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

+ CRL.A. 1009/2010

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Decided on 10th December, 2012

NITIN KUMAR Appellant

Through: Mr. Anup Bhambhani and Ms.
Nisha Bhambhani, Advs.

Versus

THE STATE (NCT OF DELHI) Respondent

Through : Ms. Fizani Husain, APP

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

For order see Crl.A.No.1008/2010.


A.K. PATHAK, J.

DECEMBER 10, 2012

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

+ CRL.A. 1008/2010

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Decided on 10th December, 2012

VIPIN KUMAR

..... Appellant

Through : Mr. Bhupesh Narula, Adv.

versus

THE STATE OF THE NCT OF DELHI Respondent

Through : Ms. Fizani Husain, APP

AND

CRL. A. 1009/2010

NITIN KUMAR

..... Appellant

Through: Mr. Anup Bhambhani and Ms.
Nisha Bhambhani, Adv.

Versus

THE STATE (NCT OF DELHI) Respondent

Through : Ms. Fizani Husain, APP

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.(ORAL)

1. Appellants have been convicted under Sections 392/397/394 IPC; sentenced to undergo rigorous imprisonment for five years with fine of ₹2,000/- (Rupees Two Thousand Only) each under Sections 392/34 IPC and in default of payment of fine to undergo

8/9

simple imprisonment for one month; sentenced to undergo rigorous imprisonment for seven years with fine of ₹2,000/- (Rupees Two Thousand Only) each under Sections 397/34 IPC and in default of payment of fine to undergo simple imprisonment for one month; sentenced to undergo rigorous imprisonment for five years with fine of ₹2,000/- (Rupees Two Thousand Only) each under Sections 394/34 IPC and in default of payment of fine to undergo simple imprisonment for one month. Benefit of Section 428 Cr.P.C. has also been accorded to the appellants.

2. Aggrieved by their conviction as also the sentences handed down to them by trial court, appellants have preferred the above noted appeals, which have arisen from the same judgment, incident and the FIR and are disposed of together.

3. Prosecution story as unfolded is that on 21st July, 2007 PW1 Kiran Devi was present in her house along with her daughter aged about ten months at first floor of House No. H-59, Harkesh Nagar, Okhla Industrial Area, New Delhi, when at about 2:30 PM appellants Nitin Kumar and Vipin Kumar (whose names were disclosed after their apprehension) along with their third

8/10

accomplice came there and asked as to whether any room was available on rent; as she was conversing with them, appellant Nitin Kumar took out a katta, appellant Vipin Kumar took out an open knife and their third accomplice took out a chhura and forcibly entered in the room and bolted the door; appellant Nitin Kumar kept katta on her neck and threatened her that in case she raised alarm, she would be killed. Appellant Vipin Kumar put the knife on the neck of her child and said that she should handover all the valuables to them, failing which child would be killed. Vipin Kumar forcibly removed bangle and silver anklet from the person of child and when Kiran Devi resisted he caused injuries on her hand. Nitin Kumar forcibly removed the gold chain from the neck of Kiran. Third accomplice of the appellants took out the purse and a gold chain from the attachy of her husband. In the meanwhile, her husband Girish Nandan (PW6) arrived there, got door opened and raised alarm. Landlord Swaroop Singh and their neighbour Vinod Kumar arrived there and tried to apprehend the appellants at which appellant Vipin Kumar caused injuries on his left hand. Vinod with the help of two policemen, namely,

10/11

Constable Balbir and Constable Anil, who were present near the spot, apprehended the appellants while their third accomplice succeeded in escaping after throwing the chhura. Anklets, bangles and knife were recovered from Vipin Kumar; country made pistol and gold chain were recovered from Nitin Kumar.

4. Information was sent to Police Post Okhla Industrial Area, pursuant whereof DD No. 19 was recorded and handed over to HC Bijender Singh, who along with Constable Onkar Singh reached the spot. He prepared sketches of knife, chhura and country made pistol in the presence of Kiran Devi, Girish Nandan and Vinod Kumar. Katta recovered from Nitin, was found loaded with live cartridges. Its sketch was prepared. Anklet, bangles and knife were recovered from the appellant Vipin. All the recovered articles were separately sealed and taken in possession by Head Constable Bijender Singh. Head Constable Bijender Singh recorded statement of Kiran Devi and prepared rukka and sent the same to Police Station per hand Constable Onkar for registration of FIR. Accordingly, FIR was registered. In the meanwhile, SI Manoj Kumar reached the spot on receiving information about the

12

incident and took over further investigation. He prepared site plan Ex. PW16/A, arrested the appellants, sent Kiran Devi and Vinod Kumar to hospital for medical examination. Katta was sent to FSL and as per the report of FSL it was found in working condition.

