

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

Judgment reserved on: February 15, 2011
Judgment delivered on: July 04, 2011

+ **CRL. A. 31/2000**

VINOD SINGH **....APPELLANT**

Through: Mr. Randhir Jain, Advocate.

Versus

GOVT. OF N.C.T. DELHI **.....RESPONDENT**

Through: Ms. Fizani Husain, APP.

WITH

CRL.A. 40/2000

ISHWAR PRASAD @ PAPAN **....APPELLANT**

Through: Mr. S. P. Singh Chaudhary, Advocate.

Versus

**THE STATE THROUGH CHIEF SECRETARY,
GOVT. OF N.C.T. OF DELHI** **.....RESPONDENT**

Through: Ms. Fizani Husain, APP.

WITH

CRL.A. 87/2000

AJAB SINGH **....APPELLANT**

Through: Mr. Sumeet Verma, Advocate/Amicus
Curiae.

Versus

**STATE
GOVT. OF N.C.T. OF DELHI** **.....RESPONDENT**

Through: Ms. Fizani Husain, APP.

WITH

CRL.A. 121/2000

BRIJ KISHORE

Through: Mr.Sumeet Verma, Advocate/Amicus Curiae.

....APPELLANT

Versus

STATE (NATIONAL CAPITAL TERRITORY OF DELHI)

Through: Ms. Fizani Husain, APP.

.....RESPONDENT

AND

CRL.A. 309/2000

GOPAL

Through: Mr.Sumeet Verma, Advocate/Amicus Curiae.

....APPELLANT

Versus

THE STATE (NCT OF DELHI)

Through: Ms. Fizani Husain, APP.

.....RESPONDENT

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. Vide this judgment I propose to dispose of above referred five appeals arising out of common judgment of conviction dated

22.12.1999 in Sessions Case No.92/97 FIR No.188/99 P.S. Adarsh Nagar whereby learned Additional Sessions Judge has found the appellants guilty and convicted appellants Ishwar Prasad, Ajab Singh, Vinod Singh and Gopal for the offence punishable under Section 392 read with 397 IPC and convicted appellant Brij Kishore @ Birju for the offence punishable under Section 412 IPC as also the consequent order on sentence dated 23.12.1999 whereby respective appellants have been sentenced to undergo RI for the period of 07 years and also to pay fine of ₹1000/- each, in default to undergo RI for the period of 03 months for the offences committed by them.

2. Briefly put, case of the prosecution is that on 02.11.1989 at about 10:10 am, on the receipt of information from PCR about a theft committed at House No.18A, Mazlis Park, Azad Pur, Delhi, DD No.8A (Ex.PW10/A) was recorded at P.S. Adarsh Nagar. Copy of DD report was entrusted to SI Mahesh Kumar who left the Police Station along with Constable Ravinder Dutt for verification of the report.

3. SI Mahesh Kumar met Smt. Bimla Devi (PW2) at the spot of occurrence and recorded her statement Ex.PW2/A. Smt. Bimla, in the aforesaid statement claimed that in the morning of 02.11.1989 at about 9:00 am, her husband left the house along with his cousin Zile Singh for his medical check up. Sometime later, she received a telephone call from one Umed Singh, maternal uncle of Vijender, a friend of her husband. The caller Umed Singh enquired whether her

husband was present at the house and she replied in the negative. Thereafter, she came to the bedroom along with her daughters Alka aged 16 years (PW4) and other daughter aged 1½ years. In the meanwhile, four persons aged around 25-26 years came to the gallery adjacent to the bedroom and one of them asked her where her husband Darshan Singh had gone. Those boys entered the room and caught hold of her as well as her daughter Alka. One of them took out a pistol and other three boys took out knives and threatened that in the event of their raising an alarm, they would be killed. Thereafter, those boys took them to the kitchen and tied them up. Two of them remained with them with knives in their hands and other two ransacked the house. Complainant claimed that those boys robbed them of ₹ 3 lakhs, jewellery, i.e. a gold pendent, a *gullaband*, a necklace, four *karas* and two rings weighing about 10 *tollas* and some documents. SI Mahesh Kumar obtained the signatures of the complainant on her statement Ex.PW2/A, appended his endorsement Ex.PW25/A on the same and sent it to the Police Station at 11:30 am for the registration of the case.

