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

Date of Decision: 15.04.2014

\+ CRL.A. 845/2013

MAHENDER SINGH@MUNNA ..... Appellant

Through: Mr. Vikram Singh and Mr. Saurabh Bhardwaj, Advs.

Versus

STATE GOVT NCT OF DELHI

..... Respondent

Through: Mr. Feroz Khan Ghazi, APP for State

\+ CRL.A. 1022/2013

VINOD @ LADDU @ KALU

..... Appellant

Through: Ms. Aishwarya Rao, Adv.

versus

STATE

..... Respondent

Through: Mr. Feroz Khan Ghazi, APP for State

\+ CRL.A. 1024/2013

RAJESH

..... Appellant

Through: Ms. Aishwarya Rao, Adv.

Versus

STATE (GNCT OF DELHI) ..... Respondent

Through: Mr. Feroz Khan Ghazi, APP for State

\+ CRL.A. 447/2014

RAJ KUMAR

..... Appellant

Through: Ms. Jyotsana Gupta, Adv.

Versus

STATE (GNCT OF DELHI) ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP for State

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

JUDGEMENT

V.K. JAIN, J.

**Crl.M.A. No. 5788/2014 (Exemption) in Crl.A. No. 447/2014**

Allowed, subject to just exceptions.

The application is disposed of.

**Crl.M.A. No. 5787/2014 (condonation of delay) in Crl.A. No. 447/2014**

For the reasons stated in the application, the delay in filing the appeal is condoned.

The application stands disposed of.

**CRL.A. No. 845/2013, CRL.A. No. 1022/2013, CRL.A. 1024/2013 and CRL.A. 447/2014 (ORAL)**

On 05.01.2012 at about 10:55 a.m., the Police Control Room received information with respect to a quarrel having taken place at B.K. 1/187, Shalimar Bagh Main Road, Kela Godown. The information when conveyed to P.S. Shalimar Bagh was recorded vide DD No.16/A, a copy of which was

given to S.I. Rajan Pal for investigation. When the Investigation Officer reached the above-referred spot, Head Constable Rajesh and Constable Dalip were present there, having apprehended one Rajesh. Two monkey-caps were also found lying on the spot. Rajesh was having a red cap with him. The complainant Baldev Ram was also present at the spot and his statement was recorded by the IO. The complainant told him that on the aforesaid date he left his house along with his son Suresh, for going to his shop in Adarsh Nagar, leaving his wife Lajwanti alone at home. At about 10:45 a.m. when he came home to take meals, he found the door bolted from inside. He also heard some noises coming from inside the house. When he knocked at the door, one person carrying a knife/chhura in his hand came out after opening the door, followed by one more person. Both of them were aged about 25-30 years. He tried to catch hold of them. In the meanwhile, another person following them also started running. When he ran towards that person to catch hold of him, a fourth person came out with a pistol in his hand and made him fall on the ground. He as well as his wife thereupon raised the alarm. In the process the monkey-cap of two of the aforesaid persons fell on the road. He further stated that one of the above-referred persons was apprehended by Head Constable Rajesh and Constable

Dalip with the help of the public. The appellant Rajesh is the person who was handed over to the Investigating Officer on the spot.

2. The case of the prosecution is that it was the appellant Rajesh who knocked at the door of the house of the complainant carrying a battery in his hand and claimed to be an Electrician who was to note the meter reading. When the wife of the complainant opened the door, he along with three other persons entered the house and pressed her mouth. One of them put a knife on her neck and asked for the keys of the almirahs, threatening to kill her in case she raised alarm. One of them caught hold of her grand-daughter, pressed her mouth and put a knife on her neck, whereas the person who was carrying a pistol with him bolted the door from inside. Threatening the wife of the complainant, the aforesaid person had just entered the rooms inside when there was a knock at the door and the aforesaid persons came out and started running away.

3. During the course of investigation, the appellants Raj Kumar, Mahender and Vinod were arrested on the basis of disclosure statement made by the appellant Rajesh, who was apprehended on the spot. One country-made pistol is alleged to have been recovered from the possession of the appellant Raj Kumar along with a live cartridge. After completion of

investigation, all the four appellants were charge-sheeted. The appellants Rajesh, Raj Kumar, Vinod and Mahender Singh were charged under Section 120B, 452/120B and 393/120B of IPC. The appellants Mahender Singh and Vinod were separately charged under Section 397/398 of IPC for using deadly weapons. The appellant Raj Kumar was also charged under Section 25 of Arms Act.

