

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

**RESERVED ON : October 01, 2013
DECIDED ON : December 20, 2013**

+ **CRL.A. 716/2000**

BHULLEY SINGH Appellant
Through : Mr. Haneef Mohammad, Advocate
with Mr.Kishore Kumar &
Mr.Imran Ahmad, Advocates

versus

STATE N.C.T. OF DELHI Respondent
Through : Mr.Lovkesh Sawhney APP for the
State.

+ **CRL.A. 754/2000**

ARUN KUMAR @ MUNNA Appellant
Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.L.Yadav, Advocate.

versus

STATE N.C.T. OF DELHI Respondent
Through : Mr.Lovkesh Sawhney APP for the
State.

+ **CRL.A. 648/2000**

AVDESH KUMAR Appellant
Through : Mr.K.K.Sud, Sr.Advocate with
Mr.R.D.Rana, Advocate.

versus

STATE N.C.T. OF DELHI

..... Respondent

Through : Mr.Lovkesh Sawhney APP for the
State.

+ **CRL.A. 681/2000**

SURESH KUMAR

..... Appellant

Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.L.Yadav, Advocate.

versus

STATE N.C.T. OF DELHI

..... Respondent

Through : Mr.Lovkesh Sawhney APP for the
State.

+ **CRL.A. 651/2000**

VIMAL CHANDRA

..... Appellant

Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.L.Yadav, Advocate.

versus

STATE N.C.T. OF DELHI

..... Respondent

Through : Mr.Lovkesh Sawhney APP for the
State.

+ **CRL.A. 645/2000**

ANIL KUMAR

.... Appellant

Through : Mr. Haneef Mohammad, Advocate
with Mr.Kishore Kumar &
Mr.Imran Ahmad, Advocates

versus

STATE N.C.T. OF DELHI

..... Respondent

Through : Mr.Lovkesh Sawhney APP for the
State.

CORAM:
MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Bhuley Singh @ Nirbhaya Singh (A-1), Arun Kumar @ Munna (A-2), Avdash Kumar Sharma (A-3), Suresh Kumar (A-4), Vimal Chandra (A-5) and Anil Kumar (A-6) challenge the correctness and legality of a judgment dated 14.10.2000 in Sessions Case No.259/1988 arising out of FIR No.200/86 registered at Police Station Kotla Mubarak Pur by which A-1 to A-5 were convicted for committing offences under Section 395 IPC read with Section 397 IPC. A-1 was also held guilty under Section 25/27 Arms Act. A-6 was held guilty for committing offence punishable under Section 412 IPC. By an order dated 17.10.2000,

they were awarded Rigorous Imprisonment for seven years with fine ₹2,000/- each. A-1 was further sentenced to undergo Rigorous Imprisonment for three years with fine ₹2,000/- under Section 25/27 Arms Act. The substantive sentences were to operate concurrently. The facts emerging out of the charge-sheet are as under:-

2. On 02.09.1986, DD No.22A (Ex.PW-6/A) was recorded at Police Station Kolta Mubarak Pur on getting information from SI Darshan Singh of PCR at about 09.10 P.M. regarding some incident at House No.E-6, INA Colony. The investigation was assigned to SI Joginder Singh who with Ct.Ravinder Singh went to the spot. The Investigating Officer lodged First Information Report after recording Sujan Kumar Saraswati's statement (Ex.PW-9/A) who informed that at about 07.45 pm when he, his wife and two children were present inside the house, five intruders armed with weapons barged into the house and committed decoity. They robbed his wife of various gold ornaments. They were taken inside the bed room and from the almirah, various articles including cash, jewellery, camera, watches etc. were robbed. Someone rang the doorbell and his friend Vijay Panwar and his friend Ashok Kumar Singh were taken inside the house. The assailants did not spare them and robbed Vijay Panwar of gold ring, wrist watch and wallet containing ₹100/-.

After some time, they all fled the spot with the robbed articles after tying their hands and feet. The complainant gave detailed description of the assailants and claimed to identify them. The IO summoned the crime team and dog squad; got the crime scene photographed and lifted finger prints on various articles. The statements of witnesses conversant with the facts were recorded. Efforts were made to find out the assailants but in vain. On 03.09.1986 the complainant and his family members left for Rohtak and returned after 4/5 days. After about 10 days of the incident, they were asked to identify the culprits apprehended during investigation. The complainant, his wife and Vijay Panwar went to police station Defence Colony and identified A-1 to A-4 as culprits. On 18.09.1986, they went to Kotla Mubarak Pur police station and identified A-5. Pursuant to their disclosure statements, A-1 and A-3 led the police to the shop of A-6 and recovered gold and silver ornaments in melted condition/form. A-1 to A-5 declined to participate in the Test Identification Proceedings (TIP). The articles recovered were identified by the complainant, his wife and PW-15 (Vijay Panwar) in Test Identification Proceedings in the court. After completion of investigation a charge-sheet was filed against the appellants; they were charged and brought to trial. The prosecution examined 23 witnesses to establish their

guilt. In their 313 statements, the accused persons denied their complicity in the crime and pleaded false implication. After considering rival contentions of the parties and appreciating the evidence on record, the Trial Court by the impugned judgment convicted all of them for the offences mentioned previously, giving rise to the filing of the present appeals.

