

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

RESERVED ON : 25th February, 2014

DECIDED ON : 6th March, 2014

+ CRL.A. 1038/2013

ALLAUDDIN Appellant

Through : Ms.Arundhati Katju, Advocate.

Versus

STATE NCT OF DELHI Respondent

Through : Mr.Lovkesh Sawhney, APP.

+ CRL.A. 877/2011

KULDEEP SINGH @ KALLI Appellant

Through : Mr.B.S.Chaudhary with Mr.Anshul
Baranwal, Advocates.

Versus

STATE Respondent

Through : Mr.Lovkesh Sawhney, APP.

+ CRL.A. 734/2013

KULDEEP SINGH @ KALLI Appellant

Through : Mr.B.S.Chaudhary with Mr.Anshul
Baranwal, Advocates.

Versus

STATE Respondent

Through : Mr.Lovkesh Sawhney, APP.

+ **CRL.A. 873/2011**

MAHENDER @ DHARMENDER Appellant
Through : Mr.B.S.Chaudhary with Mr.Anshul
Baranwal, Advocates.

Versus

STATE Respondent
Through : Mr.Lovkesh Sawhney, APP.

+ **CRL.A. 793/2012**

TINKU @ DANISH Appellant
Through : Mr.Ajay Verma, Advocate.

Versus

STATE Respondent
Through : Mr.Lovkesh Sawhney, APP.

CORAM:
MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in these appeals is to a judgment dated 16.05.2011 of learned Additional Sessions Judge in Sessions Case No.1117/09 arising out of FIR No.452/08 registered at Police Station Ashok Vihar by which Allauddin (A-1) and Tinku @ Danish (A-4) were convicted under Section 392 IPC; Kuldeep Singh @ Kalli (A-2) and Mahender @ Dharmender (A-3) were held guilty under Section 392 read with Section 397 IPC. By an order on sentence dated 25.05.2011, A-1 and A-4 were awarded RI for
Crl.A.No.1038/2013 & connected appeals

four years with fine ₹500/- each; and A-2 and A-3 were awarded RI for seven years with fine ₹500/- each.

2. Allegations against the appellants were that on 29.10.2008 at about 1.30 p.m., at Jhalkari Bai School (Sarvodya School) Wazipur, JJ Colony, they in furtherance of common intention while armed with deadly weapons committed robbery and deprived Ramesh ₹150/-; Rakesh ₹500/- and mobile phone; Hira ₹60/-; and Mukesh ₹30/-. Daily Diary (DD) No.19 (Ex.PW-2/A) was recorded at 01.50 p.m. on getting information about the incident. Investigation was assigned to ASI Dev Raj who with Ct.Surender went to the spot. The investigating officer recorded Ramesh's statement (Ex.PW-3/A) and lodged First Information Report under Section 392/34 IPC. Further case of the prosecution is that at the pointing out of the complainant, A-1, A-2 and A-4 were arrested and part of the robbed cash, mobile phone and knife were recovered from their possession on the same day in the evening. On 04.11.2008, A-3 was arrested. Statement of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against all the accused persons; they were duly charged and brought to trial. The prosecution examined eight witnesses to substantiate the charge. In 313 statements, the accused persons denied their complicity in the crime;

pleaded false implication and examined DW-1 (Ramesh Kaur) in defence. On appreciating the evidence and after considering the rival contentions of the parties, the trial court, by the impugned judgment held them guilty for committing offences mentioned previously. Being aggrieved and dissatisfied, they have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the record. The police machinery was put into motion when information about robbery incident was conveyed and DD No.19 (Ex.PW-2/A) was recorded at Police Post JJ Colony, Wazipur at 1.50 p.m. on 25.10.2008 The DD does not record as to who was the informant. No PCR official was examined to prove as to who had informed at 100 about the occurrence. This DD records that five assailants had robbed cash from labourers at pistol point. During investigation, this information was not found correct. The prosecution case, as projected in the charge-sheet, was that the assailants were four in number and two of them were armed with knives and one had an iron rod. Complainant-Ramesh who had allegedly made a call at 100 to PCR did not clarify as to why incorrect information was conveyed to the police. The investigating officer also did not explain the major variance in the two versions.

4. In statement (Ex.PW-3/A) given to the police at the first instance, Ramesh revealed that the two assailants pointed knives at them and commanded to hand over whatever they had. Due to fear, they stood on one side and the assailant who was unarmed removed mobile from his brother Rakesh and his companion took out ₹150/- from his pocket and ₹500/- from the pocket of his brother Rakesh. The assailant who had snatched mobile from Rakesh had a long scar/cut mark on cheek. He further disclosed that when his brothers Mukesh and Hira came out of their room, the assailant who had an iron rod took out cash from their pockets. Thereafter, the four assailants fled the spot. The complainant in its complaint did not describe broad features/description of the three assailants. He also did not reveal as to what cash was taken out from Hira and Mukesh. While appearing as PW-3, Ramesh made vital improvements in his deposition and deposed that one of the assailants who had a knife, put it on his stomach and threatened them to hand over all their belongings and cash. He identified A-1 as the boy who snatched mobile and money from him and his brother. He also recognized A-4 who had a knife and had put it on his stomach. He identified A-3 the other assailant who had a knife. He identified A-2 as the assailant who was standing on one side and threatening them not to raise alarm. PW-3 did

