

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

Judgment reserved on: September 10, 2010
Judgment delivered on: September 30, 2010

+ **CRIMINAL APPEAL NO.260/2010**

ISLAMUDDIN

....APPELLANT

Through: Mr. Rajesh Mahajan, Amicus Curiae with
Ms. Satsheel Sheokand, Advocate

Versus

STATE (NCT OF DELHI)

.....RESPONDENT

Through: Mr. Pawan K. Bahl, APP

WITH

CRIMINAL APPEAL NO.471/2010

JAGDISH

....APPELLANT

Through: Mr. A.J. Bhambhani, Advocate with
Ms. Nisha Bhambhani, Advocate

Versus

STATE(NCT OF DELHI)

.....RESPONDENT

Through: Mr. Pawan K. Bahl, APP

WITH

CRIMINAL APPEAL NO.639/2010

JITENDER GUJJAR

....APPELLANT

Through: Mr. Manoj Sharma, Advocate

Versus

STATE(NCT OF DELHI)

.....RESPONDENT

Through: Mr. Pawan K. Bahl, APP

AND

CRIMINAL APPEAL NO.676/2010

RAJESH @ KALU

....APPELLANT

Through: Ms. Rakhi Dubey, Amicus Curiae

Versus

STATE(NCT OF DELHI)

.....RESPONDENT

Through: Mr. Pawan K. Bahl, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. These four appeals are directed against the impugned judgment dated 22nd December 2009 in terms of which the appellants herein have been convicted for the offences punishable under Section 307 IPC read with Section 34 IPC and Section 395 IPC as also against the consequent order on sentence dated 24th December 2009. Each appellant, for the offence under Section 395 IPC has been sentenced to undergo rigorous imprisonment for a period of 10 years and also to pay a fine of ₹500/-, in default of payment of fine, to undergo SI for a period of two months respectively and for the offence under Section 307/34 IPC, they have also been sentenced to undergo RI for the period of 10 years each and also to pay fine of ₹250/- each, in default of payment of fine to undergo SI for the period of two months.

2. Briefly stated, facts giving rise to these appeals are that on 25th February 2005 at about 2:05 a.m., DD No.6A(Ex.PW15/A) was recorded at P.S. Sarojini Nagar on the basis of information received about an incident at Bhikaji Cama Place flyover. Copy of the DD report was entrusted to ASI Ishwar Dutt (PW15) for verification. He along with Constable Robert (PW9) on the receipt of DD report went to the place of incident near Hyatt Hotel Flyover at Africa Avenue Road. There he met ASI Hanuman Singh (PW6) of P.S. Sarojini Nagar. ASI Hanuman Singh handed over to him one packet duly sealed with the seal of AIMS, besides the MLCs of injured Sumit Gupta, PW3 and injured Raj Kumar, PW8. No eye witness was available at the place of occurrence. Both the injured persons were declared unfit for statement by the treating doctors. ASI Ishwar Dutt appended his endorsement on the copy of DD report and sent it to the police station for the registration of the case. He also visited Safdarjung Hospital and collected sealed packet of clothes of injured Raj Kumar from the treating doctor. Blood sample was lifted from the spot of occurrence and sealed in a separate packet. The sealed packets of the clothes of injured as well as blood sample along with sample seals were deposited in the police malkhana on the same day.

3. On 26th February 2005, injured Sumit Gupta (PW3) was declared fit for statement. ASI Ishwar Dutt recorded his statement under Section 161 Cr.P.C. wherein he disclosed that on 24th February 2005, he came to Bhikaji Cama Place in a bus where he was to meet his friend Surender. After alighting at the bus stand Bhikaji Cama Place, he proceeded towards the flyover. At around 11.00 p.m., when he reached near Hyatt flyover,

Africa Avenue Road, he was waylaid by 5-6 boys who asked him to give his valuables to them. One of them inflicted a knife injury on his back. He resisted their attempt to rob him and managed to snatch the knife from the assailant. On this, those boys grappled with him and the knife fell down from his hand. One of the robbers picked up the knife and stabbed him in his back as well as abdomen while other boys physically restrained him. Even then, he did not give up and again tried to snatch the knife from the said boy. In that scuffle, aforesaid boy sustained injury on the finger of his right hand. He further claimed that those robbers forcibly took his mobile phone make Nokia bearing No.9868129314, a silver chain and ₹850. When he raised alarm, one person (later identified as Raj Kumar) came to rescue him and those robbers also stabbed him with the knife. Statement of the injured Raj Kumar was also recorded during investigation.

