

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

% Decided on: 8th July, 2011

+ **CRL.A. 414/2010 & CrI. M.B. No. 519/2010**

DEEPAK KUMAR Appellant

Through: Mr. Yogendra Singh, Advocate

versus

STATE Respondent

Through: Mr. Manoj Ohri, APP

+ **CRL.A. 772/2010 & CrI. M.B. No. 925/2010**

SANDEEP KUMAR Appellant

Through: Ms. Ritu Gauba, Advocate

versus

THE STATE (NCT OF DELHI) Respondent

Through: Mr. Manoj Ohri, APP

+ **CRL.A. 831/2010 & CrI. M.B. No. 12443/2010**

RINKU Appellant

Through: Mr. Madhu Sudan Bhayana, Adv.

versus

THE STATE (N.C.T. OF DELHI) Respondent

Through: Mr. Manoj Ohri, APP

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may Not Necessary
be allowed to see the judgment?

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MUKTA GUPTA, J.

1. By the impugned judgment dated 12th March, 2010 the Appellants have been convicted for offences punishable under Sections 392/411/506/186/34 IPC and awarded sentence of Rigorous Imprisonment for a period of five years and fine of ₹5,000/- each under Section 392 IPC and in default of payment of fine to further undergo six months Rigorous Imprisonment. For offences punishable under Sections 411 and 506 IPC they have been sentenced to Rigorous Imprisonment for three years and for offence under Section 186 IPC a fine of ₹5,000/- and in default of payment of fine they have been directed to undergo one month rigorous imprisonment. All the sentences have been directed to run concurrently.

2. Briefly the case of the prosecution is that one Daroga Prasad, the complainant was going to his native village and thus boarded a TSR to go to Uttam Nagar Bus Terminal. In the said TSR two people were already sitting on the back seat. However, the TSR instead of taking him to the destination started taking him in different directions. On this, the Complainant became suspicious, raised alarm and jumped out of the TSR. The three persons

including the TSR driver also got down. The TSR driver caught him from his collar and the other two occupants of the TSR who were armed with knife, threatened him and took away all his belongings and ran away. On hearing the cries of Complainant, two police officials namely Ct. Babu Lal and Ct. Jitender Tyagi who were patrolling nearby reached there and chased the TSR on their motorcycle. The TSR was intercepted near Aggarwal Sweets, Vikas Puri. The TSR driver and one passenger managed to escape while the other passenger sitting on the back seat whose name came to be known as Deepak was apprehended. A chhura kept in a rexine cover was recovered from his possession. The broken suitcase of the Complainant was also recovered from the TSR. On checking, the suitcase, the Complainant found ₹1800/- cash, nokia charger and two video CDs missing. The Appellant Deepak was apprehended at the spot and on his disclosure statement Ex. PW3/B Appellant Sandeep Kumar was arrested in the presence of the Complainant and Ct. Kuldeep Kumar. The Appellant Sandeep Kumar got recovered the mobile phone charger, one purse and two silver rings from his house. On 27th May, 2005 the Appellant Rinku surrendered in the Court. During investigation TIP of the Appellant Rinku was conducted, and he was correctly identified by the Complainant and thereafter on 4th June, 2005, his police custody remand was taken. While in custody Rinku got recovered two video CDs of the

Complainant from his house in Raghbir Nagar, Delhi. Since the Appellants had obstructed the police officers in their duty a complaint under Section 195 Cr.P.C. was filed by the SHO along with the charge sheet. During trial the Appellants were charged for offences punishable under Sections 392/397/506/186/353/34 IPC and Section 411 IPC. The Appellant Deepak was separately charged for offence punishable under Section 27 Arms Act.

3. Learned counsel for the Appellant Deepak contends that the testimony of PW2 Daroga Pandit, the Complainant is not trustworthy. According to this witness, Appellant Rinku took out the mobile phone from the front pocket of his shirt whereas Ct. Jitender Tyagi PW4 states that on the personal search of accused Deepak a mobile phone was recovered. There are discrepancies as to the place where the documents that is, the seizure memo, personal search memo, arrest memo and the statements of the witnesses were recorded. Moreover, the mobile has been recovered from the co-accused and thus, there is no recovery of any stolen property from the Appellant Deepak and hence he could not be convicted for offence punishable under section 411 IPC. In the alternative it is contended that the Appellant is not involved in any other case and has already suffered imprisonment for a period of three years and thus, his sentence be reduced to the period already undergone.

