

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

+ **CRL.REV.P. 370/2009**

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Decided on : 18th November, 2011

PREM KUMAR

..... Petitioner

Through: **Mr. N. Safaya, Adv.**

versus

STATE

..... Respondent

Through: **Mr. Mukesh Gupta, APP with ASI
Ram Gopal, PS Mukherjee Nagar.**

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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| 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. (ORAL)

1. By the present petition the Petitioner seeks setting aside of the order dated 18th March, 2009 passed by Learned Additional Sessions Judge upholding the conviction of the petitioner under section 379/34 IPC and acquitting him for the offence charged.

2. Learned counsel for the Petitioner states that the conviction of the Petitioner under section 379/34 IPC is erroneous and no case under the section is made out against the Petitioner as the essential requirements of the section are not fulfilled in the present case. There are inconsistencies and contradictions in the testimonies of the witnesses and the same does not

inspire confidence. During the entire trial the petitioner was either unrepresented or was represented through the legal aid counsel which has caused grave prejudice to him. Hence the Petitioner cannot be convicted for the said offence and the impugned order is liable to be set aside.

3. Per contra learned APP states that the impugned judgment suffers from no illegality, the Petitioner has already been released on probation by the learned Additional Sessions Judge. Thus the present revision petition is liable to be dismissed.

4. Briefly the case of the prosecution is that the Petitioner along with co-accused Jawahar Singh was seen committing theft of a pipe and copper plate from the solar system installed at the terrace of barrack No. 5, New Police Lines, Kingsway Camp. Constable Manmohan Singh who resides on the first floor of the said barrack was on reserve duty on 27th August, 2000. As per the FIR Constable Manmohan Singh went to the terrace for morning walk at about 5.00 A.M. and saw the two accused persons who had already removed the pipe and the copper plate and were putting the same into a gunny bag. He apprehended them. Vide DD no. 38A the information was received at PS Mukherjee Nagar at about 5.45 AM. This DD was marked to HC Pushpendra who seized the recovered articles and arrested both the accused. After completion of investigation charge under Section 379/34 IPC was framed against both the accused persons. Learned Metropolitan Magistrate convicted the accused persons and sentenced them to undergo Rigorous Imprisonment for one year for offences punishable under Section 379/34 IPC. The Petitioner filed an appeal against this order. Vide order dated 18th March, 2009 Learned Additional Sessions Judge upheld the conviction of the Petitioner and released him on probation. This order of the

Learned Additional Sessions Judge upholding his conviction is impugned in the present petition.

5. It would be relevant to note that the charge under Section 379/34 IPC was framed against the Petitioner on 14th November, 2000 and the matter was listed for prosecution evidence on 28th November, 2000. On this date PW1 and PW2 were examined by the Learned Trial Court and were discharged, PW1 was not cross examined whereas PW2 was cross examined by a legal aid counsel. Thereafter on 17th January, 2001 PW3 was examined and discharged. No counsel for the petitioner was present on the said date. PW4 was examined and discharged on 31st January, 2001. On 14th February, 2001 the petitioner was once again unrepresented by any counsel, when PW5 was examined and discharged. Learned Metropolitan Magistrate noted that all the prosecution witnesses stood examined and therefore closed the prosecution evidence. The matter was thereafter listed for recording of statement of accused. On 12th March, 2001, the statement of accused persons was recorded. The matter was then listed for arguments on 21st March, 2001, when an application under Section 311 Cr.P.C was filed by the counsel for accused/ Petitioner for recalling of PW1 and PW2 as their cross-examination could not be done on 28th November, 2000. Learned Trial Court vide order dated 21st March, 2001 allowed the application and the matter was listed for cross examination of all witnesses on 18th April, 2001. On the said date no witness was present for cross examination. Thereafter on several occasions the witnesses were summoned but none was present for cross-examination. On 19th September, 2002 PW 2 was cross examined and discharged. None of the other witnesses have been cross examined and the order sheets do not indicate why the remaining witnesses were not available

for cross-examination. Though it is noted that on 20th February, 2003 fresh statement of accused has been recorded but there is no other statement of accused available on record other than the one recorded on 12th March, 2001. Thereafter on 30th April, 2008 Learned trial court passed the judgment convicting the petitioner.

