

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

RESERVED ON : 19th February, 2013.

DECIDED ON : 28th February, 2013.

+ CRL.A.1286/2011 & CRL.M.B.1819/2011

IMRAN Appellant

Through : Mr.Chetan Lokur, Advocate.

versus

STATE NCT OF DELHI Respondent

Through : Ms.Fizani Husain, APP.

Insp.Bishwajit Kumar, PS Sarai Rohilla.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant- Imran impugns judgment dated 10.02.2011 and order on sentence dated 19.02.2011 in Sessions Case No.19/2010 arising out of FIR No. 580/2004 PS Sarai Rohilla by which he was convicted for committing offences punishable under Sections 395/397 IPC and sentenced to undergo RI for seven years with total fine ₹ 2,000/-.

2. Daily Diary (DD) No.20A (Ex.PW-4/A) was recorded at PS Sarai Rohilla on 22.10.2004 at 19.32 hours, on getting information of dacoity at house No.A-175, Shashtri Nagar, Delhi. The investigation was assigned to SI Rajender Singh Khatri who with Const.Devender Kumar

reached the spot. Complainant-Kamlesh disclosed in her statement (Ex.PW-2/A) that at 06.30 P.M. when she was present at first floor, four assailants came inside the house. They tied her hands with a saree. The assailants were armed with desi kattas and knife. They robbed ₹ 2.5 lacs from the wooden almirah. They also snatched her gold bangles, rings and Tulsi Mala. SI Rajender Singh Khatri lodged First Information Report. The investigation was taken over by SI Arvind Pratap Singh on 07.11.2004. Efforts were made to find out the assailants but in vain.

3. On 23.11.2004, on the basis of secret information, Imran and Shamshad were arrested and from their possession one country-made katta and two cartridges, each were recovered for which separate cases under the Arms Act were registered. In their disclosure statements they revealed the names of their associates i.e. Shaqueel @ Mulla, Rashid and Bhuran. It is alleged that Shamshad recovered ₹ 7,000/- from house No.A-23, Shashtri Nagar. Pursuant to disclosure statement of Imran, ₹ 10,000/- were recovered from the shop of Shamshad. Shaqueel recovered ₹ 58,000/- from an almirah in his house. Shaqueel did not participate in Test Identification Parade. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted. Accused Shamshad, Imran and Shaqueel were charged and

brought to trial. Accused Bhuran and Rashid were declared Proclaimed Offenders. The prosecution examined twelve witnesses. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted Imran, Shaqueel and Shamshad for committing offences punishable under Sections 395/397 IPC and sentenced them. Being aggrieved, the appellant Imran has preferred the appeal.

4. Learned counsel for the appellant urged that there are vital discrepancies and infirmities in the prosecution case. The witnesses have given divergent version as to how and what manner the appellant was arrested. No application for conducting Test Identification Parade was moved during investigation. Learned APP urged that the victim categorically identified the appellant as one of the assailants who committed dacoity at her house. She had no animosity with the accused to falsely implicate him. Currency notes having signatures of Sanjay Goyal on the slips were recovered at the instance of the appellant.

5. I have considered the submissions of the parties and have examined the record. The incriminating circumstances relied upon by the prosecution against the present appellant are that he was identified by PW-2 (Kamlesh) in the Court as one of the assailants and part of the

robbed cash was recovered at his instance. At the outset, it may be mentioned that the present appellant was unknown to the complainant. She had no acquaintance with him. The appellant was not arrested at the spot or at instance of the complainant. The Investigating Officer did not move any application for conducting Test Identification Proceedings during investigation. It is also not disputed that jewellery articles were also robbed from the house. However, no jewellery article was recovered from the possession or at the instance of the appellant.

6. There are material infirmities in the statements of the witnesses as to when, where and at what time Shamshad and Imran were apprehended and arrested. PW-2 (Kamlesh) claimed that after fifteen days of the incident she identified Imran and Shamshad while going to temple and they were fighting with each other near Petrol Pump. She informed the police and both were apprehended at her instance. In the cross-examination, she stated that she had not seen the accused persons fighting among themselves. She did not identify any of the accused persons either at the spot or any other place. She signed the memos/ papers at the instance of the police. PW-10 (SI Om Prakash) did not corroborate her version and deposed that on 23.11.2004 when he, Const.Joginder, HC Jasbir and Const.Arvind were on patrolling duty and were present near

