

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

+ Crl. A. 408/2010 & Crl.M.B. 936/2010

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Reserved on: 22nd November, 2011

Decided on: 3rd January, 2012

NAEEM

..... Appellant

Through: Mr. Vivek Sharma, Adv.

versus

STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP for State

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal the Appellant lays a challenge to the judgment dated 11th March, 2010 whereby the Appellant and the co-accused Javed were convicted for offences punishable under Sections 394/397/34 IPC and the order on sentence dated 17th March, 2010 directing them to undergo Rigorous Imprisonment for a period of seven years and a fine of Rs. 3,000/- each for offences punishable under Sections 397/34 IPC and 394/34 IPC. The amount of fine is stated to have been paid. No appeal has been filed by co-accused Javed.

2. The brief facts of the prosecution case are that on 5th January, 2007 an information was received vide DD No. 27 that three/four persons have committed robbery in a house bearing number T-187, Gali No. 2 near Gautam Puri, Delhi and have run away from the spot. On receipt of the information ASI Jawahar Singh along with Const. Khushi Ram reached the place of occurrence of offence and recorded the statement of Ram Niwas. Amar Pal, the tenant of Ram Niwas living on the ground floor also claimed to have been robbed by the said persons. On the basis of the statement, a case was registered and

investigation was initiated. The MLC of the complainant and injured Amar Pal was also obtained. The Appellant was arrested on 16th January, 2007 on the basis of secret information and a country made pistol .315 bore loaded with live cartridges was recovered from the right side dub of his pant. Pursuant to the disclosure of the Appellant a pair of kundal was also recovered from the drawer of his dressing table. The Appellant disclosed the identity of co-accused Javed @ Bhura and Jakir. At the time of TIP, the Appellant refused to participate. Thus, the TIP of the recovered kundals only was conducted which were correctly identified by PW-2. The co-accused Javed @ Bhura was arrested by PW-13 on 12th June, 2007 in another case wherein he made disclosure about the commission of offence in the present case. Third accused Jakir however could not be apprehended. Charges were framed and trial was conducted. The Appellant and co-accused Javed were convicted under Section 394/397/34 IPC. Hence the present appeal.

3. The learned Counsel for the Appellant contends that the prosecution story is made up of concocted facts and the learned Additional Sessions Judge failed to consider the submissions of the defence Counsel at the time of deciding the case. PW1 Ram Niwas in his testimony has stated that accused took Rs. 2,000/- from his pant hanging in the room while in his statement to the police Ex.PW-1/A he stated that money was taken from the alimrah. Both PW-3 residing on the ground floor and PW-1 and PW-2 living on the first floor depose that the incident took place at 9.30 PM, which is not possible, as the same could not have taken place simultaneously at both the places. Learned Counsel states that PW-3 in his examination in chief stated that the accused had slapped him however this has not been stated in the statement recorded by the Police during investigation. TIP was refused by the Appellant because the PWs

had seen him and the co-accused in the police station. PW-1 has admitted the fact that PW-2, his wife had seen both the Appellant and co-accused Javed in the police station. PW-6A Ct. Pradeep Kumar states that a country made katta was recovered from the right side pocket of the trouser of the accused while PW-11 SI Jawahar Singh in his examination in chief states that the katta was recovered from the right side dub of his wearing pant. No steps have been taken by PW1 or PW2 to take back the recovered kundals. He states that even though PW-1 and PW-3 live in the same house, PW-1 states that he heard no alarm whereas PW-3 categorically stated that he had raised an alarm. Thus there are material contradictions in the testimonies of the witnesses and therefore the conviction should be set aside.

4. Per contra learned APP for the State contends that PW-1, PW-2 and PW-3 are material witnesses to the case and have completely supported the prosecution version. He urges that save certain minor discrepancies, the testimonies of all the witnesses are corroborative of each other. Further, since the recovery of earrings and pistol has been proved and the earrings recovered were also correctly identified by PW-2, the prosecution has proved its case beyond reasonable doubt by adducing sufficient incriminating evidence in support of its case and the appeal deserves to be dismissed.