4. The appellants along with others were arrested in some other case FIR no.103/2005 under Sections 399/402 IPC and Section 25/27 of the Arms Act pertaining to P.S. Mehrauli. When they were interrogated in that case, they made disclosures about their involvement in this case. So they were formally arrested and interrogated in this case. The Investigating Officer applied for fixing the date for Test Identification Parade (TIP) to fix the identity of the appellants as culprits and they were correctly identified by PW3 Sumit Gupta in the TIP proceedings. The Exhibits seized during investigation were sent to CFSL Calcutta and opinion of the doctors regarding nature of the injuries sustained by the victims was obtained.

On completion of formalities of investigation, the appellants were challaned and sent for trial.

5. The learned Additional Sessions Judge charged the appellants for the offences punishable under Sections 395 IPC and 307 IPC read with Section 34 IPC. The appellants pleaded innocence and claimed to be tried.

6. In order to bring home the guilt of the appellants, prosecution has examined 21 witnesses. The important witnesses, however, are victims PW3 Sumit Gupta and PW8 Raj Kumar who had sustained injuries in the incident.

7. PW3 Sumit Gupta testified in the court that on 24.02.2005 at around 11:00 pm, he alighted from the bus at Bhikaji Cama Place and proceeded towards traffic point of Africa Avenue road where he was supposed to meet his friend Surender. On reaching there, he rang up his friend Surender from his mobile phone. In the meanwhile, 5-6 persons came there and tried to rob him on the point of knife. He was asked to hand over his valuable articles to them. They forcibly took his mobile phone, silver chain and ₹850/- from him. In that process, a scuffle took place and one of those persons took out a knife and inflicted injuries on his abdomen, back and hand. When he raised alarm, a rickshaw puller came there and tried to save him. On this, those persons started beating the rickshaw puller. This witness also stated that when he tried to snatch the knife from the assailant, he sustained injury on his hand. He also identified the appellants as the culprits and proved the invoice pertaining to purchase of said mobile phone Ex.PW3/A.

8. PW8 Raj Kumar is the other victim of the incident. He has testified that on 24.02.2005 at about 11:00 pm, he heard the cry of a person at bus stand of local route bus No.610. He noticed 5-6 persons were beating a person and when he asked for the reason, they remarked *"Tu Iska Himajiti Hai, Tera Hi Kam Tamam Kar Dete Hai"*. Thereafter, one of them stabbed him thrice with a knife on his abdomen and once on his right thigh. After some time, police arrived at the spot and he was taken in a police vehicle to the police station. PW8 Raj Kumar has identified the appellant Jitender as the person who had inflicted knife injury on his person. He has also identified the other persons as party to the incident. He also claimed that he had identified them in Tihar Jail. However, in his cross-examination, he took a somersault and stated that appellants are not those persons and that he identified them at the instance of police.

9. The appellants in their respective statements under Section 313 Cr.P.C. denied the prosecution story in totality and claimed that they have been falsely implicated in this case. They did not prefer to lead evidence in defence.

10. The learned Additional Sessions Judge on consideration of the evidence found the testimony of PW3 Sumit Gupta and PW8 Raj Kumar reliable and on the strength of their testimony, he convicted the appellants for the offences punishable under Section 307 IPC read with Section 34 IPC and Section 395 IPC. Consequent upon the conviction, learned Additional Sessions Judge awarded sentence to the appellants in terms of order dated 24.12.2009.

11. Learned Shri A.J. Bhambhani, Advocate appearing on behalf of the appellant Jagdish, Ms. Rakhi Dubey, Amicus Curiae appearing on behalf of the appellant Rajesh, learned Shri Manoj Sharma, Advocate appearing on behalf of the appellant Jitender and learned Shri Rajesh Mahajan, Amicus Curiae appearing on behalf of the appellant Islamuddin have argued on similar lines.

12. Learned Shri A.J. Bhambhani, Advocate for the appellant Jagdish, leading the assault on the impugned judgment submitted that the case of the prosecution is essentially based upon the purported eye witness account of the incident given by PW3 Sumit Gupta and PW8 Raj Kumar, which is not reliable. Dilating on the argument, learned counsel took me through the cross-examination of PW8 Raj Kumar wherein he has stated thus:

“There was no street light near the bus stand.

Ques: How did you identify the accused persons?

Ans. I have not seen the accused persons on the spot but those were shown to me in the hospital by the police. There I identified as police pointed out to me that these are the accused persons.

