

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

Date of Hearing : 17th January, 2011
Date of Decision : 24th January, 2011

+ **CRL. L.P. No. 442/2010**

STATE

... PETITIONER

Through: Mr. O.P.Saxena, APP for the State.
Versus

ALLAUDDIN @ RAJU & ORS.

...RESPONDENTS

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | No. |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

J U D G M E N T

G.P. MITTAL, J.

1. **Crl.M.A.No.18038/2010 (under Section 5 of the Limitation Act.)**

Delay condoned for the reasons as stated in the application.

Crl. L.P. No. 442/2010

2. We have heard the learned Additional Public Prosecutor for the State and have perused the Impugned Order dated 24.4.2010 as also the testimony of the witnesses produced by the prosecution. We find that no case is made out for grant of leave to appeal.
3. The gravamen of the charge against the accused is that the accused (Allauddin, Sahil, Arun Kumar and Prem) had entered House No.C-25, East of Kailash belonging to Complainant - Harbhajan Singh. Door of the house was opened by Sunita daughter of PW-3 Smt. Shanti (maid servant working in the house). Accused Sahil was armed with a knife whereas rest of the accused were wielding country made pistol. Version of the

prosecution as can be gathered from the statement Ex.PW-1/A of PW-1 Sardar Harbhajan Singh recorded by PW-11 SI Ashok Kumar is that one of the accused asked the Complainant to hand over the money or else he would be killed. He inflicted butt of the pistol on Complainant's head. The Robbers removed ear rings from the ears of the maid servant Smt. Shanti, Rs.10,000/- from his Pooja room, one mobile Nokia 3315 and Rs.500/- from one of the plumbers Brahamanand who was working in the house. The plumbers had been locked in the kitchen whereas the Complainant, his servant and her children were pushed in the bed room. The intruders searched the Almirah and other goods lying in the room. After some time the Complainant opened the door and telephoned the police.

4. During investigation, the accused, including one Nissar who was stated to be standing outside guarding the house and keeping watch on the commission of dacoity, were arrested in a case under Section 399/402 IPC pertaining to F.I.R.1037/2005 of Police Station Lajpat Nagar. They made disclosure statements, which led to certain recoveries. During the trial, the prosecution examined as many as 16 witnesses.
5. The evidence that has been produced against the accused persons during the trial is:-
 - A. Identification of the four accused persons in the Court coupled with the refusal to participate in the Identification Parade by accused Allauddin, Prem and Arun Kumar and identification of accused Sahil.
 - B. Recovery of stolen property from each of the accused.
 - C. Matching of chance prints of palm with that of accused Arun Kumar taken during investigation of the case.
6. We would like to extract the relevant portion of the impugned judgment for proper appreciation of the grounds taken in the Leave Petition:-

“..... According to police they apprehended accused while they had assembled in an offence of preparation for committed dacoity and thereby a separate criminal case was registered and that is just after a week of the incident of this case. Defence counsel appeared to be justified in his submissions and arguments that having committed such a serious crime in the present case, accused as a probable normal human behavior would not assemble for committing a dacoity and made a preparation for that dacoity. Counsel submitted that apprehension and arrest of accused person in such a situation creates a doubt in that part of the prosecution story.

Counsel argued that if apprehension and arrest of accused persons created a doubt then the witnesses called at Police Station and accused persons shown to them before holding TIP reflected upon unfairness in the investigation. I do agree with these contentions of Ld. Defence counsel on these aspects. It appears to be a matter of fact that Sardar Harbhajan Singh while giving his FIR statement had not provided any kind of description of the culprits, either by their approximate age or by body, height or built or by any other kind of apparent body mark. Statement of Smt. Shanti and other witnesses under 161 Cr.P.C. also lacked any such description of accused persons. If arrest of accused in the manner as is being presented is found to be doubtful then the basis for the apprehension of accused becomes a serious question mark and in that background of the situation of the case we have to appreciate evidentiary value of witness Smt. Shanti and her son Arjun when they have identified accused persons. At the same time other two witnesses PW-7 & 8 have not identified accused persons as the culprits.

Another flaw in the identification of accused by Smt. Shanti and Arjun is that while identifying two accused persons as Kallu and Allauddin who were holding fire arm pistol and had demanded money from Sardar Harbhajan Singh and they identified other two accused namely Prem and Sahil who went inside the rooms in search of the valuables, prosecution has not got it cleared as to who that Kallu was as identified by these two witnesses. There is no accused by the name Kallu in this case and rather there is no accused even by name Kallu as alias name. Identification of accused persons is to be then appreciated in such kind of the evidence.