4. On behalf of the Appellant Sandeep Kumar it is contended that the only evidence against the Appellant is seizure of a mobile phone charger from his residence on the pointing out of the co-accused/Appellant Deepak. Since the said recovery is not at the instance of the Appellant himself he could not be connected with the said recovery. Moreover, the mobile phone charger is easily available in abundance in any market and unlike a mobile phone there is no identification mark or specific EMEI number to differentiate between the two similar chargers of same style. The Appellant Sandeep has been identified by PW2 in the Court for the first time. No TIP of Sandeep Kumar or the alleged mobile phone charger recovered from him was got conducted. PW2 the Complainant deposed that he did not enter the house of Sandeep and could not tell the number of storeys of the building. He also deposed that he cannot tell what proceedings were conducted at the residence. It is contended that the learned Trial Court grossly erred in convicting the Appellants simultaneously for offence punishable under Sections 392 and 411 IPC. Since the prosecution has not proved its case beyond reasonable doubt against the Appellant, the impugned judgment and order on sentence should be set aside. In the alternative it is prayed that the Appellant has already undergone imprisonment for nearly two years six months and he be released on the period of imprisonment already undergone.

5. Learned counsel for the Appellant Rinku contends that the Appellant was not apprehended at the spot. There is no recovery of any incriminating article from the Appellant. The Appellant in his defence had examined DW1 Saleem who had stated that on the day of incident the Appellant was at Meerut, however, the defence of the Appellant has not been considered by the learned Trial Court. Even as per the prosecution case the Appellant has not used any weapon of offence and in the absence of any recovery and usage of weapon he is entitled to be acquitted. The prosecution case against the Appellant falls flat as it was dark when the incident took place and the Appellant could not have identified the Appellant. It is thus prayed that the Appellant be acquitted and in the alternative since there is no previous involvement he be released on the period of imprisonment already undergone.

6. Per contra learned APP for the State contends that the incident is of wee hours in the morning of 20th May, 2005 i.e. around 4-4:30 a.m. when PW2 was going to Sarai Rohella station to catch a train to his hometown. Early in the morning at about 3:50 a.m., he took the he took the TSR to go to Uttam Nagar Terminal in which two persons were already sitting besides the driver. The auto driver, that is, the Appellant Rinku instead of taking the Complainant to Uttam Nagar Bus Terminal diverted the route from main road towards Janta Flats and on the Complainant questioning, again diverted his

route towards main road but instead of taking the proper path he took the TSR in the opposite direction. The complainant became suspicious and jumped out of TSR on which the driver Appellant Rinku stopped the TSR and caught hold of the complainant. Deepak and Sandeep who were sitting on the back were armed with knives. They too came out and pointed out the knives towards the Complainant. PW3 Constable Babu Lal and PW4 Ct. Jitender Tyagi who were patrolling, reached the spot and the Appellant Deepak was caught at the spot after chasing. The sequence of events has been described by PW3 and PW4 clearly. Besides this, the dagger Ex. PW2/B which is a double edged weapon with a long blade of 31.4 cm and the mobile phone charger of the Complainant were also recovered. The Appellant Sandeep was arrested on the next day on the pointing out of Appellant Deepak and from his house search; mobile charger was recovered. The Appellant Rinku was arrested on 27th May, 2005 vide arrest memo Ex. PW8/D from Tis Hazari Courts. His TIP was got conducted on 2nd June, 2005 in which the Complainant duly identified him and thereafter on his disclosure statement Ex. PW8/E, two CDs relating to the marriage of the Complainant were recovered from his house in Raghbir Nagar, New Delhi. The Complainant has identified all the exhibits including the mobile phone charger. The Complainant was initially examined on 27th September, 2005 wherein he duly identified all the accused persons.

However, the cross examination on behalf of Appellant Sandeep was conducted belatedly on 18th December, 2006 and again on 21st December, 2006 on behalf of Appellant Deepak and thus, there were variations in his statement. Despite minor contradictions PW2 Daroga Pandit clearly stated that Sandeep was present in the TSR and Appellant Deepak was arrested on the spot after some chase and the dagger Ex.PW2/B was recovered from him. The witnesses have proved the recovery of the dagger, mobile phone and mobile phone charger. PW3 and PW4 have also explained the minor injuries received by the Appellant Deepak. PW4 has deposed that while running Deepak struck against the footpath and fell down on the road. PW5 Ct. Kuldeep Kumar is the witness to the recovery of the mobile phone charger. The test identification parade cannot be questioned by the Appellant Rinku at this stage. PW6, that is, the learned Metropolitan Magistrate, Ms. Archana Singh when appeared in the witness box was not cross-examined and thus, her testimony has gone unchallenged. Thus, the offences under Section 392/34 IPC are clearly made out. Since the Appellant showed chhura to the police officers while chasing them, offence punishable under Section 186 IPC is made out and thus, they were rightly convicted of the said offence.

