

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

Reserved on: 16th January, 2014
Pronounced on: 19th February, 2014

+ CRL.A. 716/2010

SALAM KAVIRAJ @ CHUHA Appellant
Through: Mr. Ajay Verma, Adv. with
Mr. Shiv Kumar Dwivedi, Adv.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Ms. Rajdipa Behura, APP for the State.
SI Kapil Kumar, PS GTB Enclave.

+ CRL.A. 721/2010

ASIF @ NAEEM Appellant
Through: Ms. Rakhi Dubey, Advocate

versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Ms. Rajdipa Behura, APP for the State.
SI Kapil Kumar, PS GTB Enclave.

+ CRL.A. 728/2010

MOHD. ILLYAS Appellant
Through: Mr. Ajay Verma, Adv. with
Mr. Shiv Kumar Dwivedi, Adv.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Ms. Rajdipa Behura, APP for the State.
SI Kapil Kumar, PS GTB Enclave.

+ CRL.A. 981/2010

MIRAJ @ JAKIR Appellant
Through: Ms. Saahila Lamba, Advocate

versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Ms. Rajdipa Behura, APP for the State.
SI Kapil Kumar, PS GTB Enclave.

+ **CRL.A. 1056/2010 and Crl.MA 11127/2013**

SHAHIN @ BUSHLE Appellant
Through: Mr. Deepak Vohra, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Ms. Rajdipa Behura, APP for the State.
SI Kapil Kumar, PS GTB Enclave.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G.P. MITTAL, J.

1. Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha, Mohd. Illyas and Shahin @ Bushle impugn the judgment dated 25.01.2010 and the order on sentence dated 29.01.2010 whereby they all were convicted for the offence punishable u/s 396 of the Indian Penal Code, 1860 (IPC) and sentenced to imprisonment for life and payment of fine of Rs. 5,000/- each. In default of payment of fine, all were directed to further undergo five months simple imprisonment. All the Appellants were further convicted u/s 449 IPC r/w Section 34 IPC and were sentenced to undergo rigorous imprisonment for seven years and pay a fine of Rs. 2,000/- each. In default of payment of fine, they were required to further undergo two months simple imprisonment. Appellants Shahin

@ Bushle, Asif @ Naeem and Mohd. Illyas were also convicted u/s 412 IPC and were sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 2,000/- each, in default of payment of which they were to undergo further two months simple imprisonment. Appellants Miraj @ Jakir, Asif @ Naeem and Shahin @ Bushle were further sentenced under Section 27 of the Arms Act, 1959 to undergo rigorous imprisonment for a period of three years and pay a fine of Rs.1,000/- each, in default of payment of which they shall further undergo one month simple imprisonment. All sentences were to run concurrently.

2. First the facts. On the night intervening 05-06/08.2004, Surender Nath Kural (the deceased) was in deep slumber with the members of his family in his house at B-73, Mansarovar Park, Delhi. At about 2:30 a.m., Rita Kural's (PW-9's) sleep was disturbed when she noticed that five young persons aged between 18-20 years had sneaked in the room where she was sleeping. Her father Surender Nath Kural was sleeping on a separate cot while her mother was asleep on another cot. She noticed that Appellant Salam Kaviraj @ Chuha (whose name came to be known to PW-9 later on) was standing near the cot of her father whereas Appellants Miraj @ Jakir and Asif @ Naeem stood near the bed of her mother. Appellant Shahin @ Bushle stood at the door of the room. All of them were armed with *chhura*. One Akram (juvenile and since released) awakened her (PW-9) and simultaneously placed his hand on her mouth and threatened her not to raise voice. The juvenile broke the gold chain from her neck and then proceeded to remove her ring and bangles. Surender Nath Kural protested and wanted to know from the Appellants and their co-accused as to what they wanted. One of the Appellants told