4. The complainant Baldev Ram came in the witness box as PW-3 and *inter alia* stated that on the day of this incident, when he came back from his shop, reached his house at about 10.30-11.00 AM and knocked at the door, he heard from inside "C*hor Aa Gaye Hain*". In the meanwhile, the door was opened from inside by his wife and one person came out. When he tried to catch hold of that person, he pushed him. In the meanwhile, another person came from inside. He also pushed the witness, whereupon he (the witness) raised alarm. The third and the fourth person also came from inside the house. The public persons, who gathered there, apprehended one person from behind a van. The police was informed and the person who had been apprehended on the spot was handed over to the police. The witness identified the appellant Rajesh as the person who was apprehended on the spot. He stated that at the time they caught hold of Rajesh, one monkey cap

had fallen down on the ground which had been carried by Rajesh and the said cap as well as a torch, which Rajesh had with him, were handed over to police. Two more monkey caps were found on the spot and were seized by the police. He further stated that after 3-4 days, he had gone to the police and identified the accused Raj Kumar. He further stated that after about a week, he identified two more boys in the police station. According to him, the accused Vinod and Mahender @ Munna were the persons whom he had identified in the police station. In reply to the leading questions put to him by the learned Additional PP, he admitted that Raj Kumar was the person who had pushed him and shown a country-made pistol to him. He also admitted in the aforesaid manner that he had seen the accused Vinod and Mahender sitting near the railway line Kela Godown when he was coming on his scooter and thereafter he had made a call to the police and they were apprehended on being pointed out by him.

5. Smt. Lajwanti, wife of the complainant, came in the witness-box as PW-4 and *inter alia* stated that on 05.01.2012, at about 10.00 to 10.30 AM, someone pressed the call bell of her house. Her granddaughter Maina, who saw the aforesaid person, told her that some persons had come to note down the reading of electricity meter. When she opened the door, she found four

persons, who said that they had come to take the meter reading. One of them started checking the meter by his torch. She was standing there when he caught hold of her from her neck and brought her to the room where her granddaughter Maina was standing. That person pressed her mouth by his hand. The other persons also took out their knives and pistol. When Maina tried to save her, the assailants caught hold of her, pressed her mouth and put knives on her neck. The door was bolted by the aforesaid persons from inside. In the meanwhile, there was a knock on the door from outside. The appellants opened the door and two of them pushed her husband, who was knocking at the door. One of them showed a pistol to her husband. The witness identified the accused Rajesh as the person, who was having a torch in his hand and had entered the house for taking the reading of the meter. In reply to the leading questions put to her by the learned APP, she admitted that when she opened the door, the accused Rajesh pressed her mouth, whereas his associate put a knife on his neck and demanded keys of the *almirah*, threatening to assail her with knife if she raised alarm. She also admitted that the third appellant caught had hold of her granddaughter Maina, pressed her mouth and put a knife on her neck.

6. The granddaughter of the complainant, namely, Mahima @ Maina

came in the witness box as PW-5 and stated that at about 10.30 AM on 5.01.2012, she heard knock on the door of the house. On being enquired by her, she was told by someone that they had come to check the meter. She informed her grandmother that some persons had come to check the meter. When the door was opened by her grandmother, initially one person entered the house; he was followed by three more persons one by one. The first person pretended to read the meter. Suddenly, one of them caught hold of the hand of her grandmother and gestured them to keep silent. One of them took out a knife, kept the same on her grandmother, whereas another person took out a knife and kept the same on her. Two other persons went upstairs, where her sister was sleeping. When she (the witness) shouted, her sister got up and came down, following which there was a scramble in the house. She kicked and slapped the person who had put the knife on her and opened the door. When she opened the door, her grandfather was present there and all the four persons rushed out of the house, one by one. One of them was apprehended by the members of the public. She identified accused Rajesh as the person who had entered the house for taking the meter reading and had put the knife on the neck of her grandmother. She identified the accused Raj Kumar as the person who had put a knife on her, pressed her mouth and

who was slapped and kicked by her. She also identified the accused Vinod as an assailant though she was not able to identify the accused Mahender. This witness was also put leading questions by the learned Additional PP and in reply she admitted that the third assailant was having the pistol in his hand, had bolted the house from inside and demanded the keys of *almirah* from her grandmother. She also admitted that all of a sudden, there was a knock at the door from outside, whereupon the assailants had run towards the door and then run away after opening the door.

