

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

% Reserved on: 19th January, 2012

Decided on: 30th January, 2012

+ CRL. APPEAL NO. 344/2000 AND CRL. M.B. NO.1127/2011

GANGESHWAR Appellant
Through: Mr. N.K. Handa, Advocate.

versus

STATE NCT OF DELHI Respondents
Through: Mr. Mukesh Gupta, APP for the State
with SI Bharat Singh, PS Gandhi
Nagar.

AND

+ CRL. APPEAL NO. 432/2000

JOGINDER SINGH Appellant
Through Mr. Vivek Singh Attri, Adv.

versus

STATE NCT OF DELHI Respondents
Through: Mr. Mukesh Gupta, APP for the State
with SI Bharat Singh, PS Gandhi
Nagar.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these appeals, the Appellants lay a challenge to the common impugned judgment dated 9th June, 2000 convicting the Appellants for the

offence punishable under Section 395 IPC and the Appellant Gangeshwar for Section 397 IPC as well and the order on sentence dated 12th June, 2000 whereby both the Appellant have been directed to undergo Rigorous Imprisonment for a period of five years and to pay a fine of Rs. 1,000/- each for offence under Section 395 IPC and in default of payment of fine to further undergo Rigorous Imprisonment for a period of three months each. Further the Appellant Gangeshwar has been directed to undergo Rigorous Imprisonment for a period of seven years for offence punishable under Section 397 IPC.

2. Learned counsel for the Appellant Gangeshwar contends that there are contradictions in the testimony of PW1 Alka Jain. On one hand she states that she can identify the four persons who entered her house and on the other hand she states that the faces of the persons were covered by the handkerchief. The Appellants refused to undergo TIP as admittedly they were shown to the witnesses in the police station on the next morning after the incident. Thus even the learned Trial Court returned the finding that since the accused persons were shown in the police station, no adverse inference for refusal of TIP can be drawn against them. PW5 the only independent witness purported to be the witness of recovery, has not supported the prosecution case. In his cross-examination he has stated that the police only took his signatures on written and blank papers and he had not joined the investigation. Admittedly at the place of the alleged incident, a factory was being run on the ground floor and part of the first floor and on the remaining part of the first floor, the family of the Complainant was residing. It is stated that five-six persons were there on the ground floor in

the factory. Further the area is thickly populated and despite this fact nobody came forward to help nor has any independent witness been joined. No charge under the Arms Act was framed. Learned Trial Court returned the finding that the recovery was not reliable. It further held that all the accused persons were arrested on 8th January, 1987, however, they were shown to be arrested on 10th January, 1987 at the instance of Joginder Singh and thus in view of this fabricated evidence, the police officer's testimony was not reliable. The learned Trial Court in fact initiated proceedings under Section 340 Cr.P.C. against the Investigating Officer. Reliance is placed on *Raj Kumar @ Raju vs. State of Uttaranchal*, 2008 (3) RCR (Crl.) 602; *Dilawar Singh vs. State of Delhi*, 2007 JT (10) SC 585; *Rampal Pithwa Rahidass and others vs. State of Maharashtra*, 1994 Cri.L.J. 2320 (SC); *State of Rajasthan vs. Netrapal and others*, 2007 Cri.L.J. 1783; *Atar Singh vs. State of U.P.* 2003 Cri.L.J 676; *Mohan Girdhar Singh vs. State of Maharashtra*; 2007 Cri.L.J. 3854; *Balik Ram vs. State*, 1983 Cri.L.J 1438; *Rafikul Alam and others vs. State of West Bengal*, 2008 Cri.L.J. 2005; *Raja vs. State*, 1986 Cri.L.J. 285; *Kishan Pandit and others vs. Govt of NCT of Delhi*, 2009 V AD (Delhi) 622; *German Singh and others vs. State of Punjab*, 2005 (1) RCR (Crl) 817; *Parlhad vs. State of Haryana*, 2007 (3) RCR 387; *Willson Abraham Chouriappa vs. State of Maharashtra*, 1995 Cri. L.J 4042; *Karan alias Baasha Shyam Pawar vs. State of Maharashtra*, 2007 Cri.L.J 2573, *Manik Shankarrao Dhotre and ors vs. State of Maharashtra*, 2008 Cri.L.J. 1505 and *Shambu and Anr. vs. State of Himachal Pradesh*, 2007 Cri.L.J 3819.

