

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

RESERVED ON : 6th DECEMBER, 2013

DECIDED ON : 4th FEBRUARY, 2014

+ **CRL.A. 492/2000 & CRL.M.A. 2835/2005**

SAGAR TAKWAL Appellant
Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.L.Yadav & Mr.Lokesh ,
Advocates.

versus

THE STATE (DELHI ADMN.) DELHI Respondent
Through : Mr.Lovkesh Sawhney, APP.

+ **CRL.A. 479/2000**

MOHD. RASHEED Appellant
Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.L.Yadav & Mr.Lokesh ,
Advocates.

versus

STATE (N.C.T. OF DELHI) Respondent
Through : Mr.Lovkesh Sawhney, APP.

+ **CRL.A. 566/2000**

MOHD. ARFEEN & ANR. Appellants
Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.L.Yadav & Mr.Lokesh ,
Advocates.

versus

STATE (N.C.T. OF DELHI) Respondent
Through : Mr.Lovkesh Sawhney, APP.

AND

+

CRL.A. 59/2001

STATE Appellant
Through : Mr.Lovkesh Sawhney, APP.

versus

SAGAR TAKWAL & ORS. Respondents
Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.L.Yadav & Mr.Lokesh ,
Advocates.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Sagar Takwal (A-1), Mohd. Rasheed (A-2), Nadeem (A-3), Mohd. Arfeen (A-4) and Mohd. Noor (A-5) were arrested in case FIR No. 32/97 by the police of PS M.S.Park and sent for trial for committing offences punishable under Sections 307/397/392/411/34 IPC. The prosecution case as projected in the charge-sheet was that on 07.02.1997 in between 02.00 to 04.00 P.M. at house No. 13, RPS, DDA Flats, M.S.Park, A-1 to A-4 in furtherance of common intention committed robbery and deprived the complainant of cash ₹ 12,000/-, gold and silver ornaments and remote control (of T.V.). While committing robbery,

grievous injuries by a knife were inflicted to Km. Pragati Seth. At first instance, she was taken to Abhimanyu Hospital, M.S.Park by Rajesh Gupta and S.P.Jain, her neighbours. After providing first aid soon thereafter she was referred to GTB Hospital and remained admitted there till 15.02.1997. Daily Diary (DD) No. 8A (Ex.PW-13/A) was recorded at police station M.S.Park on getting information of an 'accident' at flat No. 13, M.S.Park. Investigation was assigned to HC Jaiveer who with Const. Surender Kumar went to the spot. After recording Aman Seth's statement (Ex.PW-2/A), First Information Report was lodged by making endorsement (Ex.PW-7/A) at 06.00 P.M. Daily Diary (DD) No. 11A (Ex.PW-13/B) was recorded on getting information from Duty Const. Devender Kumar, GTB Hospital about admission of Km.Pragati Seth by her brother Aman Seth in injured condition. During the course of investigation, the accused persons were apprehended and arrested. Statements of the witnesses conversant with the facts were recorded. Applications were moved for conducting Test Identification Proceedings but the accused declined to participate in it. Pursuant to their disclosure statements, some robbed articles were recovered. After completion of investigation, a charge-sheet was submitted against them; they were duly charged and brought to trial. By an order dated 29.07.2000, A-1 to A-4

were charged for committing offences under Sections 452/392/394/307 read with Section 397 IPC; A-5 was charged under Section 411 IPC. The accused persons pleaded not guilty to the charges and claimed trial. The prosecution examined eighteen witnesses to establish their guilt. In 313 statements, the accused persons denied their complicity in the crime and pleaded false implication. After appreciating the evidence and considering the rival contentions, the Trial Court, by the impugned judgment, convicted A-1, A-2 and A-4 for committing offences under Sections 452/392 IPC and 307 IPC read with Section 34 IPC. A-3 was convicted under Sections 452/392/394, 397 and 307 IPC. A-5 was held guilty under Section 411 IPC. By an order on sentence dated 29.07.2000, various prison terms with fine were awarded to A-1 to A-4. A-5 was sentenced to imprisonment for the period already undergone by him. The substantive sentences were ordered to operate concurrently. Being aggrieved, A-1 to A-4 have preferred appeals. It appears that A-5 did not challenge the judgment. It is relevant to note that State has preferred CrI.A. 59/2001 for enhancement of sentence awarded to A-1 to A-4.

