

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

+ **CRL.A. 649/2011**

%

Reserved on: 4th February, 2013

Decided on: 5th April, 2013

BAHADUR SINGH Appellant

Through: Mr. R.S. Rai, Adv.

versus

STATE Respondent

Through: Mr.Mukesh Gupta, APP.

+ **CRL.A. 552/2011**

MOHSIN alias MOTI Appellant

Through: Mr. Pradeep Teotia, Adv.

versus

STATE Respondent

Through: Mr.Mukesh Gupta, APP.

+ **CRL.A. 1136/2011**

MOHD. SAHID Appellant

Through: Ms.Nandita Rao, Adv.

versus

STATE Respondent

Through: Mr.Mukesh Gupta, APP.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these appeals, the Appellants impugn the judgment dated 4th March, 2011 whereby they have been convicted for offences punishable

under Section 394/34 IPC, 457/34 IPC and 411 IPC and in addition Appellants Mohsin and Bahadur were also convicted for offence punishable under Section 397 IPC. As per the order on sentence dated 11th March, 2011 Appellant Mohd. Shahid was directed to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 20,000/- for offence under Section 394 IPC and in default of payment of fine to further undergo rigorous imprisonment for a period of one year, rigorous imprisonment of five years and a fine of Rs. 10,000/- for offence punishable under Section 457 IPC and in default of payment of fine to further undergo rigorous imprisonment for a period of six months and rigorous imprisonment for a period of two years and a fine of Rs. 5000/- for offence punishable under Section 411 IPC and in default of payment of fine to further undergo rigorous imprisonment for three years. Appellants Mohsin and Bahadur were in addition to the above, directed to undergo sentence of rigorous imprisonment for a period of 7 years under Section 397 IPC.

2. Learned counsel for the Appellant Mohd. Shahid contends that the Appellant was not identified by the complainant. The identification by the son of the complainant was meaningless as he was the planted witness. There are material contradictions in the testimonies of PW1 and PW4. No public witness was associated at the time of alleged recovery of a ring and Rs. 300/- from his house. Ring was not identified in the TIP proceedings. PW1 was doing the business of artificial jewellery and thus the same could have been easily planted. Further PW8, the finger print expert has given a specific report that the finger prints lifted did not match with the finger prints of the Appellants. Further though PW1 states that there were two servants

working on the upper floor, however despite cries only one servant Mukesh came down and no other person comes down. The version of PW3 cast a doubt on the version of PW1 as to the alleged entry of the Appellants. Further PW3 does not say that he was beaten. Moreover, PW3 does not identify the Appellant Mohd. Shahid in the Test Identification Parade but strangely identifies him in the Court. PW4 Madhup states that leg blows were given to Mukesh. Thus, all the three witnesses have given different version of assault on Mukesh. Further this witness PW4 does not know as to whom he identified in TIP on 18th January, 2007. As per the report of the chance prints, the chance prints do not match with either of the three Appellants or the inmates of the house. Further only two bangles and one ring were recovered from the Appellants and thus there is no complete recovery of the goods.

3. Learned counsel for the Appellant Bahadur reiterating the submissions of the learned counsel for the Appellant Mohd. Shahid states that co-accused Firoz and Rehan have been acquitted, though there was recovery of currency notes from them and thus the Appellant is also entitled to the benefit of doubt. Further the identification of PW1 cannot be given any weightage as he did not identify any of the Appellants in the TIP and only identified Bahadur and Mohsin in the Court. Further PW4 only identified Mohd. Shahid and thus for lack of corroboration of identification the Appellant is entitled to be acquitted.

4. Learned counsel for the Mohsin states that it was the defence of the Appellant that his photos were shown, thus he was correctly identified in the judicial TIP. The TIP conducted was meaningless and no reliance can be

placed thereon. Further PW3 Mukesh states that he was hit on the mouth due to which his tooth came out, however he was not medically examined and thus there is no medical evidence on record to corroborate this version. The MLC was not proved as doctor was not produced in witness box. The jewellery was not described in the FIR or thereafter in the statements and thus the TIP of the jewellery was meaningless. Due weightage was not given to the defence evidence. The details of the knife were not given by the witnesses and thus the knife was a planted one. Testimony of PWs1, 2 & 4 has been dictated by the Police officers and thus cannot be relied upon. The learned Trial Court wrongly held the contradictions to be not major. Thus, benefit of doubt needs to be extended to the Appellants. Further Section 394 IPC mandates hurt, however as the MLC has not been proved, so Section 394 IPC cannot be invoked and Appellants cannot be convicted for the offence under Section 394 IPC.