5. After completion of investigation, charge-sheet was filed in the Court of Metropolitan Magistrate, who after completing the formalities committed the case to Sessions Court, since offence under Section 397 IPC is exclusively triable by the Sessions Court. Charges under Sections 392/394/397/34 were framed against the appellants separately on 21st February, 2008 to which they pleaded not guilty and claimed trial.

6. Prosecution examined 17 witnesses in all in order to prove its case. Material witnesses in this case are PW1 Kiran Devi, her husband PW6 Girish Nandan, PW4 Vinod Kumar, PW7 Swaroop Singh, PW2 Constable Balbir Singh, PW12 HC Bijender Singh and PW16 SI Manoj Kumar. All these witnesses had an occasion to see the appellants and they are material witnesses. Other witnesses are formal in nature.

#13

7. Trial court has found the testimonies of material witnesses, that is, PW1 Kiran Devi, PW6 Girish Nandan, PW4 Vinod Kumar, PW7 Swaroop Singh, PW2 Constable Balbir Singh, PW12 HC Bijender Singh and PW16 SI Manoj Kumar to be trustworthy and reliable and has concluded that the appellants had committed robbery in the house of PW1 Kiran Devi and PW6 Girish Nandan; while committing robbery appellants not only caused injuries on the persons of PW1 Kiran Devi and PW4 Vinod Kumar by using katta and knife but also in making an attempt to escape from the spot after committing the robbery. MLCs of PW1 Kiran Devi and PW4 Vinod Kumar corroborated their version that they had sustained injuries at the hands of appellants. As regards recovery of anklet, bangles and gold chain is concerned, these have also been taken as a corroborative piece of evidence.

8. I have heard learned counsels as well as learned APP and have perused trial court record carefully. I am of the view that the trial court has rightly convicted appellants under the aforesaid provisions by accepting the statements of aforesaid witnesses as trustworthy and reliable.

13/14

9. PW1 Kiran Devi has categorically deposed that on 21st July, 2007 at about 2:30 PM she was present in her house along with her infant daughter, namely, Anshu. Appellants along with their third accomplice came there and enquired as to whether any room was lying vacant. She replied that one room was available for letting out upstairs. Appellants stayed there while their third accomplice went upstairs. Thereafter, Nitin Kumar took out a chhura, which he had concealed underneath his shirt while Vipin Kumar took out a knife; they entered inside the room where she was sitting and bolted the door from inside; they threatened her that in case she raised alarm she would be killed; Vipin Kumar took the infant child in his possession and pointed his weapon towards the child and asked her to handover the valuables; Nitin Kumar also pointed a country made pistol towards her. They also took out a purse containing ₹5,000/- (Rupees Five Thousand Only) as well as one pair of silver anklet, one gold ring, one gold chain and a pair of gold earrings from the attachy. Silver anklets and silver bracelet were also removed from the person of child. In the meanwhile, her husband arrived there. Appellants tried to assault her husband

15

when she gave a push to Nitin Kumar. She also raised alarm at which landlord Swaroop Chand and his brother Manoj Chand along with one police official arrived there. Many people collected there, out of which one person from the locality, namely, Vinod Kumar tried to save her husband and sustained injuries in the process. Nitin Kumar and Vipin Kumar were apprehended at the spot; whereas their third-accomplice succeeded in running away. Police arrived there and took search of the appellants and recovered one pair of anklets, bangle and one gold chain besides the weapons of offence. She has correctly identified all these articles in Court. She has also identified her signatures on her statement recorded by the police under Section 154 Cr.P.C. (Ex. PW1/A). She has also identified her signatures on seizure memo of anklet and bangles (Ex. PW1/B) and seizure memo of gold chain (Ex. PW1/C). She has also identified her signatures on the sketches of knife, dagger and katta being Ex. PW1/D to Ex. PW1/F. She has also identified her signatures on the seizure memos of weapons of offence, that is, Ex. PW1/G to Ex. PW1/I. Her testimony on material points has remained unshattered in her cross examination and has rightly been

15/6

accepted by the trial court, inasmuch as it has been corroborated by other witnesses.