2. I have heard the learned counsel for the parties and have examined the record. At the outset, it may be mentioned that appellants' counsel did not contest the finding on conviction of the appellants

seriously and emphasized to modify the sentence order after taking lenient view as the appellants have suffered incarceration for more than five years and are not previous convicts. Learned Addl. Public Prosecutor also did not insist for enhancement of the sentence awarded to the appellants. Appellants' counsel merely argued that the prosecution was unable to establish beyond reasonable doubt that all the appellants had shared common intention to commit the crime. Only A-3 was allegedly armed with a knife and injuries were inflicted after the incident of robbery was over. The booty was not shared by the appellants.

3. Initially, the case was registered after recording Aman Seth's statement (Ex.PW-2/A) under Section 307 IPC. When PW-10 (Bhawna Seth) informed commission of robbery of ₹ 12,000/- cash and gold ornaments, Section 394/397 IPC were added. After thorough investigation, a charge-sheet was submitted under Sections 307/394/397/411/34 IPC. However, vide order on charge dated 30.07.1998, A-1 to A-4 were proceeded under Sections 452/392/394 read with Section 397 and 307 IPC. The trial resulted in conviction of A-1, A-2 and A-4 under Sections 452/392/307/34 IPC. A-3 was held guilty for committing offence under Sections 452/392/394 read with Section 397 and 307 IPC. In his statement (Ex.PW-2/A) made at the first instance soon

after the occurrence, Aman Seth disclosed to the police that his sister Pragati Seth was stabbed and was taken to Abhimanyu Hospital. When she was being taken on a stretcher to emergency at GTB Hospital, she called him near her by a gesture and named Sagar (A-1) his maternal aunt – Saroj's son to have attempted to murder her. He further disclosed that on the previous Dussehra festival, Sagar (A-1) had stolen ₹ 2,800/-. The complainant suspected A-1's involvement in the crime. A-1 was arrested and pursuant to his disclosure statement, the police was able to locate and apprehend his associates A-2 to A-5. Initially, A-3 was untraceable, however, he was arrested subsequently. After Pragati Seth was discharged from GTB hospital on 15.02.1997, involvement of all these accused persons emerged and she claimed to identify the assailants. The Investigating Officer moved application for holding Test Identification Proceedings of A-2 and A-4. They declined to participate alleging that they were shown to the witnesses. When A-3 was arrested on 11.07.1997, application was moved for Test Identification Proceedings in which he refused to participate.

4. Crucial testimony to infer the guilt of the accused persons is that of PW-1 (Pragati Seth) who was aged 13 / 14 years and was a student of 10th standard. She was studying at Moti Ram Memorial School, GT

Road, Shahdara. On 07.02.1997, she returned from the school at about 12.30 P.M. She deposed that her parents left around 02.00 P.M. She and her younger brother Gaurav Seth remained at home. After about ten minutes, she received a telephone call enquiring whether Aman was present at home. She responded that Aman had gone to school. After about two minutes, she again received a telephone call that school hours were over and Aman might be present. After about ten minutes, a boy came and insisted her to open the door on the pretext to handover her a diary. She declined to open the door and the said boy left. After about ten minutes, A-1 who is the son of her mother's sister came and asked her to open the door on the pretext that his mother was coming on stairs. Unsuspectingly, she opened the door and A-1 came inside. Three boys identified A-2 to A-4 were also with him. She further deposed the A-1 caught hold of her hands. The boy who had earlier come to deliver a diary was also with A-1. She further deposed that on 05.02.1997 at about 03.00 P.M. when she, her mother and younger brother were present at home, two boys had come and one of them had enquired about the presence of her mother. When she told that she was going to call her mother present inside the house, they disappeared. PW-2 further elaborated in her testimony that the two boys who had come to her house on 05.02.1997