7. PW-8 Head Constable Rajesh *inter alia* stated that on 05.01.2002, he was on patrol along with Constable Dalip in the area of Police Station Shalimar Bagh. When they reached in front of house No.B.K. 1/187, East Shalimar Bagh, at about 10.30 AM, they had heard the noise "*chor chor*" and noticed one person running towards them. He, with the help of Constable Dalip apprehended that person whose name later on came to be disclosed as Rajesh. In the meanwhile Baldev Ram also reached there. The accused Rajesh was thereafter handed over to SI Rajan Pal who reached the spot.

8. PW-12 SI Rajan Pal Singh *inter alia* stated that when he reached house No. B.K. 1/187, Shalimar Bagh, on receipt of copy of DD No. 16A,

Head Constable Rajesh and Constable Dalip met him there. The accused Rajesh was handed over by them to him. He further stated that on 08.01.2012, he along with Constable Gopal reached at Badli red light, where SI Rattan met them along with Constable Dalip and accused Rajesh. They reached a local wine shop at Haiderpur, where accused Raj Kumar was apprehended on being pointed out by Rajesh. Baldev Ram also came to the Police Station and identified Raj Kumar. According to this witness, at about 4.30 PM, on 11.1.2012, Baldev Ram came to the Police Station and informed him that two appellants were sitting near Railway Line Kela Godown. He along with Head Constable Pratap and Constable Suresh reached there and arrested the accused Mahender and Vinod at the instance of the complainant. They were having knives with them at that time and were arrested.

9. PW-10 Head Constable Pratap Singh *inter alia* stated that on 11.01.2012, at about 5.30 PM, while on patrol, he received an information from SI Rajan Pal that two persons would be coming from Railway Phatak (crossing) No. 7 near Railway Line from Kela Godown side. He shared the information with Constable Suresh, who was accompanying him and both of them reached near Phatak No.7, where they met SI Rajan Pal and Baldev

Ram. In his presence, Baldev Ram pointed out towards two persons sitting near the railway line and the accused Vinod and Mahender, who were the persons pointed out by the complainant, were then apprehended.

PW-11 SI Rattan Kumar *inter alia* stated that on 08.01.2012, accused Rajesh had informed him that the accused Raj Kumar and Mahender @ Munna and Vinod @ Kalu often come to alcohol theka in Haiderpur in the evening. Thereafter, they went to the aforesaid theka, Haiderpur, where Raj Kumar was found present and was apprehended on being pointed out by Rajesh. In the meanwhile, the complainant came to the Police Station and identified the accused Raj Kumar.

10. In his statement under Section 313 Cr.P.C., the appellant Rajesh denied the allegations against him and claimed that he had been falsely implicated in connivance with complainant Baldev Ram due to previous enmity. The other accused also denied the allegations against them and claimed to be innocent.

DW-1 Ashok Kumar *inter alia* stated that on 10.1.2012, at about 5.30 AM, some police officials apprehended the accused Mahender from the street in which he was residing and took him with them. After some days, he was informed that Mahender had been falsely implicated in this case.

11. Vide impugned judgment dated 12.02.2003, all the four appellants were convicted under Section 452 of IPC read with Section 120B of IPC as well as under Section 392/397 read with Section 120B of the Code. The appellant Raj Kumar was also held guilty under Section 25 of Arms Act.

Vide impugned Order on Sentence dated 23.02.2013, the appellants were sentenced to undergo RI for three years each under Section 452 of IPC read with Section 120B thereof and to pay fine of Rs 2000/- each or to undergo SI for one week each in default. They were sentenced to undergo RI for seven years each under Section 392 of IPC read with Section 120B thereof and to pay fine of Rs 5000/- each or to undergo SI for fifteen days each in default and further sentenced to undergo RI for 10 years each under Section 397 IPC read with Section 120B thereof of the Code and to pay fine of Rs 5000/- each or to undergo SI for fifteen days each in default.

Raj Kumar was also sentenced RI for two years under Section 25 of Arms Act and to pay fine of Rs 2000/- or to undergo SI for one week in default. Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of these appeals.

