

\$~

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

Judgement delivered on: 04 February, 2016

+

CRL.A. No. 263/2002

ALLAUDIN & ORS.

..... Appellants

Represented by: Mr.Jitendera K Jha and Mr.Anil
Kumar Mishra, Advocates.

Versus

STATE (N.C.T. OF DELHI)

..... Respondent

Represented by: Mr.Amit Chadha, Additional
Public Prosecutor for the State.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. By way of this appeal, the appellants are seeking setting aside of the judgment dated 25.02.2002 passed by the learned Additional Sessions Judge, Delhi.

2. Brief facts of the case are that on 14.04.1998 at about 2.00 PM, complainant Smt.Shahnaz Mansoor (PW3) and her husband Mansoor Zamal (PW5) returned to their house bearing No.6514, Sher Ka Pinjare, Kasab Pura, Sadar Bazar, Delhi, after visiting the clinic of Dr. Roshan Lal. Her husband went away to attend his routine work. The complainant and appellant No.1 Allaudin, who was working as servant, were present in the house when at about 2.30 PM, door bell of the house rang which was answered by

appellant Allaudin and then four young persons entered the house forcibly. One of the intruders pushed Allaudin in the toilet at the point of revolver. Another person stood at the gate and two other persons entered in the room. One of them put the *chhuri* (knife) on the stomach of the complainant asked for the key of the chest (Tijori) or else they would kill her. While demanding the key, one of them dragged the complainant in the bathroom. In the meanwhile, one of the intruders traced the key of the chest. The complainant confined herself in the bathroom. All the intruders robbed the valuable goods from the house. Thereafter, at about 3.20 PM, Munna Hashmat, one known person came there, complainant and appellant Allaudin raised alarm from inside and then only they could come out from the bathroom and toilet respectively.

3. Thereafter, the police was informed. Inspector Ram Chander Meena (PW9) went to the spot, got recorded the statement of the complainant Ex.PW3/A, made endorsement Ex.PW9/A and got the case registered vide FIR Ex.PW6/A. The list of stolen goods was supplied later on. During investigation, all the appellants including two co-accused, namely, Akhtar and Sikki, were arrested on 22.04.1998 and the stolen goods were recovered at their instance. After completion of investigation, chargesheet was filed and charges under Sections 391/395/412 IPC were framed against all the appellants including the aforesaid two co-accused, to which they pleaded not guilty and claimed trial.

4. In support of its case, the prosecution had examined nine witnesses.

5. PW1, Badru Islam is the brother of complainant Smt. Shehnaz Mansoor (PW3), at whose shop appellant Mahmood was working. He deposed that appellant Allaudin was working as domestic help in the house of his sister. PW1 joined the investigation with police on 22.04.1998, when appellant Allaudin made the disclosure statement Ex.PW1/A, led the police party to his house and got recovered the stolen goods, i.e., one bracelet and one silver coin whereupon words “Mohd. Asif Weds Zakira” were inscribed. The same were sealed with seal of RC and seized vide memo Ex.PW1/B.

6. In pursuance of disclosure statement Ex.PW1/A of appellant No.1 Allaudin, appellant No.2 Mahmood, co-accused in the dacoity in question, was also apprehended from near the shop of PW1. The disclosure statement Ex.PW1/C of appellant No.2 Mahmood was recorded. Pursuant thereto, he got recovered the stolen goods, i.e., one gold necklace, golden earrings (Bundas) and one ring, which were seized vide memo Ex.PW1/D after sealing with seal of ‘RC’. Thereafter, appellant No.3 Shiv Kumar was arrested from Gandhi Nagar at the instance of appellant No.2 Mahmood. Disclosure statement Ex.PW1/E of appellant Shiv Kumar was recorded and he got recovered four stolen goods from his house, i.e., one watch, one camera, one silver coin and one knife. These articles were sealed with seal of RC and seized vide memo Ex.

