

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

% Date of Decision: 06.03.2014

+ CRL.A. 1144/2013

SANJAY Appellant

Through: Mr. Inderpal Khokhar, Adv.

Versus

STATE NCT OF DELHI Respondent

Through: Ms. Ritu Gauba, APP for State

+ CRL.A. 1261/2013

MEHFOOJ @ MONU Appellant

Through: Mr. Ashish Kumar, Adv.

Versus

STATE (GOVT. OF NCT) DELHI Respondent

Through: Ms. Ritu Gauba, APP for State

+ CRL.A. 1324/2013

PRAVEEN MALIK & ORS. Appellant

Through: Mr. Chetan Anand, Adv.

versus

STATE (GOVT. OF NCT) DELHI Respondent

Through: Ms. Ritu Gauba, APP for State

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGEMENT

V.K.JAIN, J. (Oral)

On 27.09.2009, the Police Control Room (PCR) was informed of the passengers in Himalayan Queen Train having been robbed between Narela and Holambi Kalan Railway Station. The information when conveyed to the Police Station Old Delhi Railway Station, was recorded vide DD No.20, copy of which is Ex.PW19/A, and its copy was given to ASI Rameshwar Dass for investigation. When the Investigating Officer reached the spot, he found a crowd gathered at the train. He recorded statement of the complainant – Shashi Kant, who *inter alia*, stated that on the aforesaid date, as soon as the train left Sonapat, 6-7 boys aged between 20-30 years boarded the train from the other side of the platform. Out of them, one was a bulky boy with dark complexion having a cut on his right cheek whereas the other boys were slim or medium built. As soon as the train reached Narela, they covered the whole of the coach. One of them had a country made pistol with him whereas the others have knives and razors. They started beating the passengers and robbed them of their valuables. One passenger – Udhal Singh pulled the chain. When the train was about to reach H.K. Railway Station, those persons jumped from the train and fled towards the fields. The complainant alleged that he had been robbed of Rs.8,000/- on the point of a country made pistol whereas Anil Kumar Jha, who was sitting with him was robbed of his mobile phone number 9805671907, and Rs.2,000/- in cash whereas another passenger Bimla Devi was robbed of her chain and Rs.10,000/- in cash. He claimed that a number of other passengers had been robbed of their cash and valuables etc.

2. This is also the case of the prosecution that on 20.09.2009, the accused Sandeep, Ashok and Praveen were arrested on the basis of secret information and a toy pistol (country made pistol) was recovered from Sandeep, whereas razors were recovered from Ashok and Praveen. They were interrogated and during interrogation, they named the other co-accused persons and admitted their involvement in the crime. They led them to the house number C-24, JJ Colony, Shahbad Dairy where one mobile phone make Nokia 1650 was produced by the accused Ashok from his room. The IMEI number of the said mobile phone matched with the mobile phone of one of the victims namely Prince Gupta. The accused Sandeep also produced a polythene bag containing six mobile phones and a black colour purse from his room. The said purse contained photocopy of the driving license of Naresh Kumar besides two visiting cards etc. Out of the six mobile phones, IMEI number of one phone make Samsung 3314 matched with the phone of another victim namely Ashok Kumar Trivedi, which was stolen from him during the aforesaid dacoity. All the three above named accused persons were produced before the Magistrate in muffled face, but they refused to join TIP proceedings. On 22.10.2009, the accused Rohit surrendered in the Court and was arrested. He also refused to join TIP. However, nothing could be recovered from him.

3. On 10.11.2009, an information was received from SHO/GRP, Sonapat with respect to arrest of the accused Mehfooz by them. After obtaining his production warrants, Mehfooz was arrested and was produced before a

Magistrate. He, however, refused to join TIP. Nothing could be recovered from him despite his police custody having been taken. On 20.11.2009, accused – Sanjay surrendered before the concerned Magistrate. He was then arrested in this case and was produced before the Magistrate in muffled face. He also refused to join TIP. Nothing was recovered from him. One of the mobile phones which were recovered from accused Sandeep belonged to the victim Anil Kumar Jha as was discovered by matching its IMEI number. Initially, the charge-sheet was filed against the accused Sandeep, Ashok, Pravin, Rakesh, Mehfooz and Sanjay. Accused Rohit was arrested at a later date and a supplementary charge-sheet was filed against him.

4. On 30.03.2010, all the seven accused were charged under Section 395/397/34 of IPC. They having pleaded not guilty to the charge, as many as 24 witnesses were examined by the prosecution. No witness, however, was examined in defence.