the other to tie the deceased Surender Nath Kural. The deceased, however, got up from the cot. Appellant Salam Kaviraj stabbed the deceased with the dagger which he was holding in his hand, three-four times. PW-9 clinged to her father to save him. The deceased, however, fell down on the cot. Akram again shut her mouth forcibly. However, she managed to scream and raised an alarm and also knocked at the door of his brother's bedroom. Her brother Virender Nath Kural (PW-19) woke up and reached there. Her sister-in-law Usha Kural also reached there. She (Usha Kural) also opened the latch of the door of PW-9's younger brother's (Bhupinder Nath Kural's) room which had been bolted from outside by the Appellants. PWs 9 and 19 were able to restrain and hold two of the culprits Akram (A-1) and Salam Kaviraj (A-4). However, Appellant Salam Kaviraj was successful in freeing himself and he as others made good their escape. PW-9's younger brother thereafter called their uncle Mahender Nath Kural (PW-4) who used to stay in the adjacent house. Some neighbours also reached the house of PW-9. The persons of the public thrashed Akram who was also tied down by them. Bhupinder Nath Kural (PW-5) informed the police. PW-4 along with PW-5 removed Surender Nath Kural to SDN hospital where he was declared brought dead. The local police as well as PCR van reached the spot. Crime team was also summoned. Statement of eye witness Rita Kural marked Ex.PW-9/A was recorded by Inspector Rajender Singh (PW-24), SHO Police Station Mansarover Park. He (PW-24) made his endorsement Ex.PW-24/A on the basis of which the present case was registered. The I.O. prepared site plan Ex.PW-24/B. He seized certain articles including one piece of gold chain from PW-9's bed (the other been removed by the juvenile); two slippers from different pairs; two

polythenes containing bloody chance prints; one red and black piece of cloth like pocket of a shirt, a dagger from outside the bathroom in the verandah at the back near hand pump *etc.*

3. The juvenile Akram made a disclosure statement Ex.PW-24/C and informed the police about the involvement of the other Appellants. On pointing out by the juvenile, Appellant Miraj @ Jakir (A-2) and Asif @ Naeem (A-3) were arrested on the same evening. They also made disclosure statements Ex.PW-20/B and Ex.PW-20/A respectively. An application was moved by the I.O. (PW-24) for holding a TIP in respect of Appellants Miraj @ Jakir and Asif @ Naeem. They, however, declined to join the TIP. Appellant Miraj @ Jakir led the police party to a place near Shahdara flyover on Loni, Ghaziabad road and produced a shirt having red and black colour strips with it's front pocket and a few buttons missing (the pocket whereof was seized from the crime scene). Appellant Asif @ Naeem in pursuance of his disclosure statement also produced one '*Relaxo*' slipper from under the bushes on the right side of the railway track. The same was seized by the I.O. Appellant Asif further got recovered one dagger Ex.24/G, hidden buried in the ground as well as a torn shirt.
4. Appellant Salam Kaviraj @ Chuha (A-4) was arrested on 08.08.2004 on the pointing out of Appellant Akram (juvenile). He got recovered a red colour bloodstained shirt with one arm missing marked Ex.PW-9/12 in pursuance of the disclosure statement made by him marked Ex.PW-20/H. Although, as per CFSL report Ex. PW-13/D, human blood was found on this shirt but the blood group of the blood could not be ascertained. Appellant Salam Kaviraj was produced before the learned MM (PW-28) for the purpose of TIP. He too refused to join the TIP. He (A-4) further

led the police party to the house of Appellant Mohd. Illyas (A-5) and on 09.08.2004, Mohd. Illyas produced the stolen articles including a piece of gold chain similar to the one which was seized from the spot as well as a brown coloured woodland ladies purse Ex. PW-9/ Article 27 collectively.