PW1/F. Thereafter, appellant Mahmood led the police party to the house of accused Akhtar, who was arrested and his disclosure statement Ex.PW1/G was recorded. Pursuant thereto, he got recovered one watch, one ear tops and one ring, which were seized vide memo Ex. PW1/H after sealing with seal of RC. After that, accused Sikki was also apprehended from his house, who got recovered one camera, which was taken into possession vide memo Ex.PW1/J after sealing the same with seal of RC. Sketch of *chhuri* Ex.PW1/K was prepared. PW1 also identified the recovered goods Ex.P-1 to P-13 and proved the personal search memos of accused.

7. Constable Rajiv (PW2) recorded DD No.14/A on 14.04.1998 on receiving the information qua dacoity. He went to the Investigating Officer at the spot and took the rukka from there for the registration of the case.

8. Complainant explained how the incident took place. She also deposed that in this incident, golden ornaments, watches, camera and cash amounting to Rs.2,34,000/- including silver coins were robbed. She proved her statement Ex. PW3/A and identified the recovered goods.

9. Sh. Rajender Kumar (PW4), Civil Judge, conducted the TIP of the case property and proved the proceedings as Ex.PW4/A to J.

10. Mr.Mansoor Zamal (PW5) is the husband of the complainant, who deposed that after receiving the information qua the incident, he went to the house and found his wife and appellant

Allaudin there. His wife informed him about the whole incident. Her statement Ex.PW3/A was recorded in his presence. This witness gave the list of stolen articles and deposed that during investigation, police suspected appellant Allaudin and thereafter all the accused persons were arrested in his presence who made their respective disclosure statements and got recovered the looted articles of their respective shares.

11. ASI Jagdish Chander (PW6) recorded the formal FIR of this case on 14.04.1998 on receipt of rukka sent by ASI Ajit Singh. Inspector R.K.Rathi (PW7) joined the investigation on 22.04.1998 with Inspector R.C.Meena (PW9) Investigating Officer of the case. ASI Ajeet Singh (PW8) also joined the Investigating Officer during investigation of the case.

12. Inspector R.C. Meena (PW9) is the Investigating Officer of the case. He deposed that on 14.04.1998, when he was posted as SHO P.S. Sadar Bazar, an information about dacoity being committed in the house bearing No.6514, Sher Ka Pinjara, Kasab Pura, Delhi was received. He deputed ASI Ajeet Singh for investigation, who sent the wireless message requesting him to reach at the spot and thereafter, he alongwith other police staff went to the place of the incident at about 3.20 PM and found that the house-hold articles lying scattered, got recorded the statement Ex. PW3/A of the complainant, made endorsement Ex.PW9/A and sent the same as rukka for registration of the FIR in question.

13. On 22.04.1998, PW9 alongwith PW7 and PW8 and other police staff went to the house of the complainant and made enquiries about appellant Allaudin. On suspicion, the said appellant was interrogated, who made disclosure statement Ex.PW1/A and led the police party to his house and got recovered the stolen goods of his share, which were taken into possession vide memo Ex.PW1/B. Thereafter, appellant Allaudin led the police party at the shop of PW1 where appellant Mahmood, co-accused in the dacoity in question, was also apprehended and got recovered the stolen goods. Thereafter, appellant No.3 Shiv Kumar was arrested from Gandhi Nagar at the instance of appellant No.2 Mahmood and appellant Shiv Kumar got recovered stolen goods. Thereafter, appellant Mahmood led the police party at the house of accused Akhtar, who was arrested and he got recovered the stolen goods of his share. After that, accused Sikki was also apprehended from his house. PW9 also identified the recovered goods Ex.P-1 to P-12.

14. Statements of the appellants and other two co-accused persons were recorded under Section 313 Cr.P.C., wherein they denied the prosecution case but opted not to examine any witness in defence.

