

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

+ Crl. A. No. 606/2011 and Crl.M.B. 833/2011

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Reserved on: 1st December, 2011

Decided on: 4th January, 2012

ISHTKAR @ INTJAR

..... Appellant

Through: Mr. Rajender Yadav, Adv.

versus

STATE GOVT. OF NCT OF DELHI

..... Respondents

Through: Mr. Manoj Ohri, APP for State with
SI Sunny Kumar PS Adarsh Naggar.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal the Appellant lays a challenge to the impugned judgment and order on sentence dated 16th March, 2011 passed by the Learned Additional Sessions Judge convicting him for offences under Sections 395/397 IPC and sentencing him to undergo Rigorous Imprisonment for seven years and fine for a sum of Rs. 5,000/- and in default of payment of fine to undergo further three months S.I.

2. Learned counsel for the Appellant contends that the complainant did not produce any evidence to show that he was in possession of jewellery and cash. There are material contradictions in the testimony of the complainant PW5 and his wife PW2. PW2 has stated that Rs. 20,000/- were stolen from her room, however, PW5 states that Rs. 15,000/- were stolen. As per PW5 the accused were between 18-15 years of age whereas the Appellant is more than 28 years. The presence of the Appellant on the spot has not been proved. No recovery of the cash or jewellery allegedly robbed has been

effected at the instance of the Appellant. Besides the Appellant no other person was charge-sheeted or tried for the offence. The recovery of the country-made pistol cannot be used against the Appellant as the same was not put to the witnesses. The incident is of the intervening night of 2nd and 3rd September, 2007 at 1.30 AM when the dacoity is allegedly committed with the help of arms and cash & jewellery were removed. The Appellant was arrested on 3rd September at 4.30 PM. The manner and style of arrest of the Appellant is shrouded in mystery. Further the witnesses have stated that the Appellant was arrested from G.T. Karnal Road, By-Pass, however as per the arrest memo the Appellant was arrested from the outer Ring Road slope. The relevant witnesses like the mother of the complainant were not produced. Nobody except the husband and wife were examined, despite the entire family including the parents, elder brother's wife being present. Further no public witness has been examined. There are further contradictions between the testimonies of PW2 and PW5. One states that three mobile phones have been stolen and the other states that four mobile phones have been stolen. Further the complainant has not produced the bills of the jewellery showing the ownership.

3. Learned APP for the State on the other hand contends that the country-made pistol has been identified by PW9 S.I. Srinivas. When the Appellant was running away he fell down. Consequently his purse fell down in which I-Card and photos of the Appellant were available. The incident was committed at around 1.30 AM in the night and a PCR call in this regard was made at 2.12 at night. The purse has been identified by the witnesses which was seized by seizure memo Ex.PW5/B. Even the rukka mentioned about

the purse. The prosecution has proved its case beyond reasonable doubt and the appeal is liable to be dismissed.

4. I have heard learned counsel for the parties. The prosecution case in nutshell as per the complainant PW-5 Ravinder Garg is that on 2nd September, 2007 at about 12/12.30 mid-night he was sleeping along with his wife and two children in the rear side room of his house whereas his parents and the sister-in-law with her two children were sleeping in the front room and another room of the house. At about 1.00 AM on 3rd September, 2007 he heard the noise of checking of the almirahs. He got up and saw 7-8 boys were present in the room. One boy was standing at the gate in the corridor of his house. Those boys checked his Godrej almirah and took out the articles from it. In the meantime his wife and children also got up. Out of those boys, one boy was having a pistol, the other an iron rod and remaining boys were having knives in their hands. He identified the Appellant, who was present in the Court. Those boys including the Appellant asked his wife to take off the gold articles she was wearing, on the pointing out of knives and other weapons, which she removed and gave them. Those boys including the Appellant got removed kadas, a pair of bali, a gold nose pin of his wife. They also robbed Rs. 15,000/- cash from almirah, wrist watch and four mobile phones. Thereafter those boys stated that the complainant had brought Rs. 3 lakhs on that day and the same should also be handed over to them. On the complainant stating that whatever he had was taken away by them, those boys including the Appellant bolted the complainant and his family inside the room. After some time the complainant broke the net of the door (jaali ka darwaza), came outside and rang number 100. On

checking, they found Rs. 50,000/- and some silver utensils were removed from the Diwan lying in the room of his mother. One purse was also found lying in the room of the complainant which contained one voter I card, some photographs, one E Trans card, 23 visiting cards, one small diary and Rs. 20/30. He identified the purse which contained the election ID card & other things to be the one which fell down when the Appellant was fleeing with other accused. He handed over the purse with the articles to the Police who recorded statement Ex.PW-5/A on which the FIR was registered.

5. Similarly, PW-2 the wife of the PW-5 has also stated that 7/8 boys came and they put her and her husband into the fear of death on the point of pistols and knives and threatened both of them. Those boys put knife on the person of her husband and got removed her 4 gold bangles, one gold set and two gold rings. According to her they also looted cash, silver jewellery and articles like silver coin, glasses etc., from her house. She identified the Appellant as one of the associates who had come on the said night and looted gold and silver jewellery articles from her and her husband and threatened them to kill on point of knives and pistol. She further identified a gent's purse containing one E Trans card, 23 visiting cards, one small diary, one election I-card of Appellant Ishtkar and five passport size photographs which had fallen down when the Appellant along with the co-accused was fleeing from the spot.

6. A perusal of the testimonies of the witnesses show that the Appellant along with the co-accused was armed with deadly weapons and by use of the same they threatened the complainant and his wife to deliver them the gold articles, cash, mobile phones etc. A lot of emphasis has been laid by the

learned counsel for the Appellant on the fact that besides the husband and wife no other witness has been examined. It may be noted that in the present case the initial incident took place inside the room of complainant and his wife which was not witnessed by the sister-in-law or the parents and, thus, they could not have been eye-witnesses to the incident. There was thus no need to examine them as such. Further, while fleeing from the spot the Appellant's purse fell down which also had his I-card and his photographs besides other things. This fact is also mentioned in the rukka Ex.PW-5/A. Thus, there is sufficient evidence on record to connect the Appellant with the offence committed. Merely because the Police has not been able to arrest the other co-accused and there is no recovery at the instance of the Appellant of the looted articles, it cannot be said that the Appellant was not involved. There is no reason whatsoever for the complainant and his wife to have falsely implicated the Appellant. Further though there is a minor contradiction as regards the place from where Rs.50,000/- were robbed from the house, as PW5 says that the same were removed from the Diwan of his mother, however PW2 says from the almirah, however this is a minor contradiction which does not go to the root of the matter. Further, though it is not specifically stated that with which weapon the Appellant was armed but the witnesses have clearly stated that all accuseds were armed with pistol, and knives. Thus it is clear that the Appellant also used a deadly weapon in order to commit dacoity. Recovery of the robbed articles is not a *sine qua non* for conviction for offence under Sections 395/397 IPC. The conviction can be based on the cogent and reliable testimony of the eye-witnesses.

7. As regards the order on sentence, the minimum sentence that has to be awarded for offence under Section 397 IPC is seven years imprisonment which has been awarded by the Learned Additional Sessions Judge. The sentence cannot be reduced further.

8. I find no infirmity in the impugned judgment and order. Appeal and application are dismissed. The Appellant would undergo the remaining sentence.

(MUKTA GUPTA)
JUDGE

JANUARY 04, 2012
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