5. On 30.08.2004 at about 6:00 p.m., Appellant Shahin @ Bhushle (A-6) was arrested in pursuance of a secret information and on the pointing out by the juvenile. He also refused to join the TIP. In pursuance of the disclosure statement Ex.PW-20/P made by him, Appellant Shahin @ Bhushle got recovered one dagger buried near a well in Gopalpur. He also got recovered one purse and some other articles from an iron box in the shop of one *Kabari* in village Gopalpur.
6. On completion of the investigation, a report under Section 173 of the Code of Criminal Procedure, 1973 (the Code) was presented against the Appellants and the juvenile.
7. On Appellants' pleading not guilty to the charge, the prosecution examined 31 witnesses. Rita Kural (PW-9) and Virender Nath Kural (PW-19) are the most crucial witnesses who have deposed about the incident and have also identified the Appellants Salam Kaviraj @ Chuha, Asif @ Naeem, Miraj @ Jakir, Shahin @ Bushle and the juvenile (Akram) as the perpetrators of the crime.
8. PWs 11, 12 and 14 lifted chance prints from the crime scene from two polythene bags whereas PW-17 lifted chance prints (Ex.PW-17/A) from a dagger lying at the spot. The chance prints on the dagger, according to the prosecution have tallied with the specimen finger prints of Appellant Miraj @ Jakir (Ex.PW-17/C) vide report Ex.PW-17/B.
9. In order to afford opportunity to the Appellants to explain the

incriminating evidence appearing against them, they were examined under Section 313 of the Code. They denied the prosecution allegations and pleaded false implication. They declined to produce any evidence in defence. On appreciation of evidence, the Additional Sessions Judge (ASJ) found that the prosecution had been able to establish its case against the Appellants for the offence as stated earlier beyond shadow of all reasonable doubt. The Appellants were convicted and sentenced as stated earlier.

10. We have heard Mr. Ajay Verma, *amicus curiae* for Appellants Salam Kaviraj and Mohd. Illyas, Ms. Rakhi Dubey, *amicus curiae* for Appellant Asif @ Naeem, Ms. Saahila Lamba, *amicus curiae* for Appellant Miraj @ Jakir, Mr. Deepak Vohra, *amicus curiae* for Appellant Shahin @ Bushle and Ms. Rajdipa Behura, APP for the State.
11. The learned counsel for the Appellants urge that the prosecution case against the Appellants was not established beyond shadow of all reasonable doubt. It is contended that they were convicted merely on suspicion. No recovery was effected from them or at their instance. Recoveries shown were planted as no public or independent witness were joined at the time of alleged recoveries. PW-9 did not give the detailed description of the culprits in her statement Ex.PW-9/A made to the police after the incident. In her deposition in the Court also, she failed to give the description of the clothes worn by the culprits. Further, since the Appellants were shown to the witnesses in the police station, they were justified in refusing to take part in the TIP arranged by the I.O. and therefore, the Appellants' identification in the dock much after the incident cannot be attached any importance.

12. It is very strenuously canvassed that the articles claimed to have been recovered at the instance of the Appellants were planted by the police as they did not find any mention either in the statement Ex.PW-9/A made by PW-9 or in the crime scene report prepared by SI Rohtash Kumar, Incharge of the crime team or in the report Ex.PW-14/A prepared by ASI Sajid Hassan (PW-14) at the time of lifting the chance prints from two polythenes. It is argued that the specimen finger prints of Appellants were not taken by the I.O. in accordance with the provisions of Section 4 and 5 of the Identification of Prisoners Act, 1920 and therefore report Ex.PW-17/B showing that the chance print Ex.PW-17/A lifted from the dagger seized from the crime scene tallied with the specimen finger prints of Appellant Miraj @ Jakir Ex.PW-17/C is not admissible in evidence. In support of their contention, the learned counsel for the Appellants places reliance on a Full Bench decision of this Court in *Sapan Haldar & Anr. v. State*, 191 (2012) DLT 225. It is further urged that the ASJ erred in convicting Appellant Mohd. Illyas for the offence punishable under Section 396 IPC. Mohd. Illyas was not identified by PWs 9 and 19 as one of the persons who had participated in the dacoity. The recovery of the piece of chain, ladies purse and other articles at the instance of Appellant Mohd. Illyas is also doubtful. In any case, it is urged that there was no material whatsoever to convict him for the offence punishable under Section 396 IPC.
13. Per contra, Ms. Rajdipa Behura, APP for the State contends that PWs 9 and 19 were in a state of shock therefore they could not give the description of all the stolen articles and hence their testimonies in Court regarding theft of other articles which were recovered from the Appellants cannot be doubted. Additional Public Prosecutor urges that the

Appellants were shown to the witnesses only after they refused to join the TIP just to confirm if the police investigation was proceeding in the right direction. The dock identification is a substantive evidence which is corroborated by the testimonies of PW-9 and PW-19 with regard to the previous identification in the Police Station. APP for the State thus states that the charge against the Appellants is fully established and the judgment passed by the ASJ does not warrant any interference.

