

15. With these observations, the present petition stands disposed of along with the pending applications.

Result:- Offences u/ss 354/354-B IPC quashed.

**ABC 2020 (I) 113 DEL
ACQUITTAL & BAIL CASES
HIGH COURT OF DELHI**

(Vibhu Bakhru, J.)

Crl.A. 828/2019 & Crl.M.(Bail) 1257/2019

Decided on 15 November, 2019

KAILASH MEHTO

- Appellant(s).

Versus

STATE

- Respondent(s).

Law Covered:- (A) *Indian Penal Code, 1860 – Sections 392, 394 & 397– Conviction under – Case of the prosecution seriously doubtful Recovery of weapon – Doubt regarding the recovery of the knife – Time & place of incident– doubtful – standard of proof not being met– acquittal. (Para 37)*

(B) *Indian Evidence Act, 1872 – Section 3 – Relevant fact – Failure to join Public witness – the accused was apprehended by public but none of the public witnesses was examined – fatal to prosecution. (Para 36)*

(C) *Indian Evidence Act, 1872 – Section 3 – Relevant fact – Identification – Test identification parade – the appellant was shown to the complainant – Complainant could not identify the other assailants – fatal to prosecution. (Para 36)*

Held:- It is also important to note that none of the public witnesses were joined in the investigation. Although, it is prosecution's case that the appellant was apprehended by public but none of the public witnesses have been examined. Much evidentiary value is attributed to the fact that the appellant was identified by PW3. However, it is relevant to note that the appellant was shown to the complainant at the police station. In addition, it is also material to note that the Complainant could not identify the other two assailants (who were apprehended pursuant at the disclosures stated to have been made by the appellant) in a TIP. (Para-36)

Evaluating the evidence in totality, this Court finds that there are serious doubts as to the case set up by the prosecution. This is not only regarding the recovery of the knife, but also regarding the place and time of incident. In view of the same, this Court is unable to accept that the prosecution had established that the appellant was involved in commission of the offences for which he was charged, beyond reasonable doubt. The standard of proof not being met, the appellant is liable to be acquitted. (Para-37)

Counsel:- For Appellant(s): Mr Simon Benjamin, Advs.

For Respondent(s): Ms Kusum Dhalla, Ms Chauhan, Advs.

JUDGMENT

VIBHU BAKHRU, J.: - 1. The appellant has filed the present appeal under Section 374 of the Code of Criminal Procedure, 1973 (CrPC) against the judgment dated 04.04.2019, passed by Learned District and Sessions Judge, whereby the appellant was convicted for the offences under Sections 392/394/397 of the Indian Penal Code, 1860 (IPC). The appellant also impugns the order dated 12.04.2019, whereby he was sentenced to undergo Rigorous Imprisonment for a period of three years along with a fine of `1,000/- and in default of payment of fine, Simple Imprisonment for one month for the offence under Section 392 of the IPC; Rigorous Imprisonment for a period of three years along with a fine of `1,000/- and in default of payment of fine, Simple Imprisonment for one month for the offence punishable under Section 394 of the IPC; and Rigorous Imprisonment for a period of seven years for the offence under Section 397 of the IPC. All the sentences were to be served concurrently.

2. The impugned judgment was rendered in connection with a case arising from FIR No. 1189/2015, registered with P.S. Shalimar Bagh on 08.10.2015. According to the Complainant (Wali Mohammad - PW3), he used to sell rat killer medicine in Azad Pur Mandi. He stated that on 08.10.2015, after selling rat killer medicine in Azad Pur Mandi, he went to sell the same in the *Jhuggies* situated at *Kela Godam*. And, at about 2:15 PM, he was attacked by three boys. One of those three boys caught hold of him, while the second boy took out a knife from his pocket and attacked him with that knife. In order to save himself, the Complainant raised his right hand and the knife struck his hand. Thereafter, the said boy also attacked him with the knife on his left hip. The third assailant forcibly took out `4000-5000/- from his

a front pocket. The Complainant stated that he raised an alarm, however, two boys managed to escape from the spot but the third one was apprehended by the public. He stated that somebody informed the police about the incident and he was taken to the Hospital by the PCR van. The name of the assailant, who was caught, was later on revealed as Kailash Mehto (the appellant herein). The Complainant b further claimed in his statement to the police that he could identify the assailants, if they appeared before him. He further stated that PCR van took him to the hospital.

c 3. In order to establish the case, the prosecution examined ten witnesses. The appellant also examined two witnesses for the defence. The Trial Court evaluated the evidence available and had found the appellant guilty of the offences for which he was charged.