7. I have heard learned counsel for the parties and perused the record. PW2 Daroga Pandit was going to his village in District Chhapra, Bihar and

was carrying in his baggage wearing apparels, a video cassette, ₹1,800/- cash, Nokia mobile charger, other goods and Nokia mobile phone model No. 3310 in his pocket. At about 3.50 A.M. on 20th May, 2005 he hired a TSR from Uttam Nagar to go to Uttam Nagar Bus Terminal in which two persons were already sitting on the back seat. The TSR started moving towards the Janta Flats and on the Complainant asking the driver about the change in the route he stated that he had to pay the TSR rent to the TSR owner. On the Complainant's persistence the TSR driver again returned back on the main road and started driving the TSR in the opposite direction whereas the right path was towards the Ganda Nala. On being suspicious the complainant raised an alarm and jumped from the running TSR. On seeing this the TSR was stopped by the driver, who caught hold of the Complainant by the collar. In the meantime, the other two occupants of the TSR also came down who were armed with knives. The complainant being terrified offered all his belongings to the accused persons and pleaded for mercy. Thereafter, the Appellant Rinku forcibly took out mobile phone from the pocket of his shirt. PW3 Ct. Babu Lal and PW4 Jitender Tyagi who were on patrolling duty; when reached near D.A.V. School saw one TSR parked nearby school and three persons were quarreling with one person. They reached near the said TSR and on seeing the two police officials on a motorcycle, the complainant

raised the alarm. On being chased by the police, the Appellants started running away in the TSR towards the DAV school. Two out of the three accused managed to escape but the police apprehended Appellant Deepak on the spot and a knife/dagger was recovered from his possession i.e. from underneath the belt of his pant and from the TSR bearing No.DL-1RR-0038 the suitcase of the complainant was recovered.

8. Thus from the testimony of PW2, the complainant, the prosecution has proved beyond reasonable doubt that the three Appellants on the wee hours in the morning of 20th May, 2005 took away his belongings. The Appellants were charged for offence punishable under Section 397 IPC. However, during his testimony in the Court this witness in his examination-in-chief and his cross-examination could not identify which of the two accused that is Deepak or Sandeep showed him the knife, though he had stated that they were armed with knives. In the absence of this evidence the learned Trial Court has rightly not convicted the Appellants for offence punishable under Section 397 IPC as the user of the same has not been proved. The prosecution has however, proved the possession of a knife/dagger with the Appellant Deepak. The Appellant Deepak was apprehended immediately after the incident at the spot on being chased by PW3 Ct. Babu Lal and PW4 Ct. Jitender Tyagi. These witnesses were on patrolling duty who stated that they saw the scuffle

between one person on the one side and three persons on the other side and one person was shouting “LOOT LIYA LOOT LIYA”. On their reaching near, the three persons boarded the TSR and ran away. Since the two of them were chasing them on motorcycle, the Appellants abandoned the TSR and two of them that is Appellant Rinku and Appellant Sandeep managed to escape but Appellant Deepak was apprehended. From Deepak a knife was recovered underneath his belt of the pant which was seized vide memo Ex.PW3/A and from the TSR the suitcase of the Complainant with the broken handle was recovered. Thus the complicity of the Appellant Deepak is proved beyond reasonable doubt for offence punishable under Section 392 IPC.

9. I do not find any merit in the contention of the learned counsel that because this witness has stated that it was dark so he could not have identified the Appellants. PW2 had travelled with the Appellants for a long time because he was taken to number of places before he jumped out and thus there was sufficient time for this witness to identify the three Appellants. In his cross-examination on 21st December, 2006 he has deposed that he did not know which of the accused person was having the dagger, Ex.P-2 at the time of occurrence, as it was a dark at that time. Thus it is only on the point as to who was carrying the dagger that PW2 could not categorically mention the person. It was for this reason the Appellants have been acquitted for offence

punishable under Section 397 IPC by the learned trial Judge. As regards the contention of the learned counsel that there is discrepancy in the statement of PW2, it would be relevant to note that this witness in his examination-in-chief has correctly deposed about the events as they unfolded. But it is only in his cross examination on 21st December, 2006 that he deposed that Appellant Deepak was neither a passenger in the TSR nor did he intervene in the scuffle nor said anything to him which fact has been pointed out by the learned counsel as a major discrepancy. It is well settled in *Khujji@ Sumendra Tiwari vs. State of Madhya Pradesh (1991) 3 SCC 627* that merely because a witness is declared hostile, his entire evidence cannot be treated as effaced from record and his testimony to the extent it is reliable can be acted upon. In view of the law laid down and the fact that in the same cross examination the witness had deposed that it is wrong to suggest that accused Deepak was not involved in the incident coupled with the cogent evidence on record that the Appellant Deepak was arrested at the spot immediately after the incident, it is proved that accused Deepak was a party to the commission of the offence. I also do not find any merit in the contention of the learned counsel that there is discrepancy in regard to the preparation of seizure memo and other documents is concerned as it also do not go to the root of the matter.

