

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

RESERVED ON : 27th SEPTEMBER, 2013

DECIDED ON : 21st NOVEMBER, 2013

+ CRL.A. 232/2003

KAMLESH KUMAR @ K.K. Appellant

Through : Mr.Vivek Vidyarthi, Advocate
along with appellant in person.

versus

THE STATE (GOVERNMENT OF N.C.T. OF DLEHI)

..... Respondent

Through : Mr.Lovkesh Sawhney, APP.

+ CRL.A. 352/2003

SHER SINGH Appellant

Through : Mr.Mukul Sharma, Advocate along
with appellant in person.

versus

THE STATE (DELHI ADMINISTRATION) Respondent

Through : Mr.Lovkesh Sawhney, APP.

+ CRL.A. 258/2003

SUDESH Appellant

Through : Mr.Mukul Sharma, Advocate along
with appellant in person.

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent

Through : Mr.Lovkesh Sawhney, APP.

+ **CRL.A.299/2003**

RAJ KUMAR

..... Appellant

Through : Mr.Madhu Mukul Tripathi,
Advocate along with appellant in
person.

versus

THE STATE

..... Respondent

Through : Mr.Lovkesh Sawhney, APP.

AND

+ **CRL.A. 422/2003**

SARFRAJ

..... Appellant

Through : Mr.Mukul Sharma, Advocate along
with appellant in person.

versus

THE STATE

..... Respondent

Through : Mr.Lovkesh Sawhney, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Kamlesh Kumar @ K.K. (A-1), Sher Singh @ Lal (A-2), Sudesh @ Tyson (A-3), Raj Kumar (A-4) & Sarfraz (A-5) were arrested in case FIR No. 278/98 for committing offences punishable under Sections 458/392/394/397/34 IPC and 25 Arms Act registered at PS D.B.G. Road and sent for trial on the allegations that on the night

intervening 13/14.09.1998 at about 02.45 A.M. at House No. L-19A, Loco Shed Railway Colony, Kishan Ganj, Delhi, they while armed with deadly weapons committed dacoity and robbed ₹ 45,000/-, 1 kg silver ornaments, one gold ring and other gold ornaments after inflicting injuries to Vijay Shankar and his nephew Babloo. Police machinery was set in motion when Daily Diary (DD) No.8 was recorded at Police Post Shidi Pura on getting information from duty constable about admission of Vijay Shankar and Babloo in injured condition in Hindu Rao Hospital. The investigation was assigned to HC Rakesh Kumar who with Const. Sohan Lal went to the hospital and collected their MLCs. After recording Vijay Shankar's statement (Ex.PW-1/A), he lodged First Information Report by making endorsement (Ex.PW-11/A) thereon. SI Ram Chander took over the investigation of the case. The crime team inspected the spot and took photographs. Soon thereafter, the Investigating Officer received secret information that the culprits were hiding on a roof of a double storey building at Railway colony, Kishan Ganj near Shiv Mandir. Acting on the secret information, SI Ram Chander apprehended A-5 from the roof of House No. L-126, Loco Shed, Railway Colony, Kishan Ganj, Delhi and recovered a bag which contained a desi katta, dagger, currency notes, articles of gold and silver. Pursuant to A-5's disclosure statement, A-1 to

A-4 were apprehended and arrested. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against them for committing the aforesaid offences in the Court. They all were duly charged and brought to trial. The prosecution examined sixteen witnesses to prove its case. In their 313 statements, the appellants pleaded false implication and refuted the prosecution's allegations of their complicity in the crime. DW-1 (Const. Dev Narain) and DW-2 (Shiv Shankar) were examined in defence. The trial resulted in conviction of all under Section 397/458/34 IPC vide judgment dated 20.03.2003. Various prison terms with fine were awarded by an order dated 25.03.2003. Being aggrieved, they have preferred the appeals.

2. I have heard learned counsel for the parties and have examined the record. The appellants have not seriously challenged the incident in which complainant Vijay Shankar and his nephew Babloo were assaulted and deprived of their valuable articles but have denied their complicity in the crime. The complainant Vijay Shankar had no ulterior motive to fake the incident of robbery in which not only he and his nephew Babloo were injured but they were robbed of their cash and jewellery articles. The incident was reported to the police promptly