15. It is noted that out of five accused persons, accused Akhtar became proclaimed offender after recording of his statement under Section 313 Cr.P.C. The learned Additional Sessions Judge, after appreciating the evidence on record, discharged accused

Sikki vide impugned judgment dated 25.02.2002 as the prosecution could not produce anything incriminating material against him.

16. Thus, the learned Additional Sessions Judge vide impugned judgment dated 25.02.2002 convicted the appellants under Section 391 IPC read with Section 395 and 412 IPC and vide order on sentence dated 26.02.2002, they were sentenced to undergone rigorous imprisonment for five years under Sections 395/412 IPC and to pay a fine of Rs.500/-. In default, the appellants were sentenced to undergo rigorous imprisonment for 15 days.

17. Being aggrieved, the appellants have preferred the instant appeal.

18. Learned counsel appearing on behalf of the appellants vehemently argued that the learned Trial Court committed an error in convicting the appellants for an offence punishable under Section 395 IPC. It was submitted that charge was framed for the offences punishable under Sections 391/395/412 IPC against the appellants along with other two accused named above. When the learned Trial Court acquitted one of them and another one is absconding, then conviction ought not to have been recorded of the remaining three accused for an offence punishable under Section 395 IPC. It was submitted that for conviction of appellants under Section 395 IPC, there must be five or more persons and in view of acquittal of one out of five accused persons and one having been absconded during trial, the learned Trial Court was wrong in

invoking and applying Section 395 IPC. On that ground alone, the order of conviction and sentence deserves to be set aside.

19. Learned counsel further submitted that complainant (PW3) in her examination-in-chief had categorically stated that appellant Mahmood was not among the intruders at that time. Moreover, the learned Trial Court has not recorded any finding in the impugned judgment that there were five persons at the time of committing dacoity, which is mandatory as per Section 391 IPC.

20. Learned counsel also contended that DD No.14-A dated 14.04.1998 regarding first information was not proved. Appellant No.1 was a domestic servant in the house, where dacoity was committed. There was no public witness for the arrest.

21. Learned counsel further submitted that TIP of the case property except the silver coin of Laxmi and Ganesha was rejected by the learned Magistrate (PW4) on the ground that the jewellery produced by the Investigating Officer was similar. Moreover, no ownership proof qua the case property was filed by the complainant (PW3). In addition, despite having called the fingerprints experts and photographer, no fingerprints or chance prints were proved.

22. In support of his submissions, learned counsel for the appellants has relied upon the judgment of ***Manmeet Singh @ Goldie Vs. State of Punjab, 2015(4) SCALE 111***, wherein the Supreme Court observed as under:-

“27. With reference to the offence of dacoity under section 391, IPC in particular and the import of section 149, IPC, this Court in Raj Kumar vs. State of Uttaranchal 2008 (11) SCC 709 had propounded that in absence of a finding about the involvement of five or more persons, an accused cannot be convicted for such an offence. Their Lordships, however, clarified that in a given case it could happen that there might be five or more persons and the factum of their presence either is not disputed or is clearly established, but the Court may not be able to record a finding as to their identity resulting in their acquittal as a result thereof. It was held that in such a case, conviction of less than five persons or even one can stand, but in the absence of a finding about the presence or participation of five or more persons, less than five persons cannot be convicted for an offence of dacoity.

27 A. The above pronouncements do acknowledge the extension of the concept of collective culpability enshrined in section 149, IPC in section 396, IPC contemplating murder with dacoity. An assembly of five or more persons participating in the offence is thus the sine qua non for an offence under section 396, IPC permitting conviction of any one or more members thereof even if others are acquitted for lack of their identity. In absence of such an assembly of five or more persons imbued with the common object of committing dacoity with murder, any member thereof cannot be convicted for the said offence irrespective of his/her individual act of murder unless independently and categorically charged for that offence.”

23. Learned counsel submitted that in the light of the above

facts, conviction of the appellants under Section 395 IPC is clearly illegal and requires to be set aside. Therefore, the appeal deserves to be allowed by setting aside the order of conviction and sentence recorded by the learned Trial Court.