Petrol Pump, Kalidas Marg, Shashtri Nagar, at about 05.45 P.M., he received a secret information that two persons armed with illegal weapons would come from the side of Shashtri Nagar at about 06.00 P.M. A raiding party was organised and at about 06.00 P.M. Imran and Shamshad were apprehended on the pointing out of the secret informer. On their search weapons were recovered for which separate cases under the Arms Act were registered. He stated that Kamlesh who was returning from temple identified Shamshad. It reveals that the present appellant was not apprehended or arrested at the pointing out of the victim/ complainant. The police had already apprehended them. It was imperative for the Investigating Officer to get the present appellant identified in TIP proceedings as the victim had no acquaintance with him prior to the incident and had given only broad features of the assailants in the statement (Ex.PW-2/A). The Investigating Officer did not offer any explanation for not getting the appellant identified in Test Identification Parade. The prosecution witnesses have given inconsistent version as to when the complainant or her son identified the appellant and if so, where. PW-3 (Sanjay Goyal) in the cross-examination admitted that he went to Police Station on 23.11.2004. Many sketches were prepared. He further admitted that the police told him that the persons involved in the robbery

have already been arrested. The accused were shown to him and he identified one of them. He pointed out towards Shamshad who was identified by him in the Police Station. He further admitted that on that day all the three accused persons were in the Police Station and were shown to him and his mother. They were also informed that the looted money has already been recovered at their instance.

7. ₹ 10,000/- were allegedly recovered at the instance of Imran on 23.11.2004 vide seizure memo (Ex.PW-10/B) from shop No.A-23, Shashtri Nagar, Delhi in the presence of PW-3 (Sanjay Goyal). None of the prosecution witnesses was able to elaborate as to whom this shop No.A-23 Shashtri Nagar belonged or who was present when the recovery was effected from there. The witnesses in the cross-examination, expressed their inability to tell as to who was the owner of the said shop. The witnesses were not sure if the said shop was lying open or close at that time. No independent public witness including 'chawkidar' of the area was associated at the time of recovery. Again, cash ₹ 7,000/- is alleged to have been recovered from shop No.A-23, Shashtri Nagar, Delhi pursuant to the disclosure statement of Shamshad. It is unclear as to why the complete search was not effected at the time of visit to the said shop and why cash of ₹ 10,000/- and ₹ 7,000/- was recovered at the instance of

Shamshad and Imran at two stages. There was no specific mark on the currency notes for identification. The victim or her son Sanjay Goyal did not produce any list of missing articles to the police. It was not specified at that time that the currency notes robbed from the house were kept in sealed bundles or it contained Sanjay Goyal's signatures. The recovery of ₹ 10,000/- pursuant to disclosure statement of the accused is highly doubtful after about a month from the date of incident from an open place accessible to others.

8. It is true that complainant- Kamlesh had no animosity with the accused to falsely identify and recognize him in the Court as one of the assailants. However, in view of infirmities/ material discrepancies it would be unsafe to base conviction of the appellant for the heinous offence on her sole testimony without any corroboration. In her statement to the police, she had disclosed that four assailants had committed trespass in the house. However, in her deposition before the Court, she told that five boys came in her room and they were armed with weapons. She disclosed that Shamshad was known to her as he had worked for many years in a shop near their residence and he used to visit her house. He also used to talk to her family members and she was familiar with her voice. She did not disclose to the police that Shamshad was one of the assailants.

It was pointed out that Shamshad had not come upstairs and for that reason she did not tell his involvement to the police at the first instance. The prosecution has failed to reconcile the divergent statements. If there were five intruders in the room, there was no possibility of Shamshad to remain outside the house. PW-2 (Kamlesh) disclosed that her daughter-in-law was present at the ground floor. However, the police did not record her statement. She was under no threat. She did not reveal if she had seen any assailant including Shamshad roaming outside the house.

9. There is inconsistent version on number of other aspects i.e. when PW-3 (Sanjay Goyal) reached the spot; whether light in the house were off or on; whether PW-2 (Kamlesh) alone was present in the house or her daughter-in-law was present on the ground floor; who informed the police at No. 100; what golden ornaments were robbed; whether the ornaments were kept in the bag printed with Om Prakash Jewelers or Panna Lal Jewellers; how the almirah was opened or broken and who untied the victim. There are glaring discrepancies as to when and where the present appellant was arrested. The recovery of ₹ 10,000/- is highly suspicious at his instance.

10. In the light of above discussion, the conviction and sentence of the appellant cannot be sustained. The appellant deserves benefit of

doubt. The appeal is accepted and he is acquitted in this case. The appellant be set at liberty forthwith if not required in any other case.

11. Pending application also stands disposed of.

(S.P.GARG)
JUDGE

FEBRUARY 28, 2013

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