Accused persons were shown to me when I regained my consciousness in the hospital on 05.03.2005. It is correct I do not know who hit me with the knife only police told me that he is the person.”

and submitted that from the aforesaid version of PW8 Raj Kumar, it is apparent that it was dark at the time of incident and as such, neither PW8 Raj Kumar nor PW3 Sumit Gupta could have been in a position to see the culprits who robbed and caused injury to Sumit Gupta(PW3) as well as Raj

Kumar (PW8), as such it is not safe to place reliance upon the identification of the appellants on the basis of sole testimony of PW3 Sumit Gupta, which is not corroborated by PW8 Raj Kumar. Secondly, it is contended on behalf of the appellants that as per the prosecution story and the testimony of PW3 Sumit Gupta, he had gone to Bhikaji Cama Place with a view to meet his friend Surender with whom he had a pre-appointment and that at the time of the incident he was talking to his friend Surender. Despite of that, Surender never reached at the spot of occurrence nor he has been produced as a witness to corroborate the version of PW3. This circumstance, according to the learned counsels appearing for the appellants, casts a doubt against the version of PW3 Sumit Gupta. Thirdly, it is submitted that though as per the case of prosecution, the appellants made disclosure statements regarding their involvement in the incident and the robbery, yet nothing has been recovered pursuant to those disclosure statements, which circumstance compounds the doubt against the correctness of the prosecution story. In view of the above submissions, learned counsels for the appellants have urged me to extend benefit of doubt to the appellants.

13. On the contrary, learned APP has argued in favour of the impugned judgment. He has submitted that PW3 Sumit Gupta has fully supported the prosecution case and his version stands corroborated by the statement of PW8 Raj Kumar as well as the medical evidence i.e. the MLCs of PW3 as well as PW8, Exhibits PW11/A and PW17/A respectively. Learned APP submitted that merely because PW8 has given contradictory versions about the identity of the appellants in his examination-in-chief

and cross-examination, the version of PW3 Sumit Gupta cannot be suspected. Thus, he has pressed for dismissal of the appeals.

14. I have considered the rival contentions. On careful reading of the evidence, I find no merit in the submissions made on behalf of the appellants for the following reasons.

15. PW3 Sumit Gupta, as per the case of the prosecution, is the victim who was stabbed and robbed of his belongings i.e. mobile phone, a silver chain and ₹850/- in the occurrence. PW8 Raj Kumar is the other victim of the occurrence who was stabbed when he came to the rescue of PW3 Sumit Gupta. PW3 Sumit Gupta has fully supported the prosecution story in his testimony detailed above. His version regarding the occurrence also finds corroboration in the testimony of PW8 Raj Kumar who has categorically stated that on 24.02.2005 at around 11:00 pm, he noticed 5/6 persons beating the complainant and when he asked them as to why they were beating him, they got annoyed and uttered "*Tu Iska Himajiti Hai, Tera He Kam Tamam Kar Dete Hai.*" Thereafter, one of them stabbed him with a knife thrice on his abdomen and once on his right thigh. PW3 Sumit Gupta has also stated that he was stabbed by one of those boys at the time of robbery. The version of these two witnesses also finds corroboration in their respective MLCs Exhibits PW11/A and PW17/A. Exhibit PW11/A is the MLC of PW3 Sumit Gupta, wherein it is recorded that he was admitted in AIIMS on 24.02.2005 at 11:28 pm with the history of "assault with knife". As per the testimony of Dr. Amit Kumar (PW11) who prepared the MLC of Sumit Gupta, he found following three injuries on his person:

- “(a) One lacerated wound 2 X 1cm at front and at the back,
- (b) One lacerated wound in the abdomen 1 X 1cm, and
- (c) One lacerated wound at right forearm 2 X 1cm”

and, according to him, the nature of injuries suffered by Sumit Gupta was grievous.

16. Exhibit PW17/A is the MLC of PW8 Raj Kumar wherein it is recorded that on 24.02.2005, he was brought to Safdarjung Hospital by Constable Hukum Chand of PCR with alleged history of assault. On perusal of the MLC, it transpires that Raj Kumar had sustained a stab injury on his abdomen measuring 4 X 1 cm deep on left lumbar region of anterior abdominal part and another injury measuring 2 X 1 cm deep on lateral aspect of left thigh, besides a fracture of right clavicle. The nature of injury, as per the MLC, was opined as grievous. From the above medical evidence, it is apparent that PW3 Sumit Gupta as well as PW8 Raj Kumar had sustained stab injuries, which obviously cannot be self inflicted. Therefore, I find no reason to disbelieve the version of the above witnesses regarding the incident involving robbing of mobile phone, silver chain and ₹850/- from PW3 Sumit Gupta and causing stab injuries to PW3 Sumit Gupta as well as PW8 Raj Kumar.

