

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

Reserved on: 25.04.2014
Date of Decision: 28.04.2014

- + CRL.A. 839/2013
GOVIND @ BHARAT Appellant
Through: Mr N.K. Chahar, Adv.
versus
STATE NCT OF DELHI Respondent
Through: Mr Feroz Khan Ghazi, APP
- + CRL.A. 956/2013
SANDEEP @ SANJEEV Appellant
Through: Mr. Rajesh Kumar, Adv.
versus
STATE NCT OF DELHI Respondent
Through: Mr Feroz Khan Ghazi, APP
- + CRL.A. 960/2013
SUNNY Appellant
Through: Mr. Pradeep Chaudhary and Mr. Vineet Jain, Adv.
versus
STATE (GNCT OF DLEHI) Respondent
Through: Mr Feroz Khan Ghazi, APP

CORAM:
HON'BLE MR. JUSTICE V.K. JAIN

JUDGEMENT

V.K. JAIN, J.

On 02.10.2009, Head Constable – Rajesh Kumar (PW2) was on patrol with other police officials in the area of S.P. Badli at BG Block. When they reached at

BG Block, near MCD toilet at about 7.45 pm, they saw a person coming running and shouting *pakro pakro*. Four boys were running ahead of the aforesaid person. The aforesaid four persons were apprehended by the police officials. The statement of the person who was chasing them namely – Ravinder Shah was recorded by Head Constable – Azad Prakash. In his statement, the complainant – Ravinder Shah alleged that on that day at about 7.30 pm when he was going to market to purchase household articles and reached near Harit Transport, BG Block Road, four boys all of a sudden came in front of him, stopped him and asked him to take out whatever he had. When he declined, two of them took out daggers; one dagger was put on his abdomen whereas the other dagger was put on his neck and the remaining two boys gave beatings to him and Rs.1200/- in cash besides his mobile phone make Nokia having connection number 9990759493. One of the boys carrying dagger with him also removed the watch which he was wearing on his wrist. The aforesaid boys started running away after threatening him. When he raised alarm, the police officials coming from the opposite direction apprehended those boys whose names were later came to be known as Sunil @ Bittu, Sunny, Govind & Sandeep. Those boys were searched and mobile phone of the complainant was recovered from the pocket of the shirt of Sunny, whereas the cash was recovered from the pocket of Sandeep. The wrist watch of the complainant was recovered from the pocket of Govind. One dagger each was also

recovered from Govind and Sunil @ Bittu. One of the accused being a juvenile, three (3) of them were prosecuted.

2. All the appellants were charged under Section 392 of IPC. The appellant – Govind was additionally charged under Section 397 of IPC since he had used a dagger at the time of committing robbery. The appellants having pleaded not guilty, as many as 7 witnesses were examined by the prosecution. No witness was examined in defence.

3. The complainant – Ravinder Shah came in the witness box as PW1 and *inter alia* stated that on 02.10.2009 when he was going to market to bring household articles and when he reached near Harit Transport, BG Block Road, four boys all of a sudden came in front of him blocked his way and asked him to give to them whatever he was carrying. According to the witness, it was dark at that time. When he refused to give his belongings to them, two of the boys took out daggers from their underarm. One of them put a dagger on his abdomen whereas the other one put a dagger on his neck and the other two boys gave beatings to him and snatched his cash amounting to Rs.1200/- as well as his mobile phone make – Nokia having connection number 9990759493. One of the boys who had put a dagger on his abdomen, removed his watch from the wrist and thereafter all the boys started running towards other side. When he raised alarm and shouted for help, the police officials coming from front side apprehended all

the four boys whose names and addresses were ascertained by the police officials. He further stated that all his belongings and the daggers were recovered by the police from those boys. The witness also identified his signatures on the recovery memos Ex.PW1/B to PW1/D as well as on the arrest memos and personal search memos of the accused persons. He, however, could not identify the persons who had robbed him, claiming that it was night and dark at the time of the incident. This witness was cross examined by the learned Additional PP but nothing worthwhile came out in the cross examination. The accused persons, however, did not cross examine the witness at all despite opportunity given for the purpose.