not reveal if any of the assailants was armed with any iron rod. He did not identify A-1 as the assailant who had an iron rod in his possession. He did not specify as to which of the assailants had removed the mobile and cash from each of them. He did not identify any specific assailant who had a long cut mark on his cheek. In Court observation, A-1 was found to have an old cut mark on the left side of his temple. In the statement (Ex.PW3/A), Ramesh attributed specific role to the assailant (A-1) who was unarmed and took out mobile from Rakesh. As per the prosecution, A-1 was armed with an iron rod. So there was mis-match in the testimony of the witnesses as to which of the assailants had snatched mobile phone from Rakesh. PW-4 (Rakesh) has given inconsistent and conflicting statement. He identified A-2 to be the assailant who had a knife and accused A-4 for snatching the mobile. He deposed that A-1 was having an iron rod. He did not assign any role to A-3 in the incident. He did not depose if he had a knife in his possession or had extended threats to them. PW-4 is silent as to which of the assailants had taken out the robbed articles from them. He deposed that the person who was without any weapon snatched his mobile. He further deposed that one of the boys, who had a knife, put it on his back. He did not elaborate as to who had

snatched cash from Hira and Mukesh. Apparently, the version narrated by this witness is inconsistent with the one given by PW-3 (Ramesh).

5. PW-5 (Hira Lal) merely deposed that the assailant who was without any weapon took out ₹60/- from his pocket and snatched mobile from the hand of Rakesh. He was unable to tell as to what amount was taken out from the pocket of his brother Ramesh. He was unable to depose as to which of the assailants had which weapon. He identified all the assailants by face and deposed that they were the persons who snatched money and mobile on the point of knives and iron rods. The prosecution did not examine other eye-witness/victim Mukesh. It is stated that he was not traceable. Since Mukesh was related to PW-2 and others, there was no question of his being untraceable. Adverse inference is to be drawn against the prosecution for withholding Mukesh.

6. The prosecution witnesses have given divergent version about the identity of the appellants. None of the appellants was apprehended at the spot. The prosecution case is that PW-6 (HC Shish Ram) was aware of a ruffian (A-1) in the vicinity who had cut mark on his 'face'. On that, the police team went to the house of A-1 but he was not found there. The police on the basis of secret information went to Tikona Park and apprehended A-1, A-2 and A-4 at the pointing out of the

complainant. The fourth one had allegedly gone to fetch liquor. On search, a mobile and cash ₹180/- from A-4, ₹210/- and a dagger from A-2 and ₹100/- from A-1 were recovered. A-1 also recovered a 'rod' from the nearby bushes. PW-3 (Ramesh) did not subscribe to the prosecution story. None of the assailants was found to have any cut mark on 'cheek'. He deposed apprehension of only two boys on that day i.e. A-1 and A-4 and recovery of mobile from A-4 and an iron rod from A-1. He did not claim if A-1, pursuant to his disclosure statement, recovered the iron rod from the bushes. He was not aware from which of the accused, what amount of cash was recovered. He did not testify about the apprehension of A-2 and recovery of any robbed article from his possession. PW-3 did not claim if PW-4 was also with them at the time of apprehension of the assailants. PW-4 (Rakesh), in his examination-in-chief, did not claim if any of the assailants was arrested in his presence or any robbed article or crime weapon was recovered from their possession. He merely stated that three persons were arrested by the police and the fourth was arrested later on without revealing as to when any one of them was apprehend. He also did not state if any robbed article from any of the assailants was recovered in his presence. PW-5 (Hira Lal) is silent regarding the apprehension of the appellants and recoveries effected from them.

7. A-3 was allegedly arrested on 04.11.2008 at the pointing out of the complainant-Ramesh. However, Ramesh did not claim if A-3 was arrested on his pointing out. Identity of these assailants was not known to the victims and they were not apprehended at the spot. The investigating officer did not move any application for conducting Test Identification Proceedings. Nothing was recovered from the possession of A-3 on his apprehension. Though two of the assailants were alleged to be in possession of knives, but only one knife was allegedly recovered from one of the assailants. A-2 who had no arm at the time of occurrence, was allegedly found in possession of a knife on the same day at the time of his apprehension. The investigating officer did not collect proof of ownership of the mobile. No call details were collected. Complainant alleged that he had made a telephone call at 100 from his mobile. The other mobile in possession of the complainant was not robbed. DD No.19 does not reveal if the information was conveyed to PCR through this mobile. No such mobile number has been disclosed. There was no specific mark of identification on the currency notes.

8. In view of the major discrepancies, inconsistencies and improvements noted above, conviction of the appellants under Section 392/397 IPC cannot be sustained. Though PWs 3, 4, and 5, being

labourers, had no ulterior motive to falsely implicate the accused persons, it appears that they have not presented true facts. Lapses on the part of the investigating officer are apparent and no independent public witness was associated at any stage of the investigation.

9. In the light of the above discussion, the appeals are accepted. Benefit of doubt is given to the appellants and they are acquitted; their conviction and sentence are set aside. The appellants, who are in jail, be set at liberty forthwith, if not required to be detained in any other case.

10. Trial Court record along with a copy of this order be sent back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation.

(S.P.GARG)
JUDGE

March 06, 2014
sa