disclosure appellant had got recovered Rs.70,000/- contained in a plastic bag from his house. Recovery memo Ex.PW-6/C was

recorded. This document has been attested by PW-6, PW-10, HC Hasim Khan and PW-8.

22. The submission of the appellant that his sum of Rs.70,000/- was the illegal gratification which the accused had paid to the police officials for his false implication did not find favour with the Trial Court and rightly so; if such a huge amount of Rs.70,000/- had been paid by way of an illegal gratification to the police officials some complaint or note to the said effect would have been made to the higher authority which had not been done so in the instant case. The first information of this case recorded in DD no.6 Ex.PW-2/A at 1.05 AM had clearly mentioned that a sum of Rs. 1,90,000 belonging to Rajeshwar Kumar had been robbed from the briefcase carried by his driver Kishan Bahadur. It was at the stage itself that this amount of Rs. 1,90,000 was reported to have been missing. On 03.12.1990 this money had been ordered to be released to PW 2 on his furnishing a bank guarantee; the claim of the appellant staking a claim on this money had been rejected; no revision or appeal had been filed against the said order which had attained finality. DW-2 in his deposition has nowhere detailed the date, time and place when his father had handed over the money to ACP Rajbir Singh and to the SHO Bhag Singh. Actual giver of the money i.e. father of the appellant did not come into the witness box. DW-1 Kharak Singh is the father of co-accused Ajit Singh and his version that the father of Brahm Singh had also paid

a sum of Rs.70,000 is only a hearsay testimony. This stand of the accused as propagated in his defence and in his statement under section 313 Cr.PC did not find mention in the cross examination of either PW-1 or PW-2. It is clear that this defence has been built up as an afterthought.

23. Version of the prosecution has been fully established; the judgment of the trial court suffers from no infirmity.

24. Offence is related to the year 1989 i.e. almost two decades old.

25. It is also not in dispute that the appellant as on date is an advocate practicing at the bar; he is a first offender; he has suffered incarceration of about 7 months out of the total sentence of 3 years which had been awarded to him; fine has since been deposited.

26. In Hira Lal's case (supra) the coordinate bench of this court, on the policy of sentencing and the concept of releasing of person on probation had observed that

“..... The concept of releasing a person who is 21 years of age on probation arises out of reforming youthful offenders who are first convicts and commit an offence punishable with imprisonment of 7 years. Such offenders have to be necessarily granted probation as such offenders if kept in the company of hardened criminals, there is likelihood of their turning into obdurate criminals. Releasing of such a convict on probation always keeps him on the tenderhook as he is always conscious of the fact that if he indulges in any criminal activity during the period of probation, no more option is left with the Court than to send him to jail for serving sentence.”

27. In this background keeping in view the role ascribed to the present appellant, the fact that he is a first offender having no

criminal antecedents, he had in the intervening period of two decades proved that he has reformed himself as he has educated himself and become a lawyer and is practicing at the bar as on date; he already having remained in custody for about seven months, this would be a fit case for exercising powers for the grant of the benefit of probation.

28. While maintaining the conviction under Section 392 of the IPC, the sentence is modified and the sentence of imprisonment is set aside. The appellant is directed to be released on probation for a period of one year on his furnishing a personal bond of Rs.10,000/- with one surety of the like amount to the satisfaction of the Trial Court with an undertaking that he has maintain peace and good behaviour.

29. Appeal disposed of in the above terms.

(INDERMEET KAUR)
JUDGE

23rd November, 2009
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