12 As far as appellant/accused – Rajesh is concerned, the deposition of PW3 – Baldev Ram, PW4 – Ms. Lajwanti and PW5 – Ms. Mahima which finds

corroboration from PW8 – HC Rajesh and PW12 – SI Rajan Pal shows that he was apprehended near the place of the complainant, at about 11 am on 5.1.2012. It has come in the deposition of PW5 – Mahima that when she opened the door, it was Rajesh who stated that he had come to check the meter reading and he was the first person to enter the house. Appellant – Rajesh was followed by at least three other persons who were wearing money caps at that time. The appellant – Rajesh has not given any explanation for his being found near the house of the complainant, soon after the incident in the house of the complainant. In his statement under Section 313 Cr.PC he claimed that he was implicated in a false case on account of his enemity with the complainant. However he did not tell the court as to why he had an enemity with the complaint which led to his being implicated in a false case and what precisely that enemity was. During the cross examination of the complainant, no suggestion was given to him that he had some kind of enemity with the appellant – Rajesh. No such suggestion was given to either PW4 – Mr. Lajwanti or PW5 – Ms. Mahima. Even during the cross examination of the Investigating Officer, no suggestion was given to him that the complainant had some kind of enemity towards the appellant – Rajesh. In these circumstances, the plea taken by the appellant – Rajesh in this regard cannot be accepted.

13. Not only was the appellant – Rajesh apprehended on the spot, he was the

person who had taken the lead role in the incident which took place in the house of the complainant on 5.1.2012. It was he who represented to PW5 and her grandmother PW4 Ms. Lajwnati that he was a meter reader who had come to note down the reading of the meter. It was he who had entered the house pretending to note down the reading and later all of a sudden held her by neck. It is thus evident that the appellant – Rajesh had entered into a criminal conspiracy with three other persons to commit robbery form the house of the complaint and it was pursuant to the said conspiracy that he pretended to be a meter reader and entered the aforesaid house. There could be no purpose other than commission of robbery, behind entering the house of the complainant accompanied by persons who were also armed with deadly weapons. The appellant – Rajesh, therefore, was liable to the convicted under section 120B of IPC read with Section 452 and 392 thereof. It would be pertinent to mention that the appellant – Rajesh was also charged under Section 120B of IPC for hatching a criminal conspiracy with others to commit robbery in the house of the complainant – Baldev Ram.

Since the appellant – Rajesh actually entered the house of the complainant alongwith three other persons, some of them were armed with weapons, the charge under Section 452 of IPC also stand duly established against him on account of his having committed house trespass into the house of the complainant having made preparations for causing hurt to and/or putting inmates of the house in fear of hurt

or assault.

14. As far as the appellant – Raj Kumar is concerned, the case of the prosecution is that he was apprehended from a country made liquor vend on 5.1.2012, on being pointed out by the Appellant – Rajesh. Admittedly, no attempt was made by the Investigating Officer to get the appellant – Rajesh Kumar identified in a judicial TIP and he was shown to the complainant in the police station on that very day. Since identification before the police officer is not admissible in evidence the identification of the appellant – Raj Kumar in the police station cannot be used as a piece of evidence for the purpose of corroborating the court deposition of the witnesses with respect to his identity.

15. As far s appellants – Vinod and Mahender are concerned, the case of the prosecution as set out in the charge-sheet is that on 11.01.2012, the complainant – Baldev Ram found them sitting near the railway *phatak (*crossing) No.7 and informed PW12 – SI Rajan Pal Singh who along with other police officials reached railway crossing and apprehended them on being pointed out by the complainant. However, when Shri Baldev Ram came in the witness box, he *inter alia* stated that after about a week of the incident, two boys had been apprehended by the police and he had gone to the police station where he had identified them. It is not understood what would be the need for the complainant to identify the aforesaid appellants in the police station if it was he who first saw them sitting

near the railway crossing and informed the police officer about their presence. The complainant, when he was examined in the court, did not initially claim that he had seen the above referred two persons sitting near railway crossing and ahd ifnoremd the police officer about their presence. At the end of the examination in chiefg of this witness, certain leading questions were put to him by the learned Additional PP with the permission of the trial court and it was in response to th said leading questions that the witnesses stated that he had seen the accused Vinod and Mahender sitting near railway line, *Kella* godown near *phatak* (crossing) while he was coming back on his scooter and thereafter he had made a call to the police and they were arrested on being pointed out by him. The learned counsel for the appellants – Vinod and Mahdner has drawn my attention to the decision of the Hon'ble Supreme Court in *Varkey Joseph* vs. *State of Kerala* [1993 AIR 1892] wherein the Apex Court *inter alia* held as under:

> *"Leading question to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answer to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in Chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the*

*permission of the Court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give, his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act is intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness by answer merely "yes" or "no" but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses what he intended that they should say the material part of the prosecution case to prove against the appellant which is illegal and, obviously unfair to the appellant offending his right to fair trial enshrined under Art. 21 of the Constitution. It is not a curable irregularity."*

16. In the case before this Court, the learned trial Judge committed an error in

law by permitting the prosecution to put leading questions to the witness as regards the manner in which the appellants – Vinod and Mahender were apprehended. If the answer given by the witness to the aforesaid leading question are excluded from consideration, there is no evidence of the complainant having seen the aforesaid two appellants - Vinod and Mahender sitting near railway lines on 11.1.2012.

