

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

% Reserved on: 25th November, 2010

Decided on: 11th January, 2011

+ **CRL.A. 235/2001**

SARWAN SINGH alias GURU Appellant

Through: Mr. Sunil Ahuja and Mr. Kaushik
Ahuja, Advocates.

versus

STATE Respondent

Through: Mr. Pawan Bahl, APP.

AND

+ **CRL.A. 215/2001**

SURJEET KAUR Appellant

Through: Mr. Sunil Ahuja and Mr. Kaushik
Ahuja, Advocates.

versus

STATE Respondent

Through: Mr. Pawan Bahl, APP.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. The Appellants are the husband and wife, presently aged about 75 years and 71 years respectively. They both have been convicted for offences under Section 412 IPC and have been awarded a sentence of Rigorous Imprisonment for a period of three years and two years respectively and to pay a fine of ₹5,000/- and in default to undergo Simple Imprisonment for three months each in case FIR No. 871/1983, PS Karol Bagh under Section 397/395 IPC.

2. On 26th November, 1983 at about 1.30 a dacoity took place at the shop 'Maya Jewellers' in Karol Bagh. The complainant Bishan Dev, his father Arjun Dass and accountant Jagdish Chander Kalra were present in the shop. While Bishan Dev was sitting at the counter and his father Arjun Dass was inside, six sikh gentlemen entered into the shop and took out the revolvers and shouted 'hands up'. In the meantime, Arjun Dass also came out. Out of the six persons, two persons came to the counter and put the revolver on both the temples of Bishan Dev and shouted to give whatever valuable goods were there. One of them who was a Sikh, was standing on the gate of the shop. Two of them surrounded Arjun Dass and took from his possession the gold chain and ₹500/-. The 6th gentleman threatened the customers and cut off the telephone connections. They collected the ornaments from the shop and tied

them in a cloth bundle which was used for tying the ledger books. After confining Bishan Dev, Arjun Dass and Jagdish Chander Kalra and the customers in the bathroom, they bolted the same from the outside and went away. Subsequently one Dharmender Anand, a neighbourer came and opened the bolt and police was informed.

3. On the basis of the statement of Bishan Dev, FIR No 871/1983 under Section 397/395 IPC was registered at Police Station Karol Bagh. Description of all the six persons was given by the Complainant. On 5th January, 1984 an information was received that some persons have been apprehended by the police officers at PS Connaught Place. When the Investigating Officer went to PS Connaught Place, one of the accused Sukhdev Singh was found in the custody who disclosed about this incident. Pursuant to the disclosure by Sukhdev Singh some jewellery items were recovered and on the basis of his disclosure other accused persons were also arrested. After investigation a charge sheet was filed against Sukhdev Singh, Khushal Singh and the present Appellants under Sections 395/397/342/412/213/120B IPC. Other accused persons namely Swaran Singh @ Billu, Gurusewak Singh @ Babla, Sukhdev Singh s/o Mahender Singh, Gurubhai Singh, Swaran Singh s/o Chandu, Charan Singh, Dalbir Singh, Gurnam Singh and Kulwant Singh were declared PO. Subsequently, the co-accused Sukhdev was killed in an encounter in

Punjab and the trial against him stood abated. After recording of the evidence and statements of the accused, Gurusewak @ Babla was acquitted of the charges for offence punishable under Sections 395 and 120B IPC. Khushal Singh was also acquitted of the charge under Section 412 read with Section 120B IPC. Though the two Appellants were acquitted for the offences under Section 395/120B, they were however, convicted for offences under Section 412 IPC. The allegation in nutshell against the Appellants is that at their instance jewellery looted from the shop was recovered and thus, this appeal is confined only to this aspect of the case.

4. Learned counsel for the Appellants contends that to prove the charge for offence under Section 412 IPC as against the Appellant Sarwan Singh alias Guru, the relevant witnesses are PW14 Kuldeep Kumar, PW30 Inspector Ram Singh, and PW46 Shri Ranbir Singh, ACP and as against the Appellant Smt. Surjeet Kaur, the relevant witness are PW8 Kundan Lal, PW30 Inspector Ram Singh, PW46 Shri Ranbir Singh, ACP, PW9 Nathu Ram and PW 5 Sharwan Kumar.

