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

+ CRL.L.P. 560/2011

STATE

..... Petitioner

Through: Mr. Manoj Ohri, APP

versus

AVNISH KUMAR & ORS

..... Respondents

Through: None

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

01.12.2011

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Crl.M.A. 18667/2011

For the reasons stated in the application the delay of 53 days in filing the leave to appeal petition is condoned.

Application stands disposed of.

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1. The present leave to appeal petition is directed against the order dated 6th July, 2011 passed by Learned Additional Sessions Judge acquitting the Respondents of the charges under Section 397/392/120B/411/34 IPC read with Section 25/27 of Arms Act.

2. Learned APP for the State contends that the impugned judgment is

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based upon conjectures and surmises. Learned Trial Court has ignored the factual matrix of the case and disbelieved the clear and cogent testimony of PW1 Mishra Begum wherein she has categorically deposed against the Respondents and identified all of them, fully supporting the prosecution version. Learned Trial Court has erroneously come to the conclusion that there are contradictions in the testimony of complainant, PW2 and PW6 whereas the same are immaterial and do not go to the root of the case. The testimonies of the recovery witnesses have been ignored. The Trial Court has failed to appreciate that the accused persons have concocted a false story that they went to the house of the complainant at the relevant time for recovery of some loan given by one of them. Thus, the impugned judgment is erroneous and bad in law which is liable to be set aside.

3. I have heard learned APP for the State. Briefly the prosecution case is that one Mishra Begum used to reside with her family at house Number E-76, Vijay Vihar, Phase-I, Delhi. Incident is of 26.06.2006. Her husband and children were away and she was alone at her house. At about 1 PM, her nephew i.e. accused Javed along with his sister Sareen (aged three years) came to her house. 45 minutes later, two more persons came inside her house and snapped telephone wire and one of them gagged her mouth and

warned her not to raise any alarm. That man was armed with country-made pistol. One other person, who was armed with a knife, slapped and kicked Javed and asked him to keep mum. House was ransacked and cash amount of Rs. 90,000/-, two watches, one gold chain and other jewellery articles worn by complainant were robbed. Thereafter, both such accused fled from there with booty. Police was informed and after completion of the investigation charge-sheet was filed against the Respondents. After recording the statements of the prosecution witnesses and the accused persons under Section 313 Cr.P.C. learned Trial Judge acquitted the Respondents, which order is impugned in the present petition.

4. It would be relevant to note that PW1 Mishra Begum, complainant has deposed that initially the door was closed and when she opened the door accused Javed was found present along with his sister aged 3 years and she called both of them inside the house and served them tea and snacks. After 15-20 minutes, two more persons came inside her house. She identified both those persons. She deposed that accused Firoz was having a country-made pistol and accused Avnish Kumar was having knife. Accused Firoz put his hand on her mouth and placed the country-made pistol on her neck and asked her to keep quiet and one of them removed gold chain from her neck.

She further deposed that she herself handed over her earrings to accused Firoz and asked him not to pull the same as it might hurt her ears. Thereafter, accused Firoz put a cloth inside her mouth and tied her neck with her dupatta and both the accused, namely, Firoz and Avnish then tied her hands also. She was made to open the almirah with her hands tied and she took out one suitcase and accused Avnish and Firoz removed a wad of Rs. 50, a wad of Rs. 20 and another sum of Rs 14,000/- from the suitcase. She also deposed that either of them had disconnected the telephone. This witness in her cross-examination had denied the suggestion that she had borrowed Rs. 10,000/- from Avnish through Javed. In regard to the identification she has stated that one of the persons who came inside her house was having his face muffled and further stated that she could not tell whether their faces were muffled or not as she got afraid on seeing the arms. The contemporaneous document DD No. 23 Ex.PW9/A is the first information in regard to the incident which records that two ruffians (badmaash), who were covering their faces with handkerchiefs and one of whom was wearing black shirt and the other was wearing grey colour shirt, had robbed them at the point of revolver and knife and ruffians had locked them in a room. This document records the name of the caller as Rehman

Ali who is actually PW6 Rehmat Ali. This witness in his examination has stated that he had made call to Police from his mobile number as he had gone to meet Iqlak Ahmed husband of Mishra Begum on 26th June, 2006, where he found Mishra Begum weeping. This witness has also deposed that he did not see anybody leaving the house of complainant. In the witness box he has not stated anything in regard to the role of other co-accused and deposed that he was not in a position to identify those two persons. PW2 Iqlak Ahmed, husband of Mishra Begum has deposed that at about 1.15 PM he received a call from his wife that robbery had taken place in their house and he made a call to PW6 and instructed him to reach there immediately. Thus there is no corroboration in the testimony of PW2 Iqlak Ahmed and PW6. Furthermore PW2 has deposed that he had received call from his wife at about 1.15 PM whereas PW1 Mishra Begum has deposed that the incident had taken place at about 1.45 PM. There is no clarity in regard to the time as to when the incident took place and who had informed the Police for the first time. It is not clear that whether it was Mishra Begum or Rehmat Ali.

5. Further the presence of Iqlaq Ahmed at the spot is also doubtful as he has deposed that he reached the spot immediately and his statement had been recorded by the Police on the same day whereas PW14 SI Rajesh Kumar IO

of the case has admitted in his cross-examination that he met the husband of Mishra Begum that day and he did not remember whether he had met Rehmat Ali at the spot or not.

6. As regards the recovery of case property PW1 Mishra Begum has claimed that when she was called for TIP there were four-five chains of different designs. The TIP proceedings of the said article show that the gold chain so recovered was not properly mixed with the other gold chains which could have been useful for the purpose of identification of the looted chain. In regard to the wrist watch no bill or receipt has been produced by the prosecution and no distinctive feature of the same has been stated or displayed. The wrist watch being a common and widely available article recovery of the same cannot be used against the accused/Respondents. Furthermore according to the prosecution case CDR of Javed was also collected and the same has been admitted by PW14 but it has not been placed on record. PW16 and PW8 have given different versions in regard to the recoveries of weapons, thus the same casts doubt upon the entire proceedings.

7. Thus in view of various contradictions in the testimonies of the witnesses and the defense of the accused, the learned Additional Sessions

Judge has correctly concluded that the testimonies of the witnesses are incoherent and do not inspire confidence. Hence the prosecution has failed to prove its case beyond reasonable doubt.

8. I find no ground to interfere with the judgment passed by the Learned Additional Sessions Judge as the view taken by the learned Trial Court is a plausible view.

9. Petition is dismissed being devoid of any merit.


MUKTA GUPTA, J.

 **DECEMBER 01, 2011**
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