17. It was emphatically argued on behalf of the appellants that as per the case of the prosecution, PW3 Sumit Gupta had gone to meet his friend Surender who was supposed to meet him near Bhikaji Cama Place flyover. Despite that, said Surender has neither been cited nor examined as a witness. This circumstance casts a doubt on the correctness of version of PW3 Sumit Gupta and also points towards unfair investigation. I do not

find any merit in this submission. As per the case of the prosecution as well as the evidence of PW3 Sumit Gupta, he had gone to Bhikaji Cama Place to meet his friend Surender. However, from the version of PW3, it is apparent that Surender was not there. Therefore, PW3 Sumit Gupta called him on his mobile phone. This was the time when the incident took place. Thus, it is apparent that Surender is not an eye witness to the case and if the Investigating Officer did not deem it important to examine Surender in order to verify the correctness of the reason given by PW3 for his visit to Bhikaji Cama Place flyover, by no means can it be taken as a circumstance to suspect the correctness of the version of PW3, which version is corroborated by the testimony of PW8 Raj Kumar as well as the medical evidence i.e. the MLCs of PW3 as well as PW8.

18. Crucial issue is whether or not the appellants were involved in the aforesaid robbery. Contention of the appellants is that PW8 Raj Kumar has categorically stated that there was no street light near the spot of occurrence; as such it is highly improbable that PW3 Sumit Gupta could have seen the robbers properly so as to be able to identify them later. There is no merit in this submission for the reason that PW8 Raj Kumar is not a reliable witness. He, in his examination-in-chief, identified all the appellants, but in the cross-examination he took a somersault and deposed that he had not seen the accused persons at the spot, but they were shown to him in the Hospital. He also went on to say in his cross-examination that accused persons were shown to him when he regained consciousness in the hospital on 05.03.2005. This version of Raj Kumar cannot be true because as per the testimony of PW16 Barkha Gupta, MM,

Test Identification Parade for fixing the identity of the appellants was held on 04.03.2005 in which Raj Kumar wrongly identified the appellants Jagdish and Islamuddin, whereas the other two appellants had refused to join the TIP. From this, it can be safely inferred that PW8 Raj Kumar is not truthful about the identification of the appellants. Otherwise also, PW8 Raj Kumar has given a contradictory version about the identity of the appellants, which makes that part of his testimony unreliable.

19. Further, failure of PW8 Raj Kumar to identify the appellants as the culprits cannot be taken as a reason to suspect the testimony of Sumit Gupta (PW3) regarding the identity of the appellants as the persons who stabbed and robbed him. The identification of the appellants done by Sumit Gupta (PW3) in the court cannot be suspected for the reason that as per the testimony of PW16 Ms. Barkha Gupta, M.M., on the request of the Investigating Officer, she had conducted Test Identification Parade at Central Jail on 09.03.2005 to fix the identity of the appellants. As per PW16, the appellants showed their willingness to join the Test Identification Parade and in the Identification Parade, PW3 Sumit Gupta correctly identified the respective appellants. TIP proceedings are proved on record as Exhibits PW16/T, PW16/V, PW16/X and PW16/Z. From this, it is apparent that PW3 Sumit Gupta had identified the appellants as culprits within a span of 15 days from the date of incident when his memory was fresh. In view of this also, I find no reason to suspect the version of PW3, particularly when there is nothing on the record to suggest that PW3 had any reason or motive to falsely implicate the appellants. Thus, in my view, the learned Additional Sessions Judge has rightly relied upon the

prosecution evidence, particularly the testimony of PW3 Sumit Gupta to return the finding of guilt of the appellants.

20. Lastly, it is contended on behalf of the appellants that though their disclosure statements were recorded by the Investigating Officer, it has not led to any recovery and this circumstance casts a strong doubt against the correctness of the prosecution case. I do not find any merit in this contention for the reason that recovery of case property in a criminal trial is not the sine qua non for holding the accused guilty. What is important is whether or not the evidence led by the prosecution is credible and sufficient to prove the guilt of the accused. In the instant case, in view of the discussion above, prosecution has been able to bring home the guilt of the appellants beyond the shadow of reasonable doubt.

21. In view of the discussion above, I do not find any infirmity in the impugned judgment which may call for interference by this Court.

22. Appeals are devoid of merit, accordingly dismissed.

(AJIT BHARIHOKE)
JUDGE

SEPTEMBER 30, 2010

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