

**Yog Raj Vs. State**

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**Court :** Delhi

**Decided On :** Mar-13-1989

**Reported in :** 38(1989)DLT249

**Judge :** P.K. Bahri, J.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 392; [Arms Act, 1959](#) - Sections 27

**Appeal No. :** Criminal Appeal Nos. 112 and 168 of 1988 and 5 of 1989

**Appellant :** Yog Raj;rohtas Singh;bhupinder Singh

**Respondent :** State;state;state

**Advocate for Def. :** Dinesh Kumar, ; R.K. Saini, ; S.K. Agarwal and ;

**Advocate for Pet/Ap. :** Party in perso

**Judgement :**

**P.K. Babri, J.**

(1) These three appeals which arise from the judgment dated September 21, 1988, of an Additional Sessions Judge, New Delhi. convicting the appellants for various offences and subsequent order dated September 23, 1988, imposing sentences, are being disposed of by this common Judgment.

(2) Appellants have been convicted of offences punishable under Sections 392 & 397 read with Section 34, Indian Penal Code (for short 'IPC') and Section 411 read with Section 34, Ipc, while appellant-Rohtas Singh and appellant-Yograj have been further convicted for offence punishable under Section 27 of the Arms Act and they been directed to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1, 000.00 cash and in default to undergo further rigorous imprisonment six months for the offence punishable under Section 392 read with Section 34, Indian Penal Code and for seven years' rigorous imprisonment for offence punishable under Section 397 Indian Penal Code and one year's rigorous imprisonment for offence punishable under Section 411 read with Section 34 Indian Penal Code while Rohtas Singh and Yog Raj have been in addition sentenced to undergo one year's rigorous imprisonment each for offence punishable under Section 27 of the Arms Act with directions that the sentences imposed under Section 411 Indian Penal Code and Section 27 of the Arms Act shall run concurrently while the sentences for the offences punishable under Sections 392 & 397 Indian Penal Code shall run consecutively.

(3) Facts leading to the prosecution of the appellants and one Azad Singh, co-accused (who during the course of the trial entered the plea of guilty and was convicted and sentenced for offences punishable under Sections 392 & 397 read with Section 34 Indian Penal Code and for offence punishable under Section 420 Indian Penal Code and was sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 200 and in default of payment of fine, to further undergo simple imprisonment for two months on the first count and to undergo seven years rigorous imprisonment on the second count and to undergo two years rigorous imprisonment and to pay a fine of Rs. 200.00 and in default of payment of fine, to further undergo simple imprisonment for two months on the third count vide order dated May 21, 1986) are that P.S. Mukarjee (Public Witness 2) had lodged a report on February 23, 1984, at Police Station Connanght Place, copy of which is Ex.PW2/A, mentioning that an Ambassador Car bearing registration No. PBV-610 registered in the name of M/s. H.M.M Limited with which the witness was employed as Legal Manager, has been parked at 11 Am outside the premises of the said Company at Bharat Yuvak Bhawan, 1, Jai Singh Road, New Delhi and when he came out of his office at about 1 Pm he found his car missing.

(4) On February 24, 1984, an information was received in the Police Control Room which was passed on to the Police Post Palam and which was recorded in Daily Diary, of which copy is Ex.PW4/A, by PW8 Head Constable Ganga Ram, then posted in that Police Post, in which it was conveyed at 10.25 Am that one taxi bearing No. Dlt 5554 was subjected to attempt to robbery by some bad characters near Najafgarh Road, Palam Village and some police officer may be sent to the spot. A copy of this daily diary report was sent to ASI Chander Bhan, who was available in the area while on patrol duty, through Constable Ram Kisham. Asi Chander Bhan (Public Witness 4) arrived at the spot and in the meanwhile Si Ram Chander (PW6) also reached there and they found that PW3 Mahavir, the taxi driver., and PW5 Jai Parkash, helper of Mahavir and three passengers of that taxi namely, Jagdish, Yaqub and Kesar Mal, who were residents of some villages of Rajasthan. were present there. Appellants Rohtas and Yograj stood already apprehended by PW3 and PW5 and they were taken into custody by the police and the statement of Mahavir was recorded, which is Ex. PW3/A, on the basis of which the case was registered. A separate case was registered under the Arms Act as the weapons allegedly recovered from the two accused by PW3 & PW5 were also handed over to the police.