10. PW6 has deposed that on 21st July, 2007 when he returned home he found appellants present there. They started manhandling him in order to escape. However, they were apprehended by Vinod Kumar and Swaroop along with weapons of offence and robbed property, that is, silver anklet, bangle and gold chain. He has identified his signatures on recovery memos, sketches etc. His statement on material points has also remained unshattered and no discrepancy therein could be pointed out by the learned counsels. PW7 Swaroop Singh is the landlord. He has fully corroborated the above witnesses regarding apprehension of appellants at the spot. He has deposed that at about 2:45 PM or 3:00 PM on 21st July, 2007 he was present in his house when he heard noises coming from the house of his tenant, PW6 Girish Nandan. He reached there and saw appellants present there. They were apprehended by PW4 Vinod Kumar, PW2 Constable Balbir and Constable Anil. Vipin was having a buttondar open knife in his right hand; whereas Nitin was having a katta in his hand. PW4 Vinod Kumar has

16/17

corroborated the other witnesses. He has deposed that he was working in Delhi Police. On the date of incident he was on leave and present in his house. At about 2:45 PM he heard shouts of "bachao-bachao" from his neighbouring house of Shri Manoj Kumar and Shri Swaroop Singh, that is, H-59, Harkesh Nagar, New Delhi. He immediately went there when he was told by Girish Nandan and Kiran Devi that three boys had robbed their gold and silver jewelry on the point of knife and had gone towards the market. He chased them and apprehended them with the help of Constable Balbir and Constable Anil, who were coming from the opposite direction. He has also deposed about the recovery of knife, pistol and robbed articles, that is, silver anklets, bracelet and gold chain. He has also identified his signatures on the recovery memos, sketches of weapons of offence etc. MLCs Ex. PW4/A and Ex. PW5/A of Vinod Kumar and Kiran Devi support their versions that the appellants had caused injuries on their person during the incident and making their escape good. MLC of Vinod Kumar indicates that he had sustained two injuries on his left hand between thumb and index finger while PW1 Kiran Devi had

12/18

sustained injuries on her right wrist and middle finger of right hand. PW 2 constable Balbir has also deposed in line with aforesaid witnesses as regards apprehension of appellants. He has deposed that he along with Constable Anil was on patrolling duty in the area of Harkesh Nagar on 21st July, 2007 when at about 2.45 PM, he heard noises coming from H-59 (1st Floor), Harkesh Nagar. He, with the help of Constable Anil and Constable Vinod, apprehended Nitin and Vipin while their third accomplice Sanjay succeeded in escaping. He has also talked about recovery of weapons of offence and the robbed articles inasmuch as he has identified his signatures on the sketches, recovery memos and arrest memos.

11. Discrepancies as pointed by the learned counsels for the appellants in the statements of PW4 vis-à-vis PW1 and PW6 are minor in nature and may have crept in due to lapse of time between the occurrence of the incident and recording of their statements. Statements of the witnesses were recorded after two years of the incident. It is not the case of prosecution that appellants were apprehended in the midst of robbery. Rather, case is that they were

apprehended when they were making an attempt to escape from the spot; if that is so, their apprehension at a distance of 30-40 meters away from the spot will not make much difference, more so, when all the witnesses have stated in unison that the appellants were apprehended immediately after the incident, while they were making an attempt to escape. That apart, statement of PW 4 as against consistent statements of other relevant PWs will not be sufficient to discredit whole prosecution story only on this point. Fact remains that appellants were apprehended while they were attempting to escape from the spot. Not only the weapons of offence used in committing robbery but the robbed articles were recovered and seized at the spot, vide seizure memos in the presence of aforesaid witnesses, also strengthens the statements of abovementioned witnesses.

12. Learned counsel for the appellant has vehemently contended that PW1 is not a trustworthy and reliable witness and her testimony has been wrongly accepted by the trial court. Her deposition in court is inconsistent with what she had stated in the FIR. While deposing in Court she has stated that three boys came