d 4. The appellant has assailed the impugned judgment, principally, on three fronts. First, it is contended that the prosecution has failed to established the place of the alleged incident. According to the complainant (PW3), he was attacked in at the *jhuggies* but he regained consciousness near the railway tracks. Second, it is contended that the testimony of PW3 and PW4 is inconsistent as far as recovery of the knife is concerned. Third, it is submitted that the e testimony, as to the time of the incident, is not consistent with the MLC of the Complainant (PW3).

f 5. The learned Additional Public Prosecutor (APP) appearing for the State countered the aforesaid submissions. She contended that there was no material inconsistency and the evidence led clearly established that the appellant was guilty of the offences, for which he has been convicted.

Evidence

g 6. Before proceeding further, it is relevant to briefly examine the evidence led by various witnesses.

h 7. SI Shadi Lal was examined as PW1 and he deposed that on 08.10.2015, he was posted at Police Station Shalimar Bagh, and at about 5:10 PM, he received a *rukka* through Ct Narender sent by HC Ranvir. On the basis of the *rukka*, he recorded the said FIR and handed over the same to Ct Narender for the same to be given to ASI Ranbir for further investigation of the case.

8. HC Meenu Bala was examined as PW2 and she deposed that on 08.10.2015, at about 03:25 PM, she received information that a

person had been attacked with a knife near Fortis Hospital, Shalimar Bagh, Delhi and the person who had caused the said injury was also apprehended. She had reduced the said information in DD Register vide DD No. 36A (Ex. PW2/A). a

9. The Complainant, Wali Mohammad, deposed as PW-3. He stated that he had gone to the *jhuggies* of Shalimar Bagh near Kela Godown to sell rat killer medicine and was robbed of `5000-6000/- by three persons. He alleged that one of the them (the appellant) had given him a knife blow on his wrist and on his hip and one of the assailants had robbed him of a sum of `5000-6000/-. Thereafter, when he raised the alarm, one of the three persons (the appellant) was apprehended by person of *jhuggies* while the other assailants managed to escape. Thereafter, he was taken for the medical examination to the hospital. The police seized his blood-stained clothes. He further stated that the knife was recovered from the possession of the assailant, when he was apprehended by the public. b c d

10. In his cross examination, he deposed that he did not know as to who informed the police and that after receiving the injuries, he became unconscious and therefore he does not know as to when police reached the spot. When he regained the consciousness, he was near the railway tracks from where he was taken to the hospital by the police. He was taken to the *jhuggies* from the railway track by [sic] the residents of the *jhuggies*. He also testified that the distance between *jhuggies* and railway track is about one kilometer. e

11. Ct Anil was examined as PW4 and he deposed that on 08.10.2015, investigation of the case was handed over to ASI Ranbir Singh after the registration of the FIR. PW4, along with ASI Ranbir Singh, went to the spot i.e. *jhuggies* near Kela Gowdown near Fortis Hospital, Shalimar Bagh. HC Ranvir Singh, along with PW3, met them there. ASI Ranbir Singh (IO) prepared the site plan and the sketch of the knife at the instance of PW3. IO also collected and sealed the bloodstained clothes worn by the Complainant (PW3). PW4 correctly identified the appellant in Court and stated that on formal search of the appellant being conducted, one knife was recovered from the right pocket of the pant worn by the appellant. PW4 stated that a disclosure statement by the appellant was recorded (Ex. PW4/A) and he was arrested vide memo (Ex. PW3/E). The appellant was medically examined and was thereafter, put behind bars. f g h

12. On being cross examined, PW4 stated that they had reached the spot of incident in the evening hours and he did not remember the exact time. The place of occurrence was near the railway track, Kela Godown, Shalimar Bagh and no blood was found near the said spot. PW4 stated that he had seen the appellant for the first time in the police station. He stated that the IO had not made any inquiries from public persons in his presence. He stated that the pant of the appellant from which the knife had been seized was light grey in colour. The seized knife was 14 cm long and the blade was 6 cm long. PW4 stated that he had signed the sketch of the knife and the same bore his signature. He also stated that the distance between the *jhuggis* near Kela Godown and the tracks was about 500-700 metres.