5. PW1 – Mr. Uddal Singh was one of the passengers who were travelling in Himalayan Queen Express on 27.09.2009. He, *inter alia*, stated that about 10-12 persons came to the compartment armed with firm arms, knives and when the train reached Sonapat Railway Station, they started snatching monies and other articles from the passengers. He along with other passengers informed the PCR and pulled the chain. When the slowed down near Holambi Kalan Railway Station, all those persons got down from the

train and fled away. He, however, claimed that he was not robbed of any article. He identified the accused – Sanjay as the person who was carrying firm arm with him. He, however, could not identify the other accused persons.

PW3 – Ashutosh Trivedi is another passenger who was travelling in Himalayan Queen Express on the aforesaid date. He also deposed with respect to dacoity in train by about ten persons. He stated that one of them was armed with a gun whereas some were carrying razors and knives. He also claimed that one of the robbers had put razor on the neck of his friend Hem Vardhan. He claimed that the robbers took his mobile as well as the mobile of Hem Vardhan. He also produced the copy of the purchase bill of his mobile phone. He identified the accused Sandeep as the person who was carrying a gun at the time of incident, but was not able to identify the person who had put razor on the neck of his friend and had taken away their mobiles. He identified Ex.P1 as his mobile bearing IMEI number 354118031269188, which was snatched from him.

6. PW4 - Mr. Shashi Kant is also a victim of the aforesaid dacoity. He claimed that he was robbed of Rs.8,000/- by showing him a country made pistol. He identified all the accused persons as the boys who were involved in the incident of train robbery.

7. Smt.Bimla Devi who came in the witness box as PW8 and, *inter alia*, stated that someone had taken away her gold chain which she was wearing

around her neck besides a leather bag which contained Rs.10,000/- in cash. She, however, could not see the culprits since she at that time was looking outside the window. She did not identify any of the accused persons.

8. PW9 – Mr. Prince Gupta also deposed with respect to commission of dacoity in the train on the aforesaid date. He claimed that the persons involved in the robbery were armed with knives and razors and one of them was having a country made pistol with him. He alleged that one of the persons involved in the robbery had put razor against his neck and taken away his mobile phone make Nokia 1650. According to him, the said mobile phone was got issued in the name of his friend Hem Vardhan. He identified Ex. PX as the mobile phone which was stolen from him. He identified only the accused Ashok from amongst the accused persons who were present in the court. According to him, it was Ashok who had taken his mobile phone from him.

9. Mr. Hemwardhan is yet another victim of dacoity. He came in the witness box as PW -14 and, *inter alia*, stated that the assailants were equipped with knives and fire arms. According to him, he was robbed of his mobile make Nokia – N-72. He identified the appellant – Mehfooj as the person who had robbed him of his mobile phone.

10. PW21 – Mr. Anil Kumar Jha was also travelling in Himalayan Queen Express on the aforesaid date. He claimed that one boy having a cut mark on

his nose was armed with a revolver, whereas his companions were armed with weapons such knives and razors. According to him, he was robbed of his mobile phone and cash amounting to Rs.2,000/-. He identified the accused – Sandeep as the person who was armed with a revolver and accused Rohit as the person who had placed razor against him at the time of commission of robbery.

11. PW24 – Ram Brikesh deposed with respect to snatching of a gold chain, gold ring and currency from him. He, however, did not identify any of the accused persons and claimed that none of the accused persons was amongst the 5-6 persons who had committed crime in the train on that date.

12. PW2 – Ramesh Singh is the owner of the house number C-246, Shahbad Dairy. He, *inter alia*, stated that two rooms on the second floor of the aforesaid house were let out by him to the appellants – Sandeep, Ashok and Praveen. According to him, Ashok and Praveen were sharing one room whereas Sandeep had occupied another room. He further stated that on 29.09.2009, the police came to his house along with Ashok and Sandeep and went to the second floor of the house which was in their possession. According to the witness, he also had accompanied them to the aforesaid room. He claimed that one mobile phone was recovered from the room occupied by Ashok whereas a polythene bag containing 5-6 mobile phones, purse, camera and two gold chains were recovered from the room occupied by

Sandeep. He, however, did not identify any of the articles which were recovered from the said room.

13. PW10 – Shri Tarun Khurana is the Nodal Officer, Bharti Airtel Ltd. and he produced the copy of the Consumer Application Form in respect of application number 9805871907 which is Ex.PW10/A. The copy of the ID Proof is Ex.PW10/b whereas the copy of the declaration is Ex. PW10/C. PW11 – Mr. Shishir Malhotra is the Nodal Officer of Aircel Ltd. who produced CDR in respect of mobile phone number 9716871166. He claimed that the connection was released in the name of Rajpal Singh Kasana.