5. On behalf of the Appellant Sarwan Singh alias Guru it is contended that there are two sets of recoveries attributed to him. Firstly, that at his instance recovery of jewellery was made from his house which was witnessed by PW14, PW30 and PW46. Secondly, he had given some jewellery to co-

accused Khushal Singh and at the instance of Khushal Singh, the jewellerys were recovered. Challenging the recovery at the instance of Khushal Singh it is stated that the same is not legally admissible evidence against the Appellant. The only evidence used by the learned ASJ was the confession of the co-accused which is inadmissible in evidence and the Appellant cannot be convicted on the said basis. As regards the recovery from the house of the Appellant Sarwan Singh alias Guru, it is alleged that PW14 Kuldeep Kumar is the son of PW8 Kundan Lal who was the public witness associated at the time of alleged recovery at the instance of the Appellant, Surjeet Kaur. Both of them are residents of Naiwala Karol Bagh. At the time of recovery at the instance of Sarwan Singh alias Guru PW14 Kuldeep Kumar had met the IO and accompanied him. PW14, PW8 and the IO concealed the relationship between the two and it is only when PW14 came in the witness-box, that on his cross-examination by the defence he admitted his relationship with PW8 Kundan Lal. Moreover, PW14 Kuldeep Kumar in his testimony does not even recognize the Appellant Sarwan Singh alias Guru. He has not witnessed the recovery as he did not go inside the room and only saw the potli that was brought out by the SHO and he did not know what was contained in the potli. Even in his cross-examination by the learned APP, he sticks to his stand. As regard the testimony of PW30 and PW46, it is contended that their testimonies

are full of contradictions and in the absence of corroboration by independent witnesses, the same cannot be relied upon.

6. Qua the Appellant Surjeet Kaur, it is contended that against her also the police has planted two sets of evidence. Firstly, it is alleged that stolen jewellery has been recovered on the 13th January, 1984 from her residence at her instance. The witnesses to this recovery are PW8, PW14, PW30 and PW46. The second set of recovery is that of one necklace from the shop of PW9 which was allegedly given by Surjeet Kaur for converting it into bangles. It is stated that the register to show that the necklace was recovered from the shop of PW 5 was seized after the charge sheet was finalized on the objection of the prosecution. The same has not been produced in evidence. There is no signature or endorsement of the Appellant Surjeet Kaur on the register. Appellant Surjeet Kaur had produced in defence a slip Ex. D-I which PW5 admits to be in his handwriting according to which she had given a pair of tops and a piece of gold for soldering and not the necklace. As regards the recovery on 13th January, 1984 at her instance from her house, it is contended that PW8 Kundan Lal has not supported the prosecution case though he identified Surjeet Kaur but did not tell from where the recovery was made. It is stated that PW8 has categorically stated that he does not know from where the packet which was lying in the house and contained the ornaments, was

recovered. He further stated that as the packet was recovered by the Police officers, therefore, they would be knowing it. He also stated that he had seen the packet only in the hands of the police officer. Also he did not hear any talk of Surjeet Kaur with the police officer at that time. He did not even know as from where the gold ornaments, if any, were got weighed. It is thus, clear that this witness has not witnessed the recovery and has only been made to sign the seizure memo. It is next contended that even against Surjeet Kaur, the testimony of PW30 and PW46 is full of contradictions and thus, no conviction can be based on their testimony.

7. Reliance is placed on *State of U.P. Vs. Madan Mohan*, 1989 SC 1519 and *Babu and others vs. State of U.P.* 1983 Crl. L.J. 334 to contend that PW8 and PW14 are chance witnesses who are not residing in the locality and in view of their doubtful and unnatural presence, it is not safe to rely on their testimony. Reliance is also placed on *Mousam Singha Roy and others vs. State of West Bengal*, 2003 (3) JCC 1358 (SC) to contend that when the panch witnesses have not witnessed the actual recovery and have just been told by the IO that the article has been recovered then, such evidence is insufficient to prove the recovery. It is also held that the burden is always on the prosecution to prove its case beyond reasonable doubt on the basis of

acceptable evidence. The law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone.

8. Learned counsel for the Appellants next contends that the TIP of the property has not been conducted in a fair and proper manner and thus, the recovery cannot be connected to the accused. It is stated that PW32 nowhere states that the jewellery was mixed with similar jewellery. It is thus, prayed that since the prosecution has not been able to prove its case beyond reasonable doubt, the Appellants are entitled to be acquitted. In the alternative it is prayed that the Appellants have faced the ordeal of trial for a period of 27 years, are 75 and 71 years of age and if this Court comes to a conclusion that they have committed the offence punishable under Section 412 IPC, then they be released either on probation or on the period already undergone.