14. We have bestowed our thoughtful consideration to the contentions raised on behalf of the parties. Apart from the dock identification, the prosecution has relied on the following circumstances to connect the Appellants with commission of crime.
15. We shall be dealing with the circumstances and the material produced by the prosecution one by one:
 - (i) Recovery of three slippers, one *Suji* (Ex.PW-9/Article 3) and one *Relaxo* (Ex.PW-9/Article 1) from the spot and recovery of another slipper *Relaxo* (Ex.PW-9/Article 2) at the instance of Appellant Asif @ Naeem;
 - (ii) Recovery of one piece of cloth with red and black strips (Ex.PW-9/Article 5) and recovery of one red and black colour shirt (Ex.PW-9/Article 4) at the instance of Appellant Miraj @ Jakir;
 - (iii) Recovery of one bloodstained shirt with one arm missing at the instance of Appellant Salam Kaviraj.
 - (iv) Recovery of a Woodland brown colour ladies purse containing Rs.1100/- and a piece of gold chain (Ex.PW-9/Article 27

collectively) from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj;

- (v) Recovery of one purse (Ex.PW-9/Article 29) containing some visiting cards, one pocket book of Hanuman Chalisa in an iron box from one *Kabari* shop at Gopalpur at the instance of Appellant Shahin @ Bushle.

16. The prosecution heavily relies on the above circumstance to connect the Appellants with the commission of the offence punishable under Section 396 IPC. The prosecution also relies on the recovery of the daggers at the instance of some of the Appellants for which the Appellants were convicted for the offence punishable under Section 27 of the Arms Act, 1959. Apart from the fact that no public or independent witness were joined at the time of the alleged recoveries, there are several other reasons why we are not inclined to place reliance on the recoveries except recovery of a piece of gold chain from Appellant Mohd. Illyas in pursuance of the disclosure statement Ex.20/K made by Appellant Salam Kaviraj. Admittedly, the incident took place at about 2:30 a.m. Deceased Surender Nath Kural was removed to the hospital immediately thereafter at about 2:35 a.m. S.I. Pratap Singh along with other police officials and subsequently Inspector Rajender Singh, SHO, P.S. Mansarover Park also reached the spot. It is the case of the prosecution that S.I. Pratap Singh (PW-27) as also Inspector Rajender Singh (PW-24) along with Constable Satpal reached SDN Hospital after leaving some police officials at the spot. On reaching the hospital, they were informed that the deceased had been declared brought dead. S.I. Pratap Singh and Inspector Rajender Singh (PW-24) thereupon returned to the spot and proceeded to record

the statement Ex.PW-9/A of Rita Kural. PW-24 made his own endorsement Ex.PW-24/A on the said statement Ex.PW-9/A for registration of the case. It is also the case of the prosecution that the I.O. (PW-24) summoned the crime team and S.I. Rohtash Singh along with other officials of the crime team reached the spot. It is apparent from the crime scene report (prepared by S.I. Rohtash Singh though he has not been examined as a witness) that the crime scene was inspected by the crime team between 3:30 a.m. to 7:00 a.m. The statement Ex.PW-9/A, the endorsement Ex.PW-24/A (made about 5:00 a.m.) and the crime scene report (available on Trial Court record, but not exhibited) conspicuously do not make any mention about recovery of any dagger inside the house near the hand pump, two slippers (one *Suji* and one *Relaxo*) and the piece of cloth purported to be pocket of the shirt which was allegedly recovered at the instance of Appellant Asif. The statement Ex.PW-9/A made by PW-9 Ritu Kural, the endorsement Ex.PW-24/A as also the crime scene report prepared by S.I. Rohtash Singh also do not make any mention of removal of any other article except a piece of gold chain which was snatched by juvenile Akram (whereas the other piece of the gold chain was recovered from the bed of PW-9). Crime scene report only makes mention in the column property stolen as 'jewellery'. Theft of purse, wrist watch *etc.* belonging to PW-9 as also to PW-19 containing some of their personal articles to establish their identities were important articles which should definitely have been mentioned in the statement Ex.PW-9/A, the endorsement Ex.PW-24/A as also in the crime scene report if they had really been stolen. Similarly, recovery of the dagger should also have been mentioned in all these documents if the dagger had really been found in the open space in front of the room near the hand pump as the