14. PW12 – HC Ram Kumar, *inter alia*, stated that on 28.09.2009, he joined the investigation of this case along with SI Rajinder Dabas, ASI Rameshwar and Constable Vikas. On the basis of a secret information received by them, they went to Narela Railway Station where the accused Sandeep, Ashok and Praveen were apprehended, on being pointed out by the secret informer. Sandeep was found in possession of a pistol, whereas the others were found in possession of one razor each. He further stated that thereafter all the accused were interrogated and they made disclosure statement Ex.PW12/M, PW12/N and PW12/O. Thereafter, all the three accused led them to the house number C-24, JJ Colony, Shahbad Dairy where Ashok and Praveen got recovered one mobile phone which was seized vide memo Ex.PW2/A whereas Sandeep got recovered five mobile phones, driving

license, two visiting cards and two gold chains which were seized vide memo Ex.PW2/B and PW2/C. However, during the cross examination by learned APP, he admitted that six mobile phone were recovered out of which one was make Samsung 3310. The said phone is Ex.P2.

15. PW13 – Mr. Gaurav Rao is the Metropolitan Magistrate before whom the appellant – Rakesh Kumar refused to join TIP on 22.10.2009. The appellant – Mehfooz also refused to join TIP before him on 20.11.2009. The appellant – Sanjay was also produced before him in muffled face and he also refused to join TIP on 23.11.2009. According to the witness, the accused Rohit had refused to join TIP before him on 14.01.2010.

PW16 – Ms. Twinkle Wadhwa is another MM who, *inter alia*, stated that on 29.09.2009, accused Sandeep, Ashok and Praveen had refused to join TIP before her.

16. PW19 – Vikas Kumar has deposed with respect to the arrest of the accused Sandeep, Ashok and Praveen from Narela Railway Station. He also deposed with respect to the aforesaid three accused taking them to house bearing number C-246, JJ Colony, Shahbad Dairy where the accused Sandeep took out a polythene bag containing six mobile phones, camera, etc and the same were handed over to them whereas the accused Ashok took out a mobile phone from behind a pillow.

PW-20 SI Rajinder Dabas inter alia stated that on 28.09.2009, at about 6.50 PM, he received a secret information that the persons involved in the commission of train dacoity in Himalyan Queen Express would assemble at Narela Station to commit dacoity in Uchahar Express. He thereupon reached Narela Railway Station, along with other police officials, and apprehended the appellants Sandeep, Ashok and Parveen at a place between Railway track and Swantanter Nagar on being identified by the secret informer. He claimed that one country-made toy pistol was recovered from the left dub of Sandeep, whereas one razor was recovered from the other accused namely, Ashok and Parveen. He further stated that the aforesaid three accused were brought to Police Station and were interrogated. It transpired from their disclosure statements that Sandeep was living as a tenant in House No.C-246, Shahbad Dairy, J.J. Colony, Delhi while Ashok and Parveen were living together as tenant in another room in the same house. According to the witness, the aforesaid accused disclosed to him that they could get the robbed items pertaining to this case recovered from the aforesaid rooms. Thereafter, they reached the house in which the above referred accused persons were living on rent and met the landlord Ramesh Singh who was joined with the investigation. Ashok and

Parveen led them to their room on the second floor. Ashok took out one Nokia mobile from under a pillow and after checking its IMEI number and confirming it that it belonged to Prince Gupta, it was seized vide memo Ex.PW2/A. Sandeep opened the room under his tenancy and took out a polythene bag containing six mobile phones, besides one camera, two gold chains and one purse containing two visiting cards and a driving licence. On confirming the IMEI numbers of the aforesaid phones, it was discovered that out of them, one mobile phone make-Samsung S-3310 which belonged to the victim Ashutosh and was seized vide memo Ex.PW2/C after noting down its IMEI number in the seizure memo. The remaining articles were also duly seized.

PW-22 S.I. Rameshwar Dass has corroborated the deposition of PW-20 S.I. Rajender Dabas with respect to the arrest of the accused Ashok, Parveen and Sandeep as well as recovery of the mobile phones from the rooms which they had taken on rent at C-246, Shahbad Dairy, J.J. Colony.

17. In their respective statements under Section 313 Cr.P.C., the appellants denied the allegations against them and claimed to be innocent.