3. I have heard the learned counsel for the parties and have examined the record. Learned counsel for the appellants urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of PW-8 (Mala Saraswati) and PW-9 (Sujan Kumar Saraswati) who nurtured grudge against A-3 for supporting S.R.Gautam who contested elections of Members of Executive Committee for Super Bazar in 1986 against his opponent Mukesh Bhatt, General Secretary of Congress Party to whom PW-9 (one of the shareholders among 31 shareholders to elect) favoured. Their statements were not corroborated by any independent witness. PW-15 (Vijay Panwar) and PW-18 (Shiv Raj Singh) completely turned hostile and did not implicate them. The accused persons were shown to the witnesses after their apprehension and were justified to decline participation in TIP. DW-5 (Paramjit Kaur), A-1's wife, had sent a

telegram to the concerned authorities on 09.09.1986 when her husband lifted by the police on 06.09.1986 was not released due to her failure to pay bribe amount of ₹50,000/-. The Trial Court ignored the testimony of defence witnesses Lalit Kumar (DW-1), S.K. Sirivastava (DW-2) and Purshotam Lall (DW-9) who categorically established and proved that A-1 and A-2 were not present at the spot being on their respective duty in their offices on the relevant date and time. A-6 urged that the robbed gold or silver ornaments were not recovered from his possession. He was compelled by the police to part with the gold and silver bars weighting 140 and 170 gms respectively. The case property was released on 'superdari' to him by the Trial Court. Vital discrepancies, improvements and contradictions were ignored without valid and sound reasons. Counsel further contended that A-3 had clean antecedents, studied at Ram Lal Anand College and had contested various elections as office bearer. He was acquainted with the complaint and had visited his residence at INA colony where he had gone to campaign for his friend S.R.Gautam. DW-4 (Vijay Kumar) categorically stated that in 1985 A-3 was falsely implicated in Arms case to debar him from contesting elections. He could not file nomination on 12.09.1986 due to false implication in this case. Learned Additional Public Prosecutor urged that the impugned judgment

is based on fair appraisal of evidence and needs no interference. Adverse inference is to be drawn against the appellants for declining to participate in the TIP proceedings. The robbed articles were recovered from their possession and at their instance.

4. The police machinery was set into motion when PW-9 (Sujan Kumar Saraswati) made telephone call to PCR at 100 regarding the occurrence at his House No.E-6, INA Colony. SI Darshan Singh of PCR on telephone informed the duty officer at police station Kotla Mubark Pur who lodged DD No.22A (Ex.Pw-6/A) and assigned the investigation to SI Joginder Singh. SI Joginder Singh after recording statement of complaint (Sujan Kumar Saraswati) lodged First Information Report by sending rukka (Ex.PW-22/A) at 11.00 P.M. In the complaint Sujan Kumar Saraswati gave graphic detail as to how and under what circumstances they were robbed at the point of revolver, knife and 'gupti' and deprived of their valuable articles including gold and silver ornaments, watches, camera etc. and cash. There was no delay to inform the police about the occurrence. It is not believable that the complainant would fake an incident of decoity at his house to set the police machinery into motion particularly when he had not named any culprit/assailant. Since the First Information Report was lodged in promptitude, it cannot be inferred that

the incident of robbery was concocted by the complainant. In the case of *Jail Prakash Singh v.State of Bihar & Anr.* 2012 CRI.L.J.2101 the Supreme Court held:-

“The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant’s version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.”

5. While appearing as PW-9 in the court, complainant-Sujan Kumar Saraswati proved the version given to the police at the earliest available opportunity without major variations or improvements. He deposed that on 02.09.1986 at about 07.30/07.45 P.M. he was present in his house with his wife and two children. The drawing room was bolted from inside. When he answered the call bell, five boys pushed the door and forced their entry inside the room. A-1 took out a pistol and put it on

his temple threatening him to kill if he raised noise. The other accused persons started closing curtains of the window. In the meanwhile, his wife who was in the bed room, arrived in the drawing room and was robbed of her gold chain, ear-ring, gold bangle (kara type), gold plated iron kara at the point of knife by A-5. Thereafter, they were taken inside the bed room. He identified A-2, A-3 and A-4 to be the persons present among the assailants (A-1 and A-5). A-2 was armed with a 'gupti' and the two others (A-3 and A-4) did not have any weapon. Keys of almirah were handed over to them by his wife. They removed silver and gold jewellery lying in the boxes, one camera, five watches and ₹1200/- cash. Out of the watches, two were gents and three were ladies. In the meantime, a call bell rang from outside and after opening the door by some of the accused persons, his friend Vijay Panwar and his friend Ashok Kumar Singh were brought inside the house. They robbed Vijay Panwar of his gold ring, wrist watch and purse containing ₹100/-. They all were taken to bed room and were tied with clothes. Thereafter another call bell rang. The accused persons opened the door, went out and bolted it from outside. At about 08.00 P.M. the sound of water falling from the tap started coming. His wife managed to come outside in the drawing room and found that they all had left. The assailants had already cut off

