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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 239/2010 & CrI.M.B.119/2013

Date of Decision: 11th September, 2013

RAJESH GUPTA

..... Appellant

Through: Mr. S.B .Dandapani, Advocate.

versus

STATE (NCT) OF DELHI

..... Respondent

Through: Ms. Fizani Husain, APP for the
State with SI Vinod Kumar,
P.S Pandav Nagar.

AND

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CRL.A. 1047/2009

PANKAJ GUPTA

..... Appellant

Through: Mr. Krishan Kumar and Ms.
Sunita Arora, Advocates.

versus

STATE

..... Respondent

Through: Ms. Fizani Husain, APP for the
State with SI Vinod Kumar,
P.S Pandav Nagar.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

:SUNITA GUPTA, J.

1. Challenge in these appeals is to the judgment dated 30.10.2009 and order on sentence dated 06.11.2009 arising out of Sessions Case

No.76/2005 in case FIR No. 631/2004 u/s 392/394/397/452/506

(ii)/342/34 IPC & 25/27 Arms Act vide which the accused were held guilty for all the offences and were sentenced as under:-

- Sentenced to undergo rigorous imprisonment for a period of seven years each and were also directed to pay fine in the sum of Rs.2,000/- each, in default of payment of fine, to undergo simple imprisonment for a period of three months each for offence u/s 397/394/392 IPC read with Section 34 IPC
- Sentenced to undergo rigorous imprisonment for a period of two years and also to pay fine of Rs.1,000/- each, failing which to undergo simple imprisonment for a period of two months each for offence u/s 452/34 IPC;
- Sentenced to undergo rigorous imprisonment for a period of one year each for offences punishable u/s 506(ii) IPC read with Section 34 IPC;
- Sentenced to undergo rigorous imprisonment for a period of six months for offence u/s 342 IPC;
- Sentenced to undergo rigorous imprisonment for a period of one year each for offences punishable u/s 25 read with Section 27 Arms Act.

All the sentences were to run concurrently. Benefit of Section 428 Cr.P.C was extended to each of the convicts.

2. Prosecution case emanates from the fact that on 27.11.2004, at about 8.15 p.m, both the appellants along with their third associate

entered the house of complainant Savita Bhola at III Floor, A-12, Pandav Nagar, Delhi and committed robbery on pointing out a country made pistol and robbed her of her gold jewellery. The two accused were apprehended while they tried to flee away, below the house, by the public persons who gave severe beatings to them. The husband of the complainant also reached the spot and recovered one loaded country made pistol from the pant of accused Pankaj and four live cartridges from accused Rajesh. PCR also reached the spot and took the accused to L.B.S. Hospital. Local police arrived and took the complainant and her husband to L.B.S.Hospital where the statement of complainant was recorded, which culminated in registration of FIR against the accused persons. One sweater, muffler and a kitchen knife was also recovered from the dining room of the house of the complainant while one half sleeve sweater was recovered from the stair case. Same were seized. One gold pendent and one silver *jhumka* belonging to the complainant were also recovered from accused Rajesh and Pankaj respectively by the duty constable during their medical examination at the hospital. The country made pistol and cartridges were sent to CFSL, Hyderabad. Permission under Section 39 Arms Act was obtained from DCP (East). After

completing investigation, charge-sheet was submitted against the accused persons

3. Initially on 19.05.2005, charge for offence u/s 392/394/397/34 IPC was framed against the accused persons. Subsequently on 27.01.2006, additional charge u/s 452/506(ii)/342/34 IPC read with Section 25/27 Arms Act was also framed. Accused pleaded not guilty to the charge and claimed trial.

4. In order to substantiate its case, prosecution examined 13 witnesses. All the incriminating evidence was put to the accused while recording their statements u/s 313 Cr.P.C wherein they denied the case of prosecution and alleged that accused Pankaj along with his co-accused Rajesh had gone to demand money from the complainant as he had worked with the complainant at his shop and amount of salary was to be taken from him. When they came to demand the dues, then a quarrel had taken place between them and Gagan Bhola who raised alarm of 'chor-chor' and got them apprehended with the help of public who gave beatings to them. Complainant handed over one piece of silver ear ring and one pendent to the police for planting the same upon them. They, however, did not prefer to lead any evidence.

5. After meticulously examining the evidence led by the prosecution, vide impugned order, the appellants were convicted and sentenced as stated above, which has been assailed by the appellants by filing the present appeals.