5. Learned APP on the other hand contends that the incident took place on 30th December, 2006. The TIP of all the three accused were conducted on 18th January, 2007 wherein though PW1 identified none, however in the Court she identified Bahadur and Mohsin. Further in the TIP PW3 identified Bahadur and Mohsin, and in the Court he identified all the three Appellants. PW4 in his TIP though identifies only Shahid, however in the Court he identifies all the Appellants. The identification by the witnesses in the Court is substantive evidence and since the Appellants have been identified in Court by the natural witnesses, conviction can be safely based on their testimony. PW1 has given the complete narration of facts and has clarified that in the TIP she could not identify the Appellants due to the fear. PW3

corroborates the version of PW1. The contention that the Appellants cannot be convicted for offence under Section 394 IPC is incorrect as PW9 Dr. Sameer Sethi has been examined who has proved the MLC Ex.PW9/A which shows injury on the neck portion. Further under Section 394 IPC such person and all other persons who are in conspiracy and participating with him are liable. The TIP of the articles was done properly and thus the same proves that the Appellants indulged in trespass and robbery. In the statement under Section 313 Cr.P.C. the explanation given is that the photos were taken and shown. However, no such version has been put to the witnesses in the cross-examination. The prosecution has proved the case beyond reasonable doubt and the appeals be dismissed.

6. I have heard learned counsel for the parties. FIR No. 1001/2006 under Section 457/395/397/34 IPC was registered on the complaint of Reeta Verma. PW1 Reeta Verma in her testimony before the Court stated that work of checking and packing of artificial jewellery was being done in her house. On 30th December, 2006 at about 7.30 PM she was preparing food in her kitchen, her husband had gone out with the daughter to get her dressing done, her son Madhup was standing near the gate of the kitchen and her two servants Mukesh and Amit were working on the third floor. At that time three boys aged 24-25 years opened the gate and came at the first floor of the house. She came out of the kitchen to see as to who had come and found two boys having knives in their hand and third boy having pistol in his hand. The boy having knife in his hand asked where was Guptaji and when she stated that he was not at home, one of them put knife on her neck and she cried. The witness identified Bahadur and Mohsin as the two persons who

came at the first floor of the house. She further stated that those boys took her to the bed-room situated near the kitchen and took out two gold chains from her neck by breaking them. They also took her four gold bangles, two finger rings and a pair of earrings. Her son Madhup was made to sit on the sofa and one boy put pistol on the head of her son. The boys opened the almirah and took out Rs. 60,000/- from it. They also took one mobile and one Titan wrist watch. On hearing the cries of PW1, her servant Mukesh came at the first floor, whom the assailants gave fist and slap blows and blood started oozing out of his mouth. The assailants confined them in a room and took away the above stated jewellery, mobile, cash and watch with them. After about 10 minutes, her husband came and opened the room and took them out. The witness identified the jewellery articles in the Court which she had already identified in the TIP proceedings. Though this witness has been confronted with her earlier statement, however there is neither any material improvement nor contradiction except that the language used in statement under Section 161 Cr.P.C. is slightly different.

7. PW4 Madhup corroborated the version of PW1 and stated that on 30th December, 2006 at about 7.30 PM he was present in the kitchen at first floor of the house with his mother. Their employees Mukesh and Amit were preparing samples of artificial jewellery at the third floor when three persons came on the first floor of the house. He identified the three persons who are the Appellants herein. One of them asked about Guptaji. Thereafter, one of them put chhuri on the neck of his mother. Further the accused asked where was Guptaji, put firearm on his temple. The Appellants took them to the bed-room where Appellant Bahadur, who put chhuri on the neck of his

mother, took out four gold bangles, two gold chains, two gold rings and gold earring from the person of his mother. On this his mother cried and Mukesh their employee came on the first floor. Mukesh was forced to sit down by one of the accused and was given leg blow on his mouth. Appellant Mohsin started searching the almirah. Appellant Shahid took out cash amounting to Rs. 60,000/-. Gold jewelleryes were also taken off. Accused also took mobile phone make Nokia 3230 without SIM. The Appellants confined him, his mother and Mukesh in room and left the house. After some time his father came and opened the room. He identified all the Appellants in the Court. Further merely because he identified only Shahid in TIP proceedings cannot belie his identification in the Court. Nothing material could be elicited in the cross-examination of this witness.

8. PW3 Mukesh was also examined who stated that on the night of 30th December, 2006 he was preparing samples of artificial jewellery on the third floor of the house. At about 7.30 PM he heard a noise of cry from the floor of the owner of the house. When he reached on the first floor he saw one person putting chhuri on the neck of Reeta Verma and another person put pistol on the face of her son Madhup Verma. When he just entered the gate, one person caught hold him of his back and forced him to sit down on the stool and gave fist blows due to which he received injuries on foot and mouth and bleeding started. After some days of the incident he went to the Tihar Jail where he identified all the three Appellants herein. Thus, this witness has sufficiently corroborated the testimony of PW1 and PW4. He denied the suggestion that the accused persons were shown to him by the Police before the TIP.

9. PW-1 & 4 are natural witnesses. Further testimony of PW3 does not get washed away for the reason that the other employee working with Mukesh i.e. Amit did not come down. It is well-settled that each witness reacts differently in a given circumstance. Learned counsel for the Appellants have laid a lot of stress on the fact that the chance prints taken neither matched the Appellants nor the inmates of the house. The non-matching of the chance prints with the Appellants or the inmates of the house does not rule out that the offence has not been committed by the Appellants.

