

(2013) 09 DEL CK 0040

In the Delhi High Court

Case No : Criminal Appeal 261 of 2010 and 489 of 2009

Gaurav @ Vicky

APPELLANT

Vs

State
 Pankaj Kumar Verma Vs State of N.C.T. Delhi

RESPONDENT

Date of Decision : 19-09-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 341, 367, 392, 394

Citation : (2013) 6 ILR Delhi 4348

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Advocate : Avninder Singh, Mr. Aditya Vaibhav Singh, in CrI.A. 261/2010, Mr. Mohd. Arif in 489/2009, Mr. Prashant Mendiratta and Mr. Ashish Singh, in 369/2009, for the Appellant; M.N. Dudeja, APP., for the Respondent

Final Decision : Allowed

Judgement

S.P. Garg, J.—Gaurav @ Vicky (A-1), Pankaj Kumar Verma (A-2), Rahul (A-3) and Dilpal (facing trial before Juvenile Justice Board) were arrested in case FIR No. 217/2003 registered at Police Station Mandawali and sent for trial on the allegations that on 14.06.2003 at about 02.00 P.M. in front of CBSE building, Preet Vihar, they abducted Yogesh Kumar and Javed Ahmed and took them to Main Road near Hasan Pur Depot. At about 2.30 P.M. they robbed Rs. 60/- and mobile phone make Nokia by putting them in fear of instant death and inflicted injury with stone on Yogesh's head. The police machinery was set in motion when Daily Diary (DD) No. 13A (Ex. PW-4/A) was recorded at police station Mandawali at 15.00 hours on getting information from Head Constable Jaibir about apprehension of four assailants and recovery of mobile phone and Rs. 60/- from their possession. The investigation was assigned to ASI Jahir Ahmed who with Ct. Geetesh went to the spot. HC Jaibir handed over custody of all the assailants along with case property to him. During the course of investigation, the investigation officer lodged First Information Report (FIR No. 217/2003) after recording victim Yogesh Kumar's statement (Ex. PW-2/A) under Sections

394 /411 /34 IPC. By an order dated 28.04.2007 Dilpal's age was ascertained 16 years on the date of incidence and he was sent to Juvenile Justice Board for trial. Vide order dated 21.11.2007, A-1 to A-3 were charged for committing offences u/s 367 /341 /392 /394 IPC. A-1 was charged in addition u/s 397 IPC. To substantiate the charges, the prosecution examined 7 witnesses. In their 313 statements, A-1 to A-3 pleaded false implication. They, however, did not prefer to lead any evidence in defence. The Trial Court by the impugned judgment dated 13.04.2009 in Sessions Case No. 08/2007 convicted the appellants for the offences u/s 367 /341 /392 /394 /34 IPC and acquitted A-1 for offence u/s 397 IPC. By an order dated 27.04.2009, they were sentenced to undergo RI for three years with fine Rs. 3,000/- each u/s 367 IPC; RI for four years with fine Rs. 4,000/- each u/s 392 IPC; and RI for five years with fine Rs. 5,000/- each u/s 394 IPC. Being aggrieved, the appellants have preferred the appeals. I have heard the learned Additional Public Prosecutor and counsel for the appellants and have examined the record. Yogesh Kumar in his statement (Ex. PW-2/A) disclosed to the police that on 14.06.2003 he and his friend Javed had gone to CBSE office to fill up forms for re-checking of answer sheets. The office was closed due to second Saturday. At that juncture, three boys came there and one of them suspected them to have beaten his brother. On their denial to have done so, they asked to accompany them for identification from their brother. Thereafter, they were taken to Bus Stand, Karkari Mode where their friend met them and confirmed that they were the individual to have given beatings to their brother. The assailants forced them to accompany them in a bus. After travelling some distance in the bus, they were made to get down near Ganda Nala, Hasanpur at Bus Stand, Road No. 57. They took them to a deserted place and robbed cash and mobile phone in their possession and he was hit with a stone on his head by Gaurav @ Vicky (A-1). The complainant further informed that they were threatened not to disclose the incident. At about 02.40 P.M. they found a PCR Gypsy at a nearby place and informed them about the occurrence. The PCR officials took them in the PCR van and were able to apprehend all the four assailants at some distance. The mobile phone and cash Rs. 60/- were recovered from their possession.

2. In his statement (Ex. PW-2/A), Yogesh Kumar gave graphic detail as to how and under what circumstances they were forced to accompany by the assailants. He attributed specific role to each of the assailants by name. The name of the assailants along with their complete addresses find mention in the complaint (Ex. PW-2/A). DD No. 13A (Ex. PW-4/A) was recorded at 03.00 P.M. where there was information about the apprehension of four assailants with recovery of Rs. 60/- and mobile phone. The prosecution did not examine any PCR official who had accompanied the victims in search of the assailants and were able to apprehend them. There is no explanation as to why complainant Yogesh Kumar who had sustained injuries with a stone on head was not taken immediately to hospital for treatment. MLC (Ex. PW-5/A) reveals that Yogesh Kumar was taken to LBS hospital at 06.00 P.M. It contains reference of DD No. 13A and not FIR number.