without any delay and the First Information Report was lodged at 05.30 A.M. Vijay Shankar and Babloo were taken to Hindu Rao Hospital and were medically examined. PW-8 (Jai Bhagwan), Medical Record Technician proved MLCs (Ex.PW-8/A and Ex.PW-8/B) prepared by Dr.Dinesh Kumar Sharma. Daily Diary (DD) No. 8 was recorded at Police Post Sidhi Pura on getting information about their admission in the hospital from the duty constable posted there. In the complaint (Ex.PW-1/A), Vijay Shankar gave graphic detail of the occurrence without naming the assailants. Neither the complainant nor any other inmate in the house suspected the involvement of any acquaintance in the occurrence. Statements of Vijay Shankar, Deepa and Babloo were recorded prior to the apprehension of the culprits but none of them named the culprits as suspect. They also did not describe broad physical features/description of the assailants. The complainant claimed to identify culprits but did not disclose as to how, he would be capable to recognise them in the absence of any specific features observed by him. The police on the basis of secret information received at about 07.00 / 07.30 A.M. allegedly apprehended and arrested A-5 and recovered the robbed articles from his possession. Subsequently, at his behest, A-1 to A-4 were taken into custody.

3. Indisputably, A-1 is the close relation of the complainant being the brother-in-law (Dever) of his daughter. It has come on record that there was a marriage proposal of Pinki (daughter of complainant's brother Suresh Chand) with Mithlesh Kumar, A-1's brother. It is not denied that on the day of marriage Mithlesh Kumar ran away and the marriage could not be celebrated. Pinki was married to Upender, younger brother of the complainant's Behnoi. Apparently, A-1 was acquainted with the complainant and his family members prior to the incident. The complainant though narrated the incident minutely in the statement (Ex.PW-1/A) and assigned specific role to the each assailant but omitted to name A-1 to be one of the assailants. The complainant had direct confrontation with the culprits for sufficient duration and had sufficient and clear opportunity to see them, however, A-1 was not at all named as suspect in the First Information Report. It has come on record that A-2 to A-5 were also residing in the said locality / vicinity since long. Even none of them was suspected to be the assailant. PW-2 (Babloo) in his Court statement categorically declined to identify and recognise any of the appellants as assailants. He claimed that his uncle Vijay Shankar knew three intruders but he was not aware of their identity. Strange enough, Addl. Public Prosecutor did not opt to cross-examine the witness after

seeking Court's permission as he resiled from the previous statement made to the police under Section 161 Cr.P.C. during investigation. PW-2 (Babloo), complainant's nephew had no extraneous reasons to demolish the prosecution case. PW-7 (Deepa), complainant's wife gave a wavering statement regarding identification of the appellants in the Court. She deposed that on the night of occurrence, she had identified Kamlesh (A-1) as one of the assailants being their relative. About other assailants, at first instance, she expressed inability to recognise them. She admitted that when the police had shown all the accused persons she was able to identify only A-1. She identified A-2 to A-5 in the Court simply because the police had arrested them in this case and she was satisfied that they must have been rightly apprehended by the police. She again reiterated that she was not sure regarding identification of A-2 to A-5. She did not offer any explanation as to why in her statement recorded on the day of incident under Section 161 Cr.P.C. she did not name A-1 though he was known to her being close relative. A-1 was not apprehended at the instance of this witness. In the cross-examination, she disclosed that A-1 was not named due to fear. Since the police machinery had come into motion soon after the occurrence, there was no occasion for the witness to be under fear not to name the assailants particularly A-1 in her statement.

PW-1 is the complainant who identified A-1 to A-5 as assailants in his Court statement. He admitted that on the night of occurrence he could identify only A-1 out of the five assailants. The identity of A-2 to A-5 was not known to him. In the cross-examination, he admitted that A-1 and A-2 were known to him before the incident. He further admitted that his brother Maharaj Pujari was a tenant under A-3's father. However, he did not submit any plausible reason for not naming them in the statement (Ex.PW-1/A). He also did not give description of the assailants for identification purpose. He further admitted that A-1, A-2 and A-5 lived in the same locality i.e. Railway Colony and he had seen them by face before the occurrence. He further admitted that none of the assailants was in muffled face at the time of incident. Thus, there was no occasion for the complainant to omit the name of the assailants known to him prior to the occurrence in the First Information Report.

4. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version. In the case of '*Jai 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. After the occurrence all the assailants fled the spot with the booty and none of them could be apprehended at the spot. Vijay Shankar did not inform the police soon after the occurrence and awakened his neighbour Lal Chand who took him and Babloo to hospital. Lal Chand has not been examined and no explanation has come forthwith as to why the serious occurrence / incident was not reported to the police immediately. The rukka was sent at about 05.30 A.M. and the investigation was taken over by SI Ram Chander. Strange enough, without any cogent inputs regarding the identity of the suspects, he was able to solve the incident at 07.00 or 07.30 A.M. when on the basis of a secret information A-5 was apprehended from the roof of the House No. L-126, Loco Shed, Railway Colony, Kishan Ganj, Delhi. Prosecution witnesses have given

