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

Date of Decision: 3rd March, 2015

+ **Crl.A.No. 886/2012**

SUNIL KUMAR

..... Appellant

Through: Mr.Imran Khan, Advocate

versus

STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Through: Mr.O.P.Saxena, APP and Ms.Jasbir
Kaur, APP alongwith SI Bijender
Singh, Police Station Karol Bagh.

AND

+ **Crl.A.No. 995/2012**

ARJUN SHARMA

..... Appellant

Through: Mr.Pradeep Kumar Arya with
Mr.Narender Coudhary, Advocates

versus

STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Through: Mr.O.P.Saxena, APP and Ms.Jasbir
Kaur, APP alongwith SI Bijender
Singh, Police Station Karol Bagh

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By the present appeals, the appellants Sunil Kumar and Arjun Sharma lay the challenge to the judgment dated 12.04.2012 passed by the learned Additional Sessions Judge convicting the appellant Sunil Kumar

under Section 392 read with Section 120-B IPC and Section 120-B IPC and Arjun Sharma under Section 392/397 IPC read with Section 120-B IPC and Section 347 IPC and order on sentence dated 12.04.2012 whereby the appellant Sunil Kumar was sentenced to undergo rigorous imprisonment for 10 years and Rs. 25,000/- in default to undergo rigorous imprisonment for six months each for separate offences while appellant Arjun Sharma was sentenced to undergo RI for 10 years and Rs.25,000/- each for all the separate offences. The substantive sentences were ordered to run concurrently.

2. Prosecution case in nutshell is as under:

Smt.Dayawati used to reside alone at House No.3377/1 Christian Colony, First Floor, Karol Bagh, New Delhi and used to run a shop at DBG road. On 19.05.2009 at about 7.15 pm she returned back to her house. As she was about to enter her house, two boys came and took her inside the house, blind folded her and took her to the bathroom and locked her. She was robbed of her wearing ornaments, Rs.70,000/, two gold sets kept in the almirah and mobile phone. While the boys were still robbing her in her house, her son Deepak Aggarwal came and rang the bell. One of the boys responded by saying that she was not inside the house. Apprehending something wrong, Deepak Aggarwal rushed out after bolting the door from outside and raised an alarm. The boys jumped from the balcony. While he tried to catch hold of one boy, he was shown a knife and thereafter both the boys managed to escape.

3. It is further the case of prosecution that pursuant to the supplementary statement made by Deepak Aggarwal on the next day raising suspicion on Sunil Kumar, notice was issued to him and he was arrested. Pursuant to the disclosure made by him he got accused Arjun Sharma arrested. Mobile phone of Sunil Kumar and Arjun Sharma were seized. Both the accused were produced before Metropolitan Magistrate for

conducting their Test Identification Parade (TIP) proceedings however they refused to participate in the same. Search was made for arrest of co-accused Ravi however he could not be arrested. Chargesheet was filed against Sunil Kumar and Arjun Sharma for offences under Section 392/397/342/120-B/34 IPC. Both the accused pleaded not guilty to the charges framed against them. Prosecution in all examined 12 witnesses to substantiate its case. Both the accused alleged their false implication in the case and pleaded innocence. Accused Sunil Kumar examined himself as DW-1 and also examined his wife as DW-2.

4. After hearing learned counsels for the parties and meticulous examination of prosecution witnesses and the stand taken by the accused, they were convicted and sentenced, as mentioned above.

5. Feeling aggrieved, separate appeals have been preferred by the appellants.

6. It was submitted by learned counsel for the appellant Sunil Kumar that no role has been assigned to this accused by the material witnesses. No recovery has been effected from him. The only role assigned to him is that he was standing downstairs in the building. This accused used to go to the second floor for the purpose of physiotherapy in the house of one Sardar Amarjeet Singh, however, on the fateful day since his daughter was lying sick, therefore, he did not go to attend his duties. In order to prove the charge of conspiracy nothing has been brought on record to show that there was any meeting of mind as such, it was submitted that the accused is liable to be acquitted.

7. Learned counsel representing accused Arjun Sharma submitted that as per the prosecution Smt. Dayawati was robbed of several articles, however, no recovery has been effected. Even weapon of offence has not been recovered. The incident is alleged to have taken place in a residential area however no neighbour has been examined to prove that any such

incident had taken place. The appellant has refused to join TIP because he was shown to the witnesses in the police station and this fact is admitted by PW-1 Smt.Dayawati that in the police station she came to know the name of accused as Amit. However, the prosecution has failed to prove this theory of Amit. No admissible evidence has come to connect him with the crime. The factum of any conspiracy between Sunil Kumar and Arjun Sharma has not been proved. Under the circumstances, the impugned judgment cannot be sustained and as such, the same be set aside.