24. On the other hand, learned Additional Public Prosecutor appearing on behalf of the State while supporting the order of conviction and sentence by the learned Trial Court, submitted that it is true that out of five accused, accused Sikki was acquitted by the learned Trial Court as prosecution could not prove its case against him. Other accused Akhtar was declared proclaimed offender after recording of his statement under Section 313 Cr.P.C., therefore, there were less than five accused before the learned Trial Court at the time of passing the final order. But from the prosecution evidence and particularly from the evidence of the complainant as well as the eye-witness, the learned Trial Court was convinced that during the course of dacoity, there were seven persons. Moreover, learned Trial Court has specifically recorded in the impugned judgement that the police tried their best to arrest the other accused persons, namely Vidhya and Suresh, but they could not be traced.

25. The learned Additional Public Prosecutor further submitted that PW5 and PW1, husband and brother of the complainant respectively identified the stolen articles Ex. P-1 to P-12. He submitted that no suggestion was given to either of the witness qua the case property that the same was planted or that they were

deposing falsely in this respect.

26. As regards the contention that DD No.14-A dated 14.04.1998 regarding first information was not proved, the learned Additional Public Prosecutor submitted that Constable Rajiv Kumar (PW2) had clearly stated that on the fateful day he received an information which was recorded in DD No.14-A and on the basis of the same, he alongwith ASI Ajit Singh (PW8) reached the house in question, where dacoity was committed.

27. Further submitted, in their statements recorded under Section 313 Cr.P.C., the appellants as well as the proclaimed accused Akhtar simply stated that they had been falsely implicated in this case. Moreover, no evidence in defence was led by any of the appellants.

28. Thus, submitted that in the light of the above observations, the learned Trial Court had rightly convicted the appellants under Section 395 IPC, therefore, the said order, by any stretch of imagination cannot be said to be illegal or unlawful. Therefore, the present appeal deserves to be dismissed.

29. I have heard the learned counsel for the parties.

30. Before proceeding further, it would be relevant to advert to the relevant law on the subject. Chapter XVII (Sections 378 to 462) of the Indian Penal Code, 1860, deals with offences against property. Sections 378 to 382 IPC relate to theft, Sections 383 to

389 IPC concern offences of extortion and Sections 390 to 402 IPC deal with robbery and dacoity.

31. For the sake of convenience, Section 391 IPC, which defines ‘dacoity’ is reproduced as under:-

“391. Dacoity When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

32. The term ‘conjointly’ indicates jointness of action and understanding. Every one acts in aid of other. ‘Conjointly’ means to act in joint manner, together, ‘unitedly by more than one person. ‘Conjoin’ means ‘join together’, as per the Oxford Large Print Dictionary. According to Corpus Juris Secundum, ‘Conjointly is explained as ‘together’, the one with knowledge, consent and aid of the other and pursuant to an agreement or understanding or ‘unitedly’. In the ‘Words and Phrases’ ‘Vol. 8 A’, published by ‘West Publishing’, same meaning is adopted as in Corpus Juris Secundum. It explains that ‘conjoint robbery’ is where the act is committed by two or more persons. According to Webster’s New International Dictionary ‘conjoint’ means ‘united’, ‘connected’ associated or to be in conjunction or carried on by two or more in combination. The use of word ‘conjointly’ in Section 391 IPC indicates that five robbers act with knowledge and

consent and in aid of one another or pursuant to an agreement or understanding, i.e., unitedly. That is the spirit of their 'conjoint' action. Thus, in most of dacoities, the robbers would be acting with a common object to loot with use of violence. At least in some cases of dacoities, the robbers act and use force in pursuance of their common intention and in all cases they act in prosecution of a common object. The word 'conjointly' means uniform intention along with unified or united or concerted action. This word, because of its deep rooted meaning, has been deliberately preferred over the word 'jointly'.