scene of the crime was examined for almost three and half hours by the crime team which remained at the spot till 7:00 p.m. as is mentioned in the crime scene report. We are supported in this view by a judgment of the Division Bench of this Court in *Murari v. State*, (Crl. App. No.10/2011) decided on 24.08.2011 and a Single Bench decision of this Court in *Sudhir Kumar v. State of NCT of Delhi* (Crl. App. No.605/2013) decided on 02.09.2013. We are not inclined to believe the recovery of articles stated above from/at the instance of the Appellants.

17. At the same time, we see no reason to disbelieve the recovery of the piece of the gold chain (Ex. PW-9/Article 27 collectively) from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj in pursuance of his disclosure statement Ex. PW-20/K. We do believe the recovery of the piece of gold chain as the same is duly identified by PW-9 and the same also stands corroborated from her statement Ex.PW-9/A made immediately after the occurrence on the basis of which the present FIR was registered and further from recovery of another piece of the same chain from the cot at the crime scene.
18. Further, as per the CFSL report Ex. PW-13/D, it can be inferred that the deceased's blood group was AB, since the blood of AB group was found on the gauze piece, through which the blood was lifted from the spot. The blood group on the two bed sheets as well as the pillow and also on the *lungi* of the deceased was found to be of AB group only. However, on the piece of shirt (Ex. 2C), blood of B group, and on two other shirt pieces (Exs.9 and 10), certain blood was detected. These shirts have not been collated by the I.O. specifically with any of the Appellant and since the blood of AB group has not been detected thereon, the alleged recovery of the shirts at the instance of the Appellants is hardly of any

consequence.

19. Since we are not inclined to believe the recovery of the dagger from the spot, matching of the chance print (Q3) thereon with the specimen finger print (S1) of Appellant Miraj @ Jakir vide CFSL report Ex.PW-17/B is also of no consequence.
20. Coming to the testimonies of the eye witnesses, PWs 9 and 19 have given a very vivid account of the incident. PW-9 testified as under:-

“In (sic) on the intervening night of 5th and 06.08.2004 at about 1.00 a.m. we were at our house. My mother was not feeling well. I and my father were attending my ailing mother in latter’s room. Rest of family members had gone to sleep in their respective rooms. Doors of varandha were opened to allow fresh air to come due to my ailing mother. Between 2.00 – 2.30 a.m. five unknown boys aged between 18-20 years entered in our house. One of them came near to me. Two near the bed of my mother. Both of them were having ‘churas’ in their hands. One stood near my father and one near the gates having armed with similar ‘chura’. The boy who was standing near me shut my mouth by hands and forbade me to raise any voice. The same boy snatched a golden chain from my neck which I was wearing that time. He also started putting off my golden bangles and finger ring. Meanwhile my father opposed the same asking them as what they wanted from us. One of those boys asked his other associates to tie my father. The boy who was standing near my father stabbed the latter on his back by that chura 3-4 times. I enarmed my father to save him. He fell down on the cot. That boy again shut my mouth by his hand forcibly. Despite the same I was able to raise an alarm. Apart from that I knocked at the doors of my brother’s bed room. After hearing same, my brother Mr. Virender woke up and came there. I along with latter overpowered two of those boys. One of them succeeded in escape. The boy which was overpowered by us came to know later on as Akram. (PW pointed towards accused Akram correctly). My sister-in-law opened the doors of my younger brother which were latched

from outside by those offenders. On his return my brother called my uncle Mahender Nath Kural, who is residing in an adjoining house. He with the assistance of my brother namely Virender Nath Kural to the SDN hospital. Police came to our house. I was interrogated and my statement was recorded by the police. Public persons gathered at our house after hearing commotion. They gave beatings to accused Akram. My statement/complaint is Ex.PW-9/A.....”