(5) It was mentioned in the Fir that the taxi, which was being plied by Mahavir with the help of Jai Prakash, was engaged at the Indira Gandhi International Airport by three passengers mentioned above for going to their respective villages in Rajasthan and two of the passengers sat in the rear seat of the taxi while one passenger and Jai Parkash sat beside Mahavir Driver, in the front and as soon as the taxi reached a narrow bridge near piggery farm on kakroli Road that an Ambassador car bearing number plate Dba 6370 was found parked in front and as the taxi could not proceed further, so it was stopped and the four occupants of the said Ambassador Car, whose names were found out in investigation as the three appellants and one Azad Singh out of whom Rohtas Singh and Azad Singh were having pistols while Yograj and Bhupinder Singh were having daggers, came out and accused Robtas put the pistol at the bead of Mabavir and appellant-Yog Raj placed the dagger on the cheek of Jai Parkash whereas the other two culprits proceeded to rob the customers and they managed to snatch one bag and while they were in the process of snatching one transistor that Mabavir got courage and

be pushed open the door of the taxi which struck against accused Rohtas and the revolver fell from his hand and Robtas tried to get the revolver and Mabavir came out and Rohtas started running away and in the meanwhile Jai Parkash also managed to snatch the dagger from the hand of Yog Raj culprit and all the four culprits tried to escape by getting into the Ambassador Car and Mahavir pierced the tyre of the said Car with the dagger but still the Ambassador Car was driven to some distance and it stopped and the culprits started running towards the village and they were pursued by Mahavir and Jai Parkash and the said passengers and they managed to catch hold of Rohtas and Yog Raj at the spot whereas the other two culprits managed to escape. It is alleged that then they came back to the place where the taxi stood parked and in the meanwhile a bus came and it stopped and the passengers of the said bus administered thra Singh to the said two culprits.

(6) The police took into possession the pistol after preparing sketch Ex. PW3/C and the dagger after preparing the sketch Ex. PW3/F was taken into possession vide recovery memos Exs. PW3/B and PW3/E respectively. The Ambassador Car which had a fictitious name plate showing the number as Dea 6370 was found to have its original number plate Pbv 610 lying in its dicky, and the same were taken into possession vide recovery memo Ex. PW3/D. All the memos were signed not only by Mahavir, Jai Parkash but by the three passengers of this taxi as well.

(7) It is the case of the prosecution that Mahavir and Jai Parkash joined in investigation of the case for arresting the other two culprits and on April 26, 1984, Bhupinder Singh was arrested from Faiz Road on being pointed out and identified by the said witnesses. It appears that the other culprit Azad Singh was arrested on April 23, 1984 and he made a disclosure statement to the effect that he had encased the travellers cheques which belonged to Kesar Mal, a passenger and which were robbed on that day and on his pointing out, from the State Bank of India's Branches at Azadpur, Connaught Circus and Parliament Street, travellers cheques Ex. B I to B22 were taken into possession. It appears that Azad Singh had got encased those cheques by forging signatures of Kesar Mal on the same. However, as Azad Singh had already admitted his gait and had been convicted and sentenced separately, so this particular aspect of the case need not detain us further.

(8) As far as the case against Rohtas and Yog Raj, appellants, is concerned, the same appears to be will made out from the statements of Mabavir and Jai Parkash. The appellant-Rohtas could not engage any counsel and I had appointed Shn R.K. Saini, Advocate, for Robtas Singh Appellant, as amices Curiae on State expense and I have heard detailed arguments of S/ShriS.K. Aggarwal, R.K. Saini and Dinesh Kumar Advocates, in this case and I have also considered the evidence appearing on the record.

(9) It has been argued on behalf of these appellants that Mahavir is a Police Constable and so his testimony should not be given any importance because he must toe the line of the prosecution. It is to be remembered that at the time the occurrence took place Mahavir was functioning only as a taxi driver and it is only because of his exemplary courage showing apprehending the two culprits that he had been given this post of a Constable Mere fact that he had been rewarded for his bravery by the Police Department does not mean that is testimony should be discarded by this Court on this score alone that he is presently working as Constable of the Police.