had accompanied A-1 on 07.02.1997. They made her to lie down on the floor in the balcony. The boy who had come to deliver the diary caught hold of her legs and A-1 caught hold of her head. The other boy who was of blackish complexion and had come on 05.02.1997 put a red scarf over her mouth. The boy who had a talk with her on 05.02.1997 went inside to have some glance and came again in the balcony; sat by her side. He took out a knife from the right pocket of his pant and stabbed on her neck. All of them dragged her and bungled inside the kitchen. She became unconscious. When she regained consciousness, she heard noise of goods being taken out from the almirah. The two boys who had come to her house on 05.02.1997 again came inside the kitchen. The boy who had earlier grabbed her again put cloth over her mouth and pressed it forcibly. She started feeling suffocated. The boy who had earlier stabbed again stabbed her on her neck and she became unconscious. When she came to senses, she noticed that those assailants had left the spot. She identified A-2 to be the boy / assailant who had come to deliver a diary. A-4 was the boy who visited her house on 05.02.1997 as well as on 07.02.1997 and who grabbed her mouth on the day of occurrence. A-3 was the boy who visited her house on 05.02.1997 and 07.02.1997 and stabbed her on 07.02.1997. She identified skirt (Ex.P1), top (Ex.P2) and sameej (Ex.P3)

which she had worn at the time of incident. In the cross-examination, she informed that her statement was recorded by the police four times on 16.02.1997, 27.03.1997, 06.04.1997 and 31.07.1997. Her statements dated 06.04.1997 and 31.07.1997 were recorded in the Court premises. She explained that she could not narrate entire facts in her statement (Ex.PW-1/DA) recorded on 16.02.1997 as her physical condition was not good. She denied that her parents had tutored her the statement. She stated that A-2 and A-3 were not known to her prior to the date of occurrence. Her statement for the first time was recorded by the police on 16.02.1997. She denied that she was taken to the police station and the accused persons were shown to her. She reiterated that at GTB hospital, she had called her brother and told the name of A-1 and had signalled with her hands that she was stabbed. She elaborated that A-1's sister Aarti was engaged and her mother was mediator in the said marriage. However, the marriage could not be solemnized and the relations became strained.

5. On scrutinising the entire statement of the victim, it reveals that despite lengthy and searching cross-examination, the appellants were unable to extract / elicit any material discrepancy or contradiction to discredit her testimony on material facts to affect the core of the prosecution case. It is true that some facts narrated by the witness were

omitted by her in her statement (Ex.PW-1/DA) date 16.02.1997 and she was duly confronted. However, reasonable explanation has been given by her that due to her physical condition, she was unable to disclose all the detail facts in her statement recorded soon after discharge from GTB hospital on 15.02.1997. It has come on record that subsequently, she was again taken to Batra Hospital and got treatment for some days. Since the victim had sustained 'grievous' injuries on her vital organs and had remained admitted in GTB Hospital till 15.02.1997, the delay in recording her statement and omissions in statement under Section 161 Cr.P.C. cannot be considered to be consequential and have been made after due consultation and deliberations. In her deposition before the Court, she categorically recognised and identified the assailants and attributed specific and definite role to each of them in the occurrence. The victim had no ulterior consideration to falsely rope in the accused persons and to let the real culprit go scot free for the injuries inflicted to her. A-2 to A-4 were not acquainted with her prior to the incident. The child witness had no prior animosity with any of them to implicate falsely in the occurrence. She had direct confrontation with the assailants for sufficient long duration inside the house and had clear opportunity to observe their broad features. Even on 05.02.1997 in a renee, A-2 and A-3 visited the house on