13. HC Narender was examined as PW5, and he deposed that he was posted at PS Shalimar Bagh on 08.10.2015, and at about 2:15 pm, information was received by HC Ranvir vide DD No. 36A. On receipt of the same, PW5, along with HC Ranbir, went to the *jhuggies* situated near the main gate of Fortis Hospital, where they came to know that the injured (PW3) had already been removed to BJRM Hospital. Thereafter, they went to BJRM Hospital and collected the MLC of injured Bali Mohammad. They recorded the statement of the injured Bali Mohammad and prepared a *rukka* and the same was handed over to him for registration of the FIR. PW5 got the same registered and returned to BJRM Hospital and handed over the *rukka* and the FIR to ASI Ranbir Singh in BJRM Hospital.

14. On being cross examined, PW5 stated that he could not tell whether IO had made a departure entry while leaving the Police Station for investigation. PW5 stated that it had taken them ten minutes from the police station to reach the place of incident. No eye witnesses or injured persons were found at the spot and the injured (PW3) was already removed to the hospital by the PCR. He stated that it took around twenty minutes to reach the hospital from the spot and IO prepared the *rukka*. He stated that he did not make any entry in the register when he reached the police station. PW5 stated that he directly handed over the *rukka* along with a copy of the MLC to DO. He stated that when he reached the PS, he had a copy of MLC, along with the *rukka*. He could not tell the exact time he had left the hospital for the registration of the FIR.

15. Ct. Brij Lal was examined as PW6 and deposed that on 17.12.2015, he was posted at Police Station Shalimar Bagh. On the said

date, he joined the investigation of the present case, and along with ASI Ranbir Singh, they met the secret informer who told them that the other accused persons (Vishnu and Shambu) were seen in AA Block *jhuggies*. IO requested 4-5 passerbys to join the raiding party but they refused. On reaching the *jhuggies* AA Block, the secret informer pointed out the accused persons and they were apprehended. They were arrested vide arrest memos (Ex. PW6/A and Ex. PW6/B) and personal searches were conducted (Ex. PW6/C and Ex. PW6/D). Disclosure statements of the accused persons were also recorded (Ex. PW6/E and Ex. PW6/F).

16. Dr. Indra Pal Yadav, who deposed as PW-7, stated that he was posted as CMO in BJRM hospital, and at about 10:42 a.m. when he was on duty, injured Wali Mohammed was brought to the casualty by Ct. Narender and he was examined by Dr. Aquil Reza under his supervision. He identified his signatures on the MLC NO. 106263, which was exhibited as Ex.PW7/A.

17. HC Ranvir, who deposed as PW-8, stated that on 08.10.2015, upon the receipt of information vide DD No. 36 A, he along with Ct. Narender went to Kela Godown Road, *jhuggies*, near Fortis hospital, where they came to know that the injured had already been removed to BJRM hospital. Thereafter they went to the hospital and he recorded the statement of the complainant (Ex.PW3/A). They collected the MLC of injured Wali Mohammad. He stated that, thereafter, he along with complainant went to the spot and ASI Ranbir and Ct. Narender also came at the spot.

18. In his cross examination, he deposed that he received the DD No. 36A at about 3:25 pm and he reached at the spot at about 3:40pm and when the injured met him in the hospital he was conscious.

19. Vijay Mehto, neighbour of the appellant, deposed as DW1 and stated that when the police came to the house of the accused (the appellant) to arrest him, there was hue and cry and on that day the accused was not feeling well. The accused, Kailash Mehto, was taken to the police station. The police officials who took him had told to him that the accused shall be released after inquiry, but the accused was not released by the police.

20. In his cross examination, he stated that the accused might have been detained on the 10th of the month but he did not remember

a the month. At about 8pm-9pm, one police officer who was in the uniform had come to the house of the accused. He deposed that he did not make any inquiry about the accused or make any complaint about the accused being taken by the police. He further stated that the police official had told him that he would release the appellant after making inquiries.

b 21. Sushila Devi, mother of the appellant deposed as DW2. She stated that when police came at the house of the accused, there was hue and cry. On that day, the accused was not feeling well as he was suffering from TB and piles and the same was informed to police, c who told her that, the accused will be released after the inquiry, but the same was not done.

d 22. In her cross examination, she stated that she cannot tell the date, month and year when police came to their house, she stated that she did not make any inquiry about the accused or made any complaint about the police taking the accused.

