

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

%

Date of Decision: 22.01.2014

+

CRL. APPEAL NO.1408/2010

BHAGIRATH

...Appellant

Through: Mr. Aditya V. Singh and Mr.
Arvinder Singh, Advs.

versus

THE STATE (NCT OF DELHI)

...Respondent

Through: Mr. Feroz Khan Ghazi, APP for
State

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (Oral)

On 11.4.2005, an information was received by the Police Control Room (PCR) with respect to some thieves having entered the house number A-14/110, Choti Masjid, Inderlok. The information was conveyed by PCR to Police Post Inderlok where it was recorded vide DD No.27 and the copy of the said DD was given to SI Sanjay Bhardwaj for investigation. The aforesaid police officer reached the house number A-14/106-B, Inderlok. The complainant Mrs. Rubina met him there and her statement was recorded by him. Ms. Rubina told him that on that day, she was present in her house with her family member, when three boys entered their house at about 8.45 pm. On entering the house, they took out knives, asked her for the keys of the *alimirah* and after taking the keys from her. The intruders made them enter the kitchen which they bolted from outside. The lights of the house were switched off by them.

After some time, her nephew Wasim came out through a small window opening in the kitchen and called up her nephew Naved who thereupon came to their house and de-bolted the kitchen. One blue colour bag containing Rs.8500/- in cash, voter I-card, electricity receipts etc were stolen from the house besides articles of gold jewellery weighing about 8-10 *tolas*.

2. The case of the prosecution is that on 14.4.2005, the appellant – Bhagirath was arrested and during the course of investigation, he made a disclosure statement stating therein that the knife and stolen bag had been kept at Tulsi Nagar behind a garbage dump (*Khatta*) which he could get recovered. This is also the case of the prosecution that thereafter the appellant – Bhagirath took the investigating officer to Tulsi Nagar, Nala Road and took out a knife and a blue colour bag which had been kept under a brick adjoining the wall of the said dumping ground (*khatta*). The blue bag which the appellant produced contained the voter I-card of the complainant, besides three electricity bills in the name of Mohd. Kasim, which were duly seized, after duly sealing them. During the course of investigation, the appellant refused to join Test Identification Parade (TIP) before the learned Metropolitan Magistrate on 3.5.2005 on the ground that he had been shown to the witnesses in the police station and the police officials had also taken his photograph.

3. The complainant Ms. Rubina came in the witness box as PW1 and stated that on 11.4.2005 at about 7.45 pm she was present in her house along with her daughters, son and nephew when all of a sudden three

boys, who had covered their faces with a cloth and were wearing shaded caps entered the house from the main side door. One of them was having a knife in his hand. She was threatened with knife and asked to handover the money and keys of the *almirah*. She handed over the keys to the intruders. They were locked inside the kitchen. After about 15-20 minutes, her nephew Wasim went out of the kitchen through the window and brought out a phone to the kitchen from where her daughter called a relative. His elder brother Naved then reached their house and opened the door of the kitchen. On checking they found that jewellery articles weighing 8-10 *tolas* and cash about Rs.8,000/- to Rs.10,000/- lying in the *almirah* was missing. This witness expressed her inability to identify the intruders. She was also not able to identify the knife which is alleged to have been got recovered by the appellant. The witness, however, identified her election I-card Ex.P2 and the electricity bills Ex.P3 (colly) as also the bag ex.P1 and stated that those articles were also found missing from her house. However, in her cross examination by the learned counsel for the appellant, she expressly admitted that Ex.P1 to P3 were provided, to the police, by her and her husband.

4. PW2 – Ms. Rabia is the daughter of PW1. In her deposition, she stated that on the fateful day, one or two persons entered the backside of their room. One of them was having a big knife with him and they were taken to kitchen which was bolted from outside. She further stated that those persons first demanded the keys of *almirah* from her mother and thereafter they were locked in the kitchen. She also stated that after some time they sent Wasim outside though the window and he brought a mobile phone to the kitchen from where he telephoned the in-laws of her

sister and Naved reached their house and opened the door. This witness was also unable to identify any of the intruders, but was able to identify the bag Ex.P1, election I-card Ex.P2 as well as the electricity bills Ex.P3 (colly) though she could not say whether the aforesaid articles were stolen from their house by the accused persons.

5. PW3 – Ms. Hiba is the another daughter of PW1. She also stated about one or two persons entering their house, bolting them inside the kitchen, demanding keys of *almirah* from her mother and thereafter Wasim coming out of the kitchen through the window, bringing the mobile phone to the kitchen and on being informed Naved coming to their house and opening the door of the kitchen. She also did not identify the intruders. This witness, however, was able to identify Ex.P1 to P3 but could not say whether the said articles were stolen from their house by the accused persons or not.