3. On behalf of the Appellant Joginder it is contended that the Appellant was the servant of the Complainant. It is the case of the Complainant herself that they were watching television and somebody knocked the door. Since it was the duty of the Appellant to open the door, he went and opened the door. When he came after some time he informed that his uncle had come. Inadvertently as the door was not locked again, the Appellant Joginder has been held to be a part of the gang which committed the dacoity at the house of the Complainant. It is contended that the conduct of the Appellant Joginder was a normal conduct. He even informed that his uncle Ashok had come and merely because he forgot to lock the door and after about 10-15 minutes few persons came in the house, it cannot be said that the Appellant committed the offence with the co-accused. The conduct of the Appellant at best raises suspicion and does not prove the guilt beyond reasonable doubt to convict him for the offence under Section 395 IPC.

4. Reiterating the contentions raised by the learned counsel for the co-accused Gangeshwar, it is contended that since only three accused have been convicted and five have been acquitted whereas one was declared PO in the absence of five or more people, it cannot be said that the Appellant committed the offence of dacoity. There is no recovery at the instance of the Appellant Joginder. The learned Trial Court erroneously held that the reply of the Appellant was evasive. A perusal of the testimony of PW1 shows that the Appellant Joginder and the other servant Ramesh PW10 remained locked in the house the entire night and Joginder was arrested on the next morning. The learned Trial Court clearly held that PW2 the Investigating Officer fabricated the evidence of the Appellants. The Appellants were not produced

within twenty four hours of arrest and kept in illegal custody for two days. Thus in view of the unfair investigation and fabrication of evidence as held by the Hon'ble Supreme Court in *Babubhai vs. State of Gujarat and ors*, 2010 (12) SCC 254 and *State of Haryana vs. Ram Singh*, 2002 (2) SCC 426 the Appellant is entitled to acquittal.

5. Learned APP for the State on the other hand contends that the conduct of the Appellant Joginder is self speaking and is relevant under Section 8 of the Evidence Act. The Appellant opened the door due to which the co-accused entered the house and committed dacoity. Further the Appellant Gangeshwar has been clearly identified by the Complainant PW1 as the handkerchief had fallen out from his face. Thus there is no infirmity in the impugned judgment as the learned Trial Court has considered all aspects of the matter.

6. I have heard learned counsel for the parties.

7. PW1 Complainant has stated that on 7th January, 1987 at about 7.00 p.m. when her husband had gone to the house of his elder brother in Gandhi Nagar, she along with her two children was present in the house. She further stated that on the ground floor of the house there was a readymade garment factory. She was watching television along with the servants Ramesh and Joginder. At about 9.30 P.M. somebody knocked at the door of the house and Appellant Joginder, who was working with her, went at the door in order to open it. He came upstairs after ten minutes. On the Complainant asking him, he informed that his maternal uncle had come. He did not disclose the name of his maternal uncle and later disclosed the name as Ashok. Ashok was also working as a pressman in their factory previously. After 10-15

minutes, 8-10 persons came at the upper floor of the house. They were having revolvers and knives in their hands. They switched on the light and directed them “Jahan Baithe Hai Wahin Baithe Rahon’ and also threatened to kill the children in case the goods were not given to them. When they were leaving the room they also threatened to kill the Complainant. Out of fear the Complainant handed over earrings, rings, four bangles, one pair of jhumki, one locket, one tika, one nath tika and ring made of gold which were lying in the almirah and four bangles and earrings which she was wearing at that time. They demanded the keys of the almirah which she handed over and they removed Rs.7,000/- currency notes, silver ornaments and one wrist watch. They confined Ramesh and Joginder in bathroom and closed the door of the bathroom. One of the person directed his associates to shoot the Complainant. On the call of Ramesh the Complainant opened the door of the bathroom and both Ramesh and Joginder came out of the bathroom. At about 11.30 P.M. her husband came to the house. Thereafter the police recorded the statement of the Complainant Ex. PW1/A on which FIR was registered. According to her the accused persons were about 20 years of age and she could identify all the accused persons in the Court. She further stated that she identified the gold jewellery which was recovered from the possession of the accused in TIP conducted in the Court of Shri P.C. Ranga, the learned Metropolitan Magistrate.

8. In the cross-examination PW1 has stated that she had seen all the four persons who had come upstairs. Thus though in the examination-in-chief it was stated that 8-10 people came on the upper floor but in the cross-examination it is stated that four persons came upstairs. She further stated

that all the persons had covered their faces with handkerchief and the handkerchief of one of them fell down. On being confronted she further stated that she did not know the person who had entered her house and had switched on the light. According to her the light of the room had been switched off by them but the outer light had been switched on. Thus from a perusal of the testimony of this witness it is evident that only four people came upstairs whose faces were covered with the handkerchief and the handkerchief of one of them fell down. Thus the Complainant had the opportunity to see only one of the accused. In her testimony before the Court the Complainant stated that Mahesh, Gangeshwar, Dinesh and one Bunty came upstairs. She stated that she could identify Gangeshwar as he was having an identification mark on his face and she had seen Gangeshwar at the time of lighting the lamp which she lighted. She does not point out that Gangeshwar was the person whose handkerchief was fallen. Thus from the testimony of this witness it is evident that firstly there is a discrepancy inasmuch as how many people came upstairs whether they were 8-10 or four. Further whether she has been able to see their faces because the faces of all of them were covered and it is only from one face that the handkerchief fell down. The Complainant had nowhere pointed out that Gangeshwar was the person from whose face the handkerchief fell down.