6. A perusal of the statements of the prosecution witnesses and the statement of accused shows that the manner in which the statements were recorded was most unsatisfactory and perfunctory. During the entire trial the petitioner is either not represented by a lawyer or has been represented by some legal aid counsel who has not cross examined the witnesses. Also when the witnesses were recalled for cross examination only one appeared and there is nothing on record to show as to what steps were taken by the court to ensure the presence of other witnesses. The entire trial conducted by the learned Trial Judge seems to be an idle formality.

7. Before proceeding further it would be relevant to reproduce the statement of accused recorded by the trial court:

“Statement of accused Prem Kumar s/o Man Bahadur:

The memorandum of substance of prosecution evidence is put to you accused that on 27/8/2000 you accused were seen by Ct. Manmohan on hearing the noise of khat khat on the roof of barrack no. 5 and when he had gone to take a morning walk and say both of you accused while stealing the brass chadar and rod from Solar System installed on the roof of the said barrack and he also saw you accused putting the same in the gunny bag while you were in the process of taking away the said stolen property while you accused Jawahar Singh was having one gunny bag in your hand whereas the other accused Prem was receiving small plastic bag containing two screw drivers, one plas, two aris and one key and one reti and in the gunny bag there were chadar of brass and rod made of brass

weighing about 10 kgs. On alarm being raised the residents of the barrack also came there. Police was informed. Statement of complainant Ex.PW-1/A was recorded on the basis of which FIR Ex. PW-4/A was recorded by ASI Renu on ruka sent by HC Pushpinder through Ct. Avadh Bihari. The sanction by the competent authority for installation of the solar system is Ex.PW3/A. Chadar and pipe made of brass were taken into possession vide Ex. PW-1/B. Ari and screw drivers were taken into possession vide Ex.PW-1/C. Jamatalashi of the accused are Ex.PW-1/D and Ex.PW-1/E respectively and the said articles are Ex.PW-1 to P-7. IO prepared site plan Ex.PW5/B at the instance of the complainant. IO also made the endorsement on the statement of the complainant Ex.PW-1/A and sent the same through Ct. Avadh Bihari for the registration of the case to which accused stated that case is false. PWs have deposed falsely. I do not want to lead defence evidence.

8. The manner in which the statement of accused is recorded is perverse as it cannot made out whether any incriminating circumstance has been put to the accused and what answer the accused has given for the questions. The linchpin of Section 313 Cr.PC is the opportunity to 'explain any circumstances appearing in the evidence against him'. This means that every circumstance from which the Court would draw the inference of guilt against the accused has to be put to the accused. It is the duty of the Trial Judge to question the accused properly and fairly, bringing home to the mind of the accused, in simple and clear language, the exact case he has to meet and each material point that is sought to be used against him and of affording him a chance to explain it if he can and so desires.

9. The opportunity granted under Section 313 Cr.P.C. must be real and not illusionary. Questions must be so framed as to give to the accused clear notice of the circumstances relied upon by the prosecution, and an

opportunity to render such explanation as he can of that circumstance. Each question must be so framed that the accused can understand it and appreciate what use the prosecution desires to make of the same against him.

10. The Courts employ the concept of prejudice to aid in remedying the injustice. The prejudice in the present case is apparent and grave. The manner in which the trial is conducted in the present case is not a mere irregularity but illegality and the error on part of the trial Judge in not examining the accused persons strictly in compliance to Section 313 Cr.P.C. and not giving the right to cross-examine the witnesses is grave which has resulted in causing material prejudice to the petitioner.

11. In view of the facts that the Petitioner has already faced the ordeal of trial, appeal and the present revision for the last 11 years, I am of the opinion that no useful purpose would be served in remanding the matter back for fresh trial. Even on consideration of facts on record the Learned Additional Sessions Judge thought it fit to release the Petitioner on probation. Consequently, the judgments dated 18th March, 2009 by the Learned Additional Sessions Judge and 30th April, 2008 of the Learned Metropolitan Magistrate are set aside and the Petitioner is acquitted of the charges framed.

12. Petition stands disposed of.

(MUKTA GUPTA)
JUDGE

NOVEMBER 18, 2011
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