4. PW2 – Constable Rajesh Kumar *inter alia* stated that on 7.10.2009, he was on patrol along with other police officials in the area of S.P. Badli at BG Block near MCD public toilets when they saw one boy coming running from the front side and shouting *pakro pakro*. Three/Four boys were running ahead of him. They ran after those boys and apprehended them. The witness identified the appellants – Govind, Sunny and Sandeep and claimed that wrist watch with Rs.1200/- in cash and mobile phone were recovered from them besides two daggers – one from Govind and the other from Sunil. According to him on search of Govind, wrist watch of the complainant was recovered from him.

PW3 – Constable Umesh corroborated the deposition of PW2 – Constable Rajesh Kumar with respect to the accused persons having been apprehended in the

above referred manner and the daggers as well as the mobile phones and wrist watch and cash of the complainant having been recovered from them. He also correctly identified the accused persons. PW4 – Constable Satyapal is the third police official, who along with others had apprehended the accused persons and recovered the cash, mobile and watch of the complainant besides two daggers, from them. PW7 – Head Constable Azad Prakash also corroborated the deposition of PW2 to PW4 in all respects and identified the accused persons.

5. PW5 – ASI Rajbir Singh stated that on 2.10.2009, investigation of this case was assigned to him and he reached the spot where HC Azad, Ct. Satyapal, Ct. Bhopal, Ct. Umesh, Ct. Shri Krishan and Ct. Yogesh were present. Accused Sandeep @ Sanjeev, Govind @ Bharat, Sunny and Sunil @ Bittoo (facing trial before the Juvenile Justice Board) were found present at the spot in the custody of aforesaid police officials. The sealed parcels containing the case property and daggers which the police officials had recovered from the accused persons were handed over to him along with the documents.

6. In their statements under Section 313 Cr.PC, the appellants denied the allegations against them and claimed to be innocent.

7. Vide impugned judgment dated 4.5.2013, the appellants were convicted under Section 392/34 of IPC. The appellant – Govind @ Bharat was additionally convicted under Section 397 of IPC for using a deadly weapon during the

commission of robbery. Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of these appeals.

8. The impugned judgment has been assailed on the following grounds:

- (i) The complainant has not identified any of the appellants;
- (ii) The case of the prosecution is that the recovery memos were prepared before the FIR was registered, but the FIR number finds mention on all the recovery memos which creates serious doubt about the truthfulness of the prosecution case;
- (iii) According to the complainant, the mobile phone contained the sim of mobile number 9990759493, but as per the seizure memo of phone, it contained no sim card;
- (iv) The complainant even during the cross examination by learned Additional PP, denied having stated to the police that his personal belongings and daggers were recovered from the accused persons; \
- (v) No TIP of the stolen property was held;
- (vi) It was found by the trial court during the examination of PW3 – Constable Umesh that he was looking at the summons Ex.PW3/B on which the names of the accused, recovery from them and the time had been noted.

9. As noted earlier, the appellants did not cross-examine the complainant Shri

Ravinder Shah, thereby admitting the deposition of the witness. Though the aforesaid witness did not identify any of the accused persons, he clearly stated that he was stopped by four (4) boys, two (2) of whom were armed with the daggers, one (1) of whom put a dagger on his abdomen, whereas the other put dagger on his neck and thereafter his mobile phone as well as cash amounting to Rs.1,200/- was removed from his pocket. The watch which he was wearing on his wrist was also removed by one of the boys. By not cross-examining the witness the appellants did not dispute the factum of robbery, including the theft of mobile phone, watch and cash amounting to Rs.1,200/- as well as use of daggers by two (2) of the boys. Even otherwise, the complainant had nothing to gain by making false accusation of armed robbery. The conduct of the complainant in chasing four (4) boys, simultaneously shouting *chor-chor* also, corroborates the allegations of robbery made by him.