33. From bare reading of provisions of aforesaid Section, it is clear that when five or more persons conjointly commit a robbery or they conjointly attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery and persons present and aiding such commission or attempt amount to five or more, every person who is so committing, attempting or aiding is said to commit 'dacoity'. Therefore, robbery or attempted robbery by at least five persons is dacoity. It is not necessary that all the five persons must commit or attempt to commit robbery. If the total number of those who are committing or attempting to commit or are present and aiding such commission or attempt is at least five, all of them are guilty of dacoity.

34. In other words, those who commit robbery and those who attempt to commit the same, and those who are present and aiding

such commission or attempt are all counted, and if their number is five or more all of them would be guilty of committing dacoity. Moreover, it is not necessary for their conviction that their attempt must succeed. If the attempt does succeed it is a dacoity, and if the attempt fails even then the offence is dacoity. However, in the present case, the appellants alongwith other co-accused succeeded in their attempt of dacoity.

35. Section 395 IPC provides punishment for dacoity. The same reads as under:-

“395. Whoever commits dacoity shall be punished with [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

36. In the case of ***The State of Maharashtra Vs. Joseph Mingel Koli & Ors., 1997 (1) BomCR 362***, after perusing Section 395 IPC, the Bombay High Court held as under:-

“29..... When robbery is either committed or an attempt to commit it is made by five or more persons then all such persons, who are present or aiding in its commission or in an attempt to commit it, would commit the offence of dacoity.”

37. It is not out of place to mention here that a similar situation arises in dealing with cases of 'unlawful assembly' as defined in Section 141 IPC and the liability of every member of such unlawful assembly for an offence committed in prosecution of common object under Section 149 IPC. Section 141 IPC indicates that an assembly of five or more persons can be said to be 'unlawful

assembly', if common object of the persons comprising such assembly is as mentioned in the said Section. Section 149 IPC declares that if an offence is committed by any member of unlawful assembly in prosecution of common object of that assembly, every member of such assembly is guilty of that offence.

38. In *Dalip Singh & Ors. Vs. State of Punjab, 1954 SCR 145*, it was held that if the prosecution fails to establish that the appellants were five or more in number, Section 149 IPC cannot be applied. But the Court held that it is not essential that five persons must always be convicted for invocation of the said provision. Where it is possible to conclude that though five or more persons were 'unquestionably' at the place of offence and the identity of one or more was in doubt, conviction of less than five persons with the aid of Section 149 IPC, would be legal and lawful. Speaking for the Court, Bose J., stated:

"Before Section 149 can be called in aid, the court must find with certainty that there were at least five persons sharing the common object. A finding that three of them "may or may not have been there" betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation. This is not to say that five persons must always be convicted before section 149 can be applied. There are cases and cases. It is possible in some cases for Judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 would be good. But if that is the conclusion it

behaves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty. Men cannot be hanged on vacillating and vaguely uncertain conclusions".

39. Similarly, in ***Krishna Govind Patil Vs. State of Maharashtra, (1964) 1 SCR 678***, the Supreme Court observed:

"10.....It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only the said accused; but there may be other evidence, such as that given by the court witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence....".

40. The Supreme Court in ***Ram Bilas Singh & Ors. Vs. The State of Bihar 1964 (1) SCR 775***, while dilating on the scope and purport of Section 149 IPC had held:-

"What has been held in this case would apply also to a case where a person is convicted with the aid of s.149, Indian Penal Code instead of s.34. Thus all the decisions of this court to which we have referred make it clear that it is competent for a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than that number have been convicted by it if (a) the charge states that apart from the persons

named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and evidence led to prove this is accepted by the court; (b) or that the first information report and the evidence shows such to be the case even though the charge does not state so, (c) or that though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons there is other evidence which discloses the existence of named or other persons provided, in cases (b) and (c), no prejudice has resulted to the convicted person by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence."