6. It was submitted by learned counsel for the appellants that this is a case of wrong appreciation of evidence. Conviction is based on the testimony of PW-1 and PW-3 who are interested witnesses. No independent witness has been examined. It has been admitted by the Investigating Officer of the case that he himself did not recover any article from the possession or at the instance of the accused. The articles were handed over to him either by PW-3 Gagan Bhola or the duty constable. If the pistol and cartridges were recovered by Gagan Bhola, why the same were not handed over at the spot and why the same were handed over in the police station. Moreover, if he had taken search of the accused persons why did he not find *jhumka* and pendent which was recovered by Duty Constable. This shows that the *jhumka* and pendent has been planted upon the accused. It is not established that the muffler and sweater given by Gagan Bhola to police belongs to accused. It was further submitted that the FIR has been recorded prior to the MLC, that being so, why in the MLC,

names of the accused do not find mention. The Constable who took the accused to hospital was not examined by the prosecution. There are contradictions in the testimony of PW-1 and PW-3. Under the circumstances, prosecution has failed to bring home the guilt of the accused beyond shadow of doubt and as such they are entitled to be acquitted. Reliance was placed on *Sanjay Kumar Gupta v. The State, Govt. of NCT of Delhi*, 2009(4) JCC 2544; *State v. Parkha Ram Suri & Ors.*, 2011(3) JCC 2094; *Harendra Narain Singh & Ors vs. State of Bihar*, 1991 SCC (Cri) 905; *Man Preet Singh vs. State*, 2004 Cr.L.J 530; *Pramil @ Parmanand Gajanan Rao v State of Goa*, 2006(2) Bom, C.R.434; *Vijay Kumar @ Bhushan v. State and State Delhi Administration vs. Vijay @ Bhushan*, 2007(1) JCC 16; *Dharam Singh vs. State*, 2007(4) JCC 3068; *Dharambir vs. State of Haryana*, 2008(4) JCC Narcotics 197 and *Anil Kumar Goswami vs. State (NCT of Delhi)*, 2012(1) JCC 47.

7. Rebutting the submissions of learned counsel for the appellants, it was submitted by learned Additional Public Prosecutor for the State that the impugned order does not suffer from any infirmity which calls for interference. The accused persons have admitted their presence in the house of the complainant. The

suggestion given to the complainant and her husband is contrary to the case set up by accused in their statements recorded under Section 313 Cr.P.C. On the other hand, there is no reason to disbelieve the testimony of PW-1 and PW-3 which on material points goes unrebutted. As regards omission to mention name of accused in the MLC, it was submitted that the accused were taken to hospital by PCR van and, therefore, since their names were not known to them, as such in the MLC it was shown 'unknown'. FIR was registered later on. The recovery of country made revolver and the cartridges stands proved and testimony of PW-3 in this regard goes unchallenged. The FSL report further proves the case of prosecution, as such it was submitted that the appeal is devoid of merit and is liable to be dismissed.

8. I have given my anxious thoughts to the respective submissions of learned counsel for the parties and have perused the record.

9. In order to substantiate its case, Prosecution has basically relied upon the testimony of PW-1 Savita Bhola and PW-3 Gagan Bhola. Savita Bhola has unfolded that on 27.11.2004, at about 8 p.m, she was present in her house along her two children, namely, Mahima, aged about six years and son Yash, aged about two years. The door

bell rang. She thought her husband had come and asked her daughter Mahima to open the door. Mahima opened the door. Savita also reached there and saw a person outside the door. That person was the same person who had come 7-8 days back to repair the water tap but at that time she did not open the door. He told her that he had come to repair the water tap but she asked him to leave the place. Meanwhile, two associates joined him and they pushed her inside the house and all the three entered her house. One of them caught hold of her daughter while remaining two intruders started beating her and they put their hands into her mouth in order to stop her raising alarm. Meanwhile, she noticed that the third person who caught hold of her daughter was pressing her mouth. She requested the third person to release her daughter, by giving signal to him without speaking any word and that she would not raise alarm. One of the assailants took her in the middle room and asked her to open the almirah. Due to fear, she opened the almirah. One assailant continued to cover her while the second who was with her took out all the ornaments including three gold chains, five gold rings, two pairs of gold ear rings, two gold heavy lockets from the almirah and also demanded cash from her. She told that there is no cash in the house, on which