21. In the later part of her testimony, PW-9 identified the Appellants, namely, Salam Kaviraj @ Chuha, Asif @ Naeem, Miraj @ Jakir, Shahin @ Bushle and the juvenile (Akram) and assigned specific roles to each one of them. PW-19 Virender Nath Kural corroborated PW-9's testimony in all material particulars. He also identified the said Appellants and deposed about the part played by each one of them. Both these witnesses in their examination-in-chief have also stated to have identified the Appellants in the Police Station.
22. Referring to this part of their testimonies, the learned counsel for the Appellants have urged that since the Appellants were shown to the witnesses in the Police Station, they were justified in refusing to take part in the TIP. It is thus contended that the Appellants' identification for the first time in the Court after a lapse of 3-4 years is valueless and cannot be relied upon to base their conviction particularly when the witnesses have not given a detailed description in their statements under Section 161 of the Code recorded by the police.
23. Obviously, PWs 9 and 19 were not called to take part in the TIP. In fact, as soon as the application was moved by the IO (PW-24), the Appellants refused to join the same. The testimonies of PWs 9 and 19 have to be read with the testimony of PW-24, I.O. of the case.

24. Admittedly, Akram (juvenile) was apprehended at the spot. PW-24 testified that police custody remand of Akram was obtained. He was interrogated and in the evening at the instance of Akram, Appellants Asif @ Naeem and Miraj @ Jakir were arrested. He deposed that on the next date *i.e.* 07.08.2004 they were produced in muffled faces in the Court and an application for TIP was moved. He testified that both of them (Asif and Miraj) refused to participate in the TIP. It is very important to note that it was only thereafter that purported recoveries were effected and the Appellants were brought back to the Police Station. PW-24 deposed that thereafter PW-9 Rita Kural and PW-19 Virender Nath Kural met them near railway crossing at Shahadra, Loni, Ghaziabad. They also came to the Police Station after knowing about the recovery and identified the Appellants (Miraj @ Jakir and Asif @ Naeem) in the Police Station. Thus, Appellants Miraj @ Jakir and Asif @ Naeem were shown to the witnesses only after they refused to join the TIP.
25. Similarly, PW-24 deposed that after Appellant Salam Kaviraj @ Chuha was arrested, he was advised to keep his face muffled. He was produced in the Court on 09.08.2004. Here also PW-24 testified that on an application for holding TIP, Appellant Salam Kaviraj refused to join the same. It was thereafter that three days' police custody remand of Appellant Salam Kaviraj was granted and again purported recoveries were effected from him and while they were returning to the Police Station, PWs 9 and 19 met them near Shahdara flyover and they identified Appellant Salam Kaviraj as one of the offenders. With regard to Appellant Shahin @ Bushle, he refused to join the TIP on an application moved on 31.08.2004. It was two days thereafter that Appellant Shahin @ Bushle was identified by PWs 9 and 19. Thus, the

Appellants' contention that they refused to join the TIP as they had been earlier shown to the witnesses cannot be believed. It may be noticed that the steps for holding the TIP were taken by the I.O. at the earliest opportunity. Moreover, PW-9 had sufficient time to watch and observe the Appellants. It is not a case where the witnesses just had a glimpse of fleeing culprits.