the telephone wires. He went downstairs and made a telephone call at 100. After about 20-25 minutes the police reached and recorded his statement (Ex.PW-9/A). The complainant identified revolver (Ex.P3), gupti (Ex.P4) which were in the hands of the accused A-1 and A-2 respectively and used by them. He also identified wrist watches (Ex.P5 to P9), camera (Ex.P10), record player (Ex.P11). He also recognized Ex.P-1 and Ex.P2, gold/silver masses which showed traces of the melted ornaments.

The witness was cross-examined at length by the counsel for the accused persons. He disclosed that he was posted and working at Palam Airport in National Airport Authority as Deputy Director and was on duty from 09.30 A.M. to 05.30 P.M. He had taken leave for 4-5 days w.e.f. 04.09.1986 to go to Rohtak. He admitted that during his presence at Rohtak, he was not contacted by Delhi police and was not aware if the culprits were apprehended. When they returned to Delhi, the police asked them to identify the culprits. The police had inquired from them about the general structure or description of the culprits. He was not asked about the basic or minute details of the assailants i.e. colour, hair, ear, nose etc. The police inquired from them about the complexion of the culprits. He further informed that he, his wife and PW-15 had gone to the court to

participate in the proceedings for identification of the case property recovered during investigation. He denied the suggestion that Ex.P-1 and Ex.P-2 were identified by them out of greed and it did not belong to them. Complainant denied if any photograph of any assailant was shown to him and his wife any time. He was not aware if A-1 was arrested on 06.09.1986 and any telegram was sent by his wife to the higher police authorities regarding his wrongful confinement in the police station. He disclosed that he and his wife had first gone to police station Defence Colony for identifying the culprits. Later on, they visited police station Kotla Mubarakpur for identifying A-5. The witness further explained that when they identified the accused persons in the police stations, the names and addresses of assailants were told to them by the Investigating Officer after their identification and before that they were not aware of it. He denied the suggestion that he identified the culprits/accused persons at the instance of the police or that they were not involved in the crime.

On perusal of the statement, it reveals that despite searching and lengthy cross-examination, no material inconsistency/discrepancy could be elicited to discredit the testimony of the witness who had no prior familiarity with the assailants and at the earliest opportunity had mentioned identifying features of the culprits. Soon after the

apprehension of the culprits, he identified them while they were in police custody. He volunteered to participate in the Identification Proceedings, which were conducted without any delay soon after the apprehension of the assailants, however, the accused persons declined to participate alleging that they were shown to the witnesses by the police. PW-21 (M.K.Gupta), learned Metropolitan Magistrate conducted Test Identification Proceedings (Ex.PW-21/B) qua A-1 to A-4 on 11.09.1986 and recorded their statements (Ex.PW-21/C to Ex.PW-21/F). Again on 18.09.1986, he conducted TIP (Ex.PW21/9) for A-5 and recorded his statement (Ex.PW21/K). He further deposed that A-1 to A-4 were produced before him in muffled faces.

In his court deposition, the victim had no hesitation to identify and recognize A-1 to A-5 for participating in the crime. The complainant had direct confrontation with the assailants at the time of occurrence and had clear and proper opportunity for sufficient length of time to observe their features carefully with greater intensity and vividness and recognize them. He had no animosity/enmity with any of them to wrongly identify them as culprits and to spare the real culprits. He identified A-1 disclosing that he had beard at the time of occurrence. Not only the complainant identified and recognized the assailants, he came to

pick out the particular accused person and the details of the part which the accused had played in the crime with reasonable particularity and further informed as to which of the assailants was in possession of which specific weapon. He was categorical to state that A-1 had a country made pistol. A-5 robbed them at the point of knife and A-2 had 'gupti'. He was fair to say that other two accused persons (A-3 and A-4) did not have any weapon. In their deposition, he further elaborated that the fourth and fifth accused were the assailants who had closed curtains on the windows. The description given by the complainant tallied/matched with the general description of the assailants arrested during investigation. No suggestion was put to him in the cross-examination if he had any familiarity with any of the assailants or had come into contact with them at any point of time in any connection whatsoever.