18. As far as the appellant Sanjay is concerned, it has come in the deposition of PW-1 Udhal Singh that he was having a fire arm with him and had a cut on his face. Though according to PW-3 Ashutosh Trivedi and PW-21 Anil Kumar Jha, it was Sandeep who had a gun with him, considering the fact that in the FIR itself it was alleged that one of the persons involved in the dacoity had a cut on his face, the involvement of the appellant Sanjay in the dacoity cannot be disputed. This was not the case of the appellant Sanjay that he had not have a cut mark on his face. Considering the cut mark on the face of the said appellant, the witnesses could not have committed a mistake in identifying him during the course of trial.

19. As far as the appellant Mehfooz is concerned, it has come in the deposition of PW-14 Hemwardhan Singh that he was the person who had robbed him of his mobile on the aforesaid date. The appellant Mehfooz being the person who must have come into close contact with the witness at the time of snatching his mobile phone, the witness could not have forgotten his face, since it is not everyday that one faces incident such as armed dacoity in a moving train and, therefore, the face of the person who robs him of a valuable would always come before his eyes whenever he recalls the incident. Therefore, I see no reason to

disbelieve the deposition of PW-14 Hemwardhan Singh with respect to identification of appellant Mehfooz.

20. As far as the appellant Rakesh is concerned, he has been identified by only one witness, namely, PW-4 Shashi Kant who identified all the appellants. However, he did not claim that Rakesh was the person who had robbed him of Rs.8000/-. According to him, it was the person carrying a gun who had snatched Rs.8000/- from him by showing a country made pistol to him. He also identified the appellant who, according to him, was having gun. However, there is contradiction in the deposition of the witnesses as to who actually was carrying a gun at the time of dacoity; according to one witness, it was Sanjay and according to two witnesses it was Sandeep. As noted earlier, it has come in the deposition of one of the eye witnesses that some of the robbers had covered their faces with handkerchief. Considering PW-4 Shashi Kant does not claim to have been robbed of his cash by the appellant Rakesh, identification by him alone, in the facts and circumstances of the case, would not be sufficient for maintaining his conviction, when it has come in evidence that some of the accused persons had covered their faces with handkerchief and according to

some of the witnesses, only 7-8 persons were involved in the incident. The appellant Rakesh, therefore, needs to be given benefit of doubt.

21. As far as the appellant Parveen is concerned, he has been identified by only one witness PW-4 Shashi Kant. As noted earlier, Rs. 8,000/- from the possession of PW-1 Udhal Singh were removed by a person who was carrying a gun with him and this is not the case of the prosecution that the appellant Parveen had a gun with him.

Though according to the police officials, the appellants Parveen, Sandeep and Ashok had together taken them to house No. C-246, Shahbad Dairy, J.J. Colony, PW-2 Ramesh Singh claimed that only Ashok and Sandeep were brought by the police to his house on 29.09.2009. In view of the deposition of PW-2 Ramesh Singh, it would not be safe to believe the testimony of the police officials as far as the appellant Parveen is concerned. Even otherwise, according to police officials also, it was Ashok who produced one mobile from the room which he had taken on rent and Sandeep had produced six mobiles as well as some other articles kept in a polythene bag in the room which he had taken on rent. No recovery has been attributed to the appellant Parveen even by the police officials. In these circumstances, benefit of doubt needs to be extended to the appellant Parveen as well.

22. Coming to the appellant Sandeep and Ashok, both of them have been identified by the witnesses. It has come in the deposition of PW-3 Ashutosh Trivedi that it was the appellant Sandeep who was carrying a gun with him though as noted earlier, according to another witness, it was Sanjay who had a gun with him. However, the fact remains that he identifies the appellant Sandeep as one of the persons involved in the dacoity. PW-4 Shashi Kant, as noted earlier, identified all the appellants, including Sandeep. According to PW-21 Anil Kumar Jha also, it was Sandeep who was armed with a revolver. Despite contradictions as to whether Sandeep was carrying a revolver or only Sanjay was, the fact remains that this witness also identified the appellant Sandeep.

23. As noted earlier, the appellant Sandeep produced as many as six mobile phones from the room, which he had taken on rent in the house of PW-2 Ramesh Singh. One of the mobile phones, which the appellant Sandeep produced from the aforesaid house, belonged to the witness Ashutosh Trivedi. When Ashutosh Trivedi came in the witness-box as PW-3, not only he deposed with respect to the theft of the mobile phone from his possession, he also identified the said mobile phone Ex.P-1 having IMEI No.354118031269188. A perusal of the seizure memo Ex.PW-2/C would show that one of the mobile phones which the

appellant Sandeep produced from his room was having IMEI No. 354118031269188. It thus stand proved that the appellant Sandeep was found in possession of the stolen mobile phone of the witness Ashutosh Trivedi, soon after its theft. Since the appellant Sandeep has not given any explanation for his having possession of the aforesaid mobile phone, his case being that no phone at all was produced by him to the police, a statutory presumption can be drawn under Section 114 of the Evidence Act that either he had committed theft of the aforesaid mobile phone or he had received or retained it knowing or having reason to believe the same to be stolen property. In the facts and circumstances of the case, particularly the recovery immediately after the theft, the presumption should be that he had committed a theft of the mobile phone from the possession of the witness Ashutosh Trivedi, meaning thereby that he was one of the persons involved in the aforesaid dacoity.