26. In *Munshi Singh Gautam & Ors. v. State of M.P.*, (2005) 9 SCC 631, it was held that the identification of the accused in the Court is a substantive evidence and relevant under Section 9 of the Evidence Act, 1872. As a rule of prudence, the Courts normally ask for corroboration to the dock identification by prior test identification. It was observed that in appropriate cases, where the Court is impressed by a particular witness, it can safely rely on his/her testimony without such corroboration. Similarly, in *Ramanbhai Naranbhai Patel v. State of Gujarat*, (2000) 1 SCC 358, the Supreme Court observed that where the witnesses had sufficient time to see the face of the assailants, the absence of test identification parade was inconsequential.
27. It is important to note that PWs 9 and 19 did not prefer to rope in any false person. Although Appellant Mohd. Illyas was also arrested and recovery of certain stolen property was also effected from him and he was also sent up to the Court to face trial under Section 396 IPC, but PWs 9 and 19 did not identify him as one of the persons who participated in the dacoity. Thus, in the instant case, PWs 9 and 19's testimonies have been corroborated by their own depositions with regard to the Appellants' earlier identification before the police after they had refused to participate in the TIP arranged by the I.O. Relying on PWs 9 and 19's testimonies,

we have no manner of doubt that juvenile Akram and Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha and Shahin @ Bushle had committed dacoity and that Appellant Salam Kaviraj had committed the murder of Surender Nath Kural while committing the dacoity. This evidence by itself is sufficient to convict the Appellants for the offence punishable under Section 449 read with Section 34 IPC as also under Section 396 IPC. Moreover, the testimonies of PWs 9 and 19 find corroboration from the recovery of piece of gold chain (Ex.PW-9/Article 27 collectively) from Appellant Mohd. Illyas in pursuance of the disclosure statement made by Salam Kaviraj. The piece of chain has been duly identified by PWs 9 and 19 and also finds corroboration from the *rukka* Ex.PW-9/A registered on the statement of PW-9 immediately after the incident.

28. A feeble attempt has been made by the learned counsel for the Appellants to urge that there was some delay in lodging the FIR in as much as although the incident took place between 2:30 a.m. to 2:45 a.m., the FIR was registered only at 5:10 a.m. It may be noted that immediately after the incident, the police was informed by DD No. 42-A in the Police Station at 2:36 a.m. The DD was transmitted to S.I. Pratap Singh and information was also passed on to Inspector Rajender Singh, SHO of the Police Station. They immediately proceeded to the spot. When they noticed that the injured had already been removed to the hospital, while leaving some members of the team, the I.O. (Inspector Rajender Singh) proceeded to the SDN hospital where he obtained the MLC of the injured who had been declared brought dead. He returned to the spot, inspected the same, recorded the statement of PW-9, made his own endorsement Ex.PW-24/A thereon and then transmitted it to the Police Station at 5:00

a.m. Thus, there cannot be said to be any unexplained delay in recording of the FIR at 5:10 a.m. Moreover, delay in recording FIR otherwise cannot be of any importance in such a case as one of the culprits *i.e.* the juvenile was apprehended at the spot and his name was mentioned in the FIR. Hence, there was no scope of any padding in the FIR.

29. In view of the foregoing discussion, we are of the opinion that the recovery of the daggers Ex.PW-24/G and Ex.PW-24/H from the spot as also at the instance of Appellants Asif @ Naeem and Miraj @ Jakir respectively is doubtful. The recovery of the ladies purse and `1100/- from Appellant Mohd. Illyas is also a little doubtful as in any case the currency notes have no mark of identification and recovery of sum of `1100/- does not in any way connect Appellants Mohd. Illyas or Salam Kaviraj with the commission of the crime. We are not inclined to take the same into consideration for holding the Appellants guilty as the same could be the result of padding by the police in view of our earlier observation. We are also not inclined to believe the recovery of the dagger and recovery of the piece of red and black striped piece of cloth which allegedly matched with the red and black coloured striped shirt got recovered by Appellant Miraj @ Jakir. We are also not going to attach much importance to the recovery of the dagger and one *Relaxo* slipper at the instance of Appellant Asif @ Naeem and recovery of one purse containing Hanuman Chalisa and Timestar wrist watch and the dagger at the instance of Appellant Shahin @ Bushle as all these articles were not mentioned either in the statement Ex.PW-9/A or in the crime scene report prepared between 3 a.m. to 7 a.m. and are otherwise debatable. We do believe the recovery of the broken piece of gold chain from Appellant

Mohd. Illyas at the instance of Appellant Salam Kaviraj in pursuance of the disclosure statement made by him. However, Appellant Mohd. Illyas on the basis of recovery of piece of gold chain cannot be convicted for the offence punishable under Section 396 IPC or for that matter for the offence punishable under Section 449 IPC read with Section 34 IPC. He has not been identified as one of the five intruders.