Prosecution sought to support its case by recovery of stolen articles at the instance of accused persons. Having gone through the evidence and record I do not find this part of the prosecution case duly proved or providing any kind of support to the prosecution charge. The articles taken away by accused, according to prosecution charge, were wrist watch make HMT from the person of Sardar Harbhajan Singh, an amount of Rs.10,000/- from the pooja room in the house, a pair of ear rings from the person of Smt. Shanti and a cordless telephone make Panasonic which belonged to Sardar Harbhajan Singh and a mobile phone handset make Nokia which was taken away from plumber Brahammanand. Except money all these stolen articles were claimed to have been recovered at the instance of accused persons and recovery was got effected from a fast food shop bearing No.217 Haus Khas, Delhi which was stated to be in the tenancy of Allauddin. Recovery witness Ct. Naveen Kumar Tyagi PW-10 all that he deposed is that accused Allauddin got recovered one mobile phone make 3315 Nokia from his shop of Chaumin No.217. Accused Sahil got recovered a pair of ear tops, accused Nisar got recovered HMT watch from the same shop and accused Prem got recovered cordless telephone make Panasonic. Inspector Ashok Kumar has also deposed these recoveries got effected by accused persons from that shop. None of these witnesses has deposed exactly at what particular place these stolen articles had been kept by accused persons and then got recovered to suggest an exclusive knowledge and possession of these articles by them. Ct. Naveen in cross examination states that shop was found locked and the key was taken from the owner of the shop but then admittedly owner or no other person from the locality was joined as a witness in this recovery. IO explained in cross examination that owner of the shop namely Krishan was not there available and the key of the shop was delivered by some child. Admittedly owner landlord of the shop has not been joined witness even at subsequent stage atleast to prove the fact that Allauddin was the tenant in the shop or that other accused persons used to visit that shop or were ever seen in that shop. Recovery of stolen articles at the instance of accused in such circumstances becomes doubtful. Doubt is further strengthened when we find that Sardar Harbhajan Singh in his F.I.R. statement has not given that wrist watch which he was wearing was taken away by the culprits. Witness deposed during trial that accused persons took away the wrist watch he was wearing. This important fact

could not have been omitted in F.I.R. statement and it creates a doubt if wrist watch of Sardar Harbhajan Singh was taken away.

Sardar Harbhajan Singh deposed in his examination in chief that cordless telephone had been thrown by accused persons near the main gate in the kitchen garden. There was no question of then recovery of cordless phone at the instance of accused. Witness Smt. Shanti improved upon her police statement when she deposed that besides ear rings, her gold bangles were also taken away by the culprits. Admittedly ear rings when taken up for identification in TIP and that to mixed with only two other pairs of ear rings, Shanti had not been able to identify her ear ring pair as PW-18 Ld. MM has deposed. She identifying ear ring in court evidence loses its value. Lastly the mobile phone of the plumber, except the model and the colour there was no other mode adopted to get it identified as the property belonging to this witness. No such efforts were made what was the IMEI number of the mobile when it was taken away from the custody of its owner Brhammanand at the time of incident. No effort was made what was the IMEI number of the mobile when recovered by the police.

Recovery of stolen articles at the instance of accused fails to inspire confidence and it fails to connect accused persons with this crime. Ld. APP had argued that chance finger prints had been lifted from almirah and it have been found connected with the finger prints of accused Arun as per the FSL report. Evidence of Smt. Shanti however shows that whereas accused Kallu and Allauddin remained in the living room demanding Sardar Harbhajan Singh and others to hand over the valuables, it is only accused Prem and Sahil who had gone inside the rooms in search of the valuables. Even if we take accused names as Kallu by the witness to be Arun, in the absence of accused Arun to have gone inside the rooms, his chance finger prints appearing on almirah becomes a doubtful fact.”

7. PW-1 Sardar Harbhajan Singh and PW-3 Smt. Shanti had sustained minor injuries in the incident. Both of them supported the prosecution version. PW-1 Sardar Harbhajan Singh was frank enough to admit that he could not identify the culprits because of the Mocular de generation (on account

of old age) whereas PW-3 Smt. Shanti identified all the accused except Nissar, who according to the prosecution was guarding the house from outside. PW-4 Arun son of PW-3 Smt. Shanti apart from supporting the version of the prosecution has also identified the four accused persons. PW-7 Sampat and PW-8 Brahmanand who were allegedly present at the time of incident have also supported the incident of robbery, though they have not been able to identify the culprits.