9. Learned APP for the State though fairly states that the learned ASJ erroneously used the statement of co-accused Khushal Singh against the Appellant Sarwan Singh alias Guru to prove the recovery at the instance of Khushal Singh as against the Appellant, however, the second set of recovery at the instance of Sarwan Singh that is from his house is stated to be clearly proved beyond reasonable doubt. It is urged that though the testimony of PW14 does not implicate the Appellant, however, conviction can be based on

the testimony of PW30 and PW46 the two police witnesses. Similar is the contention as regard the recovery at the instance of Smt. Surjeet Kaur. It is stated that the testimony of the police witnesses cannot be brushed aside and conviction can solely be based on their testimony.

10. Having heard learned counsel for the parties and on perusing the record, I find that the learned ASJ grossly erred on certain aspects. In the present case, the Appellants were not amongst the six accuseds who had looted the jewellery shop. The Appellants were charged for offences punishable under Section 395 read with 120B IPC for which they were acquitted. The Appellants have been convicted for offence under Section 412 IPC, that is, for dishonestly possessing stolen property with the knowledge or reasons to believe that the same has been transferred by the commission of a dacoity or that the same belongs to a gang of dacoits. This being the charge, it is the duty of the prosecution to prove beyond reasonable doubt that the Appellants were in conscious possession of the stolen property. Secondly, they had the knowledge that the articles were stolen in dacoity. In the present case, the second essential ingredient has not been proved by the prosecution. The Appellants have already been acquitted of the charge of conspiracy. As held in *Achyut Das & Anr. vs. State of Assam*, AIR 1994 SC 968 in the absence of evidence of such knowledge, the only presumption that can be drawn is that

the accused knew that they were stolen articles and thus liable to be convicted for offence punishable under Section 411 IPC.

11. As regards the recovery at the instance of Smt. Surjeet Kaur from her house, I find force in the contention of the learned counsel for the Appellant that PW 8 is not a witness to the recovery of the jewellery articles from her house. PW8 though has identified the Appellant Surjeet Kaur but has not stated from where the recovery was made and what was recovered. He has only seen a packet in the hand of the police officer and signed the seizure memo. Thus, the only evidence now left is the testimony of the two police officers. Though it is well settled that conviction can be based on the testimony of police officers, however their testimony will have to be scrutinized with caution as to whether the same is reliable or not. As per PW 30 and PW 46, the investigating officer, on the basis of disclosure statement of accused Sukhdev Singh, they went to the house of the Sarwan Singh @ Guru. Accused Sarwan Singh did not meet them there. However, his wife Surjeet Kaur was interrogated and she disclosed to have received some golden and diamond jewellery from her husband Sarwan Singh @ Guru and she produced a packet of jewellery. It is only in the cross-examination that it is stated that this jewellery was lying in the box by PW 46. No site plan of the place of recovery was prepared. There is no mention of the box in the seizure

memo Ex. PW 8/A. The disclosure statement of the Appellant that this jewellery was given by her husband or that it was stolen property, is inadmissible in evidence. Thus, all that can be inferred is that she produced the jewellery and in view of these facts it has to be decided whether she was in the conscious possession of the jewellery or not. Law is well-settled that in case of a recovery from the house, all the occupants of the house cannot be convicted for conscious possession of the incriminating articles. The possession by the wife will be that of the husband when the wife has possession on account of the husband. Moreover, the mere fact that the accused's wife produced the stolen articles from the house where both were living together, cannot lead to the conclusion that she was in conscious possession of the incriminating articles. Thus, even believing the recovery of jewellery from the house at the instance of Smt. Surjeet Kaur wherein she produced a packet, the same cannot be attributed in her conscious possession, especially when the prosecution case is that it is the husband who had the possession of the incriminating articles. Thus Appellant Surjeet Kaur cannot be convicted for the offence punishable under Section 411 IPC. The other count on which the Appellant Smt. Surjeet Kaur is sought to be implicated is recovery of a necklace on 15th January, 1984 from the goldsmith Nathu Ram PW9, which she had allegedly given as per her disclosure for preparing two

bangles. This recovery made from the goldsmith Nathu Ram is also suspect as the register was not produced in evidence. PW9 has admitted his handwriting on Ex.D-1 which is a slip which shows that a pair of tops for repair and a piece of gold for the purpose of soldering. The necklace EX. P148 allegedly recovered from the shop of Nathu Ram has not been identified by PW 3 Bishan Dev, the complainant. The learned trial court rightly held that the recovery of the necklace from Nathu Ram was doubtful.