10. The complainant specifically stated that the boys who carried out robbery started running towards other side after snatching his belongings and were apprehended by the police officials on the spot and their names and addresses were inquired. He also stated that all his belongings as well as two (2) daggers were recovered from the boys who were apprehended by the police. By not cross-examining this witness the appellants also admitted that the boys who had committed robbery were apprehended on the spot and the stolen property as well

as two (2) daggers were recovered from them.

11. The depositions of PW2 Constable Rajesh Kumar, PW3 Constable Umesh and PW4 Constable Satyapal prove that they had seen four (4) boys being chased by the complainant and had apprehended those boys on the spot. To this extent the complainant also corroborated their deposition. PW2, PW3 as well as PW4 identified the appellants as three (3) of the four (4) boys whom they had apprehended on the spot. The mobile phone make Nokia was recovered from the appellant Sunny, cash amounting to Rs.1,200/- was recovered from the appellant Sandeep @ Sanjeev, whereas the watch of the complainant was recovered from the appellant Govind @ Bharat. It is true that when PW3 was examined in the court he was found carrying and looking at a summon on which the name of the accused, recovery from them and time had been noted. This would indicate that before the witness was examined, he had refreshed his memory from the documents, though it was done by him without permission from the court. Even if I exclude the deposition of PW3 from consideration, the deposition of PW2 Constable Rajesh Kumar and PW4 Constable Satyapal is sufficient to prove the identity of the appellants as three (3) of the four (4) boys, whom the police officials had apprehended on the spot on 2.10.2009. The deposition of PW5 ASI Rajbir Singh who went to the spot and to whom the accused persons were handed over also corroborates the deposition of PW2 and PW4 with respect to identity of

the persons whom they had apprehended on the spot. Thus, commission of robbery by four (4) persons has been proved by the complainant whereas the identity of the appellants as the persons who committed the robbery stands proved from the deposition of PW2, PW4 and PW5.

12. If the appellants were not the persons who had committed robbery of cash, mobile phone and watch from the complainant, the only possibility can be that the police officials who apprehended the boys let off the boys whom they had apprehended and substituted them by the appellants before this Court. In my view, there could have been no reason for the police officials to let off the real culprits and implicate innocent persons. This is more so when the appellants do not claim any previous animosity or ill-will of the police officials towards them.

13. The complainant not identifying the appellant and denying having stated to police that his personal belongings and daggers were recovered from the accused persons becomes meaningless considering that according to the witness the persons who committed robbery were apprehended on the spot and the stolen articles as well as daggers were recovered from them and the identity of the robbers having been proved by PW2, PW4 and PW5.

14. It is true that according to the complainant the mobile phone stolen from his possession had connection No.9990759493, meaning thereby that the mobile phone had a SIM card in it whereas, as per the seizure memo no SIM card was

cound in the mobile phone recovered from the appellant Sunny. This, however, would be of no consequence since the appellants were apprehended only after they were chased by the complainant for some distance and, therefore, the appellant Sunny had ample opportunity to remove the SIM from the mobile phone either immediately after removing it from the pocket of the complainant or while running from the spot, without the complainant having noticed him removing the SIM card from the mobile phone. The purpose would be to prevent his location being traced, in case a call was made on the mobile phone. Moreover, the appellant Sunny does not claim that the mobile phone recovered by the police from him belonged to him and not to the complainant. In any case, the charge against the appellants stand duly proved even if the recovery of the mobile phone from the appellant Sunny is excluded from consideration since it has been proved that they were the boys who were involved in the commission of robbery involving theft of a mobile phone besides cash and a wrist watch.

15. As regards FIR number on the documents which were prepared before rukka was sent to the police station, it is a matter of common knowledge that the FIR number on such documents is filled up only after the copy of the FIR is brought to the spot. Moreover, there was absolutely no cross-examination of IO ASI Rajbir Singh in this regard. He was not asked to explain how FIR number came to be mentioned on the documents which had been prepared before the FIR

was registered. In the absence of any cross-examination of the Investigating Officer directly on this aspect, no adverse inference against the prosecution can be drawn on account of the FIR number having been recorded on the documents.