4. It is further the case of the prosecution that on 05.01.1990, appellants Ajab Singh, Ishwar Prasad, Vinod Singh, Brij Kishore and Gopal were arrested by SI Ram Sevak (PW27) of P.S. Welcome under the Arms Act. On interrogation, the appellants disclosed their involvement in the robbery and consequent to their respective disclosure statements, they got recovered some of the stolen cash and

ornaments. The information regarding arrest of the appellants and recovery of stolen property at their instance was conveyed by SI Ram Sevak to Crime Branch. On 06.01.1990, SI Zile Singh of Crime Branch made a formal application before ACMM Shahdara and obtained custody of the appellants. Thereafter, they were produced before the concerned Magistrate at Tis Hazari Courts in muffled face and a request was made for holding Test Identification Parade to fix their identity. The application was marked to the Link Magistrate for doing the needful. The appellants, however, declined to participate in the Test Identification Parade. It is alleged that on 07.01.1990, the appellants made further disclosures which led to recovery of some more stolen ornaments and cash on 09.01.1990.

5. It is also the case of the prosecution that the appellant Brij Kishore is the brother-in-law of Darshan Singh (wife's sister husband). He was party to the conspiracy to commit robbery and was the brain behind the occurrence.

6. The appellants were charged by the learned Additional Sessions Judge for the offences punishable under Section 395 read with 120B IPC, Section 395/397 read with 120B IPC, Section 342 read with 120B IPC, Section 412 IPC and Section 506(ii) IPC. The appellants pleaded not guilty to the charges and claimed to be tried.

7. In order to bring home the guilt of the appellants, prosecution has examined 27 witnesses. PW2 Bimla and PW4 Alka are the eye

witnesses to the occurrence. Both of them have supported the prosecution version as detailed in the rukka Ex.PW2/A and they have identified the appellants Ishwar Prasad, Ajab Singh, Vinod Singh and Gopal as the persons who committed robbery at their house. They testified that Ishwar Prasad was armed with a pistol whereas other three persons were having spring actuated knives. They also deposed that they were confined in the kitchen on the point of pistol and knife by Ishwar Prasad and Ajab Singh while the other two appellants ransacked and looted the valuables i.e. ornaments, cash and documents. They also stated that after the exit of robbers, PW4 Alka untied the hands and legs of her mother PW2 Bimla. They raised alarm and were rescued by their neighbour PW1 Krishna Devi who unbolted the door from outside.

8. PW1 Krishna Devi is the next door neighbour of PW2 Bimla. She has corroborated the version of PW2 Bimla and PW4 Alka that on hearing their cries, she opened the door of the kitchen which was bolted from outside.

9. In order to prove the arrest of the appellants on 05.01.1990 in Arms Act cases and recovery of some of the stolen cash and ornaments at the instance of respective appellants, the prosecution has examined PW5 Harinder Singh, PW6 Vimal Malhotra, PW15 Head Constable Beg Raj, PW16 Head Constable Zahir Ahmed, PW17 Head Constable Bolender Singh, PW18 Constable Chhatter Singh, PW19 SI Raj Pal,

PW23 Head Constable Birbal Singh and PW27 Inspector Ram Sewak. However the public witnesses PW5 Harinder Singh and PW6 Vimal Malhotra turned hostile and they have failed to support the prosecution story.