12. As regards the Appellant Sarwan Singh @ Guru is concerned, PW30 and PW 6 have stated that on 20th January, 1984 accused Sarwan Singh @ Guru was arrested from the Court of Shri R.S. Mahla learned MM, Delhi. He was interrogated and he disclosed that he can get his share of some pieces of jewellery and ₹1,100 which he gave to Khushal Singh recovered. PW 30 & PW 46 reached the place of work of Khushal Singh where he produced one box covered with velvet containing 22 notes of ₹50/- denomination and 11 pieces of silver and diamond and seized the same and stated that these articles were given to him by Sarwan Singh. This recovery on the basis of disclosure statement of Khushal Singh cannot inculcate the Appellant Sarwan Singh. This confessional statement of the co-accused Khushal Singh cannot be used against Appellant Sarwan Singh. Khushal Singh was also an accused in the present case. However, relying on his confessional statement, Khushal Singh

has been acquitted and Sarwan Singh has been convicted. In State *NCT of Delhi vs. Navjot Sandhu*, 2005 (11) SCC 600 it was held that there is need for an inextricable link between the information supplied and the physical object recovered.

13. As regards recovery of jewellery from the disclosure of Sarwan Singh @ Guru from his house, it may be noted that pursuant to the disclosure statement, the Appellant took the police to his house and got recovered jewellery from the shed. Though, PW 14 in his testimony has said that he joined the recovery but he did not go inside the room, however, there is no contradiction as regards the testimony of the two police officers PW 30 and PW 46 in this regard. Though, these witnesses stated that on 28th January, 1984 on the basis of the disclosure statement of Sarwan Singh, the police were led to his house and took out a polythene from the tin shed, six golden ring, a pair of ear rings, a necklace were recovered and the same were seized vide memo Ex. 14/A. Nothing has been elicited from the cross-examination of these witnesses except the fact that the prosecution witnesses PW 14 did not enter the room. However, the testimony of these two police officers cannot be brushed aside merely because the panch witness did not give the entire details. The contention that both PW 8 and PW 14 who were associated at the time of two recoveries were father and son and thus were chance witnesses is of no

consequence as even excluding the testimony of the public witness there is sufficient evidence to connect the Appellant Sarwan Singh with the recovery of jewellery from his house. The jewellery recovered from his house has been duly identified by PW 3 the Complainant in the TIP conducted. PW 32 has stated in his testimony that at the time of identification of the jewellery the same was mixed up with similar items brought by the investigating officer and thereafter the witnesses correctly identified their jewellery. On the basis of the evidence produced by the prosecution, coupled with the presumption which can be raised under Section 114(a) of the Evidence Act that when a person is found in possession of stolen property, it can be presumed that either the person himself stole the property or that he has received the goods knowing them to be stolen, I am of the opinion that the charge against the Appellant Sarwan Singh for offence under Section 411 IPC has been proved beyond reasonable doubt.

14. For the reasons stated above, Sarwan Singh @ Guru, Appellant in Criminal Appeal 235/2001 is convicted for offence punishable under Section 411 IPC. The maximum punishment provided for an offence punishable under Section 411 IPC is imprisonment which may extend to 3 years. No minimum sentence has been statutorily prescribed. Appellant Sarwan Singh has already undergone imprisonment for a period of 10 months and has paid

the fine. He is 75 years of age and has faced the ordeal of trial and appeal for 27 years. In the interest of justice, he is awarded a sentence of imprisonment for the period already undergone and the fine already deposited for offence punishable under Section 411 IPC. Criminal Appeal No. 235 /2001 is disposed of as partly allowed. The bail bond and surety bond stands discharged.

15. Surjeet Kaur, the Appellant in Criminal Appeal No. 215/2001 is acquitted of the charge under Section 412 IPC. The impugned judgment convicting and sentencing Smt. Surjeet Kaur for offence punishable under Section 412 IPC is set aside. Criminal Appeal No. 215 is allowed. The bail bond and the surety bond are discharged.

(MUKTA GUPTA)
JUDGE

JANUARY 11, 2011
vn