Reasons & Conclusion

e 23. The learned counsel appearing for the appellant submitted that the trial court had erred in convicting the appellant, as the evidence in the present case was insufficient for such a verdict. He submitted that there were serious infirmities regarding the time as well as the place of the incident, which clearly indicates that the appellant had been falsely implicated.

f 24. The trial court considered the controversy with regard to recovery of the knife. It found that there was inconsistency in the testimony of the complainant-victim (who deposed as PW-3) and the testimony of Ct. Anil (who deposed as PW-4) with regard to place of recovery of knife. However, the trial court reasoned that such minor g inconsistencies did not in any manner render the evidence of the complainant untrustworthy.

h 25. In addition, the complainant-victim (PW-3) had deposed that he had gone to the *jhuggies* of Shalimar Bagh, near Kela Godown to sell rat killer medicine and other related articles. He was attacked by three persons including the accused (appellant). He alleged that the accused had struck him with knife on his right wrist and on his hip. And the one of the persons had robbed him `5,000-6,000/-. He stated that he raised an alarm and the accused (appellant) was apprehended by persons of the *jhuggis* while other assailants

managed to escape. He stated that the knife was recovered from the possession of the appellant, when he was apprehended by the public. a

26. Concededly, this testimony of the complainant is in material variance with the testimony of PW-4 (Ct. Anil). He had deposed that on the date of the incident, that is, on 08.10.2015, he was posted at PS Shalimar Bagh and investigation had been handed over to ASI Ranbir Singh after registration of the FIR. He deposed that he had gone to the spot (that is, *jhuggis*, near Kela Godown, near Fortis Hospital) along with ASI Ranbir Singh. He also stated that they had met with HC Ranvir Singh and the complainant at the spot. He further deposed that they along with the Complainant had come back to PS. The accused (appellant) was present at the PS and was identified by the complainant as the person who had attacked him with a knife. He stated that the IO conducted a formal search of the accused and recovered one knife form the right pocket of the trousers worn by him. b c d

27. Although, the inconsistency in testimony of PW3 and PW4 regarding the recovery of the knife may not, by itself, be sufficient to raise any doubts as to the involvement of the appellant in the incident, however, that is not the only material inconsistency in the evidence obtaining in the present case. There is also inconsistency with regard to the time and place of the incident. e

28. The complainant's (PW-3's) testimony is unambiguous. He had testified that he had gone to the *jhuggis*, near Kela Godown, Shalimar Bagh, when three assailants had robbed him. He had also deposed that he had gone to *jhuggies* at noon. f

29. In his cross-examination, he stated that after receiving injuries he had become unconscious and, therefore, could not depose as to when police had reached the spot. He stated that when he regained his consciousness, he was near the railway tracks and, thereafter, was taken to hospital by the police. In the same breath, he had also stated that when he was taken to the *jhuggies* from the railway tracks by [sic from] residents of the *jhuggies*. He also stated that the distance between the *jhuggies* and the railway track was about one kilometre. He also confirmed that the incident had taken place in the *jhuggis*. Thus, according to the testimony of PW-3, he was attacked and robbed in the *jhuggies*; he had thereafter become unconscious and when he recovered, he was near the tracks, which was some distance away from the *jhuggies* (one kilometer). Thus, he was about a g h

a kilometre away from the place of the incident. It is also important to note that PW-4 had also deposed that the distance between the railway tracks and the *jhuggis* near Kela Godown was about 500-700 metres. No explanation whatsoever has been presented by the prosecution regarding this; consequently, no evidence has been led on this aspect which would shed any light as to how the complainant b had been moved from the site of his attack to a spot at a distance of at least 500- 700 metres.

30. In addition to the above, there are irreconcilable inconsistencies in the evidence regarding the time and incident. PW-1 c (SI Shadi Lal) had deposed that he was posted as a duty officer at PS Shalimar Bagh on 08.10.2015. He had received the *rukka* sent by HC Ranvir (PW-8) through constable Ct Narender (who deposed as PW-5). On the basis of the said *rukka*, the FIR in question was registered (FIR No.1189/2015). He stated that the *rukka* was given to ASI Ranbir d for further investigation.

31. HC Meenu Bala (who deposed as PW-2) stated that she was working as a duty officer from 8:00 AM to 4:00 PM at PS Shalimar Bagh on 08.10.2015. She had received information through wireless operator at about 3:25 PM, regarding a person being e attacked with a knife near Fortis Hospital, Shalimar Bagh and that the person who had caused the injury had been apprehended. She had entered the information in the DD register (DD No.36-A). A perusal of the FIR in question indicates that it was registered at 5:10 f PM. This is consistent with the testimony of PW-1. The FIR indicates that the time of incident to be 14:15 hours (2:15 PM) and the time of receipt of information as 15:15 hours (3:15 PM). It is important to note that the FIR also refers to the receipt of the MLC (MLC No.106263/2015). It is, thus, clear that the MLC had been received g by PW-1 by 5:10 PM. However, the MLC (Ex.PW-7/A) indicates that the injured had been brought to the hospital (Babu Jagjivan Ram Memorial Hospital) at about 10:42 AM. Since the said MLC is mentioned in the FIR, the said time is required to be read as 10:42 h AM and cannot be read as 10:42 PM.