17. According to PW 8 - HC Rajesh, he along with SI Rajan Pal Singh nad Ct. Bhupinder accompanied by the appellant Raj Kumar had gone to Etah on 11.1.2012 in search of the other accused persons. The witness claimed that they left the police station at about 10.30/11 am on that date and reached Etah at about 8.30/ 9 pm. They stayed at Etah for about one and a half hours and while returning from Etah, they went to Mohan Nagar, Ghaziabad in the morning where Rajesh got recovered a country made pistol from near a temple. If deposition of this witness is correct, PW12 – SI Rajan Pal Singh could not have arrested the appellants – Vinod and Mahender from near the railway crossing on 11.01.2012. Even according to PW7 – Ct. Bhupinder, they had reached Etah at about 9/10 am. Considering the distance between Etah and Delhi, SI Rajan Pal Singh could not have been present near railway crossing at about 5 pm on 11.1.2012 when the case of the prosecution is that the police party had also gone to Mohan Nagar in Ghaziabad before returning to Delhi and had recovered a country made pistol from

there. Be that as it may, there is material discrepancy in the evidence of the prosecution as regard the place from where and the manner in which the appellants – Mahender and Vinod were arrested by the police.

18. The most important aspect as far as the appellants – Raj Kumar, Mahender and Vinod are concerned is that the intruders other than Rajesh were wearing monkey caps when they entered the house of the complainant. It has come in the deposition of PW5 – Mahima that Rajesh was wearing a normal cap on his head whereas the other persons were wearing monkey caps. In my view, it would be extremely difficult for any person, to see the faces of the intruders wearing monkey caps, so minutely that they are in a position to identify him at a later date. This is more so, when weapons have been put on them and the intruders stayed with them for a very short time. Admittedly, no robbery actually took place from the house, since there was a knock at the door, soon after the intruders had entered the house. The witnesses, therefore, could not have been in a position to look at them for a reasonably long period. The very purpose of wearing the monkey caps by any person seeking to commit robbery in a house would be to hide their identity so that in case they are caught, the witnesses are not able to identify them. In fact, Smt. Lajwanti, wife of the complainant did not identify the accused Raj Kumar, Vinod and Mahender. The inability of the aforesaid witness to identify the intruders other than Rajesh can easily be attributed to the fact that they were

wearing monkey caps at the time they were in the house of the complainant.

19. No attempt was made by the Investigating Officer to get the accused Vinod and Mahender identified from the eye witness in a TIP. Admittedly none of these accused was previously known to any of the eye witnesses and none of them was apprehended on the spot. The identification for the first time in the trial, through admissible in evidence, is by its very nature a weak piece of evidence and in the absence of special facts and circumstances, the court would look for corroboration before convicting a person on the basis of identification for the first time when the accused is in the dock. Such corroboration can be in the form of identification in a judicial TIP during the course of investigation, recovery of some stolen articles from the accused or in some other manner which would convince the court that the person identified for the first time during trial was the person actually involved in the incident.

The legal position with respect to identification of an accused was summarized by the Hon'ble Supreme Court in ***Dana Yadav @ Dahu and Ors. Vs. State of Bihar*** *(2002) 7 SCC 295 inter alia* as under:

> "(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.
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> X X X

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

However in the case before this Court not only were the accused – Mahender, Raj Kumar and Vinod identified for the first time in the court, they were also wearing monkey caps at the time the incident took place in the house of the complainant and therefore, it would be extremely difficult for the witness to identify them at a later date. As noted earlier, though Mahima identified the appellants – Rajesh, Vinod and Raj Kumar, Smt. Lajwanti did not identify either Vinod or Raj Kumar. As far as appellant – Mahender is concerned, he was not identified by either of them.