30. It is very disturbing to note that although there was no evidence, perhaps it was not even the case of prosecution that Appellant Mohd. Illyas was one of the persons who committed dacoity in question, yet merely on the recovery of a piece of gold chain and certain other articles, he has not only been convicted and sentenced for the offence punishable under Section 412 IPC but also under Section 396 IPC. PWs 9 and 19 were specific that five persons, *i.e.*, the juvenile and four Appellants (Salam Kaviraj, Asif, Miraj and Shahin) were responsible for committing dacoity. It is not even the case of the prosecution that during investigation, Appellant Mohd. Illyas was found to have committed dacoity in association with other accused persons or that he was present outside to guard the spot. Thus, conviction of Appellant Mohd. Illyas for the offence punishable under Section 396 IPC or for that matter, under Section 449 IPC read with Section 34 IPC is not tenable. The same is accordingly liable to be set aside.
31. We have already held above that we are inclined to believe the recovery of gold chain (Ex.PW-9/Article 27 collectively) from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj. The question for consideration is whether Appellant Mohd. Illyas can be convicted for the offence punishable under Section 412 IPC merely on the basis of

recovery of this piece of gold chain. Admittedly, Appellant Mohd. Illyas has not come forward with any explanation with regard to possession of the piece of gold chain. He has simply denied the recovery. Mere possession of stolen property or a property belonging to a gang of dacoits is not sufficient to hold a person guilty of an offence punishable under Sections 411/412. At this stage, it would be appropriate to extract Sections 411 and 412 IPC hereunder:

“411. Dishonestly receiving stolen property

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

412. Dishonestly receiving property stolen in the commission of a dacoity

Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoity, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

32. Thus, to bring a case within the four corners of Section 411 IPC, the person who retains the stolen property must have knowledge or reason to believe the same to be a stolen property. Similarly, to hold a person guilty under Section 412 IPC, the prosecution must prove that the person concerned knew or had the reason to believe that the property was transferred by commission of dacoity or was received from a person whom he knew or had reason to believe to belong to a gang of dacoits.

No evidence whatsoever has been produced by the prosecution to show that Appellant Mohd. Illyas knew or had reason to believe that the piece of gold chain (Ex.PW-9/Article 27 collectively) had been obtained by commission of dacoity or he knew that Appellant Salam Kaviraj belonged to a gang of dacoits. At the same time, no explanation has been given by Appellant Mohd. Illyas as to how he came in possession of the piece of gold chain. Therefore, an inference can definitely be drawn that Appellant Mohd. Illyas knew or had reason to believe that the piece of chain was stolen property. Thus, instead of Section 412 IPC, Appellant Mohd. Illyas is liable to be convicted for the offence punishable under Section 411 IPC.

33. Therefore, while maintaining the conviction of Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha and Shahin @ Bushle for the offence punishable under Section 449 IPC read with Section 34 IPC and Section 396 IPC, they are acquitted for rest of the offences. Similarly, Appellant Mohd. Illyas is convicted for the offence punishable under Section 411 IPC and is acquitted of rest of the offences.
34. The sentence awarded by the ASJ to Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha and Shahin @ Bushle for the offence punishable under Section 449 read with Section 34 IPC and 396 IPC is maintained. Whereas, Appellant Mohd. Illyas is sentenced to undergo RI for a period of three years and to pay fine of Rs.5,000/- or in default to undergo simple imprisonment for three months for the offence punishable under Section 411 IPC, which he has already undergone. He will be released, if not required in any other case.
35. The appeals are partly allowed in above terms.

36. Pending applications also stand disposed of.

37. A copy of the order be transmitted to the Trial Court for information.

(G.P. MITTAL)
JUDGE

(SANJIV KHANNA)
JUDGE

FEBRUARY 19, 2014

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