

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

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Date of Decision: 07.02.2014

+ CRL.A. 784/2013 and Crl.M.(B) No. 1261/2013 (suspension of sentence)

ANIL KUMAR Appellant
Through: Mr Shailender Dahiya, Adv with
appellant in person.

versus

STATE Respondent
Through: Ms Ritu Gauba, APP

+ CRL.A. 877/2013 and Crl.M. (B) No.1411/2013 (suspension of sentence)

SALIM Appellant
Through: Mr S.K. Sharma, Adv.

versus

STATE GOVT. OF NCT OF DELHI Respondent
Through: Ritu Gauba, APP

+ CRL.A. 1361/2013 and Crl.M(B) No. 2160/2013 (for suspension of sentence)

JAGDISH @ BABLOO @ KALYUG Appellant
Through: Ms Payal Juneja, Adv.

versus

STATE (GNCT OF DELHI) Respondent
Through: Ritu Gauba, APP

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (Oral)

On 16.03.2005, the complainant Deepak Dogra was brought to Jairpur Golden Hospital in injured condition. On receipt of information in this regard, ASI Attar Singh of Police Station Sultan Puri reached the aforesaid hospital and recorded the statement of Deepak Dogra. He told the Investigating Officer that on 15.03.2005, at about 9.30 PM, when he was crossing the railway line near Railway Station Nangaloi, while returning to his home, he was held by two persons, whereas the third person put a knife on his face and the fourth person started searching him. When he protested, a knife blow was given on his face, as a result of which he got scared and when the assailant tried to give the second knife blow, he caught the knife from both his hands and pulled it towards him, as a result of which he got injuries on both his hands. The robbers took out his mobile phone bearing No. 9871567751 make Samsung as well as his purse containing Rs.80/-cash, besides telephone diary and identity card of Bal Bharti School and some other papers. The robbers then ran towards Prem Nagar-II. The complainant somehow reached his house from where he was taken to hospital by his favour.

2. The case of the prosecution is that the appellant Jagdish @ Babloo @ Kalyug who had been arrested in the case registered vide FIR No.403 of 2005 confessed to his involvement in the aforesaid robbery. Jagdish @ Babloo @ Kalyug was then arrested in this case and was interrogated.

According to the prosecution Jagdish @ Babloo @ Kalyug, took them to his house No. 126, Gali No. 6, Station Block, Prem Nagar-I and produced a mobile phone make Samsung from his room. The aforesaid mobile phone was seized after it had been sealed. Thereafter Jagdish @ Babloo @ Kalyug took the police to X/333, Gali No. 7, Prem Nagar-II, where the he pointed out the appellant Salim, who was also arrested in this case. Salim was interrogated and pursuant to the disclosure statement made by him, he produced a purse kept on the TV in his room. The said purse contained I-Card of the complainant, besides his photograph and other documents. The purse along with its contents was seized, after it had been sealed.

Thereafter, on being pointed out by Jagdish @ Babloo @ Kalyug, the appellant Anil Kumar was arrested and was interrogated. The case of the prosecution is that Anil produced the school I-card of the complainant from the pocket of the shirt which had been hung in his

room, and was also seized by the police. Thereafter, one Dalip Singh @ Monu was apprehended on being pointed out by Jagdish, Salim and Anil. All the four accused persons refused to join TIP before the Metropolitan Magistrate and were thereafter chargesheeted.

3. Vide impugned judgment dated 15.05.2013, Dalip Singh was acquitted, whereas remaining three were convicted under Section 394 read with Section 34 of IPC. Vide impugned Order on Sentence dated 25.05.2013, the appellant Jagdish @ Babloo @ Kalyug was to undergo RI for five years and to pay a fine of Rs 10,000/- or to undergo SI for six months in default, whereas the appellant Salim and Anil were sentenced to undergo RI for three years each and to pay fine of Rs 10,000/- each or to undergo SI for two months each in default. Being aggrieved from their conviction and the sentence awarded to them, the appellants are before this Court.

4. PW-4 Deepak Dogra is the only eye witness of the robbery which took place in the night of 15.03.2005. When he was examined on 25.10.2005, he, *inter alia*, stated as under:-

“I reached on the railway track one boy who was also going on the same way put a blade on my neck and asked me as to why I abused him and in that process I crossed the railway track and tried to run away from there but I was apprehended by Kalyug known in the area present in the court today and correctly identified among the other accused persons. Thereafter 7/8 more

boys came over there and they apprehended me towards the patri side in the darkness. Accused Kalyug asked to give knife from accused Salim present in the court today and correctly identified by the witness among the other accused and then he started giving blow on my neck, abdomen, cheek, lip and palm of both the hands and finger from the said knife. Thereafter accused Anil present in the court today and correctly identified by his name and face also beat me with legs.”