8. On the contrary, learned Additional Public Prosecutor for the State submitted that both Smt.Dayawati as well as Deepak Aggarwal have stood the test of cross-examination and nothing could be elicited to discredit their testimony. They were not inimical to any of the accused for which reason they would falsely implicate them in this case. Moreover, both the accused refused to join TIP as such, adverse inference is to be drawn against them. It was further submitted that even no suggestion was given to PW-1 Smt.Dayawati that accused was shown to her in the police station. Under the circumstances, it was submitted that the impugned judgment does not suffer from any infirmity which calls for interference as such, appeals are liable to be dismissed.

9. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record.

10. Prosecution machinery was set in motion on receipt of an information regarding dacoity at House No. 3377/1 Christian Colony, first floor, Karol Bagh, New Delhi on which DD No.27A Ex.PW4/A was recorded and was assigned to SI Mahipal Singh, PW-10. SI Mahipal Singh alongwith constable Shanker reached House No. 3377/1 Christian Colony, First Floor, Karol Bagh, New Delhi where Deepak Aggarwal gave his statement Ex.PW2/A *inter alia* that his mother Smt. Dayawati aged 70 years used to reside alone at 3377/1 Christian Colony, first floor, Karol

Bagh, New Delhi and used to run a shop at DBG Road. On 19.05.2009 at about 8.00 pm he went to meet his mother as per the daily routine. He rang the bell and called his mother however he heard the noise of a male person from inside that *Mataji* is not inside. He suspected some foul play and after bolting the door from outside went in the street and raised an alarm "Chor Chor". In the meantime two boys jumped from the balcony in the street. He tried to catch hold of one of those boys but he showed him knife and ran away. He chased those boys by raising alarm "Chor Chor" but they managed to escape. The person who had showed him knife was strong built and was of wheatish complexion while the other boy was slim and was having fair complexion. Both the boys were between the age group of 30-32 years. He rang police on 100 number and went to his mother. On enquiry his mother informed him that when she returned to her house after closing the shop at about 7.30 pm, two boys aged about 30 -32 years came from behind and enquired about *Ammaji*. When she asked as to whom they were enquiring, then the strong built boy caught hold of her hand while the other boy tied her hands and legs with *chunni* and asked her not to raise alarm failing which, they will kill her with a knife. Both the boys removed her ornaments which she was wearing and they also took away Rs.70,000/- cash and two gold sets from the almirah and one mobile. This statement of Deepak Aggarwal culminated in registration of FIR Ex.PW4/B.

11. The star witness of the prosecution are PW-1 and PW-2. PW-1 Smt.Dayawati unfolded that on the fateful day at about 7.15 pm after returning from her shop when she was about to enter her house after unlocking, two boys came to the stairs from behind. One boy asked her "*Voh Mata Ji Kahan Hain*". She enquired "*Kaunsi Mata Ji*". Immediately thereafter the boy who had asked her about *Mataji*, put a cloth over her mouth and both the boys caught hold of her and took her inside the house.

She identified accused Arjun Sharma as one of the boys whose name she came to know at the police station as Amit. Both the boys then blind folded her in her house. They took her to the bathroom and locked her there. Inside the bathroom they removed her diamond earrings, two gold Karas of six tolas, one gold finger ring and one three tola gold chain. The duo enquired about the cash and threatened to kill her in case she failed to tell them about the same. She told them that Rs.70,000/- cash was kept in the almirah. Thereafter, those boys took out the cash and two gold sets from the almirah. While they were still robbing her house, her son Deepak Aggarwal came and rang the bell and called her by name to which she did not respond. One of the boys then responded saying that "*Mata Ji Andar Nahi Hain*". On hearing the unknown male voice from inside the house, her son bolted the door from outside, rushed down and raised alarm saying "Chor Chor". On hearing the alarm both the boys jumped from the balcony alongwith the money and jewellery and ran away. She also identified accused Sunil Kumar by saying that he used to work with resident of floor above her house.

