

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

% *Judgment Reserved on: 11th November, 2009*
Judgment Delivered on: 18th November, 2009

+ **CRL.REV.P.126/2003 and Crl.M.A.Nos.214-215/2003**

SURINDER SINGH Petitioner
Through: Mr.C.L.Gupta and
Mr.Dharminder Singh Sidhu,
Advocates.

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. On 22.2.1990 at about 5 PM at the Rabadi Machine, near Village Mahipal Pur, the complainant was wrongfully and illegally confined by Jaiveer Singh @ Vijay, Surender and Sushil Kumar. He was at the point of knife robbed of Rs.12,000/- and criminally intimidated by all the aforestated persons. On these allegations contained in the complaint of Madan Lal charge-sheet was filed.

2. The Trial Court had examined 10 witnesses. Accused Sushil Kumar had been acquitted. Accused Jaiveer and Surender, the

present petitioner had been convicted under Section 394/506/34 of the IPC; both the convicts had been sentenced to undergo RI for one and half years and to pay a fine of Rs.5,000/- in default of payment of fine to undergo SI for 6 months for the offence punishable under Section 394/34 of the IPC; for the offence punishable under Section 506 of the IPC the convicts were sentenced to undergo SI for one and half years and to pay a fine of Rs.5000/- in default of payment of fine to undergo SI for a further period of six months.

3. The appeal before the Additional Sessions Judge vide judgment dated 10.1.2003 had been dismissed; no modification was made in the sentence either.

4. The petitioner before this court is Surender. On his behalf, it has been pointed out that the judgment of the courts below suffer from a gross illegality as both the courts below have failed to appreciate that the eye-witness Madan Lal examined as PW-3 had admittedly not identified the present petitioner; the evidence which had surfaced against the petitioner was the recovery of the alleged amount of Rs.8000/- from the tin box in the guardroom where the present petitioner was posted. This recovery purportedly effected vide memo Ex.PW-1/A has not been attested by any public witness; the said notes had also not been identified by the complainant and this has come in the categorical version of ASI Hari Singh PW-4. The circumstance of this recovered amount

i.e. of Rs.8000/- having been recovered from the possession of the petitioner had not been put to the petitioner in his statement under Section 313 of the Cr.PC, in the absence of which such an incriminating circumstance cannot be read against him. For this proposition counsel for the petitioner has placed reliance upon the judgment reported in Kanhai Mishra @ Kanhaiya Misar vs. State of Bihar 2001 (2) RCR (Crl.) 110. It is stated that benefit of doubt has accrued in favour of the petitioner. It is a settled rule of criminal jurisprudence that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. For this proposition reliance has been placed upon State of Haryana vs. Shibu @ Shiv Narain and Ors. 2008 (3) RCR (Crl.) 951.

5. Arguments have been rebutted by the counsel for the State.

6. Record has been perused. Arguments have been appreciated.

7. PW-3 is the complainant and the only eye-witness in this case. He has deposed that on 12.2.1990 Vijay Kumar had approached him with samples of TV and VCR parts; Vijay Kumar took him to Mahipal Pur at his residence. He took him to a room; Sushil asked him i.e. PW 3 to accompany him inside the room; two persons were already present in the room ; name of one was Vijay; the other person could not be identified by PW-3.

8. The complainant PW-3 was not able to identify Surender as the perpetrator of the offence as committed on 12.2.1990. Further version of PW-1 on oath is that he was given a knife blow and two out of the said persons removed Rs.12000/- from his pocket as also his watch; he made his complaint Ex.PW-3/A to the police.

9. It is, thus, clear from the version of PW-1 that the presence of Surender on the date of offence i.e. 12.2.1990 has not been proved.

10. The evidence relied upon by the courts below against the petitioner is the recovery of Rs.8000/- effected from him on 13.2.1990 from the guardroom of the petitioner. Petitioner Surender was admittedly posted as a guard at Kothi No.3, Tyagraj Marg; pursuant to the disclosure statement of Sushil Kumar the police party had gone to the place of recovery where from inside the guardroom from a tin box the petitioner Surender had produced Rs.8000/-; all the notes were in the denomination of Rs.100/- each. The said notes were seized vide recovery memo Ex.PW-1/A; this document has been attested by Const. Surender Pal PW-1, ASI Hari Singh PW-4 and ASI Ramesh Chand PW-10. As per Ex.PW-1/A Rs.8000/- all the notes in the denomination of Rs.100/- had been recovered from the room of Surender which were lying in a box.