6. A-1 and A-2 were arrested on 10.09.1986 whereas A-3 and A-4 were taken into custody on 11.09.1986. The Investigating Officer moved an application for holding Test Identification Proceedings before the Metropolitan Magistrate on 11.09.1986 and A-1 to A-4 were produced in the court in muffled faces where they declined to participate in the Test Identification Proceedings alleging that they were shown to the witnesses.

Prosecution case is that on 12.09.1986 after A-1 to A-4 declined to

participate in the TIP, PWs 8, 9 and 15 were asked to identify the culprits. The accused persons did not produce any cogent material to infer that prior to 12.09.1986 they were shown to PWs-8, 9 and 15 in the police station. A-5 was arrested on 17.09.1986 and was sent before the learned Metropolitan Magistrate to participate in the TIP proceedings on 18.09.1986. He also declined to join the TIP parade allging that during his custody he was shown to number of persons. A-5 did not reveal if he was shown to PWs 8,9 and 15 during custody. His arrest was effected on 17.09.1986 by PW-12 (SI Siri Ram), from police station Vinay Nagar who had no concern with the investigation of this case. None of the eye-witnesses visited police station Vinay Nagar to recognize A-5. Apparently, A-1 to A-5 had no reasonable explanation to refuse participation in TIP. In *Prem Singh Vs.State of Haryana* 2011 (10) SCALE 102, the Supreme Court observed as under:-

“The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the

accused-Appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case.”

7. In *Rabindra Kumar Pal @ Dara Singh Vs. Republic of India*

AIR 2011 SC 1436 discussing the evidentiary value of photo identification

the Supreme Court held as under:-

*“Now let us discuss the evidentiary value of photo identification and identifying the accused in the dock for the first time. Learned Addl. Solicitor General, in support of the prosecution case about the photo identification parade and dock identification, heavily relied on the decision of this Court in **Manu Sharma (supra)**.11:37 AM 3/2/20115 It was argued in that case that PW 2 Shyan Munshi had left for Kolkata and thereafter, photo identification was got done when SI Sharad Kumar, PW 78 went to Kolkata to get the identification done by picking up from the photographs wherein he identified the accused Manu Sharma though he refused to sign the same. However, in the court, PW 2 Shyan Munshi refused to recognise him. In any case, the factum of photo identification by PW 2 as witnessed by the officer concerned is a relevant and an admissible piece of evidence. In para 254, this Court held:*

Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by Section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of Section 9 of the Evidence Act

that the same i.e. the act of identification becomes admissible in court. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation.

It was further held:

It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to

hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

It was further held that "the photo identification and TIP are only aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath.

8. The purpose of TIP is to test the statement of the witness made in the court, which constitutes substantive evidence. The TIP proceedings during investigation serve to prove the authority with material to assure themselves if the investigation was proceeded on right lines and therefore it was desirable to hold them at the earliest opportunity. A further reason is that an earlier opportunity to identify also tends to minimize the chances of the memory of the identifying witnesses fading away due to long lapse of time.

9. In *State of Maharashtra Vs.Suresh* (2000) 1 SCC 471 the Supreme Court observed:-

“identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the

real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held.”

Adverse inference can be drawn against the accused persons for declining to participate in the Test Identification Proceedings.

10. Another crucial witness who witnessed the horrible incident is PW-8 (Smt.Mala Saraswati), complainant’s wife. She corroborated the version given by her husband on all material facts and deposed that when they were present in the house at about 07.30 P.M., her husband was made to stand near the entrance door of the drawing room and a country made pistol was put on his temple. She identified A-1 to be the assailant who had placed a pistol on the temple of her husband. She distinctly and definitely stated that A-3 and A-4 were the assailants who closed the curtains of the window of both the sides. She recognised A-5 being tallest of all the intruders, holding a knife who removed golden chain from her neck; golden kada and two gold bangles from one hand and gold plated iron kada from the other hand besides removing ear-rings. A-5 threatened her husband not to raise alarm or else they would shot him

dead. She further deposed that all the five intruders commanded her to hand over cash to them in the drawing room. When she told that they did not have any cash in the house and to take whatever they wanted from the almirah lying in the bed room, they were taken to the bed room and she was made to open the almirah. From inside the almirah, they took her jewellery i.e. one necklace, ear-ring (of gold), silver ornaments i.e. Payajaib, kamarband of a child, silver toys, sindoor daani, five watches (two gents and three ladies) and ₹1200/-. She also described as to which of the assailant was having which weapon. In the cross-examination, she elaborated that after 10 days of the occurrence, she along with her husband went to the police station for the identification of four assailants and they were identified by them. After six days or so the police was able to arrest the fifth assailant and she identified him in some other police station near Kotla. She denied the suggestion that the police had shown A-3 and others in the police station on 11.09.1986. She further deposed that she and her husband had gone to Rohtak and remained there for three or four days after the incident and when they returned, they were asked to identify the culprits by the police on phone. She once went with her husband to police station Defence Colony and then after five or six days to police station Kotla Mubarakpur for identification of the assailants.