12. PW-2 Deepak Aggarwal reiterated the averments made by him in his initial complaint Ex.PW2/A and corroborated the testimony of PW-1 in all material particulars. He further deposed that he informed PCR on 100 number. Thereafter police officials came and his statement and that of his mother were recorded. He further deposed that after reaching the house of his mother when he parked his motorcycle, he saw accused Sunil Kumar standing downstairs near the door. He enquired from him as to why he was standing. Initially he kept mum and then he replied that he had come to meet Amarjeet Singh. Sardar Amarjeet Singh was residing on the first floor in the same building. He identified accused Arjun Sharma as the same person who jumped from the balcony and showed him the knife.

13. As regards the incident of robbery at the house of PW-1 Smt.Dayawati both these witnesses were subjected to lengthy cross-examination by learned defence counsels however nothing material could be elicited to discredit their testimony. The same are cogent, coherent, reliable and trustworthy and even there is no challenge that an incident of robbery had taken place in the house of Smt.Dayawati which stands proved not only from the testimony of complainant Deepak Aggarwal and Smt.Dayawati but also from the surrounding circumstances which reflects that immediately after the incident information was given by Deepak Aggarwal on telephone to PCR which resulted in recording of DD No. 27A and thereafter the police machinery was set in motion on the very same day without any loss of time. The statement of Deepak Aggarwal was also recorded by SI Mahipal Singh which culminated in registration of FIR.

14. Crucial question for consideration is regarding the perpetrators of the crime. As regards accused Sunil Kumar is concerned, it is the case of prosecution that he was employed at the house of PW3 Smt.Surinder Kaur who used to reside on the second floor of the same property where PW1 was residing. Smt.Surinder Kaur has stated that in the year 2008 her husband suffered paralytic attack and they engaged accused Sunil Kumar and his brother in law to help her husband in Physiotherapy and to look after him. For three months Sunil Kumar looked after her husband at the house of her daughter in Vikaspuri. Thereafter she returned back to her house alongwith her husband and accused Sunil Kumar and his brother in law continued to take care of her husband at the said house. She further deposed that Sunil Kumar used to visit her house at about 10.00 am and used to remain there till 6.00 pm. On 19th May, 2009 Sunil Kumar did not come to perform his duty and he did not even come on the next day. She contacted him telephonically and he informed that his child was ill. On 21.05.2009 Sunil Kumar told her telephonically that his daughter was

unwell. She then told that police was making enquiry about him and Sunil Kumar told her that he would come. Besides the fact that the testimony of this witness has gone unchallenged for want of cross-examination, even accused Sunil Kumar in his statement under Section 313 Cr.P.C has admitted the factum of his employment at the house of PW-3 to look after her husband and that he did not visit her house on 19.05.2009 as his child was ill. Sunil Kumar examined himself as DW-1 and his wife as DW-2 and both of them have deposed to the same fact. Smt.Dayawati has also identified accused Sunil Kumar to be the boy who used to work on the upper floor of her house.

15. Deepak Aggarwal however on 20.05.2009 made a supplementary statement stating that while he was ascending the stairs he met Sunil Kumar downstairs and enquired about his presence. Initially, he kept mum and thereafter he said that he used to work at the house of one Mr.Amarjeet Singh, the resident of second floor.

16. Much emphasis was laid by learned counsel for the appellant Sunil Kumar by submitting that no such statement was made by Deepak Aggarwal in the initial complaint Ex.PW2/A made by him to the police. It was rightly observed by learned Additional Sessions Judge that after committing such a gruesome crime both the culprits managed to escape from the spot as such, the sequence of events was bound to get replayed in the mind of Deepak Aggarwal and although when he made the statement initially to the police meeting of Sunil Kumar at downstairs might not have occurred to him but on the very next day he gave the supplementary statement on the basis of which the whole case was solved. It has come on record that pursuant to the information given by Deepak Aggarwal accused Sunil Kumar was called after serving a notice in the police station. He made a disclosure statement Ex.PW6/E and pursuant to the disclosure statement, name of Arjun Sharma and one Ravi figured for the first time