(10) Then certain discrepancies appearing in the statements of these two important witnesses have been highlighted, firstly that PW3 stated that the said Ambassador Car stood parked when the taxi reached there whereas PW5 deposed that the Ambassador Car came and stopped in Iron of the Taxi. This is only the way of describing a particular fact from different perspectives. Every witness has his own Way of narrating the facts and if there takes place any slight Variation narration of facts by the witnesses that would not result in bringing any contradiction in their statements. The main fact was that the four culprits were found in that particular Ambassador Car, who came out of that Car and committed the robertry. It has been then pointed out that PW3 deposed that as soon as he opened the door of the taxi the revolver fell down from the hand of Rohtas and he tried to drag revolver and then he ran away from the spot whereas PW5 has stated that Rohtas had run away with the revolver and it was only when the culprits were being chased in the fields that Rohtas threatened the pursuing witnesses and the passengers and that Mahavir hand pelted a stone which struck Rohtas's hand and the revolver fell down from his hand. 'It is true that there is clear contradiction in

the said two statements of the said two witnesses. It appears that PW5 had tried to replenish the version of the prosecution by making it more dramatic. Even in the Fir it was mentioned that as soon as the taxi door was opened the revolver had fallen from the hand of Rohtas. Then there is a contradiction with regard to the fact whether PW5 had snatched the dagger from the hand of appellant-Yog Raj or it was PW3. This contradiction can be easily explained because it is mentioned in the Fir itself that it was Mahavir who had actually pierced the tyre of the Ambassador Car with the dagger when the culprits had entered into that Car for escaping from the spot. So, the dagger which was snatched from the hand of appellant Yog Raj by PW5 initially had come into the hand of Mahavir and in that context Mahavir came to state in Court that he had snatched the dagger from Yog Raj's hand. I do not think that this slight contradiction appearing in the statement of these two witnesses shatters the substratum of the prosecution case. Then, it is pointed out that PW3 deposed in court the passengers of the bus had given beating to the said two culprits whereas PW5 had not said anything of the sort. Mere fact that no question was put to PW5 in order to elicit this particular fact in his testimony does not mean that there has appeared a contradiction in the statements of the said two witnesses on this aspect of the case. It is also pointed out that Mahavir had not stated in his statement that he had gone to give message to the police on telephone whereas PW5 had so stated. I do not understand how this innocuous omission in the testimony of PW3 on this aspect of the matter is of any consequence as far as the prosecution case regarding involvement of these appellants in the commission of the actual crime is concerned. It has been argued that the revolver which was seized from appellant-Rohtas had three live cartridges Exs.P3 to P5 loaded in it, still no shot was fired by Rohtas even when he was being chased and stated to have confronted the pursuers with the revolver and that makes the prosecution story doubtful that the appellants were apprehended in the manner, as alleged. The culprits, when faced with somewhat remarkable resistance at the hands of Mahavir and Jai Parkash, must have been flabbergasted and thus, in that state of mind they thought it fit to make their escape from the spot and it is nothing abnormal that they failed to use weapons against their pursuers.

(11) It has been then argued that the three passengers of the taxi, who had been actually robbed, were not examined as witnesses in the trial so an adverse inference should be drawn against the prosecution case that if those prosecution witnesses who were very material witnesses had been examined, they might not have supported the prosecution case. The record of the case shows that efforts were made to get those witnesses served but without success. The Investigating Officer made a positive statement in Court that those witnesses have again left the country and thus. They were not available. That statement of the Investigating Officer went unchallenged. So, it cannot be said that the prosecution had deliberately not examined the said three witnesses. Even the reports of the Process Server show that those witnesses had gone abroad. Hence, non-examination of the said witnesses under these circumstances would not result in any adverse inference being drawn against the prosecution case.

(12) The appellants in their statements under Section 313, Code of Criminal Procedure, mentioned that five or six persons including the appellants were picked up by the police while others were let off and they were falsely implicated in this case. No questions have been put in cross-examination of the police witnesses as well as public witnesses to suggest as to why these appellants should have been falsely implicated by the police. PW3 and PW5 appear to be truthful witnesses and had no axe of their own to grind by falsely implicating the appellants in this case. They had given straight forward testimony in Court which inspires confidence regarding their credibility. The learned Additional Sessions Judge has believed them, so do I. So, the convictions of these two appellants for the offences punishable under Section 392 & 397 read with Section Indian Penal Code and Section 27 of the Arms Act are to be upheld. However, they could not have been convicted for the offence punishable under Section 411 read with Section 34 IPC. No reason have been given by the Additional Sessions Judge for convicting the said two appellants for the said offence. Mere fact that the robbed property had been taken away by the other culprits, who were not arrested at the spot, does not mean that these two appellants could not separately convicted for an offence punishable under Section 418 IPC. I, hence, set aside their conviction and sentence awarded under Section 411 read with Section 34 IPC.