The learned counsel for the appellants relied upon the decision of this Court in Crl. A. No.172/2001 titled Pradeep Saini & Anr. Vs. State decided on 9.9.2009. In the aforesaid case, the sketch of the knife alleged to have been recovered from the possession of the accused Kishore Kumar was found to bear the FIR number though it had been prepared before the registration of FIR. The prosecution did not offer any explanation as to under what circumstances the number of FIR had appeared on the document prepared before the registration of the FIR. The Court was of the view that in these circumstances it could be inferred either that the FIR was recorded prior to the alleged recovery of knife or the number of FIR was inserted in the document after the FIR had been registered and in both situations it would reflect upon the veracity of the prosecution version and create doubt about recovery of knife in the manner alleged by the prosecution. This judgement would not be applicable to the facts of this case where the factum of robbery as well as the apprehension of the robbers on the spot stands proved even from the oral deposition of the complainant and the identity of the appellants as the persons involved in the robbery stands proved from the oral depositions of PW2, PW4 and PW5.

16. The learned counsel for the appellants also referred to the judgements of the Hon'ble Supreme Court in Ashish Batham Vs. State of M.P. (2002) 7 SCC 317 and State of U.P. Vs. Ashok Kumar Srivastava (1992) 2 SCC 86.

In Ashok Batham (supra), the Apex Court *inter alia* observed that mere suspicion, however, strong or probable cannot be a substitute for legal proof required to substantiate the charge. There can be no quarrel with the proposition of law enunciated in the above-referred case but the charge against the appellants, in my opinion, stands proved beyond any reasonable doubt.

In State of U.P. Vs. Ashok Kumar Srivastava (supra), the Apex Court in the context of circumstantial evidence held that the conviction should be based only if all the links in the chain of circumstances are complete, pointing to the guilt of the accused and every hypothesis of innocence capable of being negated on evidence. In the case before this Court, the evidence available against the appellants unerringly points to their guilt and negates every hypothesis of their being innocent.

17. For the reasons stated hereinabove, the conviction of the appellants under Section 392 of IPC read with Section 34 thereof cannot be faulted with. Since a dagger was recovered from the possession of the appellant Govind and the dagger is certainly a deadly weapon it being capable of causing death if used as a weapon of offence, the prosecution has also been able to prove that the aforesaid appellant

had used a deadly weapon during the commission of robbery by placing it on the body of the complainant. Therefore, Section 397 of IPC is attracted as far as the appellant Govind is concerned.

18. For the reasons stated hereinabove, the conviction of the appellants Sandeep and Sunny under Section 392 of IPC and the conviction of the appellant Govind under Section 392 of IPC read with Section 397 thereof is affirmed. However, in the facts & circumstances of the case the substantive sentence awarded to the appellants Sandeep and Sunny is reduced from four (4) years each awarded by the trial court to three (3) years each. The sentence of fine imposed on them, however, remains unaltered. In the event of default in payment of fine they shall undergo SI for three (3) months each as against six (6) months each awarded by the trial court. The appellant Govind @ Bharat having been awarded the minimum prescribed substantive sentence, there is no scope for its reduction. The fine imposed on him also does not call for any reduction. It is, however, directed that in the event of default of payment of fine, he shall undergo SI for three (3) months as against one (1) year awarded by the trial court. There will be no independent conviction of or sentence on the appellant Govind under Section 397 of IPC since the aforesaid Section does not constitute an independent offence but only prescribes a minimum punishment if the offender, at the time of committing robbery or dacoity, as the case may be, uses any deadly weapon or

causes grievous hurt or attempts to cause death or grievous hurt.

The appeals stand disposed of accordingly.

One copy of this order be sent to the concerned Jail Superintendent for information and necessary action.

LCR be sent back along with a copy of this order.

APRIL 28, 2014
rd/b'nesh

V.K. JAIN, J.