

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

+ CRL.REV.P. 549/2008 & Crl. M.B. No. 1259/2008

% Reserved on: 23rd March, 2012

Decided on: 13th April, 2012

PANKAJ @ JAGGI @ DIMPLE

..... Petitioner

Through Mr. Baldev Raj & Mr. Jitender Singh,
Advocates

versus

STATE

..... Respondent

Through: Mr. Manoj Ohri, APP for the State
with SI Jagan Nath Prasad.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner seeks setting aside of order dated 22nd September, 2008 passed by the learned Additional Sessions Judge, upholding the order of conviction passed by the learned Metropolitan Magistrate and modifying the sentence awarded to the petitioner from rigorous imprisonment of six months to four months.

2. Learned counsel for the petitioner contends that the learned courts below failed to appreciate the facts of the case and passed the impugned judgments on conjectures and surmises. Learned appellate court failed to appreciate that during the cross-examination, PW1 has categorically stated that one generator set and a bicycle were stolen from his house however he was not having any document to prove the ownership of both the articles nor any effort was made by the investigating officer to prove that the alleged recovered articles actually belonged to the Complainant. There are material

contradictions in the testimonies of the prosecution witnesses. Learned Appellate Court has further failed to appreciate that all the documents, site plan, seizure memo, pointing out memo could not be proved during the trial. The petitioner was initially arrested in case FIR No. 11/92, PS Kirti Nagar and thereafter arrested in the present case (FIR No. 447/1991). Cross-examination of PW7 SI Rameshwar Dayal could not be conducted due to his unavailability. Thus it is contended that the testimony of this witness cannot be read in evidence. Hence the prosecution has not been able to prove its case against the petitioner. The petitioner has no criminal antecedents and is not involved in any other case except the present one. The impugned orders of the learned courts below being illegal are liable to be set aside.

3. On the other hand learned APP for the State contends that the Petitioner is involved in other offences. The case property was already seized and handed over on superdari to PW1 who identified the same in the Court. Further during recording of the testimony of PW3 and PW6, no objection was raised by learned defence counsel as regards non-production of the case property. The learned Courts below have correctly appreciated the evidence placed on record and convicted the petitioner. The present petition has no merit and is liable to be dismissed.

4. I have heard learned counsel for the parties and perused the record.

5. Briefly the facts of the case are that on 17th September, 1991 Complainant Gian Singh got FIR NO. 447/1991 under Section 380/411/34 IPC registered at PS Paschim Vihar. The complainant in the FIR had stated that in the intervening night of 16/17th September, 1991 one generator set (Birla Yamaha) Engine No. CD 910 8141 and one bicycle Hero Ranger (Red

Colour) were stolen from his house. Subsequently the petitioner and co-accused Sukhbir were arrested in another case FIR No. 11/1992 registered at PS Kirti Nagar. During the investigation of the said case, the petitioner and the co-accused disclosed the commission of the present offence and at the pointing out of the accused persons, the Birla Yamaha generator set and Hero Ranger Bicycle were recovered from the house of petitioner Pankaj @ Jaggi. Thereafter the petitioner was arrested in the present case. After investigation, charge sheet was filed. After recording the statement of prosecution witnesses and statement of accused persons under section 313 Cr.P.C., the learned Metropolitan Magistrate vide judgment dated 18th April, 2007 convicted the petitioner and co-accused Sukhbir Singh for offences punishable under Section 411 IPC and vide order on sentence dated 24th April, 2007 sentenced them to undergo Rigorous Imprisonment for six months and pay a fine of Rs. 400/- each, in default of payment of fine to further undergo simple imprisonment for two days. Aggrieved by the judgment passed by the learned Metropolitan Magistrate, the petitioner and the co-accused Sukhbir preferred an appeal. Learned Additional Sessions Judge vide judgment dated 22nd September, 2008 while upholding the conviction of the petitioner and modifying the quantum of sentence awarded to him from Rigorous Imprisonment for six months to Rigorous Imprisonment for four months, acquitted the coaccused. These judgments of the learned Additional Sessions Judge and learned Metropolitan Magistrate are impugned in the present petition.