one of them took out a pistol and loaded the same with a cartridge and put the pistol into her mouth. She repeated her request that she had no cash in the house. Thereafter they confined her and her children in the bathroom of the house. She also bolted the bathroom from inside. Thereafter, she heard the cries of her husband Gagan Bhola. After about 10-15 minutes, her husband opened the door of the bathroom from outside and she also unbolted the bath room from inside. Her husband informed her that the intruders have been over powered by the public persons. She came down along with her husband and saw a crowd of public persons and the two intruders were over powered by them. She identified accused Rajesh to be the person who had rung the bell of the door and entered the house along with co-accused Pankaj. She further deposed that she can also identify the third associate of the accused persons, if shown to her. Accused was armed with knife at the time of the incident and he put his fingers in her mouth to stop her from raising alarm while co-accused Pankaj had caught hold of her daughter Mahima. The third associate had taken the ornaments from the almirah.

10. She further deposed that pistol which was used by the accused persons was recovered. Police arrived and took them to L.B.S.

hospital where they were medically examined. In the hospital, her statement Ex.PW1/A was recorded by the police which bears her signature at point A. Accused were also admitted in the same hospital and were medically examined. In the hospital, one piece of *jhumka* and one gold pendent was recovered from the accused persons which were seized vide memo Ex.PW1/D. The katta and cartridges were recovered which were also seized vide recovery memo Ex.PW1/E. Sketch of the same Ex.PW1/B was also prepared. Both the accused were arrested vide arrest memo Ex.PW1/H and Ex.PW1/J. Police had prepared the site plan of the place of incident. They had seized one sweater and one knife also which was produced by her husband. In cross-examination she admitted that accused Rajesh was known to her prior to the incident. She, however could not say if he was working at the shop for 5-6 months. She denied the suggestion that he worked at the shop for about 5-6 months and his money was due towards her husband or that on the day of the incident, he had come to the house for demanding money or that a quarrel had taken place between her husband and the accused persons or that they raised alarm 'chor-chor' and got the accused persons apprehended by the public and beaten up.

11. PW-3 Gagan Bhola has deposed that he was running the business of interior decorator at his shop at house No.63, Pandav Nagar. On 27.11.2004, he had to go to attend a wedding along with his family. So after closing the shop at 8.20 p.m, he reached the house which was situated at 3rd floor. When he pushed the call-back button, he found one person inside the house. An iron mesh gate was also fixed on the main door of the house. That person open the wooden door. He enquired from him as to why he was present in the house. He replied that he was an electrician. On suspicion, he tried to bolt the door from outside but in the meantime two other persons came there and tried to pull him inside the house. He raised hue and cry. Those three persons started running out of the house. He caught hold of one person by his sweater but he managed to wriggle out of the sweater and ran away. He followed them downstairs and raised alarm. On hearing this, some boys who had come to visit the nearby gym caught hold of the accused persons and public persons gave beatings to them. He went upstairs and found his wife and two children locked up in the toilet by the assailants. He opened the door and brought them out. He along with his wife came downstairs to the place where public persons were giving beatings to the accused

persons with kick and fist blows. His wife informed him that accused persons were the same who committed robbery in her house on which he conducted search of the accused persons. On search of accused Pankaj Gupta, one loaded country made pistol was recovered and four live cartridges were recovered from accused Rajesh. Accused Rajesh Gupta had worked as a plumber prior to 1-1/2 months of the incident. In the meantime, PCR reached the spot and took the accused persons to hospital as they had received injuries due to beatings given by public persons. He and his wife had also received injuries. As such, they were also taken to L.B.S. hospital by police. He handed over the country made pistol and five cartridges to the Investigating Officer of the case in the hospital. I.O. recorded the statement of his wife and seized the pistol, vide seizure memo Ex.PW1/E. The accused persons were also given treatment in the hospital. Their search was conducted. One silver *jhumka* and gold pendent was recovered from their person which was identified by his wife as belonging to her. From the hospital, he along with his wife and police came back to his house. One kitchen knife and one muffler was lying in the room of the house while the sweater was lying on the second floor near the stair-case. He handed over the same to the I.O of the case who took

the same in possession vide memo Ex.PW3/A. Crime team reached the spot and inspected the scene of occurrence and developed chance prints. Thereafter he along with his wife went to police station. Accused persons were arrested vide Ex. PW1/H and Ex.PW1/J and their personal search was conducted vide Ex.PW1/F and G. This witness also denied in cross examination that accused Rajesh was employed by him or that he worked as an employee for six months or that a sum of Rs.6,000/- towards his salary was still payable by him. He went on stating that since accused Rajesh was not employed by him, therefore, the question of outstanding salary did not arise. He further denied the suggestion that accused Rajesh had come to his house along with his friend Pankaj for demanding his dues of Rs.6,000/- or that he did not pay the same, as such, a quarrel had taken place between them.