10. PW15 Head Constable Beg Raj and PW16 Head Constable Zahir Ahmed deposed that the appellant Ajab Singh led the police party to his house bearing No. 1/3710, Bhagwan Pur Khera, Shahdara and produced an amount of ₹3945/-. PW17 Head Constable Bolender Singh and PW27 Inspector Ram Sewak testified that appellant Ishwar Prasad took them to house No. 1/3691, Bhagwan Pur Khera, Shahdara and produced two gold chains and cash amount of ₹ 23,375/-. PW18 Constable Chattar Singh and PW19 SI Raj Pal deposed about the recovery of gold locket and ₹6420/- from house No. 1/34038, Bhagwan Pur Khera, Shahdara at the pointing out of the appellant Vinod Singh. PW23 Head Constable Birbal Singh testified that appellant Gopal led them to the house No. 1114, Jassu Ki Basti, Chandni Mahal and produced an amount of ₹ 11270/-.

11. PW14 Head Constable Madan Lal and PW20 SI Zile Singh are witnesses of disclosure statements made by the appellants in the office of Crime Branch on 07.01.1990. They have also deposed about various recoveries made at the instance of appellants Brij Kishore, Gopal, Ishwar Prasad and Ajab Singh on 09.01.1990.

12. PW7 Vidhya Nand is the brother-in-law (sister's husband) of Brij Kishore. He stated that appellant Brij Kishore had kept a sum of ₹ 15,000/- in trust with him and that on 09.01.1990 at the instance of appellant Brij Kishore, he gave ₹15,000/- to the police. PW21 Constable Nanhey Ram stated that a pair of "*karas*" was recovered from the house of Ajab Singh at his pointing out on 09.01.1990.

13. The appellants, when examined under Section 313 Cr.P.C., denied the correctness of the prosecution evidence in toto.

14. Learned Additional Sessions Judge, on consideration of evidence found the appellants guilty and convicted the appellants Ajab Singh, Ishwar Prasad, Vinod Singh and Gopal for the offence punishable under Section 392 read with Section 397 IPC and he convicted the appellant Brij Kishore for the offence punishable under Section 412 IPC.

15. Learned Shri Sumeet Verma, Advocate appearing for the appellant Brij Kishore @ Birju has submitted that his conviction under Section 412 IPC is not sustainable under law for the reason that the prosecution has miserably failed to link the alleged ₹15,000/- at the instance of the appellant Brij Kishore with the robbery. He further submitted that perusal of evidence of PW2 Bimla and PW4 Alka would show that there is a clear attempt on their part to falsely implicate him by improving upon their earlier stand in the complaint as also their statements under Section 161 Cr.P.C. Thus, learned counsel has urged for acquittal of the appellant Brij Kishore.

16. Learned Ms. Fizani Husain, APP for the State, refuting the argument, contended that PW7 Vidya Nand has categorically stated that about 1½ months after 09.01.90, appellant Brij Kishore had kept ₹15,000/- with him, which money he produced and handed over to the police when the appellant Brij Kishore led the police party to his house. Learned APP submitted that Brij Kishore has not given any explanation regarding the source of ₹15,000/-. Therefore, the learned trial court was right in concluding that aforesaid ₹15,000/- was part of the money stolen in the robbery.

17. I find merit in the submission of learned counsel for the appellant. In order to succeed on charge under Section 412 IPC, the prosecution is not only required to establish the recovery of ₹15,000/- at the instance of the appellant but it is required to establish beyond doubt that aforesaid ₹15,000/- was part of the stolen money. The learned Additional Sessions Judge has assumed that the aforesaid money was part of the stolen property without appreciating that there is no cogent evidence to link said amount with the stolen property. A careful reading of the testimony of PW2 Bimla (complainant) would show that she has improved upon her version in the complaint. As per the statement made to the police vide Ex.PW2/A, complainant Bimla had stated that in the morning of 02.11.90, she received a telephone call from one Umed Singh who inquired if her husband was present in the house, whereas PW2 in her testimony in the court has given an improved version stating that though the caller had identified himself