and thereafter it was at the instance of accused Sunil Kumar that accused Arjun Sharma was arrested from his house on the same day. Mobile phone of Arjun Sharma make NOKIA 6610 IMEI No.35154000003920 with Airtel SIM No. 8991100612102068429 and mobile phone No.9971200612 of Sunil Kumar was seized. Factum of seizure of mobile phone of Arjun Sharma is even admitted by him in his statement recorded under Section 313 Cr.P.C. However, as regards mobile of Sunil Kumar, it was submitted by learned counsel for the appellant that as per the customer application form Ex.PW9/A it was in the name of Chand Ram. Chand Ram however deposed that he never applied for obtaining a mobile phone connection. He also displayed ignorance about accused Sunil Kumar. From the testimony of the prosecution witnesses it stands established that the mobile connection was applied in the name of Chand Ram and the mobile phone was recovered from accused Sunil Kumar on 29.05.2009. Although accused Sunil Kumar tried to show that this mobile was not recovered from his possession, however, firstly there is no reason to disbelieve the testimony of prosecution witnesses regarding the recovery of this mobile from the possession of this accused. Moreover, Sunil Kumar stepped into the witness box as DW-1. Even at that time he did not even utter a word about non-seizure of mobile phone from his possession or that he was not using this phone number during those days. DW-2 Promila his wife also nowhere deposed about the mobile phone. PW-9 Israr Babu, Nodal Officer, Vodafone proved the call detail record Ex.PW9/C according to which mobile phone connection no.09971200612 was having IMEI 35154000003921 which tallied with the IMEI No. of mobile phone recovered from accused Arjun Sharma. The call detail record further revealed that on 19.05.2009 at 20:12:25 outgoing call was made from mobile phone no. 9953620388 at the mobile phone connection no. 9971200612 of Arjun Sharma. The call detail record further reveals that on

20.05.2009 at 15:18:37 and 17:21:09 two outgoing calls were recorded in addition to sending of one SMS at 15:09:10. The mobile phone of Sunil Kumar was bearing IMEI No.352938025339590 upto 19.05.2009 however on 20.05.2009 IMEI number as against the above referred two outgoing calls and outgoing SMS find mention as 351540000803920 those of handset of Arjun Sharma and recovered from him.

17. Criminal conspiracy is always hatched in secrecy and direct evidence is hardly available. In the instant case although accused Sunil Kumar tried to take a plea that he had not even come for his duty at the house of Sardar Amarjeet Singh on 19.05.2009 and 20.05.2009. However his duty hours were from 10.00 am to 6.00 pm. At about 7.30 pm Deepak Aggarwal met this accused downstairs when he was going to meet his mother upstairs. Besides the fact that accused was unknown to Deepak Aggarwal and had absolutely no rhyme or reason to falsely implicate him, it was only a suspicion raised by him on the next day when he informed the police about the fact that he met Sunil Kumar downstairs and the conversation which had taken place between them. The police was completely in dark regarding the identity of the accused. It was only pursuant to the disclosure statement of accused Sunil Kumar that the name of accused Arjun Sharma and Ravi were revealed and it was only at the instance of accused Sunil Kumar that Arjun Sharma was subsequently arrested. The call details amply proved the conspiracy between the two and it was for the accused to prove as to how they were having conversation with each other if they were not connected with each other. However, nothing has been brought on record by any of the accused in this regard so much so that despite the fact that Sunil Kumar appeared as DW-1 he did not try to explain the call details. Subsequent to the arrest of accused Sunil Kumar and Arjun Sharma both these accused were produced before the learned Metropolitan Magistrate for the purpose of getting their Test

Identification Proceedings conducted however as per the proceedings Ex. PW-12/B and Ex.PW-12/C conducted by Sh Sidharth Mathur, Metropolitan Magistrate both the accused refused to join Test Identification Parade. Needless to say, the refusal to join TIP leads to an adverse inference against the accused that had they joined the proceedings, they would have been identified by the witnesses. The plea taken by accused Sunil Kumar is that he refused to join as he was not informed about the consequences of the same. However, this plea is devoid of merit as a perusal of TIP proceedings conducted by Sh Sidharth Mathur, Metropolitan Magistrate Ex.PW12/C goes to show that when accused refused to participate in the proceedings he was duly warned by the learned Metropolitan Magistrate that an adverse inference can be drawn during the course of trial on his refusal to participate in the proceedings but accused still refused to participate in the TIP. At that time the reason assigned by him for not joining the proceedings was that he was working on the floor just above the residence of the witnesses and, therefore, witnesses were known to him. So far as Smt.Dayawati is concerned, she was knowing this accused from before as he was working at the house of Sardar Amarjeet Singh for substantial period but so far as Deepak Aggarwal is concerned, he was not known to him from before and precisely for this reason the TIP was required to be conducted which was refused by this accused. He was duly identified not only by Smt.Dayawati but by Deepak Aggarwal also in the Court to be the same person with whom he had a conversation on the ground floor when he came to visit his mother on the fateful day. Under the circumstances, conspiracy to commit the crime between Sunil Kumar, Arjun Sharma and one other person who could not be arrested stands duly proved and the accused was rightly convicted by the learned Trial Court.