12. A perusal of statement of both the accused recorded u/s 313 Cr.P.C goes to show that the plea taken by accused Pankaj was that he had gone along with his co-accused to demand money from the complainant as he worked with the complainant at his shop and amount of salary was to be taken from him. A quarrel had taken place between them and PW-3 Gagan Bhola raised alarm 'chor-chor'

and got them apprehended by the public who gave beatings to them. It was further pleaded that the pistol, cartridges, silver ear-ring and gold pendant had been planted upon them. Accused Rajesh in his statement u/s 313 Cr.P.C had taken the plea that he had accompanied his co-accused to the house of the complainant as his co-accused had gone to demand money from the complainant as he had worked at his shop. Thereupon instead of paying money, a quarrel took place and Gagan Bhola raised alarm `chor-chor'. Public apprehended them and gave beatings to them. Under the circumstances, the suggestion given to the prosecution witnesses and the stand taken by the accused persons makes it clear that contradictory stand has been taken by accused. It was suggested to PW-1 and PW-3 that Rajesh used to work at the shop of Gagan Bhola and a sum of Rs.6,000/- was due for which he had gone to the house of the complainant to demand the money whereas in their statement recorded u/s 313 Cr.P.C, no such plea has been taken by accused Rajesh that he had worked at the shop of Gagan Bhola. In fact now the stand taken was that accused Pankaj was working at the shop of Gagan Bhola and his salary was due. Therefore, Pankaj had gone along with Rajesh to the house of the complainant where the quarrel ensued. No evidence has been led by

the accused persons in order to prove as to who was working at the shop of Gagan Bhola and whether any amount was due to him or not. That being so, the suggestion given to the prosecution witnesses which was denied by them was not even carried forward by the accused persons in their statement u/s 313 Cr.P.C.

13. However, the suggestions given to the prosecution witnesses and statement of accused under Section 313 Cr.P.C makes it clear that the accused are not disputing their presence in the house of complainant. They are also not disputing regarding beatings given to them by public. In this background, since the presence of the accused persons in the house of complainant is undisputed, the entire incident has to be considered. Learned counsel for the appellant had placed reliance on *Raju alias Balachandran & Ors v. State of Tamil Nadu*, AIR 2013 SCC 983, for submitting that PW1 and PW3 are interested witnesses. There is no independent witness hence no reliance can be placed on their testimony. In this case, it was observed that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related witness may have an enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying the

standard of discerning scrutiny. However, this is only a rule of prudence and not one of law. Though the prosecution case rests on the testimony of Savita and her husband Gagan and there is no other independent witness but that itself is not sufficient to cast any doubt on their testimony keeping in view the fact that the accused persons have failed to show that there was any enmity between them and the complainant/her husband. Once it is not proved as to for what purpose the accused persons had gone to the house of the complainant, there is no reason to disbelieve the testimony of Savita who had given a detailed account of the entire incident by explaining the role of each and every accused with minute details. Despite cross examination, nothing could be elicited to discredit her testimony. Furthermore, according to Gagan Bholra, on search of the accused persons a loaded country made pistol and four cartridges were recovered from the accused persons. His testimony in this regard goes absolutely unchallenged and unshattered as he was not cross examined in regard to this recovery at all. In fact, except for giving a bare suggestion that no such incident had taken place, his entire testimony regarding the incident has not been assailed in cross examination.

14. It further stands proved that the accused persons were taken to L.B.S. hospital where their search was taken by the Duty Constable and one silver *jhumka* and one pendent was recovered from the search of both the accused persons which were duly identified by the complainant and the same were seized. There is no plausible reason as to why the complainant or her husband would get the *jhumka* and the pendent planted upon the accused persons since recovery is not a *sine qua non* for proving the offence of robbery.

15. Much emphasis was led by learned counsel for the appellants for submitting that the Constable who had taken the accused persons to hospital was not examined by prosecution and reliance was placed on ***Parkha Ram Suri*** (supra) and ***Pramil***(supra). Section 134 of the Indian Evidence Act provides that no particular number of witnesses are required for proof of any fact. It is trite law that it is not the number of witnesses but it is the quality of evidence which is required to be taken note of for ascertaining the truth of the allegations made against the accused. In ***Thakaji Hiraji vs. Thakore Kubersing Chamansing*** (2001) 6 SCC 145, it was observed as follows:-

“It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the

prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself -- whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses.”