10. As regards the Appellant Sandeep, on the disclosure statement made by co-accused Deepak Ex. PW3/B who led the police to the house of the Appellant Sandeep at Raghbir Nagar from where he was arrested, there is recovery of a mobile charger his instance. However, PW2 has fairly stated that the mobile phone charger is a common thing and can be used in many models of make NOKIA and is easily available in market. Thus, in my opinion the recovery of mobile charger being an ordinary article would not connect the Appellant Sandeep with the present case. However, PW2 has deposed that the Appellant Sandeep was the one who was present on the night along with the other co-accused and had robbed the articles i.e. his suitcase, mobile phone charger and money from him. PW5 Constable Kuldeep in his testimony has also deposed on similar lines that accused Deepak had led the police party and PW2 to the house of Sandeep where on the pointing out of PW2, the Appellant Sandeep was arrested. These statements of PW2 & PW5 are also supported by the version given by PW8 SI Ram Kishore who has deposed that when the accused Deepak led them to the house of accused Sandeep PW2 identified the accused Sandeep and he was thus arrested vide arrest memo Ex.PW 5/A. The contention that no TIP of Sandeep was got conducted is liable to be dismissed as the Appellant Sandeep had been arrested in the presence of the complainant PW2 who had identified him.

Thus, there was no need of his test identification parade as the Appellant Sandeep has been duly identified person who had robbed him at the time of the incident. Thus there is sufficient and cogent evidence placed on record to convict the Appellants for offence punishable under section 392/34 IPC.

11. I find merit in the contention of learned counsel for the Appellant Sandeep that he cannot be convicted for offence punishable under Section 411 IPC. A mobile charger of nokia has been recovered at the instance of the Appellant Sandeep. However PW 2 has admitted that the mobile charger is an ordinarily available item with no special/unique mark of identification on it. Thus the same cannot be identified to be one robbed from the Complainant. In the absence of proper identification of the stolen article, Appellant Sandeep cannot be convicted for offence punishable under Section 411 IPC.

12. As regards the Appellant Rinku, the contention of the learned counsel that no recovery of any incriminating article was attributed to the appellant deserves to be rejected as the two video CD's belonging to the complainant were recovered from the Appellant. This recovery of CD's alongwith his identification by PW2 clearly prove the presence of the Appellant at the time of incident as well as his participation in the crime. The recovery and identification of the CD's is also corroborated by the testimony of PW3 Constable Babu Lal and PW8 S.I. Ram Kishore who has deposed that 2 CD's

were recovered at the instance of accused Rinku from his house at Raghubir Nagar, Delhi. Thus, there is sufficient and cogent evidence to prove the recovery of CD's from the Appellant Rinku. Complainant PW2 in the test identification parade duly conducted by PW6 Ms. Archana Sinha, learned Metropolitan Magistrate has identified the Appellant Rinku, as the person who was driving the TSR. Though a suggestion was given to PW2 and PW8 that photograph of Rinku was shown to PW2 and thus he identified him however, this suggestion has been denied by the witnesses. There is no material on record to show that at any point of time the photograph of the Appellant Rinku was taken so that the same could be shown to PW2. Appellant Rinku during his test identification parade has nowhere taken this objection. The defence of alibi of Appellant Rinku is also not sustainable. Though he has examined DW1 Salim on 6th February, 2010 in this regard who has stated that Rinku was with him at the weekly bazaar however, this defence is clearly an afterthought and no such suggestion has been given to PW2 when he was cross-examined on 31st August, 2009. Thus, I find no infirmity in the order of conviction of the Appellants for offence punishable under Section 392/34 IPC.

13. From the testimony of PW3 constable Babu Lal and PW4 Constable Jitender Tyagi it is proved that when they were chasing the Appellants one of

the occupant of the TSR showed PW3 a dagger and threatened him thus proving the offence under Section 506 IPC against the Appellants.

14. However PW 3 or PW4 have not stated that the occupants of the TSR either assaulted or used criminal force to deter them in performing their duties. Thus they could be convicted for offence punishable under Section 186 IPC only and not under Section 353 IPC. Therefore, the conviction of the Appellants for offence punishable under section 186 is upheld. As regards the contention of learned counsels for the Appellants on the quantum of sentence is concerned, the Appellants have been awarded a sentence of Rigorous Imprisonment for five years. Appellant Rinku has already undergone the same. In regard to the remaining two Appellants, they still have to undergo the remaining sentence of nearly two years. I find no mitigating circumstance to reduce the sentence of the Appellants.

15. The appeals and the applications are accordingly dismissed except setting aside the conviction and sentence of the Appellant Sandeep for offence punishable under Section 411 IPC. The Appellants who are in custody be informed through Superintendent Jail.

(MUKTA GUPTA)
JUDGE

JULY 08, 2011/vn