32. Dr Inderpal Yadav (who deposed as PW-7) had testified that he was on duty as CMO on 08.10.2015 and the injured (PW-3) was brought to the casualty by Ct Narender (PW-5) and was examined by Dr Aquil Reza under his supervision. He also affirmed that he had seen Dr Aquil Reza write and sign the MLC in the

official course of duty. In addition, he also identified his endorsement at point B. There are two important aspects that are noteworthy in the testimony of PW-7. First, that the injured (PW-3) was brought to the hospital at about 10:42 AM and second that he was brought to the hospital by Ct Narender (PW5). This is inconsistent with the case set up by the prosecution. According to the prosecution, the incident had occurred at around 2:15 PM and information regarding the same was received at 3:15 PM. The complainant-victim (PW-3) had deposed that he had gone to the *jhuggis* at noon time. In view of the above, there is serious doubt as to the testimony of PW-3 as to the place as well as time of incident. As noticed above, he had testified that the incident had taken place in the *jhuggies*. He had become unconscious and on regaining his consciousness he found himself to be near the tracks, which he testified were at a distance of about one kilometre from the *jhuggies*. Although, PW3 testified that he had gone to the *jhuggies* at about 12:00 noon, PW7 has testified that he was brought to the Babu Jagjivan Ram Memorial Hospital at 10:42 AM by Ct. Narender.

33. It is also important to refer to the testimony of Ct Narender (Head Constable at the time of deposition), who deposed as PW-5. He had deposed that HC Ranvir registered the information of the incident by DD No.36-A. As per testimony of PW-2, this was recorded at about 3:25 PM. On receipt of this information, PW-5 and HC Ranvir had gone to the *jhuggis* near main gate of Fortis Hospital where they came to know that the injured (PW-3) had already been removed to BJRM Hospital. However, according to PW-7, Ct. Narender had brought the complainant (PW-3) to the BJRM Hospital at 10:42 AM.

34. The trial court had addressed this controversy by holding that the deposition of PW-7 that the injured was brought at 10:42 AM was not correct, as the entire sequence of events show that it was night time when the injured was taken to the hospital and, therefore, the time of arrival as recorded in the MLC (Ex.PW-7/A) has to be read as 10:42 PM and not AM. This Court is of the view that this reasoning is manifestly erroneous. The FIR in question, which was recorded at 17:10 hours (5:10 PM), bears a reference to the MLC and, therefore, the time of arrival of the injured at the hospital cannot be 10:42 PM, which is more than 5 ½ hours after the recording of the FIR.

35. This is also wholly inconsistent with the testimony of PW-3 that indicates the time of incident at 12:00 noon. It is also

a inconsistent with DD No.36-A, which was recorded at about 3:25 PM. The trial court reasoned that since the incident had taken place at 2:15 PM and DD No.36-A was recorded at 3:25 PM, the same meant that the injured was taken to the hospital at 10:42 PM. But in such a case, the MLC could not find mention in the FIR which was registered at 5.10 PM.

b 36. It is also important to note that none of the public witnesses were joined in the investigation. Although, it is prosecution's case that the appellant was apprehended by public but none of the public witnesses have been examined. Much evidentiary value is attributed to the fact that the appellant was identified by PW3. However, it is relevant to note that the appellant was shown to the complainant at the police station. In addition, it is also material to note that the Complainant could not identify the other two assailants (who were apprehended pursuant at the disclosures stated to have been made by the appellant) in a TIP.

c 37. Evaluating the evidence in totality, this Court finds that there are serious doubts as to the case set up by the prosecution. This is not only regarding the recovery of the knife, but also regarding the place and time of incident. In view of the same, this Court is unable to accept that the prosecution had established that the appellant was involved in commission of the offences for which he was charged, beyond reasonable doubt. The standard of proof not being met, the appellant is liable to be acquitted.

f 38. In view of the above, the impugned judgment dated 04.04.2019 and the order on sentence dated 12.04.2019, are set aside and the appellant is acquitted of the offences for which he is charged.

g 39. The jail authorities are directed to forthwith release the appellant, subject to him not being involved in any other case.

40. The appeal is allowed in the aforesaid terms. The pending application is disposed of.

h **Result:-** Appeal allowed.