She fairly admitted that no inquiries were made by her from the police as to from where the accused persons were arrested and since how long they were with them. She further reiterated two assailants had put curtains on the window. The facial feature of that person was in her memory and she could definitely identify him. She had given rough description of those boys in her statement. She recalled that she visited police station Defence Colony on 12th September, 1986. She denied the suggestions that the accused persons were identified by her at the instance of the police.

On scanning the testimony of this witness whose presence inside the house was quite natural and probable, it transpires that she has supported the case of the prosecution in its entirety and has recognized the accused A-1 to A-5 to be the assailants who committed decoity. No ulterior motive was assigned to this witness to falsely rope in the accused persons with whom she had no prior familiarity or acquaintance. The testimony of PWs 8 and 9 is not at variance and both have stood the test of cross-examination and their version given to the police at the first instance could not be shaken. In the absence of prior enmity or ill-will these witnesses were not expected to let the real culprits go scot-free and to implicate innocent ones. The culprits were not named by them in the First Information Report. None of them was a suspect. They were not arrested

at their instance. After the occurrence, they had gone to visit their relatives at Rohtak and stayed there for three or four days. After about ten days of the incident, they were asked by the police to recognize the culprits arrested by them to ensure that the innocent ones are not involved. When both PWs 8 and 9 visited the police station Defence Colony and Kotla Mubarakpur on 12.09.86 and 18.09.86 respectively they were able to recognize them. Prior to that, they had agreed to participate in the Test Identification Proceedings which were declined by the accused persons for the reasons known to them. Both the witnesses attributed similar role to each of the assailants and narrated the sequence of event by which they were robbed of their valuable articles at the point of deadly weapons without any major variations.

11. PW-15 is Vijay Panwar who happened to visit the complainant at 07.45 P.M. when the assailants were committing the decoity inside the house. Unaware as to what was happening inside the house, he and his guest Ashok Kumar went inside the house in question. PW-15 deposed that when they entered, a boy 'holding' a knife placed it on his back and threatened him not to raise alarm. He saw Mrs.Saraswati and his family members sitting on the floor of the drawing room. They were also ordered to sit by the side of Mrs.Saraswati. When he looked

around, he found five persons in the house besides the family of Mrs.Saraswati. One of them was holding a weapon which looked like a revolver and that person hit him on his head with his hand. He was robbed of his gold ring, wallet containing ₹100/- and wrist watch. All of them were thereafter taken to bed room. The assailants tied their hands and legs and started ransacking the house. The witness, however was not certain regarding identify of the accused person and merely stated that they looked 'familiar' to him but did not remember their faces exactly as the incident had occurred about five years ago. In the cross-examination by learned Additional Public Prosecutor after seeking Court's permission, the witnesses stated that one of the assailants had a 'gupti' in his hand. He had given details of the five intruders in his statement recorded on 03.09.1986 and had informed that the intruder who had 'beard' was holding the revolver. He further admitted that on 12.09.1986, he had visited the police station Defence Colony and had identified the A-1 to A-4 clearly. He identified A-2 who had 'gupti' with him on the day of incident. A-4 had tied his hands and A-3 had ransacked the house. He further admitted that A-5 was identified by him in the police station Defence Colony on 18.09.1986 and he was the intruder who had a knife on the day of occurrence. He was, however, unable to say with certainty

that five accused persons present in the court were the assailants though he stated that they looked 'familiar'. PW-15's testimony is in consonance with the version narrated by PWs 8 and 9 recording the sequence of events inside the house. PW-15 was, however, not sure regarding the identity of the accused present in the court. He had opted to participate in the Test Identification Proceedings but it could not be conducted due to the refusal of the accused persons to participate in it. Nonetheless, he has not given clean chit to A-1 to A-5. His testimony to the extent he supported the prosecution can be relied upon. In the latest judgment in *Bhajju @ Karan Singh vs. State of M.P.* 2012 CrI.L.J.1926 the Supreme Court held:

"Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant/accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of the Code of Criminal Procedure, the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witness, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief, as well as the cross-examination of the said witness in so far as it supports the case of the

prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution.”

12. In the case of *Rameshbhai Mohanbhi Koli & Ors v. State of Gujrat* (2011) 11 SCC 111, the Supreme Court held:

“It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof.”

13. PW-11 (Ravinder Singh) also visited the house of the victim.

When he gave a call bell twice there was no response. When he was

about to leave he was held back by someone who caught hold of him from collar from back side and was dragged inside the house at the point of some sharp weapon. He deposed that after he was taken inside the house, he was commanded to raise arms and look down. He was robbed of his money ₹1,000/- and identity card. He was, however, unable to identify any of the assailants as everything had happened with him on his back. The testimony of this witness lends credence to the complainant's version regarding the happening of incident of decoity in his house. Since this witness had no direct confrontation with the assailants, his inability to identify them in the court is of no consequence.