6. PW1 Gian Singh, complainant in his testimony has deposed that on 16th September, 1991 he kept one generator set make Birla Yamaha and one

bicycle make Hero Range red colour in the varrandah of his house. On 17th September, 1991 when he got up in the morning he found both the articles missing from his house. He went to the police station and lodged the complaint. Thereafter on 5th January, 1992 police officials of Police Station Kirti Nagar came to his house along with the accused and examined the spot on the pointing of both the accused persons. This witness identified the generator and bicycle in police station and the same were released to him on superdari on 8th January, 1992. In his cross-examination this witness has stated that he had not deposited the receipt of purchase of bicycle. He had stated that he had seen the accused persons first time only when they were brought to his house by police officials and he had not seen the accused persons in his locality or anywhere else prior to that day.

7. PW3 H.C. Ashok deposed that on 5th January, 1992 he was posted at PS Kirti Nagar. On that day he along with SI Nathu Singh, HC Sidh Nath and Ct. Angrej Pal was on patrolling duty when one secret informer informed the investigating officer that two persons were about to come to sell the stolen stereos at about 6:00 p.m. At about 6:15 p.m., the investigating officer formed a raiding party near Wadhwa Ice Depot, Ramesh Nagar and on the pointing out of secret informer, two accused persons going towards Ramesh Nagar Mill Market having two bags were apprehended. On checking, two stereos were recovered from the possession of accused Sukhbir and two more stereos were recovered from the possession of accused Pankaj. On interrogation they disclosed that the stereos were stolen from the area falling under the jurisdiction of PS Paschim Vihar. Both the stereos were taken into police possession.

8. In the present case, it may be noted that PW7 ASI Rameshwar Dayal, the investigating officer though appeared and got his statement recorded under examination in chief on 15th September, 2004 when his cross-examination was deferred, however thereafter this witness was never called for his cross-examination and thus the material witness i.e. the investigating officer has not been cross examined. The testimony of this witness PW7 as stated in his examination in chief alone cannot be looked into. Though it is well settled that non-examination of investigating officer is not fatal to the prosecution case and each case has to be looked into by its peculiar facts, however in the present case, the corroborative evidence of site plan, mechanical inspection report etc. have not been proved. It is thus to be seen whether on the basis of the testimony of the other witnesses the conviction of the Petitioner can be rested upon. PW 6 ASI Nathu Singh has deposed that the case properties(one generator and bicycle) were recovered though at the instance of accused but from the house of the Complainant i.e. House No. DG1/ 250 Paschim Vihar instead of house of the Petitioner. Further, PW4 HC Baljeet Singh deposed that he was working in VRK West District as in-charge of VRK. He has proved the original record of case FIR No. 11/1992 under Section 411/34 IPC and also proved detailed documents and huge recovery from the accused persons.

9. Thus, the only evidence on record regarding recovery of the stolen generator and bicycle is of PW3 HC Ashok Kumar, who has stated that at the pointing of both the accused the recovery was made from the house of the Petitioner. The witnesses have admitted that no efforts were made to join independent witnesses from the locality. The recovered articles were not

subjected to test identification parade. The complainant has produced no document to show the ownership of the recovered articles, especially when the articles were of the kind readily available and had no identification mark. Further the corroborative evidence has also not been proved as the testimony of PW7 ASI Rameshwar Dayal cannot be read against the Petitioner as no right to cross-examine PW7 was afforded to the Petitioner. There are contradictions in the testimony of PW3, PW4 and PW6. The prosecution has not been able to establish its case beyond reasonable doubt against the Petitioner.

10. Hence keeping in view the facts and circumstances of the case, the impugned orders convicting the Petitioner are set aside. The Petitioner is acquitted of the charge punishable under Section 411 IPC. The petition is accordingly allowed. The Petitioner is on bail. The bail bond and surety bond of the Petitioner are discharged.

11. Petition and application are disposed of. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

April 13, 2012
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