When this witness was further examined in chief on 30.11.2005, he changed the earlier version of the incident given by him and *inter alia* stated as under:-

“Accused Kalyg named (Jagdish @ Babloo) stabbed me. Accused Anil present in the court and correctly identified among the other co-accused caught hold me from my behind and accused Saleem present in the court today and correctly identified amongst the other co-accused handed over the knife to Kaliyug (Jagdish) and after raising my objection first Kaliyug (Jagdish) stabbed on my mouth and face and when I tried to save myself I also received injury in my hand palm. Besides three accused persons there were 4-5 boys more available and they were only standing there. Today I have no idea about the fourth accused present in the court.”

In the cross-examination recorded on 30.11.2005, the complainant *inter alia* stated as under:-

“When I was crossing the railway line only accused Jagdish @ Kaliyug was there and thereafter accused Saleem and Anil came over there. The incident took place at his residence of half kilometer from railway phatak. At that time I raised alarm. Then Anil and Saleem came over there.”

However, when the complainant was cross-examined on 09.10.2006, he made a somersault and inter alia stated as under:-

“I did not know accused persons prior to the incident. I had not disclosed the names of the accused persons when police came to meet me in the hospital. I came to know about the names of the accused persons through police and for that reasons I had not disclosed the names of the accused persons in my complaint Ext.PW4/A. In fact the police officials had told me about the names of the accused persons and their roles they played in the robbery. Voltd. I had not seen the faces of the accused persons at the time of robbery as it was night. I cannot say if the accused persons were present at the spot. It is wrong to suggest that I falsely implicated the accused.”

He was cross-examined by the learned Additional PP, but during the said cross-examination, he did not identify the appellants as the persons involved in the robbery.

5. It would thus be seen that the complainant Deepak Dogra has made wholly contradictory statements in the Court. In the FIR Ex. PW-4/A, he had stated that two boys had held him and the third boy put a knife on his face, whereas the fourth boy took his search and when he resisted, he was given a knife blow on his face. He also alleged that when the assailant sought to give the second blow, he took it on his hands. However, when he was examined in the Court on 25.10.2005, he gave a different version and claimed that one boy had put a blade on his neck and asked him as to why he had abused him. In

the FIR, he did not say that the boy who put blade on his neck had abused him.

In his deposition dated 25.10.2005, he stated that the appellant Jagdish @ Babloo @ Kalyug took knife from the appellant Salim and then gave blows on his neck, abdomen, cheek, lip and palm of both the hands, whereas Anil gave beating to him with the legs. In the complaint to the police, he had not claimed that one of the assailants had taken knife from the other assailant nor had he claimed that one of the assailants had given beating to him using his legs for the purpose. However, in his examination-in-chief dated 30.11.2005, he claimed that Anil had caught him from behind, whereas Jagdish @ Babloo @ Kalyug had give knife blow to him and Salim had handed over the knife to Jagdish @ Babloo @ Kalyug. The examination-in-chief dated 30.11.2005 thus was in line with the version given by him in the FIR except to the extent in the FIR that he did not claim that the person who gave knife blows to him had taken that knife from another assailant.

In his deposition dated 25.10.2005, the complainant stated that initially he met Jagdish @ Babloo @ Kalyug and thereafter 7-8 boys had come over there and apprehended him. On the other hand, in his cross-examination on 30.11.2005, he stated that when he was crossing

the railway line, Jagdish @ Babloo @ Kalyug was there and thereafter Salim and Anil came over there, on alarm being raised by him.

6. More importantly, the complainant, when he was examined in the Court, was not firm with respect to identity of the persons involved in the robbery. In the FIR, he did not disclose the name of any of the boys involved in the commission of robbery, but when he was examined in-chief on 25.10.2005, he stated that the appellant Jagdish @ Babloo @ Kalyug was not in the area. In the FIR he did not even say that one of the assailants was known to him or had been seen by him in the locality. Had the complainant known the appellant Jagdish @ Babloo @ Kalyug, he would certainly have stated so in the FIR Ex. PW-4/A. Moreover, in his cross-examination recorded on 09.10.2006, this witness stated that he did not know the accused persons prior to this incident and had come to know about their names only through the police. He also stated that in fact the police officials had told him not only the names of the accused persons, but also the roles played by them in the robbery. He was categorical that he did not see the face of the accused persons at the time of robbery, as it was night. If the cross-examination dated 09.10.2006 is correct, the identity of the appellants as the persons involved in the incident does not stand proved. Moreover, not only in his cross-

examination, but also in his examination-in-chief dated 25.10.2005, the witness clearly stated that the incident of robbery had taken place in darkness. Therefore, there was no opportunity for the witness to identify the persons involved in the robbery.

In any case, considering the absolutely contradictory depositions made by the complainant with respect to the identity of the persons involved in the incident of robbery, it will not be safe to place reliance upon his testimony, as regards the identity of the culprits.