6. PW4 Ahmad is the son of the complainant, but he also could not identify any of the intruders, though he admitted that when the intruders had entered their house, they had demanded the keys of the *almirah* from his mother, had bolted them in the kitchen and thereafter Naved went to their house, opened the door and released them. This witness also could not identify any of the intruders. He though identified Ex.P1 to P3, but could not say whether the aforesaid articles were stolen from their house by the accused persons or not.

7. PW7 – Wasim, stated that on the fateful day, he was present in the house of PW1, Rubina, when the robbers entered the house, took keys

from the complainant and locked them inside the kitchen. He further stated that he came out of the kitchen through a hole in the kitchen. However, this witness was also not able to identify any of the accused persons.

8. PW5 – Inspector Sanjay Bhardwaj has stated that the appellant – Bhagirath had let them to the dumping ground (*khatta*) Tusli Nagar and pointed out towards the bricks, underneath which a knife and blue colour bag containing voter I-card and the electricity bills of Ms. Rubina were found and were seized vide memo Ex.PW5/1.

9. PW10, Head Constable Rajkumar, is the witness of the alleged recovery of knife, bag and documents, Ex.P2 & Ex.P3, at the instance of the appellant - Bhaghirath and he has corroborated the deposition of PW5 – Inspector Sanjay Bhardwaj in this regard.

10. In his statement under Section 313 of Cr.P.C., the appellant denied the allegations against him but he admitted that he refused to take part in the TIP and claimed that he had been shown to the witnesses.

11. As noted earlier, the appellant was not identified by any of the eye-witnesses, during the course of trial. In the absence of identification of the appellant while he was in the dock, his refusal to join TIP before the Metropolitan Magistrate becomes meaningless. Had he been identified by the witnesses during the course of trial only then an

adverse inference could have been drawn that had the appellant joined the TIP, he would have been identified by the witnesses.

12. The only evidence produced against the appellant during the course of trial was the alleged recovery of the bag Ex.P1, Voter ID card, Ex.P2 and electricity bills Ex.P3 (colly) at his instance, from under the bricks behind a garbage dump on 14.4.2005, i.e., three (3) days after the theft. As noted earlier, in her cross-examination by the accused persons, the complainant, Smt. Rubina, admitted that Ex.P1 to P3 were provided to the police by her and her husband. If the aforesaid documents were handed over either by the complainant or by her husband or by both of them to the police, the alleged recovery at the instance of the appellant on 14.4.2005 become highly doubtful and it could be a case of planting the said articles by the police. It would be pertinent to note here that the remaining eye-witnesses clearly stated in their cross-examination that they could not say whether Ex.P1 to P3 were stolen by the accused persons or not. Therefore, none of them is a witness of the theft of Ex.P1 to P3.

13. As noted earlier, in her examination-in-chief the complainant stated that no document was stolen from her house, though, during cross-examination by the learned Additional PP she admitted that Ex.P1 to P3 were also stolen from her house. Thus, there is contradiction in the deposition of complainant as to whether Ex.P1 to P3 were stolen from her house or not. It goes without saying that the benefit of contradiction on this material aspect of the case goes to the accused. In case Ex.P1 to P3 were not stolen from the house of the complainant as

initially stated by her in her examination-in-chief, those articles could not have been recovered at the instance of the appellant on 14.4.2005. In case the aforesaid articles were handed over to the police by the complainant and/or her husband as stated by her during cross examination by the accused persons, the inevitable inference would be that those articles were planted upon the appellant and were not recovered at his instance.

14. As rightly pointed out by the learned counsel for the appellant neither any cash nor any jewellery was found inside the bag, Ex.P1, which is alleged to have been recovered at the instance of the appellant and therefore the appellant had no reason to conceal the aforesaid bag, with the documents of the complainant inside, when neither the voter ID card, Ex.P2 nor the electricity bills, Ex.P3, could have been of any use for him. I find merit in the contention that a person who commits theft of jewellery, cash and in case some documents such as voter ID and electricity bills have been kept inside the bag the currency, they thief may conceal the cash, and also the documents, if he has no opportunity to take out the cash, but he is unlikely to conceal the documents such as voter ID card and electricity bills which are of no use for him and, in fact, can land him in trouble if recovered from him or at his instance. In the ordinary course of human nature, a thief is likely to throw away such documents which though of no use to him can land him in trouble at any point of time.

15. For the reasons stated hereinabove, I hold that the alleged recovery of Ex.P1 to P3 at the instance of the appellant is highly doubtful. He is given the benefit of doubt and is accordingly acquitted.

The appeal stands allowed.

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

Trial court record be sent back.

JANUARY 22, 2014/*rd*

V.K. JAIN, J.