18. As regards Arjun Sharma is concerned, this accused was duly identified by Smt.Dayawati who alongwith one other boy blind folded her,

took her to the bathroom and locked her inside where she was robbed of her wearing ornaments and then on the threat of killing her Rs.70,000/- cash, two gold sets and mobile were also taken away by them. PW-2 Deepak Aggarwal also identified this accused as the person who showed him the knife when he tried to catch hold of him in the street. The accused is not alleging any enmity, ill will or grudge against any of these two witnesses for which reason they would wrongly identify him as the assailant.

19. This accused has also refused to join TIP on the ground that he was shown to the witnesses in the police station. Learned counsel for the appellant tried to take benefit from the testimony of Dayawati who deposed that at the police station she came to know the name of accused Arjun as Amit however no inference can be drawn that prior to conducting his TIP proceedings the witness had gone to the police station or that accused was shown to her. Even no suggestion has been given to this witness that accused was shown to her in the police station. Similar is the case with PW-2 Deepak Aggarwal. As regards Deepak Aggarwal is concerned, it was tried to be submitted by learned counsel for the appellant that while giving description of the accused he stated that one of the accused was strong built and wheatish complexion whereas accused Arjun Sharma was having fair complexion. However accused does not get any benefit from this slight variation in as much as the witness has clarified that it was dark at the time of incident and therefore he believed that his complexion is wheatish. The mere fact that a variation has come regarding the complexion of the accused as to whether it was wheatish or fair does not mean that he was not the accused whom the witness had seen jumping from the balcony and whom he had tried to catch hold and who showed him the knife. Sufficient time was available for both the witnesses to see the accused and to describe his features so as to subsequently identify him.

In view of the identification of the accused by both the witnesses there is nothing to suspect the involvement of the accused in the crime.

20. The robbed articles and the weapon of offence could not be recovered but it is a matter of record that one of the co-accused is still at large and as per the disclosure statement made by accused Arjun Sharma which although is inadmissible in evidence the looted articles were taken by the co-accused, as such, non-recovery does not adversely affect the case of prosecution.

21. As regards non joining of any independent witnesses, it is common experience that for variety of reasons the public persons do not want to join the police proceedings. It has come in the statement of PW-2 Deepak Aggarwal that persons from the neighbourhood though were present in the balcony of their respective houses but did not come down. Moreover, the mere fact that there is no independent witness is absolutely no ground to discard the testimony of the victim herself who had absolutely no rhyme or reason to make a police complaint regarding the incident of robbery and then to face the turmoil of visiting the police station and Court umpteen number of times and then to identify the accused. Under the circumstances, the learned Additional Sessions Judge rightly convicted both the accused for the offences referred above and the impugned judgment dated 12.04.2012 does not call for any interference.

22. Coming to the quantum of sentence, it was submitted that the appellants are the only bread earners in their families and as such, leniency be shown. One cannot lose sight of the fact that the victim in the instant case is a senior citizen aged about 70 years. Despite the fact she was having four sons she was living alone and was earning her livelihood by running a shop near her house. Appellant Arjun Sharma and his associate with the help of accused Sunil Kumar who was working in the house of Sardar Amarjeet Singh above the house of Smt. Dayawati must be keeping

a watch on her daily routine. One can visualise the turmoil faced by Smt. Dayawati who was blind folded, confined in the bathroom and then robbed of her wearing ornaments, cash, jewellery and mobile. Such crimes have now become a daily routine. Day and night senior citizens are being targeted by criminals. Under the circumstances, the gravity and seriousness of the offence cannot be lost sight of. However imposition of sentence of 10 years and Rs.25,000/- for each of the offences seems to be on a higher side. As such, the substantive sentence of the appellants is modified from 10 years to 7 years each while maintaining the sentence of fine and the default sentence. In case of realisation of fine, the entire amount be paid as compensation to victim Smt. Dayawati.

23. With this modification, the appeals stand disposed of.

Copy of the judgment along with Trial Court record be sent back. Appellants be informed through the Jail Superintendent.

(SUNITA GUPTA)
JUDGE

MARCH 03, 2015
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