7. As regards the alleged recovery of stolen articles, the case of the prosecution against the appellant Anil is that the school I-card of the complainant Deepak Dogra, issued by Sarvodya Bal Vidyalaya was recovered from his room on 16/17.03.2005. A perusal of the FIR would show that the complainant did not allege theft of the school I-card, issued by Sarvodya Bal Vidyalaya, when he reported the incident of robbery. Moreover, it is difficult to believe that the appellant Anil would have retained the school I card of the complainant with him till the time it is alleged to have been recovered by the police. The school identity card of the complainant was absolutely of no use for the appellant Anil and, therefore, there was no reason for him to retain the said card and keep it in his house. In fact, the first attempt of the robber would be to

throw away any such stolen article which would immediately link him with the robbery and for possession of which he can have absolutely no explanation to offer. The person who commits robbery would know that in the event of his being arrested, his house was bound to be searched by the police in order to recovery of stolen articles. Therefore, he would not like to retain any article which has no monetary value and is otherwise of no use to him, but at the same time can lend him in trouble on account of its recovery from him. Therefore, the alleged recovery of school I-card of the complainant from the appellant Anil is highly doubtful.

8. The case of the prosecution is that the purse of the complainant containing I-card, issued by Rana Electrical Services to him was recovered from the room of Saleem on 16.03.2005. However, in the FIR, there is no allegation of theft of the I-card, issued to the complainant by Rana Electrical Services though theft of the I-card issued by Bal Bharti School is mentioned therein. Had the complainant been carrying the I-card issued by Rana Electrical Services, there would be no reason for him not to disclose its theft in the FIR when he had disclosed the details of other stolen articles, including the I-card, issued by Bal Bharti School. Moreover, the I-card of the complainant, issued

by Rana Electrical Services was of no use of the appellant Salim and, therefore, he had no reason to retain the same and keep it in his house till 16.03.2005. As noted earlier, the attempt of the robber would be to get rid of such stolen articles which have no monetary value and are of no use to him. Therefore, the appellant Salim had no reason to retain the I-card of the complainant in his house up to 16.03.2005.

As regards the purse of the complainant, I find that in the FIR, no particulars of the purse such as its make or even its colour was given to the police. Therefore, it would be difficult to say that the purse which was recovered from the appellant Salim was the purse of the complainant Deepak Dogra. A purse is an article of common use which is likely to be found with every person. In the absence of particulars such as make, shape or even the colour of the purse in the FIR, it would not be safe to convict the appellant Anil Kumar only on the basis of the recovery of a purse from his house.

9. As regards recovery of a mobile phone from the possession of the appellant Jagdish @ Babloo @ Kalyug, I find that in the FIR the complainant had given the connection number as 9871567751. The IMEI number of the mobile phone, which is the only method by which identity of a mobile phone instrument can be established, was not given

in the complaint. No receipt of purchase of the aforesaid mobile phone was submitted by the complainant to the police. No effort was made by the Investigating Officer or by the complainant to ascertain the IMEI number of the mobile connection No. 9871567751 from the service provider. Nothing prevented the Investigating Officer from ascertaining the IMEI number of the stolen mobile phone of the complainant from the concerned service provider. The complainant also could have obtained the IMEI number of his stolen mobile from the service provider and given to the Investigating Officer. He could also have given the receipt of purchase of the aforesaid phone to the police officer. That, however, was not done. A perusal of the Seizure Memo of the mobile phone Ex.PW-6/C would show that it does not contain IMEI number of the mobile phone alleged to have been recovered from the house of the appellant Jagdish @ Babloo @ Kalyug. There is no explanation from the prosecution as to why the IMEI number of the mobile phone alleged to have been recovered from the appellant Jagdish @ Babloo @ Kalyug was not noted in the Seizure Memo. The Investigating Officer, in my view, ought to have obtained the IMEI number of the stolen mobile phone, as also the IMEI number of the mobile phone alleged to have been recovered from the house of the

appellant Jagdish @ Babloo @ Kalyug and only on comparison of the two IMEI numbers, it could be verified as to whether the mobile phone alleged to have been recovered from the appellant Jagdish @ Babloo @ Kalyug was the same mobile which was stolen from the possession of the complainant on 15.03.2005 or not.

I also find that in the FIR, the complainant did not even give the model number of the mobile phone stolen from his possession. The Seizure Memo also does not give model number of the Samsung mobile phone, alleged to have been recovered from the house of the appellant Jagdish @ Babloo @ Kalyug.

A perusal of the Seizure Memo of the mobile phone would show that the phone alleged to have been recovered from the room of the Jagdish @ Babloo @ Kalyug was of blue colour. The FIR, however, does not even disclose the colour of the stolen mobile phone.

10. For the reasons stated hereinabove, the prosecution, in my view, has failed to prove beyond reasonable doubt that the mobile phone alleged to have been recovered from the room of the appellant Jagdish @ Babloo @ Kalyug was the same phone which was stolen from the possession of the complainant Deepak Dogra on 15.03.2005.

11. For the reasons stated hereinabove, all the three appellants are given benefit of doubt and are hereby acquitted.

The appeals as well as the applications stand disposed of

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

LCR be sent back along with copy of this judgment.

FEBRUARY 07, 2014
BG

V.K. JAIN, J.