

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

+ **CRL.A. 184/2003**

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Reserved on: 22nd May, 2013

Decided on: 22nd July, 2013

JOGINDER @ JOGA

Through Appellant
Mr. B.S. Chaudhary, Ms. Chitra
Goswami, Ms. Kanta Chaudhary,
Advts. with Appellant in custody.
versus

STATE N.C.T. OF DELHI

Through Respondent
Mr. Manoj Ohri, APP for State with
SI Sodhan Singh PS Dabri.

+ **CRL.A. 193/2003**

YOGINDER @ GUDDU

Through Appellant
Mr. B.S. Chaudhary, Ms. Chitra
Goswami, Ms. Kanta Chaudhary,
Advts. with Appellant in person.
versus

STATE N.C.T. OF DELHI

Through Respondent
Mr. Manoj Ohri, APP for State with
SI Sodhan Singh PS Dabri.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeals impugn the judgment dated 24th January, 2003 convicting the Appellants for offences under Section 395/34 IPC and Appellant Yoginder also for offence under Section 397 IPC and the order on

sentence dated 24th January, 2003 directing them to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 1000/- and in default of payment of fine to undergo simple imprisonment for 1 month.

2. The prosecution case is based on the statement of PW2 Darshana who stated that on 10th July, 2001 she along with her mother-in-law and the domestic maid Pinki were present at home. At about 3.00 PM the call bell of the house rang and the domestic help Pinki opened the gate. She came back and stated that two boys had come on black motorcycle from the village and were enquiring about her husband Ashok. She found the two boys present on the gate on a black motorcycle and on enquiry they stated that they had been sent from village by Ramesh and they wanted to talk about a plot. These persons had come to her house two days earlier as well and had made enquiry about her husband but she had not opened the gate. She made these persons sit in drawing room, went to her mother-in-law, told her that someone had come from the village and she should see them. Her mother-in-law went to the drawing room and after seeing those persons stated that they were not from the village and she did not know them. As the door was opened 4/5 other persons entered the drawing room. One of the persons, who came on the motorcycle, removed her two gold bangles, one mangalsutra, one gold ring, one pair of ear tops, one gold chain from her person and the other person was holding a country made pistol in his hand when her jewellery was being removed. The other persons who came later started searching the house for other things. The persons who had come later were having revolver/ pistol with them. In the meantime her nephew Sushil, her daughter Garima and son Ashu also came inside the house. The

intruders also took away one National VCR, one Philips 2 in 1, one camera and Rs. 2,000/- cash from her house. They left by locking them in the bathroom and closing the gate from outside. She identified the Appellant Yoginder as the person who was carrying pistol and Appellant Joginder as the person who removed the jewellery from her person. She further stated that she had gone to the jail and had identified Joginder present in Court.

3. The evidence of this witness is supported by PW2 Pinki. She also identified Joginder as the person who had removed the jewellery and Yoginder as the person who was having gun with him. She also stated that she went to the jail and identified Joginder in the TIP. Though PW3 Sushil nephew of PW1 was also examined as a prosecution witness, however he only stated that he found 3 – 4 persons present in the drawing room and those persons took all of them to the bathroom and bolted the bathroom from outside. He had not seen the two Appellants but there were other persons who were standing near him. PW4 Shri S.S. Rathi the then learned Metropolitan Magistrate exhibited the TIP proceedings. He stated that on 16th March, 2002 Joginder @ Joga was produced before him and duly identified by the Duty officer, he expressed his desire to join the TIP. Joginder @ Joga himself choose 10 other inmates. After the necessary positioning of the jail inmates, witness Darshna was called. She looked at all the 11 persons and rightly identified Joginder @ Joga. Thereafter witness Pinki also identified accused Joginder in the TIP before him. On 20th May, 2002 the date for TIP of Yoginder @ Guddu was fixed for 24th May, 2002, however, when he went to the jail, Yoginder stated that he did not wish to join the TIP. Yoginder was clearly informed that an adverse inference could

be raised against him, however he still maintained his decision. The said statement was recorded by him and duly signed by Yoginder. This witness has not been cross-examined.

4. Learned counsel for the Appellants assails the TIP on the ground that PW1 in her cross-examination admitted that the height and figure of the inmates joined in the TIP was different from the Appellant. In this regard PW4 the learned Metropolitan Magistrate has not been cross-examined. Further in examination-in-chief this witness stated that Joginder @ Joga himself selected 10 prisoners from amongst whom the Appellant was identified by PW1 and PW2.

5. Learned counsel for the Appellant has sought to assail the evidence of these witnesses on the ground that the date of alleged incident was 10th July, 2001, however the Appellants were arrested on 4th March, 2002 in FIR No. 69/2002 under Section 186/353/307/471/34 IPC and 25 Arms Act registered at PS Paschim Vihar by the Crime Branch and pursuant to the disclosure made, the Appellants were arrested in this case. Thus, there is no material evidence except the disclosure statement, as there is no recovery of either the weapon of offence or the jewellery. To prove an offence under Section 397 or 395 IPC the recovery of weapon of offence or the robbed article is not a sine-qua-non as already held by this Court in *Ishtkar @ Intjar Vs. State Govt. of NCT of Delhi MANU/DE/0082/2012*. The Appellants were not arrested on the spot or after a chase. They were arrested after about 8 months and thus the possibility of disposing of the knife or the robbed articles cannot be ruled out. In case the testimony of the prosecution witnesses is reliable, the conviction can be safely based thereon. In the present case the version of

PW1 Darshna is fully supported by PW2 Pinki. The only ground to assail the testimony of PW2 Pinki is that admittedly she was not working as a maid servant with PW1 at the relevant time, thus her presence was doubtful. PW2 Pinki has also been cross-examined in this respect and she stated that though she was not working as a maid servant at the relevant time in the house of PW1, however she often came to her house and at the relevant time she was present in the house.

6. The complainant could not have disclosed the names of the assailants in the FIR as she was not aware of their names. They were total strangers to her and the testimony of complainant or PW2 cannot be discarded on this ground. Further as per the prosecution case PW3 reached home only later on, and thus he had not witnessed the entire incident. Thus non-identification of the Appellants by PW3 is immaterial as he entered the house when around six to seven persons were there searching the house. Merely because PW3 has stated in his cross-examination that no one was present outside would not discredit the testimony of PW1 and PW2, as it is not necessary that in each case robbers are supposed to post someone outside for guarding the place.

7. Further even if in the present case only two accused have been convicted the conviction under Section 395 and 397 IPC can still be based as PW1 and PW2 have clearly stated that besides the Appellant 4 or 5 more persons were involved and the non trial or conviction of the other 4 or 5 persons would not vitiate the conviction of the Appellants for offences under Section 395 and 397 IPC. In *Raj Kumar @ Raju Vs. State of Uttaranchal* (2008) 11 SCC 709 it was held:

“21. It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the *factum* of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons—or even one—can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity.”

8. In view of the aforesaid discussion, I find no infirmity in the impugned judgment of conviction and the order on sentence. The appeals are accordingly dismissed. Bail Bonds and surety bonds are cancelled.

(MUKTA GUPTA)

JULY 22, 2013

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