the pretext to see her mother. Even prior to the occurrence, A-2 had come at her house and insisted her to open the door to deliver a diary. When A-1 came at the spot and asked her to open the door on the pretext that his mother was coming, the child was persuaded to open it without suspecting evil design. Had there been prior animosity or ill-will, she must have not opened the door at the instance of her relation A-1. Once A-1 with A-2 to A-4 was inside the house, they not only robbed but also inflicted injuries to the helpless child who was alone in the house. There are no sound reasons to disbelieve the child witness who herself had sustained 'grievous' injuries. Minor discrepancies, contradictions and improvements highlighted are inconsequential as they do not go to the root of the case and affect the core of the prosecution case. These so-called improvements are in fact elaboration of facts given by the witness in her statement (Ex.PW-1/DA) at the first instance to the police.

6. Statement of PW-1 (Pragati Seth) is in consonance with the statement of PW-3 (S.P.Jain) and PW-4 (Rajesh Gupta). She disclosed that she was taken to Abhimanyu Hospital by them on a scooter. PW-4 (Rajesh Gupta), an independent witness from the neighbourhood also deposed that her daughter Isha @ Seema informed him that Pragati @ Guriya was lying unconscious at her house at 03.30 P.M. He immediately

rushed to the house of Pragati and found her lying unconscious in the balcony. She was smeared with blood. He lifted Pragati in his lap and came down stairs. He requested S.P.Jain R/o 8, RPS, DDA Flats, present at the gate of the house to bring his scooter to take Pragati to a hospital. Thereafter, Pragati was taken on PW-3 (S.P.Jain)'s scooter to Abhimanyu Hospital. After admitting her in the hospital PW-3 (S.P.Jain) left for the office of her mother Bhawna Seth to bring her there. Doctors gave first aid to the injured and in the meantime, her mother arrived there. Her statement is similar to the testimony of PW-3 (S.P.Jain).

7. PW-1 (Pragati Seth) corroborated the version of her brother Aman Seth to whom she had indicated about A-1's involvement by uttering his name by a gesture. The occurrence took place in between 02.00 P.M. to 04.00 P.M. The First Information Report was lodged at 06.00 P.M. without any delay. In the statement (Ex.PW-2/A), Aman Seth implicated A-1 for the injuries caused to her sister. Since the FIR was lodged promptly without any delay and A-1 was named therein, there was least possibility to concoct a false story in such a short interval. Victim's statement is also in consonance with medical evidence. PW-6 (Dr.Naresh Verma) from Abhimanyu Nursing Home deposed that a girl known Guria was brought in their nursing home with bleeding injury on the vital part of

her throat. First aid was given to her and she was referred to GTB hospital. In the cross-examination, he clarified that no paper was prepared regarding the first aid given to the girl who remained there for about 10 to 15 minutes. He further deposed that the patient was not in a position to speak. PW-9 (Dr.T.R.Ramteke) from GTB hospital medically examined Pragati Seth on 07.02.1997 at about 04.30 P.M. and found the following injuries on her body :

- “1. *Incized wound on central aspect of throat, having dimension of 3 cm. x 1 cm. depth, bleeding present, Respiratory distress was also present.*
2. *Superficial incised wound at left wrist on dorsal aspect about five cm. long.”*

The injuries were caused by sharp object. MLC (Ex.PW-9/A) was prepared by him. In the cross-examination, the expert witness stated that the patient was conscious and oriented. She was capable to speak a few words. He further clarified that only one ‘stab’ wound was noted by him. Since, PW-1 (Pragati Seth) was conscious and oriented when she was medically examined by PW-9 (Dr.T.R.Ramteke) there was every possibility of her to divulge the name of the assailant to her brother Aman Seth who had reached there from his school. Since, she was not acquainted with A-2 to A-4, she was unable to name them.