10. I find no merit in the contention of the learned counsel for the Appellants that in view of the fact that MLC of PW3 Mukesh has not been exhibited and hurt has not been proved, Section 394 IPC is not attracted. Though MLC of PW3 Mukesh has not been proved, however the MLC of PW1 Reeta Verma has been proved and exhibited as Ex.PW9/A. As per the MLC, PW1 received two superficial incised wounds one on the right side of the neck and other on the thumb bone right palm. It is thus apparent that hurt has been received while committing robbery. Section 394 IPC provides that if any person in committing or in attempting to commit robbery voluntary causes hurt, such a person and any other person jointly concerned in committing or attempting to commit such robbery shall be punished with a term which may extend to 10 years and shall also be liable to fine. Causing of hurt to PW1 has been proved by the prosecution beyond reasonable doubt. The Appellants herein were jointly concerned in committing the robbery in which hurt was caused to PW1. Thus all the three Appellants are liable for conviction under Section 394/34 IPC.

11. As regards the contention of the learned counsel for the Appellants that there was no proper identification, it may be noted that TIP proceedings of the Appellants were conducted on the 18th January, 2007. No illegality has been pointed out in the said proceedings. The witnesses have been suggested that they were shown to them while in Police custody, however under Section 313 Cr.P.C. the defence taken is that their photographs have been shown which suggestion has not been given to the witnesses. In the TIP proceedings conducted PW1 did not identify any of the Appellants which fact she clarified during her cross-examination that she was afraid and thus she could not identify them. PW3 Mukesh identified Mohsin and Bahadur in TIP and PW4 Madhup identified Shahid in the TIP proceedings. PW-1, 3 & 4 identified all the Appellants in the Court and since they did not identify the other co-accused, they were acquitted. Identification of the accused by the witnesses in the Court is the substantive identification. The witnesses had sufficient time to see the Appellants. In the cross-examination nothing material has been elicited to show that the witnesses could not have identified the Appellants. I do not find any infirmity in the identification of the Appellants by the witnesses.

12. Further the recoveries of articles have been effected from all the three Appellants. From Mohsin and Bahadur one gold bangle each and from Shahid one gold ring have been recovered, besides knife from Mohsin and Bahadur and cash from Mohsin and Shahid. The identification of this jewellery was also got conducted wherein all the three witnesses identified the two bangles however failed to identify the ring. PW13 Shri Amit Kumar the then learned Metropolitan Magistrate has not been cross-examined.

There is no suggestion to either PW1 or PW13 that the jewellery got identified was not genuine/artificial. Even assuming jewellery was artificial the same is also of some value. The complainant has clarified that she identified the jewellery by the design. There is no necessity of giving detailed description at the time of registration of FIR describing the jewellery.

13. Learned counsel for the Appellants have urged that the testimony of defence witnesses have not been considered. It may be noted that each of the Appellants examined one defence witness each. DW1 Amit Kumar has stated that on 3rd January, 2007 at about 7/7.30 PM when he was returning to his house, he saw 4/5 persons taking away accused Bahadur in a van. One of them also had his motor-cycle. They were in civil dress. This witness in his cross-examination has admitted that he neither informed the PCR nor made a Police complaint about the persons who had taken away. He do not even remember the day or week when Appellant Bahadur was lifted. This witness has admitted that he had not even raised any alarm when he saw 3/4/5 persons taking away Appellant Bahadur. There is no material on record to corroborate the testimony of this witness, which would have cast a doubt in the prosecution case. Similarly DW2 Dev Anand has stated that on 3rd January, 2007 at about 12.00 mid-night 9/10 Police officials came to the house of Shahid. While they were taking him along with them, he saw the mother of Shahid crying. Even this witness stated that he did not make any complaint to anybody in this regard. Similar is the evidence of DW3 Indresh Chauhan on behalf of Mohsin. No doubt, the testimony of defence witnesses is required to be accepted in the same manner as prosecution witnesses,

however in the present case, the three witnesses produced in defence except stating that the Appellants were picked up at a particular point of time from their house have not stated anything else. Further there is no corroboration to the version of these three witnesses. Thus, no credence can be laid to the testimony of these witnesses. No doubt, the accused is not required to prove his case beyond reasonable doubt, however he is required to prove the same by preponderance of probability which also the Appellants have failed to do.

14. As regards non-association of the public witnesses at the time of recovery, nothing has been shown that the evidence of police witnesses is unreliable and not trustworthy. There is no reason why they should falsely implicate the Appellants. As held in *Karamjit Singh v. State (Delhi Admn.)*, (2003) 5 SCC 291, the presumption that a person acts honestly applies as much in favor of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. There is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon.

15. Thus, I find no infirmity in the impugned judgment of conviction and order on sentence. The appeals are dismissed.

(MUKTA GUPTA)

APRIL 05, 2013

‘ga’