14. The complainant in his statement (Ex.PW9/A) given to the police at the earliest opportunity described details of the articles robbed by the assailants. He specifically gave description of the gold and silver ornaments with weight, camera make 'Praktika', five wrist watches-two gents and three ladies make Citizen, Timex, HMT Blue dial, Kelton, and Citizen and cash ₹1200/-. He further disclosed that his friend Vijay Panwar was deprived of his gold ring, watch make Citizen and cash ₹100/-. The prosecution examined PW-13 (SI Mannu Sharma), PW-17 (K.L.Kapoor) and PW-22 (SI Joginder Singh) to prove recovery of these articles at the instance of the accused persons. PW-13 (SI Mannu

Sharma) deposed that pursuant to A-1's disclosure after arrest on 10.09.1986, he led the police party to quarter No.N-221, Sarojani Nagar and recovered record player (Ex.P-11), wrist watch (Ex.P-5) and cash ₹4000/- out of box lying on parchappi (mazanine) seized vide seizure memo Ex.PW13/F. A-2 also led the police team to his house E-1201, Netaji Nagar and recovered camera (Ex.P-10), wrist watch (Ex.P-6) and 'Gupti' (Ex.P-4) taken into possession vide seizure memo (Ex.PW13/G). A-3's involvement in the crime surfaced in the disclosure statements of A-1 and A-2. A-4 recovered a lady watch (P-7), gents watch (P-8) and cash ₹800/- from his house. A-1 and A-3 thereafter led the police team to Madangir Market, at shop No.P9, Central Market Madangir and pointed out the shop of A-6 where they had sold the robbed ornaments to him. A-6 produced the melted mass of gold and silver ornaments. Gold mass weighing 140 gms (Ex.P-1) and silver mass weighing 170 gms (Ex.P-2) were seized vide seizure memo Ex.PW-13/M. A-5 was arrested on 17.09.1986 and according to PW-12 SI Siri Ram, from police station Vinay Nagar, he recovered a polythene bag after digging earth from the bushes near railway station, Sarojani Nagar and it contained two wrist watches one make 'Kelton' and the other having a plastic dial (Ex.P-8 and Ex.P-9). These were seized vide seizure memo (Ex.PW-12/B). Similar is

the testimony of PW-17 (SI K.L.Kapoor) and PW-22 (SI Joginder Singh). All these witnesses were cross-examined but nothing material could be elicited to suspect the recovery of these articles at the instance of the assailants PW-21 (Sh.M.K.Gupta) conducted Test Identification Proceedings of the recovered articles on 18.11.1986. PW-8 (Mala Saraswati), PW-9 (Sujan Kumar Saraswati) and PW-15 (Vinay Panwar) participated in the Test Identification Proceedings (Ex.PW-21/M) and identified the articles robbed from their possession. PW-8 (Mala Saraswati) in her testimony after looking the case property i.e. gold mass (Ex.P-1) and silver mass (Ex.P-2) deposed that Ex.P-1 was mass of gold which had been partly melted together. The witness stated that there were bangles which had been bent and melted in the mass of gold. The links of the gold chain and necklace were there besides ear rings. All have been melted partly into one mass. Similarly there was melted mass of silver, which also showed links of the payajaib hanging down. She also identified ladies wrist watches (Ex.P-5 to Ex.P-7), gents watches (Ex.P-8 and Ex.P-9). Ex.P-10 (camera) and Ex.P-11 (record player). In the cross-examination, she fairly admitted that the police had made inquiries about the watches but they were unable to produce the cash memos as the articles were given as gifts. She further disclosed that all the wrist

watches recovered were imported and were not easily available. Wrist watch make 'kelton' had some peculiarity and was not easily available in the market. Wrist watch make 'Timex' though available in the market but the model recovered was not easily available. She further reiterated that in her first statement to the police she had given description of each and every ornament and articles robbed. She was confronted with her statement (Ex.PW-8/A) where the name of the ornament and weight was described. She denied the suggestion that Ex.P-1 and Ex.P-2 did not contain her ornaments or that the police under coercion and pressure took 140 grams of gold and 170 grms of silver in a bar/dali form from A-6 and planted it in this case. PW-9 (Sujan Kumar Saraswati) also identified the articles recovered by the police in his court statement. He explained that gold mass (Ex.P-1) showed traces of ornaments unmelted. The silver mass of metal Ex.P2 was identified in which chain of payajaib was hanging. He denied the suggestion that Ex.P-1 and Ex.P-2 were identified by him due to greediness. PW-15 (Vijay Panwar) recognized and identified wrist watch (Ex.P-5) make 'citizen' robbed from him. The assailants did not seriously contest the recovery of these articles at their instance. When the motive was to commit robbery, it was not expected that the assailant would return empty handed. A-6 during trial moved an