as maternal uncle of Vijender, but she could make out it was not the voice of maternal uncle of Vijender, but that of the appellant Brij Kishore. PW4 Alka has also stated that after the telephone call, her mother, namely, PW2 told her that though the caller claimed to be maternal uncle of Vijender, but it was the voice of the appellant Brij Kishore (Birju). From the aforesaid material improvement in the testimony of the witnesses vis-a-vis the allegations in the complaint, prima facie, there appears to be concerted effort on the part of the witnesses to rope in the appellant Brij Kishore for the offence of robbery. In this backdrop, even if the recovery of ₹ 15,000/- from PW7 Vidya Nand is believed, it cannot give rise to a conclusion that aforesaid ₹15,000/- was part of the stolen property. Failure of the appellant Brij Kishore @ Birju to give explanation regarding the source of said money by itself cannot give rise to a conclusive presumption that recovered money was the part of the stolen property. It is well settled that in a criminal case, the prosecution has to stand on its own legs and it cannot take advantage of weakness of the defence. Thus, in the backdrop of aforesaid facts and circumstances, I am of the considered opinion that the prosecution has failed to link the recovered ₹15,000/- with the stolen property beyond reasonable doubt. Accordingly, the appeal of Brij Kishore @ Birju is accepted and he is acquitted of charge under Section 412 IPC giving benefit of doubt.

18. Learned Shri S.P. Singh Chaudhary, Advocate for the appellant Ishwar Prasad, learned Shri Randhir Jain, Advocate for the appellant

Vinod Singh and learned Shri Sumeet Verma, Advocate on behalf of the appellants Ajab Singh and Gopal have assailed the impugned judgment on the ground that it is based upon the incorrect appreciation of the facts. It is submitted that case of the prosecution as projected is based upon the testimony of eye witnesses PW2 Bimla and PW4 Alka as also the arrest of the appellants in Arms Act cases by the police of P.S. Welcome on 05.01.90 as also the recovery of part of stolen property at the instance of respective appellants on 05.01.90 as also 09.01.90. Learned counsels submitted that perusal of the impugned judgment would show that the learned trial court has not found the evidence of the prosecution regarding the arrest of the appellants under Arms Act on 05.01.90 as also the evidence regarding recovery of stolen property at the instance of respective appellants on 05.01.90 and 09.01.90 reliable. Thus, it is obvious that this is a case of unfair investigation. Despite that, the learned Additional Sessions Judge has convicted the appellants only on the basis of their dock identification by PW2 Bimla and PW4 Alka, ignoring that the witnesses were examined more than five years after the alleged robbery. Learned counsels submitted that the learned Additional Sessions Judge has erred in placing undue emphasis on the TIP proceedings Ex.PW21/B recorded by the then Metropolitan Magistrate Shri C.K. Chaturvedi (PW21) to conclude that the appellants declined to participate in the TIP without any reasonable explanation and made it a basis for drawing adverse presumption against the appellants and accepting the dock identification by the

witnesses. Learned counsels have concluded that the learned trial court ought to have considered that it is not safe to rely upon the dock identification after five years of the occurrence, particularly when there is no recovery at the instance of the appellants and even their arrest dated 05.01.90, which started unravelling the process of investigation is doubtful. Thus, learned counsels for the appellants have urged for acquittal of the appellants.

19. Learned Ms. Fizani Husain, APP, on the other hand, has canvassed in favour of the impugned judgment and submitted that the learned Additional Sessions Judge has rightly relied upon the dock identification of the appellants by the witnesses, particularly when there is nothing on the record to show any motive or enmity on the part of the witnesses to falsely implicate the appellants.

20. I have considered the rival contentions and perused the record. On perusal of the charge sheet, it transpires that the case of the prosecution is essentially based upon the eye witness account of the occurrence given by PW2 Bimla (complainant) and PW4 Alka besides the evidence regarding the arrest of the appellants Ishwar Prasad, Ajab Singh, Vinod Singh and Gopal by the officials of P.S. Welcome on 05.01.1990 in presence of two public witnesses as also the purported recovery of part of stolen property at the instance of respective appellants on 05.01.90 as also 09.01.90.