8. The important question, however, is whether the accused who had been sent for trial were responsible for the crime? The way the prosecution evidence has been collected and the investigation carried out do create doubt in the case of the prosecution as to the identity of the perpetrators of the crime or at least some of them whom the prosecution has been unable to segregate.
9. We are conscious of the fact that accused cannot be acquitted simply because of some lacunae or fault in the investigation by the Investigating Officer, yet, where the fairness of the investigation affects important pieces of evidence, accused would be entitled to the benefit of doubt.
10. The purpose of holding an identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from midst of other persons without any aid; a test is done to check up their veracity as also to give a minimum opportunity to the witnesses to refresh their memory as the trial would normally take some time. In other words, the main object of holding an Identification Parade during the investigation stage, is to test the memory of witness based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witness of the crime.
11. The prosecution case as set up in the statement Ex.PW-1/A of complainant PW-1 Sardar Harbhajan Singh is that he (the complainant), his servant and his children were pushed in the bed room with the direction to remain there whereas plumber PW-8 Brahmanand PW-7 Sampat were bolted

inside the kitchen. PW-3 Smt. Shanti Devi, however gave a different story when she deposed in her examination in chief that they (complainant Sardar Harbhajan Singh, she and her children) were pushed inside the kitchen, the culprits had however, not bolted the kitchen from outside. Therefore, she came out of the kitchen with her daughter and sat in the verandah/hall in front of the kitchen. Assuming, what was stated by PW-3 Smt. Shanti Devi in the Court was correct and she had sufficient time to identify the culprits and even assuming that some of the persons with their sharp memory can identify the culprit, even if he has seen him for a few seconds or minutes. The Identification Parade assumes importance, particularly, in view of the manner in which the accused were arrested. The manner in which the accused were shown to PW-3 Smt. Shanti Devi and PW-4 Arjun in the Police Station before holding the Test Identification Parade does create doubt in the case of the prosecution.

12. The doubt is further compounded by the manner in which the recovery of the small articles from the same shop has been shown at the behest of each of the accused. According to the case of the prosecution the stolen property consisted of a sum of Rs.10,000/- from puja room of the complainant, a wrist watch and a cordless phone belonging to the complainant, a sum of Rs.300/- from PW-4 Arjun son of PW-3 Smt. Shanti, the ear rings belonging to PW-3 Smt. Shanti and a sum of Rs.500/- and a mobile phone belonging to PW-8 Brahmanand. In this case, though the accused persons had been arrested incidentally in another case under Section 399/402 IPC while making preparation for another dacoity just after couple of days of this incident, yet no cash was recovered from them. It is quite strange that each one of the accused got recovered a very small/insignificant part of the stolen property in as much as accused Prem got recovered the cordless phone, accused Allauddin got recovered the mobile phone, accused Sahil got recovered the ear rings, accused Nissar got recovered the wrist watch and that too from the same shop. As per the statement of PW-1 Sardar Harbhajan Singh in his examination in chief,

cordless phone was thrown away by the culprits near main gate in the kitchen garden (while they were leaving) then wherefrom the cordless phone was got recovered. The prosecution preferred neither to put the said cordless phone for identification to the complainant or to cross examine him on this point.

13. The ear rings allegedly recovered at the instance of accused Sahil were not identified by PW-3 Smt. Shanti Devi during the Identification Proceedings held by PW-15 Sudesh Kumar, Metropolitan Magistrate on 17.11.2005. She was specific that none of the ear rings put up in the identification proceedings belonged to her. However, when she was examined in the Court as PW-3 on 26.09.2006 she readily claimed the ear rings and identified the same.
14. Similarly, the conclusions reached by the learned Additional Sessions Judge regarding matching of chance palm prints cannot be faulted since accused Arun Kumar who had been guarding the complainant with a pistol had not gone to the bed room wherefrom chance prints were lifted.
15. The principle which govern and regulate the hearing of Appeal by the High Court, against an order of acquittal passed by the Trial Court are well settled by catena of judgments of the Apex Court.
16. Relying on '*Ajit Savant Majagvai vs. State of Karnataka*', (1997) 7 SCC 110, the Apex Court in '*Prem Kanwar vs. State of Rajasthan*', (2009) 3 SCC 726', reiterated the principles which must be kept in mind while hearing an Appeal against acquittal. These are:-

“(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High court has also to keep in mind that the trial court had the advantage of looking at the demeanor of witnesses and observing their conduct in the court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.”

17. It cannot be said that the view taken by the learned Additional Sessions Judge was not a possible view on the material placed before him during trial. Rather, in the circumstances, that was the only plausible view.
18. The Petitioner State has failed to make out any ground for grant of leave to file the Appeal. The Leave Petition is without any merit; it is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

January 24, 2011/sa/vk