19/20

inside the house and asked her as to whether any room was available for letting out. On her saying that one room was available upstairs, Nitin and Vipin stayed downstairs while third accused went upstairs. Thereafter, Nitin and Vipin committed robbery. However, in her statement Ex. PW1/A she had stated that all the three boys came at about 2:30 pm and asked her as to whether any room was lying vacant. Immediately thereafter, all the three boys, who were armed with desi katta and knife, entered into the room and bolted the same from inside and thereafter, committed robbery. She had also assigned role to Sanju of taking husband's purse containing Rs.500/- and one gold chain from his briefcase. However, while deposing in Court she has not assigned any role to the third accomplice; instead she has deposed that accused persons opened the briefcase and took out Rs.500/- from her husband's purse besides silver anklet, one ring, one gold chain and a pair of earrings. It is further contended that besides taking an inconsistent stand she also improved her version with regard to the robbed articles. I do not find much force in the contention of learned counsel for the appellants. The discrepancies as pointed

out by the learned counsel are minor in nature and there is probability of such discrepancies appearing in the statement of PW1 since the same was recorded in court after more than two years of the incident. Memory of a person may fade with the passage of time and for this reason a person may waiver in narrating the incident on certain points which by itself would not be sufficient to discard the testimony of witness as a whole. As regards the roles of appellants, PW1 Kiran has been consistent and merely because she has remained silent about third accused appellants cannot derive any benefit therefrom since appellants had been apprehended at the spot itself, inasmuch as robbed articles were recovered from them. Statement of a witness has to be read as a whole. A holistic reading of statement of PW1 clearly indicates that she had stuck to her statement as regards roles played by the appellants are concerned, same are consistent. Learned counsel for the appellants has further contended that the statements of witnesses are discrepant as regards the apprehension of appellants. As per PW1 Kiran, PW2 Const. Balbir Singh, PW6 Girish . Nandan and PW7 Swaroop Singh, appellants were

2/22

apprehended at the spot itself; whereas PW4 Vinod Kumar has stated that when he reached the first floor of House No. 59, Harkesh Nagar, New Delhi PW6 Girish Nandan and his wife PW1 Kiran and Swaroop Chand, who were already present there, told him that the three boys had committed robbery and had gone towards the market road. He chased them. Const. Anil and Const. Balbir were coming from the opposite side. Appellants were apprehended while third accomplice succeeded in running away after throwing a big chura. In his cross examination, he stated that appellants were apprehended at a distance of about 30/40 meters away from the place of occurrence. Thus, it is contended that there is serious doubt about appellants having been apprehended at the spot. I do not find much force in this contention either. PW1, PW2, PW6 and PW7 have deposed that appellants escaped by showing weapon of offence but were apprehended at the spot. PW4 has deposed about appellants having been apprehended within 30/40 meters from the spot which distance is not much. Since the appellants were making an attempt to escape there is every possibility of their having travelled 30/40 meters away from

22.23

the spot. It is not the case that the appellants were successful in escaping and were apprehended later on. While appellants were committing robbery husband of PW1 arrived there and raised alarm which attracted the attention of PW4 and PW7 who would have taken some time to arrive at the spot and in the meanwhile, appellants could have moved a little away from the spot before they were apprehended. In these facts, if other witnesses have stated that appellants were apprehended at the spot and one witness has stated that appellants were apprehended at a distance of about 30/40 meters away from the spot, it will not make much difference as it is a matter of perception of an individual about the "spot". However, the fact remains that appellants were apprehended and robbed articles were recovered from them; on these points all the witnesses have deposed in line with each other which shows the appellants' complicity in the commission of crime. Appellants cannot get away by creating confusion on this trivial point. Such minor abrasions have to be ignored and the statements of the witnesses have to be read as a whole, brushing aside minor and trivial discrepancies.

231
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13. In Vijay @ Chinee versus State of Madhya Pradesh 2010 (8) UJ SC 3727, Supreme Court has held that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the Court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. In State of U.P. versus M.K. Anthony AIR 1985 SC 48, Supreme Court has held as under:

“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is

24
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against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer”.

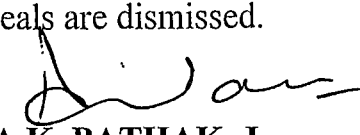
14. In State versus Saravanan and Anr. AIR 2009 SC 152, Supreme Court has held that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to

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26

reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof; in normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, itself would not prompt the court to reject the evidence on minor variations and discrepancies.

15. In my view, the finding returned by the trial court is in consonance with the evidence led by the prosecution and appellants have been rightly convicted. As regards sentences awarded to the appellants, the same are also proper and proportionate to the crime committed by the appellants and requires no interference.

16. For the foregoing reasons, both the appeals are dismissed.


A.K. PATHAK, J.

DECEMBER 10, 2012

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