20. As regards identification by complainant – Baldev Ram, it has come in evidence that when the door was opened, one of the intruders pushed him, as a result of which he fell down. Since the intruders other than Rajesh were wearing monkey caps, it would be very difficult for the complainant to see their faces particularly when he had only a glimpse of the intruders, he having been pushed by one of them and having fallen on the ground. Though he claimed that he had removed the cap of one of the intruders, he does not say who that intruder was. Even otherwise, it would be difficult to accept that a person, despite having fallen down on account of push given to him, was able to remove the monkey cap of one of the intruders. It would be pertinent to note here that in his statement to the police, the complainant did not claim that he had removed the cap of one of the intruders. The statement given by him to the police was that in the scuffle that took place, the monkey caps of the two intruders had fallen on the spot. It would, however, be difficult to accept that the caps would fall down during scuffle. It would require a conscious effort to pull the monkey cap of another person. In any case, even if it is assumed that on account of caps of the two intruders having fallen down, the complainant was able to see their faces, that could not be for so much duration as would enable him to later identify the intruders during the course of trial, particularly when the witness himself has fallen down on account of push given to him. Therefore, it was imperative for the IO to make an attempt

to get the appellants – Raj Kumar, Mahender and Vinod identified in a judicial TIP and their identification by the complainant for the first time in the Court, without any corroborative evidence, would not be sufficient to sustain their conviction.

21. The evidence produced by the prosecution does not prove that the intruders had attempted to commit robbery by the time there was a knock at the door. Neither Smt. Lajwanti nor Ms. Mahima stated, of her own, that the intruders had asked them for the keys of the *almirahs*. It was only in response to the leading questions put to them by the learned Additional PP that they admitted that the intruders had demanded the keys of the *almirahs* from Smt. Lajwanti. Since, the aforesaid leading questions could not have been allowed by the learned trial Judge, the response given by the witnesses to the aforesaid leading questions needs to be excluded form consideration. If that is done, there is no evidence of the intruders having demanded the keys of the *almirahs* from the wife of the complainant. Even otherwise, had the intruders asked for the keys of the *almirahs,* before there was a knock at the door, Smt. Lajwanti as well as Ms. Maihma would have stated so in their examination-in-chief, before they responded to the leading questions put to them. There is no evidence of the appellants having attempted to remove any article from the house of the complainant before the door was opened either by the intruders or by the wife or granddaughter of the complainant.

Therefore, it would be difficult to say that a robbery was attempted by the intruders. The act of the intruders, in my view, was still at the stage of making preparations for committing robbery, but, on account of knock at the door, they could not execute their plan. Therefore, the charge under Section 393 of IPC does not stand established.

22. As regards the alleged recovery of country made pistol from the appellant – Raj Kumar, as noted earlier, there are contradictions, in the deposition of witnesses as to when they had reached Mohan Nagar while returning from Etah on 11.01.2012. The case of the prosecution is that the appellant – Raj Kumar was in their custody since 08.01.2012 and he had also made a disclosure statement on that very day. There is no explanation from the prosecution as to why the country made pistol was not recovered on 8th, 9th or 10th January, 2012. Even while going to Etah on 11.01.2012, the police officials chose not to go to Mohan Nagar first and they claimed to have gone there only while returning from Etah. The conduct of the police officials is contradictory to the natural course of human conduct and, therefore, difficult to accept. Ordinarily, the Investigating Officer, immediately on recording disclosure statement of the appellant – Raj Kumar would have attempted to recover the country made pistol, instead of waiting for three days. No police official is likely to take such a chance since the weapon could, in the meanwhile, be removed by someone from the place where the appellant – Raj

Kumar had allegedly kept the same. The recovery of country made pistol from the appellant – Raj Kumar in these circumstances, becomes doubtful and the benefit of doubt must necessarily accrue to the accused.

23. For the reasons stated hereinabove, the appellants Mahender, Vinod and Raj Kumar are given benefit of doubt and are hereby acquitted. The appellant Rajesh is convicted under Section 120B of IPC read with Section 392 thereof as well as under Section 452 of IPC. He is sentenced to undergo RI for three years and to pay fine of Rs 1000/- or to undergo SI for three months under Section 452 of IPC. He is also sentenced to undergo RI for three years and to pay fine of Rs 2000/- or to undergo SI for three months in default under Section 120B IPC read with Section 392 thereof.

The appeal stands disposed of.

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

LCR be sent back along with the copy of this judgment.

APRIL 15, 2014 V.K. JAIN, J.
***BG/RD***