21. Perusal of the impugned judgment would show that the learned Additional Sessions Judge on scrutiny of the prosecution evidence did not find the evidence of the prosecution pertaining to arrest of the appellants Ishwar Prasad, Ajab Singh, Vinod Singh and Gopal within the jurisdiction of P.S. Welcome in Arms Act on 05.01.90 as also the recovery of the part stolen property at the instance of above appellants respectively on 05.01.90 and 09.01.90 reliable. Thus, learned Additional Sessions Judge has held the appellants guilty of offence under Section 392 read with Section 397 IPC on the basis of the eye witness account given by PW2 Bimla and PW4 Alka as also the dock identification of aforesaid appellants by the said two witnesses.

22. According to SI Mahesh Kumar, on the receipt of DD Report, he reached at the spot of occurrence i.e. House No.A-18, Mazlis Park (1st Floor). There, he met complainant Bimla and recorded her statement Ex.PW2/A which was endorsed and sent to the Police Station for the registration of the case. On perusal of the complaint statement Ex.PW2/A as also the statement Ex.PW4/A of PW4 Kumari Alka recorded under Section 161 Cr.P.C. on **02.11.89**, it transpires that neither the complainant nor Kumari Alka (PW4) had named either of the appellants as the robbers who entered the house and committed robbery nor they had given specific identification features of those robbers. Both of them had stated to the police that the robbers were aged 25-26 years and one of them had curly hair. Perusal of the record shows that PW2 Bimla was examined for the first time in court on

13.03.96 and PW4 Alka was examined in the court on 14.08.96. From this, it is obvious that both the eye witnesses were examined in the court after a lapse of more than five years from the date of occurrence. Thus, I do not find it safe to rely upon the dock identification of the appellants mentioned above by aforesaid witnesses. Doubt against the reliability of dock identification of the appellants by PW2 & PW4 is further compounded for the reason that this is a case of unfair investigation. Learned Additional Sessions Judge has found the evidence of the prosecution relating to arrest of the appellants in Arms Act cases on 05.01.1990 as also the disclosure statements made by them leading to discovery of stolen property unreliable. This puts a question mark on the fairness of the investigation conducted by the police. As the prosecution evidence in this regard has been found to be unreliable, it cannot be said with certainty when and under what circumstances the respective appellants were taken into custody by the police. Therefore, a possibility cannot be ruled out that the Investigating Officer might have shown the appellants to the witnesses while they were in his custody. Thus, I do not find it safe to hold the appellants guilty of robbery/dacoity on the basis of dock identification by the witnesses who were examined more than five years after the occurrence, particularly when, there is no other corroborative evidence to link the appellants with the crime.

23. Learned APP has contended that all the appellants Ishwar Prasad, Ajab Singh, Vinod Singh and Gopal were produced before the

concerned Metropolitan Magistrate for TIP on 06.01.1990 and they all refused to participate in TIP in spite of the warning that their refusal may give rise to an adverse presumption. In support of this contention, learned APP has drawn my attention to the TIP proceedings Ex.PW21/B and submitted that in view of the aforesaid refusal on the part of the appellants, learned Additional Sessions Judge has rightly relied upon the dock identification of the appellants by the witnesses.

24. It is true that the refusal of an accused to participate in TIP without a reasonable explanation may give rise to an adverse inference against him and may be taken as a reason to accept the dock identification of the accused by the witnesses. This however, is not an absolute rule. Before drawing an adverse inference on account of refusal to participate in TIP, the court is under obligation to scrutinize the evidence carefully to satisfy its conscience that there are circumstances justifying the drawing of adverse presumption. In the instant case, the situation is entirely opposite. The arrest of the appellants is shrouded in mystery. It is not clear when and under what circumstances, respective appellants were arrested and therefore, a possibility cannot be ruled out that during the period of their detention, the Investigating Officer might have shown the appellants to the witnesses, which prompted them to refuse to join the TIP. Thus, I do not find merit in the contention of learned APP.

25. The result of above discussion is that I find it difficult to maintain the conviction and sentence of the appellants. Appeals are accordingly accepted and the impugned judgment of conviction and consequent order on sentence passed against the appellants are set aside and the appellants are acquitted of respective charges, giving them benefit of doubt.

(AJIT BHARIHOKE)
JUDGE

JULY 04, 2011
pst/akb