24. Coming to the appellant Ashok, it has come in the deposition of PW-9 Prince Gupta that he was the person who had robbed him of his mobile bearing IMEI No. 359337/02/20/096/4. As noted earlier, the appellant Ashok had produced a mobile phone to the Investigating Officer from the room which he along with Parveen had taken on rent in the house of PW-2 Ramesh Singh. The mobile phone was produced by

him in the presence of Ramesh Singh and was seized vide memo Ex.PW-2/A. A perusal of the seizure memo would show that IMEI number of the mobile phone which the appellant Ashok produced from his room was 359337/02/20/096/4. It thus proved that the appellant Ashok had come into possession of the stolen mobile, soon after its theft from PW-9 Prince Gupta. Therefore, in his case also, a statutory presumption can be drawn that either he had committed theft of the aforesaid phone or he had received or retained it knowing or having reason to believe the same to be stolen property. Considering the emphatic deposition of PW-9, identifying the appellant Ashok as the person who committed theft of the mobile phone from him, the presumption should be that he had snatched the said phone from Prince Gupta during the train dacoity on 27.09.2009.

25. As far as the appellant Rohit is concerned, he has been specifically identified by PW-21 Anil Kumar Jha as the person who had put a razor against him and removed a mobile phone as well as cash amounting to Rs 2,000/- from his custody. Since the appellant Rohit must have come into close contact of PW-21 at the time he robbed him of his mobile phone, the witness could not have committed any mistake

in identifying him during trial. Therefore, his identity was duly established.

Ex.PW-10/C is the scanned copy of the call details of mobile No.9805871907 having IMEI No. 35426901-5193270. The above-referred mobile connection was obtained in the name of Anil Kumar Jha vide application Ex.PW-10/A which has been duly proved by an official from Airtel, namely, Tarun Khanna. A perusal of the seizure memo Ex.PW-2/B would show that one of the phones which the appellant Sandeep produced from the room which he had taken on rent was of Soni Ericson having IMEI No.35426901-5193272. Thus, the stolen mobile phone of the witness Anil Kumar Jha was recovered from the possession of the appellant Sandeep. The case of the prosecution, as noted earlier, is that all the appellants, including Rohit and Sandeep were involved in the dacoity. Therefore, there is a likelihood of the phone which the appellant Rohit snatched from the witness having been handed over by him to Sandeep from whom it was later recovered along with other mobile phones.

26. It has come in evidence that all the appellants had refused to join TIP during the course of investigation. They refused to join the TIP on the ground that their photographs had been taken by the IO and either

they or their photographs were shown to the witnesses. However, there is no evidence of any of the witnesses having seen any of the appellants, before they refused to join TIP nor have the appellants shown existence of circumstances from which it can be inferred that they were shown to the witnesses. It is thus evident that the appellant refused to join TIP without any reasonable justification. An adverse inference can be drawn that had they participated in the TIP, they would have been identified by the witnesses and that precisely was the reason they refused to join the said proceedings. It would also be appropriate to note here that all the appellants were produced with their faces muffled and the application for holding their TIP was made at the earliest opportunity.

27. For the reasons stated hereinabove, I see no good ground to interfere with the conviction of the appellants Sanjay, Mahfooz, Sandeep, Ashok and Rohit under Section 395 of IPC. However, no separate conviction under Section 412 of IPC is justified when they have been convicted under Section 395 of IPC. As far as the appellant Rakesh and Parveen are concerned, for the reasons stated hereinbefore, they need to be given benefit of doubt. They are accordingly acquitted.

28. As regards the sentence awarded to the appellants Sanjay, Mahfooz, Sandeep, Ashok and Rohit, it cannot be said to be excessive

or harsh. Therefore, the sentence calls for no reduction. It is, however, directed that in the event of failure to deposit the fine, the appellants Sanjay, Mahfooz, Sandeep, Ashok and Rohit shall go undergo SI for 15 days as against one month each, awarded by the Trial Court.

MARCH 06, 2014
rd/BG

V.K. JAIN, J.