8. During her (PW-1) treatment at GTB hospital, A-2 and A-4 were arrested and were sent to judicial custody. On 16.02.1997, application was moved for conducting their Test Identification Proceedings and the Court concerned issued production warrants for their appearance. However, the learned Judge declined to conduct Test Identification Proceedings as the accused persons were produced in unmuffled faces. The order was challenged and Court of Sh.J.D.Kapoor, learned Addl. Sessions Judge directed the learned Metropolitan Magistrate to conduct Test Identification Proceedings. A-2 to A-4 declined to participate in the proceedings. Adverse inference is to be drawn against them for declining to join Test Identification Proceedings. Since PW-1 (Pragati Seth) was getting treatment in the hospital at the relevant period, there was least possibility of her to visit the police station to see the assailants there. Recovery of the stolen articles identified in Test Identification Proceedings conducted by PW-11 (Nivedita Anil Sharma, MM) also connects the accused with the crime.

9. The impugned judgment is based upon fair appraisal of the evidence and all the relevant contentions of the accused persons have been dealt with minutely with reasons. I find no sound reasons to deviate from the findings recorded by learned Trial Court. The accused persons did not

submit plausible explanation to the incriminating circumstances appearing against them. All of them had gone to the house of the victim together, after due planning. They all had participated in the crime and played specific role in the incident. They all shared common intention to commit the crime. Apparently, the appellants were the author of the crime.

10. Regarding modification of sentence order, it reveals that A-1 was enlarged on bail and substantive sentence was suspended on 15.04.2004. Nominal roll dated 17.07.2010 reveals that at the time his custody period was four years, two months and twenty three days besides remission for one year, two months and fourteen days. The unexpired portion of sentence was one year, six months and twenty three days. He was not involved in any other criminal activity and had clean antecedents. His conduct in the jail was satisfactory. Nothing emerged if after release on bail he indulged in any criminal activity or misused the liberty granted to him. He was not armed with any 'deadly' weapon. He suffered ordeal of trial / appeal for about sixteen years. Considering the mitigating circumstances, the substantive period already undergone by him in this case is taken as substantive sentence. However, A-1 shall deposit compensation of ₹ 50,000/- in the Trial Court within fifteen days and the

compensation will be released to the victim – Km. Pragati Seth after due notice.

11. A-2 was granted regular bail by this Court on 25.04.2003. Nominal roll dated 05.07.2010 reveals that his custody period was two years, eleven months and twenty one days besides remission for ten months and eight days as on 28.04.2003. He was first offender and was not involved in any other criminal case. His overall jail conduct was satisfactory. He was also not armed with any weapon at the time of occurrence. Considering the circumstances, the substantive sentence under Section 307 IPC is reduced from seven years to five years. Other terms and conditions of the sentence order are left undisturbed.

12. A-3 was convicted with the aid of Section 397 IPC. The minimum sentence prescribed therein is seven years which cannot be altered or modified. Sentence awarded to A-3 is maintained.

13. A-4 was admitted to regular bail on 17.09.2001. Nominal roll dated 05.07.2010 reveals that he had undergone four years, four months and twenty three days incarceration besides earning remission for two months and twenty days as on 22.09.2001. The unexpired portion was two years, four months and seventeen days. He had no criminal background and was not a previous convict. His jail conduct was satisfactory. He was

also not armed with any weapon. Considering the circumstances, the substantive sentence under Section 307 IPC is reduced to RI for Five years. Other terms and conditions of the sentence order shall remain unchanged.

14. A-2 to A-4 shall surrender before the Trial Court on 10th February, 2014 to serve the remaining period of substantive sentence (if any). A-1 to A-4 shall deposit unpaid fine (if any) with the Trial Court on or before 10th February, 2014 or else shall suffer default sentence.

15. Appeal preferred by the State stands dismissed as unmerited.

16. The appeals stand disposed of in the above terms. Pending application also stands disposed of. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

FEBRUARY 04, 2014/*tr*