The delay in getting Yogesh Kumar examined medically has not been explained. Apparently, the investigating officer has already lodged First Information Report by sending rukka at 04.30 P.M. It is unclear why MLC (Ex. PW-5/A) does not contain FIR number and creates doubt if the FIR was ante-timed. The injury i.e. swelling (1 cm X 2) over left occipital region was found on the victim which was simple in nature caused by a blunt object. It rules out use of any "deadly" weapon. The stone/brick allegedly used to inflict injury was not seized. The bloodstained clothes of the victim were also not taken into possession.

3. The story presented by the prosecution regarding kidnapping and robbery does not inspire confidence and it appears that the victims have not presented true and correct facts. None of the assailants had prior acquaintance with the victims and had anticipated their arrival at CBSE office on second Saturday which was a holiday. The assailants were not armed with any weapons whatsoever. There was no plausible reason for the victims to accompany the strangers to Bus Stop, Karkari Mode from CBSE office. Again it is unbelievable that the victims would travel in a public bus with the assailants without any objection voluntarily knowing that they were suspecting them to be author of injuries/beatings to their brother. At no stage, the victims raised alarm. There are no allegations that any force was used by the assailants to take the victims with them. It is unclear why the victims would accompany the assailants after alighting from the bus towards a deserted place. They did not have any valuable articles or cash with them prompting the accused persons to kidnap them and rob them at a deserted place. At the place of occurrence also and soon thereafter the complainant or his associate did not raise hue and cry. The accused did not abscond from the place of occurrence. It is unexpected that after committing a serious offence of robbery the accused persons would stay at the place of occurrence to be apprehended by PCR officials at the pointing out of the victims then and there. No application for holding Test Identification Proceedings was moved during investigation. Nothing was recovered in the personal search of A-1 to A-3. Only Dilpal Singh was found in possession of a mobile phone and Rs. 12/-. The Investigating Officer did not investigate as to in which private bus, the assailants had travelled with the victims or who had purchased the tickets. No tickets were recovered from the possession of the assailants or victims. The bus number was also not ascertained. The Investigating Officer did not visit the place of occurrence and no site plan was prepared at the instance of the victims. There was no occasion for the assailants to inflict injuries to Yogesh in the absence of any resistance.

4. Yogesh Kumar in his Court statement only identified Pankaj (A-2) as one of the assailants by pointing out towards him without naming him. He was unable to ascribe specific role to each of the accused. He was unable to disclose as to who was the offender who overpowered him or who robbed mobile phone and purse from the pocket. He was also not sure as to which of the accused had struck brick on his head. In the cross-examination, he admitted that he was unable to recollect correctly physical features regarding identity of Rahul (A-3), Pankaj Kumar Verma (PW-2) and Gaurav @ Vicky (A-1). PW-3 (Javed) in his

Court statement was not certain that the accused persons standing in the dock were the culprits. He was fair to say that he was not sure completely about their identity. He was also unable to pinpoint the role played by the each assailant. In the cross-examination, he reiterated that he was not sure as to whether the offenders standing in the dock were the persons who robbed them. No independent public witness was associated at any stage of investigation.

5. Divergent versions have been narrated by PWs-2 and 3 on material facts. PW-2 disclosed that they had gone to CBSE office at about 02.15 P.M. whereas PW-3 narrated the time as 12.00 or 12.30 P.M. PW-2 spoke that after the incident, they walked for three or four minutes and found a police booth and reported the incidence to the police-men present at the police booth. In the meantime PCR van reached and they searched the assailants in the PCR van. The Investigating Officer has admitted in the cross-examination that there was no police booth near the place of incident. No such police booth has been depicted in the site plan. PW-2 Yogesh Kumar and PW-3 (Javed) have given inconsistent version as to how much cash was found in their possession and how much was robbed. PW-2 (Yogesh Kumar) admitted that when they informed the assailants that they were left with no money even for the fare of the bus, one of the offenders gave Rs. 10-20 out of the money kept in the purse. The Investigating Officer did not collect call details of the mobile phone in possession of the assailant/victims. The call details could have disclosed the location of the victims and assailants at the relevant time. There are contradictory versions regarding the manner in which the victims were made to alight from the bus near the spot. There is nothing in their deposition that any threat was extended to the victims to alight at that spot. There are other contradictions regarding the place where the statement of the complainant was recorded or the articles were seized. It is mystery why the assailants would abduct two young persons and take them at a long distance to rob them specially when the victims had no valuable articles/cash with them.

6. The prosecution is bound to prove the guilt beyond reasonable doubt. Mere suspicion is not enough and no substitute for proof. Court's verdict must rest not upon suspicion but upon legal grounds established by legal testimony to base conviction. In the light of the above discussion, the impugned judgment can't be sustained and is set aside. The appeals are allowed and A-1 to A-3 be released forthwith if not required to be detained in any other case. A copy of the order be sent to Jail Superintendent. Copy be also sent to the accused/appellants through Jail Superintendent. Trial Court record along with copy of this order be sent back forthwith.