inconsistent version as to how and under what circumstances, A-5 was apprehended and the robbed articles were recovered from his possession. No independent public witness including the owner of the house was associated despite their availability at the time of conducting proceedings on the roof. It is unclear as to why A-5 who was not under suspicion would hide on the roof with stolen / robbed articles and inmates of the house would not come to know about his presence there. None of the other assailants was found in possession of any robbed article and none of them attempted to flee from their respective houses. It is unbelievable that A-1 to A-4 would allow A-5 to retain all the robbed articles and would not share the booty. Contradictory statements have emerged as to whether the robbed articles were recovered from A-5's possession or he recovered it from underneath the waste articles lying on the roof. The roof was accessible to all the inmates of the house. There was no specific mark of identification on the robbed articles. Police did not offer any explanation as to why the entire cash of ₹ 45,000/- robbed could not be recovered despite apprehension of all the suspects soon after the incident. Application was moved by the Investigating Officer for conducting Test Identification Proceedings of the case property. The learned Magistrate directed the Investigating Officer to produce the property 'similar' to case

property to mix for identification proceedings. However, the Investigating Officer could not arrange the 'similar' property to be mixed with the case property and consequently the Test Identification Proceedings could not take place. Adverse inference is to be drawn against the prosecution for not making available the 'similar' case property for identification purpose.

6. The material prosecution witnesses have given different version in their statements in the Court regarding the actual sequence of occurrence inside the house. There are conflicting statements as to the period since when PW-2 (Babloo) had started residing with the complainant in the house in question. PW-2 (Babloo) disclosed that on the night intervening 02.30 to 02.45 A.M. on seeing an intruder, he got Vijay Shankar and his wife awakened. Thereafter, two intruders barged in the room and demanded keys from his uncle Vijay Shankar. When he (Vijay Shankar) refused to hand over the keys, he was beaten. When he intervened, he was stabbed on his back thrice. He did not know what was stolen on that night. In all, there were three intruders and he was not aware if any other suspect was outside the house. PW-7 (Deepa) on the other hand disclosed that at about 02.30 A.M. she got up and noticed that one intruder was opening the steel almirah lying in the room. She made Babloo got up and informed him about the presence of a stranger in the

room. Babloo got up and grappled with that person and made him to fall on the ground. By the time, her husband had also got up and he asked Babloo to beat that intruder. At that point of time, four more persons entered inside the room and three of them started assaulting Babloo with a knife. When her husband told the intruders that he had no cash, he was stabbed with a knife. Complainant (PW-1) narrated another version of the occurrence and deposed that at about 02.30 A.M. (mid-night) he heard commotion and saw an intruder opening a steel almirah. His wife and nephew got up. They were surprised to see four persons inside the house. Babloo grappled with that intruder. Babloo was assaulted with the knife resulting in three stab wounds on the back. Within a second, he was assaulted with knife and was given two stab wounds on the head. Apparently, all these witnesses have given contradictory versions regarding their confrontation with the assailants inside the house. It appears that the prosecution witnesses have not presented true facts regarding the incident and have suppressed some material facts. It is unclear as to what was the nature of injuries suffered by the victims. Original record is not traceable and the reconstructed record does not contain the MLCs of the injured. PW-8 (Jai Bhagwan) is a Medical Record Technician from the Hindu Rao Hospital who merely proved the

MLCs (Ex.PW-8/A and Ex.PW-8/B) prepared by Dr.Dinesh Kumar Sharma. It is not clear whether the injuries sustained by the victims were grievous or simple in nature. The weapons with which the injuries were inflicted were not sent to Forensic Science Laboratory for examination. It is not clear till which period the injured remained admitted in the hospital. However, it has come on record that both the victims were conscious when the police collected their MLCs. Since the intruders residing in the same locality were previously acquainted with the complainant and other witnesses, they were justified to decline to participate in the TIP proceedings and no adverse inference can be drawn against them on that score. The crime team inspected the spot in between 06.00 A.M. to 07.00 A.M. and at that time there was no inkling of the suspects. The witnesses made vital improvements in their depositions and were duly confronted with. A-5 is alleged to have been apprehended at a distance of about 200 meters from the place of occurrence. However, the Investigating Officer did not bother to associate the complainant and other eye witnesses that time.

7. In the light of above referred discrepancies, inconsistencies, infirmities or deficiencies touching core of the case, appellants' conviction can't be sustained. Resultantly, the appeals are allowed setting aside the

conviction and sentence awarded to the appellants. Bail bonds and surety bonds of the appellants stand discharged. The Trial Court record be sent back forthwith. Pending application (if any) also stands disposed of.

(S.P.GARG)
JUDGE

NOVEMBER 21, 2013/*tr*