16. ***Surinder Narain @ Munna Pandey vs. State of U.P.***, AIR

1998 SC 192 was also a case where murder took place while deceased was travelling in rickshaw. Non- examination of rickshaw puller was held not to be fatal by observing that evidence has to be weighed and not counted.

17. I have carefully gone through both the judgments relied upon by learned counsel for the appellants. Same has no application to the facts of the case in hand inasmuch as in ***Parkha Ram Suri(supra)***

there was a dispute between the husband and his family members on one side and the members of wife's family regarding the character of the wife. The matter reached the community Panchayat. Panchayat decided to hold Jal Pariksha by erecting two bamboos on the banks of river Yamuna at the cost of mother of the wife and brother of the wife. Bamboos were fixed. Her husband Mohan Lal and his wife's brother Lalit were asked to enter the water and hold on to the bamboos which were firmly held by two other persons. Two swimmers were also kept ready inside the water. However, none of the two came out even after a considerable time and got drowned and their dead bodies were retrieved after about four days. Mohan Lal's father and elder brother along with members of the Panchayat were prosecuted for offence u/s 304 and 384 read with Section 34 IPC for causing death of the deceased. According to the prosecution version, two persons, namely Hari and Sardari held the bamboos with the support of which deceased Lalit and Mohan sat inside the water. However, those persons were neither interrogated nor cited as a witness. It was observed that they were the most crucial witnesses for the prosecution to depose what exactly happened before or after the deceased entered the water. As such an adverse inference had to be

drawn against the prosecution for their non-examination. Similarly in *Pramil* (supra), for non-examination of material witness, an adverse inference was drawn. It was case based on circumstantial evidence. However, things are entirely different in the instant case inasmuch as Constable who had taken the accused persons to hospital was not an eye witness of the incident. He merely removed the accused to hospital. That being so, his non-examination is not fatal.

18. Similarly, as regards the omission to mention the name of the accused persons in the MLC, it is a matter of record that the accused persons were taken to hospital by PCR van and as per the MLC, the accused persons were unconscious/semi-unconscious and the police officials were not aware of their names. That being so, the MLC was prepared as 'unknown'. The FIR was recorded subsequently when the complainant reached the hospital. Therefore, no significance can be attached to non-mention of names of accused in MLC.

19. The plea that the country made pistol and cartridges were planted upon the accused by Gagan Bhola, does not inspire confidence inasmuch as it has come in his deposition that when he took search of accused, then the loaded country made pistol was recovered from accused Pankaj while four cartridges were recovered

from accused Rajesh. His testimony was not assailed in cross-examination. That being so, it does not appeal to reason as to why and how Gagan Bhola would hand over the country made pistol or the cartridges to the police officials in order to plant the same upon the accused persons with whom no enmity could be proved. The country made pistol and cartridges were sent to CFSL which confirmed that they were arms and ammunitions within the definition of Arms Act. The sanction u/s 39 Arms Act for the prosecution of the accused for the possession of the said arms was also accorded by PW-13 Sh. Ajay Chaudhary DCP.

20. The other authorities relied upon by learned counsel for the appellant has no application to the facts of the case in hand inasmuch as same pertains to circumstantial evidence where it is incumbent upon the prosecution to prove all the links in the chain whereas the present case is based on direct evidence in the form of testimony of Savita and Gagan Bhola and as discussed above, on material points, testimony of both the witnesses goes un rebutted. Savita has also given a clear, vivid and cogent picture of the entire incident with specific role of each and every accused.

21. The nut shell of the aforesaid discussion is that the prosecution had succeeded in establishing its case and the impugned order does not suffer from any infirmity which calls for interference.

22. Even as regards the quantum of sentence, although learned counsel for the appellant prayed for a lenient view by submitting that accused Rajesh has remained in jail for 5 years while Pankaj remained in jail for 3-½ years when he was released on bail by Hon'ble Supreme Court, however, the accused persons have been convicted for offence u/s 397 IPC besides other offences. Section 397 IPC mandates that "the imprisonment shall not be less than seven years". That being so, the sentence, even otherwise, cannot be reduced.

23. Under the circumstances, there is no merit in both the appeals. The same are accordingly dismissed. Copy of this order along with Trial Court record be sent back.

**SUNITA GUPTA
(JUDGE)**

SEPTEMBER 11, 2013
as