application for release of gold/silver mass Ex.P-1 and Ex.P-2 on 'superdari'. The Trial Court reversed its previous order to release the case property on superdari to him when it was claimed by the complainant. Vide order dated 07.10.86 the matter was left to be decided after getting the evidence of the parties. It was imperative for A-6 to prove that gold/silver bars weighing 140 and 170 gms were taken under coercion by the police from his possession. No worthwhile evidence has come on record if on any specific date A-6 was forced to part with Ex.P-1 and Ex.P-2. No complaint was lodged by him against any particular police officer. The police was not aware about the sale of ornaments to A-6 prior to the arrest of A-1 and A-3. Only pursuant to their disclosure statements, the police discovered that these ornaments were sold to A-6 a jeweller/gold smith running a shop in Madangir. A-6 in 313 statement did not claim ownership but came up with the plea that his customers had entrusted their old gold and silver jewelry to convert into new jewellery of latest design and he had melted those ornaments into Ex.P-1 and Ex.P-2. The recovery of gold and silver mass was not effected by the police from his shop. He, however, did not produce any evidence to substantiate his defence and did not reveal the names of the customers who had entrusted old gold and silver jewellery to him to make new ornaments. No such customer was

examined in defence. The police is not expected to plant all these articles of significant value just to falsely implicate the accused persons with whom they nurtured no enmity. Minor discrepancies in the statement of the witnesses regarding recovery of articles are of no consequence. Recovery of the robbed articles at the instance of the accused persons is an incriminating circumstance to connect them with the crime.

15. A-1 and A-2 made futile attempt to set up plea of alibi during trial which did not find favour and was out-rightly rejected with reasons A-1 claimed that on the day of incident, he was present on his official duty in Ashok Yatri Niwas, Hotel of ITDC at Ashoka Road, New Delhi from 02.00 pm to 10.00 pm. and examined DW-1 (Lalit Kumar) and DW-2 (S.K.Sirivastava). A-1, however was unable to produce cogent and authentic record to prove his presence at the said place. DW-5(Paramjit Kaur), his wife, did not claim in her deposition if A-1 had gone to attend duty on 02.09.1986 and remained there from 02.00 pm to 10.00 pm. She did not reveal at what time, A-1 had left for his office that day or when he returned after performing his duty. No such suggestion was put to PW-8, PW-9 and PW-15 in cross-examination. In fact plea of alibi was not set up during their cross-examination. DW-1 (Lalit Kumar) admitted that an employee had to punch card before time keeper to indicate the time and

date of arrival/departure. No such punching card record was produced before the court to ascertain the duration during which A-1 remained present in the office for duty. DW-1 admitted that he was unable to produce such card punching record as it pertained to the year 1986 and has since been destroyed. No attempt was made by A-1 to get the record preserved. No such record was produced or collected during investigation. Admittedly, during his duty hours, DW-1 had gone to attend complaints in ITDC hotel having 556 rooms. DW-2 (S.K.Sirivastava) disclosed that on 02.09.1986 A-1 attended his duty from 02.00 pm to 10.00 pm and had marked his presence in attendance register (Mark DW2/A). From 03.09.1986 to 05.09.1986 he was also on duty from 02.00 pm to 10.00 pm. On 06.09.1986, he came in the morning duty from 07.00 am to 03.00 pm and he did not attend the office thereafter. On 07.09.1986, some staff members informed him that he had been taken away by the police. In the cross-examination, he admitted that he could not produce attendance register of the year 1983 to 1988 (except of the year 1986). He did not produce the register Mark PX during investigation to the police or informed the higher police officials about the presence of A-1 on duty at the relevant time. As a Supervisor, he did not use to sign the attendance register (Mark PX) It was not counter-signed by any other

officer. He admitted that this register used to remain lying on the table all the 24 hours. After the attendance register was complete and not in use, it was kept in the shelves in the room. He further admitted that attendance column from 07.09.1986 to 08.09.1986 were blank and he did not mark 'absent' of the employee for those days. He was unable to give reasons for not marking A-1 absent on 07th or 08th September, 1986 when he had not attended the office. It transpires that register Mark PX has not come from proper custody and was not maintained in due course of business.

A-2 in his 313 statement claimed that he was working as Airconditioning Technician with A.I.I.M.S. Hospital and was on duty from 02.00 pm to 10.00 pm on 2nd September, 1986. He examined DW-9 (Purshotam Lall) who deposed that as per attendance register Mark PZ (Marked DW-9/A) of September 1986 A-2 was on duty from 01.09.1986 to 06.09.1986. He, however, admitted that this attendance register was kept by him for his personal record. The correct procedure was to mark attendance in a muster roll sheet which was given to Jr. Engineer and after every month, it was deposited with Accounts Branch. The attendance in muster roll sheet was filled up daily and counter signed by him. Muster roll sheet of date 02.09.1986 must be there in the Accounts branch of A.I.I.M.S. but he was unable to produce it. In the cross-examination, he

admitted that A-2's name was in different ink and hand than the name of his father in Ex.DW9/A. Duty timings were not mentioned in the register. Register Mark PZ was an unofficial record. Apparently the register (Ex.DW9/A) produced by the witness was not an official and authentic record to be relied on to establish the presence of A-2 in the office. Again in the cross-examination of PWs 8, 9 and 15, A-2 did not put any such suggestion regarding his presence in the office at the relevant time. The defence witnesses examined by the A-1 and A-2 after a considerable delay inspire no confidence and cannot be believed.