9. The learned Trial Court has held that since the Appellants were shown to the witnesses in the police station on the next date, an adverse inference cannot be drawn against them for their refusal to get the TIP conducted. There is no illegality in this finding of the learned Trial Court. However, as laid down by the Hon'ble Supreme Court in *Malkhan Singh vs. State of U.P.*,

2003 (5) SCC 746 test identification is only a tool in the investigation and the substantive evidence is the evidence of the identification in Court. The test identification parade provides corroboration to the testimony of the witness in Court as to the identification of accused. It was held that in appropriate cases the Court may accept the evidence of the identification in Court even without insisting on such or other corroboration. In the present case, no doubt, the identification of the Appellant Gangeshwar by the Complainant PW1 was a valid identification however, reliance thereon cannot be placed in view of the fact that as per the testimony of this witness the faces of the assailants who came to the first floor were covered and the handkerchief of only one of them fell down. It is not stated that Gangeshwar was one whose handkerchief fell down. In the absence of handkerchief having fallen down there is a bleak possibility that PW1 could have identified the Appellant Gangeshwar on the basis of identification mark. Further it was her own case that the light of the room had been switched off. The testimony of PW1 is not corroborated by the other witnesses PW10 Ramesh, the other servant who was present at the relevant time. In the absence of any corroborative evidence it would not be safe to convict the Appellant Gangeshwar merely on the basis of statement of PW1 that she identified Gangeshwar due to identification mark on his face, for the first time in Court as held in *Malkhan Singh* (Supra).

10. Further it is the case of the Complainant that both Ramesh and Joginder were in the house throughout the night and they were taken to the police station the next morning. It is the further case of PW1 that when she went to the police station on the next day morning with her brother-in-law

they found the Appellant Gangeshwar and 7-8 other accused person in the police station whom she identified. It may be noted that the case of the prosecution is that on the pointing out of the accused Joginder accused Gangeshwar was arrested from his house and recovery of one gold tika and Rs. 250/- cash was made from his possession by the police vide memo Ex. PW4/C. Thus the version of the police and the PW1 is contrary to each other. According to the police officers at the pointing out by Joginder, Appellant Gangeshwar was arrested whereas according to the Complainant Joginder was at home throughout the night and was taken to the police station only in the morning. Further on the morning of the next date when she went to the police station she found the accused person in the police station. In view of this discrepant testimony of PW1, which is contradicted on all material aspects and there being no corroborative evidence it would not be safe to base the conviction of the Appellant Gangeshwar. He is thus entitled to the benefit of doubt.

11. As regards Appellant Joginder the only evidence against him was that of his conduct. Joginder admittedly at the time of incident was at the house when somebody knocked the door, he went to open the same and after some time when he came he did not tell the name of his uncle who had come to meet him. Thereafter, after ten minutes 8-10 accused came to the house of the Complainant. The learned Trial Court has convicted the Appellant Joginder on the basis of the fact that he was in connivance with the other accused and that is why he kept the door opened which is also evident from the fact that when he came back after meeting his uncle in the first instance he did not disclose the name and on being asked he disclosed the name. It

may be noted that this conduct of Appellant Joginder certainly raises suspicion. However, for conviction, proof beyond reasonable doubt has to be adduced by the prosecution against the accused. Further the version of the police that at the instance of Joginder, the co-accused Gangeshwar was arrested is also belied by the version of PW1 who stated that throughout the night Joginder was in the house and when she went the next day she found the accused in police custody where she identified him. Thus the Appellant Joginder is also entitled to benefit of doubt.

12. In view of the aforesaid discussion, the Appellants are acquitted of the charges framed. Appellant Joginder is on bail thus his bail bond and the surety bond are discharged. Appellant Gangeshwar is in custody. The Superintendent, Tihar Jail, is directed to release the Appellant Gangeshwar forthwith, if not required in any other case.

Appeals and application are disposed of.

(MUKTA GUPTA)
JUDGE

JANUARY 30, 2012
‘vn’