5. I have heard the learned Counsels and perused the record. This case consists of two incidents committed by the Appellant and the co-accused in succession. The brief facts of the first incident as per the statement of PW-1 Ram Niwas are that on 5th January, 2007 at about 9:30 pm he heard a knock on the door and on opening the door three young boys aged 22-25 years entered the house. Two persons were having country made katta and one was having an ustra in his hand. One of them pointed the katta towards him and demanded Rs.

5,000/- . When he showed his inability to pay they took out the keys of the almirah from the pocket of his pant hanging on the wall and removed Rs. 2,000/- from the almirah. They also removed one pair of kundal belonging to his wife who is also a witness. Thereafter they fled after hitting PW1 on his head with the butt of the katta. His statement is corroborated by PW-2, his wife in her testimony. Both PW-1 and PW-2 identified the Appellant and Javed in Court. The mere fact that after eight months of the incident PW-1 during his examination in chief stated that the money was taken from his pant pocket instead of the fact that keys were taken from the pocket and then money from the almirah is a minor contradiction which does not go to the root of the prosecution case and cannot invalidate the same. When confronted with the discrepancy during cross examination PW-1 goes on to explain that the Rs. 2,000/- were of currency notes in the denomination of Rs. 100/- each and the said money was kept in the top portion of the almirah under the clothes.

6. Similarly the facts of the second incident as per PW-3 are that on 5th January, 2007 at about 9:30 pm, three people entered his house which was not locked. Two of them had kattas and the third had a razor. They demanded Rs. 2,000/- from him. When he stated that he did not have the money he was slapped by one of the persons. Then the other associate put a katta on his chest and removed Rs. 1,500/- from his gullak and the person with the razor caused injury on his ear. The persons then left bolting him from outside. He also identified both the Appellant and Javed in Court.

7. Learned Counsel for the Appellant contends that both the alleged incidents are said to have been committed at 9:30 pm which is not possible. The said contention is devoid of any merits as no person can be expected to know the exact time when an incident occurs and only an approximate time can be

provided in evidence. The incidents took place in succession in the same house without much gap of time. Thus the approximate time given by both the PWs is bonafide.

8. PW-6A had deposed that the katta was recovered from the right side pocket of the Appellant instead of the right side dub. PW-6A was not cross examined and therefore his testimony has gone unchallenged. PW-10 and PW-11 have deposed in their examination in chief that the pistol was recovered from right side dub. This is not a material contradiction as contended, as minor variations in the testimonies of the witnesses are bound to occur.

9. The Courts cannot expect the testimonies of the witnesses to be without any discrepancies. Considering the time taken during investigation and then the Trial, the witnesses are bound to have some lapse in memory. The Court has to observe whether the error or discrepancy is grave enough to discredit the testimony of the witness in its entirety or not. In the present case the mere fact that PW-3 forgot to mention having been slapped in his statement to the police or that PW-1 did not hear the alarm raised by PW-3 cannot be said to be material improvement or conduct warranting the prosecution case unreliable.

10. As regards the plea of the Appellant for having refused TIP, it may be noted that nothing has come on record to show that PW1 or PW3 saw the Appellant in the Police Station. Even as regards the seeing of PW2 is concerned, the statement of PW1 that PW2 saw the accused is hearsay based on the statement of PW2 and thus not admissible in evidence. Nothing has been stated in this regard by PW2. Thus, adverse inference is required to be drawn against the Appellant for refusing the test identification parade.

11. PW-1, PW-2 and PW-3 have stated that there were three persons who had committed the offence. They had further stated that two of the accused had

kattas and one had a razor. They had even correctly identified the two accused on trial in Court. From the testimony of PW1 and PW2 it is evident that the Appellant was armed with a razor and while taking the kundals the razor was put on the neck of PW2. Thus the ingredients of Section 397 IPC are clearly satisfied.

12. The police have recovered a katta from the Appellant's person and the stolen kundals based on the disclosure made by him. The kundals recovered were rightly identified by PW-2 during TIP and in the Court proceedings. The prosecution has therefore proved its case beyond reasonable doubt.

13. Thus, I find no merit in the present appeal. The appeal and application are dismissed. The Appellant is already in custody, he will undergo his remaining sentence.

(MUKTA GUPTA)
JUDGE

JANUARY 03, 2012
'pj'