A-3 examined DW-3 (S.R.Gautam), DW-4 (Vijay Kumar) and DW-6 (G.L. Suri) to establish that he was an active supporter of DW-3 who had contested elections for Super Bazaar fixed for 15.06.1986 at INA Super Bazar. DW-4 (Vijay Kumar) disclosed that A-3 was a student in Ram Lal Anand College in 1985 and passed B.A. from Delhi University in the year 1988-89. He had contested election for the Central Council. He was selected as one of the 11 members of EC. DW-6 (G.L.Suri) also produced documents to show that A-3 was a student in Ram Lal Anand College. These witnesses, however, did not depose as to where A-3 was present on the day of incident. PWs 8,9 and 15 had no concern with the activities of A-3 prior to the incident.

16. The impugned judgment is based upon fair appraisal of evidence and warrants no interference. All the relevant contentions of the appellants have been dealt with minutely with cogent reasons. When a dacoity is committed, the victims and inmates of the house are normally and naturally in a state of extreme excitement with a heavy sense of fear. In the instant case, the court can understand the trauma of inmates of the house who had encounter with five armed strangers and were threatened of dire consequences in the presence of their children. Minor discrepancies, improvements, contradictions and inconsistencies highlighted by the counsel for the appellants are of no consequence as they do not affect the core of the prosecution case that A-1 to A-5 participated in the crime and were identified by PW-8 and PW-9. The police was able to recover robbed articles from their possession or at their instance soon after the occurrence pursuant to their disclosure statements. In the absence of any prior animosity, the testimony of the police officials cannot be disregarded. The findings of the Trial Court on conviction are upheld.

17. Counsel for the appellants adopted alternative argument to take lenient view as the incident had occurred about 25 years ago and the appellants have no criminal antecedents. A-1, A-2 and A-5 were

convicted under Section 395 read with Section 397 IPC each and were awarded Rigorous Imprisonment for seven years each under Section 397 IPC. The minimum sentence prescribed for the use of deadly weapons is seven years. The sentence awarded thus cannot be modified/reduced or altered. Their conviction and sentence are maintained.

18. A-3 and A-4 were given Rigorous Imprisonment for 7 years each with fine ₹2,000/- each. They have suffered agony of trial for more than 25 years. A-3 was not armed with any weapon. Robbed articles were not recovered from his possession. He was earlier involved in case FIR No.367/1985 under Section 25 Arms Act and was acquitted by the court vide judgment dated 31.07.1986. His nominal roll dated 25.10.2010 reveals that he remained in custody for four months and four days and earned remission for one month and fifteen days. He was enlarged on bail and his substantive sentence was suspended vide order dated 31st January 2001. His involvement in any other case has not surfaced. Considering the mitigating circumstances, sentence order requires modification and the substantive sentence (of A-3) is reduced from seven years to three years. Other terms and conditions of the order are left undisturbed.

19. A-4's nominal roll dated 25.10.2010 reveals that he remained in custody for one year and eighteen days as on 13.11.2001 besides earning remission for one month and 20 days. He is not a previous convict and was not involved in any criminal case. After his enlargement on bail during the pendency of the appeal his involvement in any other criminal case did not emerge. He is aged about 50 years and has an old, aged mother suffering from chronic old age ailments. His father and wife have expired. He is to look after his twin children. It is stated that he is at present working in a printing press. Considering these mitigating circumstances, the substantive sentence (of A-4) is reduced to three years. Other terms and conditions of the order are left undisturbed.

20. A-6 was a jeweler and was held guilty as receiver of robbed property under Section 412 IPC. He is 48 years old and has two sons to take care of them. He is to look after his aged mother who is 75 years old. He is the only bread earner of the family. As per nominal roll dated 07.12.2010, he remained in custody for two months, five days besides earning remission for five days. He is not a previous convict and was not involved in any other criminal case. The substantive sentence of A-6 is reduced to two years. Other terms and conditions of the order are left undisturbed.

21. The appeals stand disposed of in the above terms. The appellants are directed to surrender before the Trial Court on 3rd January, 2014 to serve the remaining period of substantive sentence. The Registry shall transmit the Trial Court records forthwith.

(S.P.GARG)
JUDGE

December 20, 2013
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