11. PW-2 SI Dalbir Singh reached the place of posting of the present petitioner i.e. at Kothi No.3, Tyagraj Marg; with the

permission of the officers Surender was taken to the PS Vasant Kunj; PW-3 had also accompanied them. Petitioner was handed over to the Investigating Officer Insp.Hasmel Khan PW-8.

12. PW-1 has on oath stated that he accompanied by PW-4 and PW-8 reached Tyagraj Marg, where at the pointing of Surender Kumar from the guardroom from a tin box Rs.8000/- was recovered; the currency notes of Rs.8000/- were in the denomination of Rs.100/- each, they were seized vide memo Ex.PW-1/A; no proceedings were conducted at the spot. In his cross-examination PW-1 has admitted that the seizure memo was signed by him as also by PW-4 and PW-10.

13. PW-4 has corroborated this version of PW-1; in his cross-examination he has stated that the numbers of the notes were not noted and had not been shown to the complainant for identification; he denied the suggestion that Surender told him that this money is his saving and belongs to him.

14. PW-10 has also proved the recovery memo Ex.PW-1/A; he was however unable to identify the currency notes.

15. Investigating Officer PW-8 was also present at the time of this recovery. Ex.PW-1/A was prepared by him. The said notes were exhibited as Ex.P-1/12/800 (collectively). He denied the suggestion that no recovery was effected from the present petitioner.

16. Statement of the accused under Section 313 of the Cr.PC has also been perused. Admittedly, the circumstance of this recovery i.e. the recovery of Rs.8000/- in the denomination of Rs.100/- notes having been effected at the instance of the petitioner had not been put to the petitioner.

17. Trial Court and the Appellate Court have gravely erred in relying upon this recovery. Admittedly, the recovered notes which has no specific mark of identification and nor were their numbers noted; were even shown to the complainant as to whether it was his stolen property. This has been admitted by PW-4. Recovery had been effected on the following day i.e. one day after the incident. It is difficult to believe that the recovered amount would have been kept by the petitioner in his guardroom; natural conduct would have been to conceal the money in some far out place. That apart, the incriminating circumstance of these notes having been recovered from the present petitioner had not been put to the petitioner. There is no such averment in the statement of the accused under Section 313 Cr.PC.

18. In Kanhai Mishra (supra) it has been held by the Supreme Court that a circumstance not put to the accused during his examination under Section 313 of the Cr.PC cannot be used against him.

19. Admittedly, this recovery is the only piece of evidence which is sought to be proved against the present petitioner; there is no other evidence against him; the eye-witness has not identified the present petitioner. This circumstance not having been put to the accused, it is clear that the same cannot be used against him. The recovery of the amount at the hands of the petitioner is thus belied; the alleged amount had also not been identified by the complainant as his stolen money. Benefit of doubt has accrued in favour of the petitioner.

20. In Ram Kishore vs. State 41 (1990) DLT 86 (DB), the Division Bench of this Court has held that where the recovered articles which were jewellery items had neither been described by the complainant and nor any distinguishing feature had been given, the recovery having been effected from a thickly populated place where no independent witness had been joined, the recovery also not having been got identified to the satisfaction of the court and there being no other evidence against the accused, he had been acquitted of the charges under Section 411 of the IPC.

21. This also appears to be a case where miscarriage of justice has arisen. The golden thread which runs through the web of administration of justice in criminal cases is that if there are two views on the evidence adduced in the case, the view favourable to the accused should be adopted; the paramount consideration of the court is to ensure that miscarriage of justice is prevented.

22. Prosecution has not been able to establish the circumstance of recovery; the petitioner is entitled to benefit of doubt and a consequential acquittal. He is acquitted of the charges leveled against him. Bail bond and surety bond of the petitioner stand canceled.

(INDERMEET KAUR)
JUDGE

18th November, 2009
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