(13) As far as appellant Bhupinder Singh is concerned his case stands on a different footing. He was not apprehended at the spot. No recovery is stated to have been effected from him. In the Fir the only descriptions of the two culprits, who had escaped from the spot, are that one of them was aged about 25 years having average built, of height of 5'-6', of whitish complexion wearing a blue pant and black bushirt whereas the other culprit was aged about 20-22 years of strong built, having height of 5'-T' with whitish complexion having very small beard, wearing blue pant and blue sweater. No facial features of the said two culprits were got elicited from Mahavir when he gave this statement which is the basis of the FIR. It is case of the prosecution that this particular culprit Bhupinder was arrested on the pointing out by PW3 &PW5; and that is why no test identification parade was got conducted to get this culprit identified from the witnesses. This particular Explanationn of the prosecution cannot be countenanced even if this culprit had been arrested on being pointed out byPW3 & PW5, the Investigating Officer should have known that there were three other witnesses, namely, the passengers of the taxi, who were yet to identify this particular culprit. So, it was incumbent upon the Investigating Officer to have kept this culprit in muffled face after he was arrested and he should have taken steps for getting the test identification parade done in respect of this culprit atleast by other three public witnesses. Apart from this lapse on the part of Investigating Officer, I find that in evidence it has come out that this appellant-Bhupinder was not arrested by the Investigating Officer on the pointing out of PW3 & PW5 ; rather PW3 has categorically Stated that he was summoned by the police and taken to Karol Bagh where he identified the appellant-Bhupinder. He does not say that he had joined the Investigating Officer for apprehending Bhupinder and it was on his pointing out that Bhupinder was arrested. In cross-examination he stated that after he had given the statement to the police he did not join the police in investigation of the case, although he wrongly mentioned in cross-examination that a test identification parade was to be held but later on it was not held. It is not the case of the prosecution that at any point of time the Investigating Officer had prayed for holding any test identification parade in respect of this culprit. PW5 in examination-in-chief stated that after a few days the police had called him to Police Post Karol Bagh and he identified the appellant-Bhupinder at the said Police Post, So, it is

quite clear that the prosecution version that the appellant-Bhupinder was arrested on being pointed out and identified by PW3 & PW5 is quite doubtful when Pw3 & PW5 do not support this particular aspect of the prosecution case. Thus in the present case it was absolutely necessary for the Investigating Officer to have put up the appellant- Bhupinder for some test identification parade who come to be arrested after about months of the occurrence.

(14) It has been held in *Kanan & others v. State of Kerala* : 1979 CriLJ919 , that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous test identification parade to test his powers of observations. It was held that if no test identification parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. In *Oudh Ram & others v. The State* . : 22(1982)DLT20 , it was laid down that identification of an accused by the witness at the Police Station is of no consequence and the same is also bit by Section 162 of the Code of Criminal Procedure. In the present case, the appellant-Bhupinder was arrested after about two months of the occurrence and no description of facial features of the culprit had been given in the Fir, So it was absolutely incumbent on the part of Investigating Officer to have put this culprit for test identification parade So, a benefit of doubt has to be given to this appellant in this case. He deserves to be acquitted.

(15) It appears that the Additional Sessions Judge has illegally sentenced the appellants Rohtas and Yog Raj separately under Section 392 and Section 397 both read with Section 34 IPC. Section 397 Indian Penal Code only makes the sentence more stringent in case of robbery or dacoity committed with the aid of deadly weapons and the minimum sentence in such case is seven years. So, Section 397 Indian Penal Code has to be taken resort to while awarding sentences under the main substantive Sections pertaining to robbery and dacoity as the case may be. The Additional Sessions Judge was not legally right in imposing separate sentences for the offences punishable under Sections 392 & 397 IPC.

(16) In view of the above discussion, I allow the appeal of appellant Bhupinder and set aside his convictions and sentences and acquit him of all the charges, while dismiss the appeals of Rohtas and Yog Raj with modification that they shall undergo sentences of seven years rigorous imprisonment and a fine of Rs.1000/ and in default of payment of fine, to undergo further rigorous imprisonment for six months each for the offences punishable under Sections 392 and 397, both read with Section 34 Ipc while the other sentences awarded under Section 411 read with Section 34 Ipc are concerned, the same are, hereby, set aside. The sentences awarded under Section 27 of the Arms Act are maintained. However, all these substantive sentences of rigorous imprisonment shall run concurrently.

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