41. The Supreme Court thus enunciated, on an exhaustive survey of the judicial renderings on the issue that it is competent for a Court to come to the conclusion that there had been an unlawful assembly of five or more persons and yet convict a lesser number of persons if the charge stated that, apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and that the evidence led to prove the same is accepted by the Court or if the FIR and the evidence shows such to be the case even though the charges does not state or if though the charge and the prosecution witnesses named only the acquitted and convicted persons, there is other evidence which disclosed the existence of named or other persons provided, that in the last two contingencies, no prejudice would result to the convicted persons by the reason of omission to mention in the

charge that the other unnamed persons had also participated in the offence.

42. In ***Ram Dular Rai Vs. State of Bihar, (2003) 12 SCC 352***, the Supreme Court held that:-

"Coming to the question whether Section 149 has application when presence of more than five persons is established, but only four are identified, Section 149 does not require that all the five persons must be identified what is required to be established is the presence of five persons with a common intention of doing an act. If that is established merely because the other persons present are not identified that does not in any way affect applicability of Section 149, IPC".

43. Thus, interpretation of Section 391 IPC is simple that there must be at least five persons in a dacoity; the Section nowhere says that minimum five persons must be convicted of it. It can easily be seen, thus, that the principle underlying Sections 34, 149, 120-A IPC punishable under Sections 120-B and Section 391 IPC punishable under Section 395 IPC are same with respect to the liability of lesser number of persons than mentioned in the above-named Sections of the Indian Penal Code.

44. So far as the plea of false implication being taken by the appellants in their statements under Section 313 Cr.P.C. is concerned, in the case of ***Chheddu Vs. State of Uttar Pradesh, 2000 Cr.L.J.78 (All)***, it was held that where the presence of informant and other witnesses at the time and place of incident was established and their positive evidence regarding the way in which

the dacoity was committed found reliable having no previous enmity with accused, no case of false implication established, therefore, conviction of accused under Section 395 IPC was just and proper.

45. Coming back to the case in hand, as observed above, five persons were arrested and charges were framed against them. Out of those five accused, one accused Sikki was acquitted by the learned Trial Court as the prosecution could not prove its case against the said accused and the other accused Akhtar became proclaimed offender after recording of his statement under Section 313 Cr.P.C. It is the case of the prosecution that two other accused, namely, Vidhya and Suresh could not be arrested by the police despite having tried their best. In order to prove the participation of five persons, the sole reliance was placed upon the deposition of PW3, the complainant and the eye witness of the incident in question. In her evidence, in the examination-in-chief, PW3 firmly stated that on 14.04.1998 at about 2.30 PM door bell rang and when appellant Allaudin answered the call and opened the door, four intruders entered one by one. In her cross-examination, she had categorically stated that appellant Shiv Kumar had entered first of all and was having a revolver in his possession. Other accused Akhtar, who had been declared as proclaimed offender, was having *chhuri* in his possession. PW3 vigorously stated that the two intruders, who were not present before the learned Trial Court, had demanded the key of the chest from her and dragged

her to the bathroom. She further stated that the intruder who was not present was wearing blue colour jeans. Inspector R.K. Rathi (PW7), Additional SHO, P.S. Sadar Bazar, Delhi, joined the investigation with PW9, Investigating Officer of the case. He is also a witness to arrest of the accused persons and the recovery of the stolen articles. During his examination, he clearly stated that the accused persons led the police party to the house of accused Vidhya but his house was found locked and on enquiry from landlord, they came to know that the said accused had left to his village.

46. PW1 and PW5, confirmed the seizure of the stolen articles Ex.P-1 to P-12. It was pointed out by PW5 that the act of seizure from the accused persons was made in his presence between 2.30 PM to 6.30 PM on 22.08.1998 and that all the seizure memos bear his signatures at point B. In the said circumstances, the reliance placed upon the evidence of PW5, husband of PW3, who gave the details about the loss of properties in the crime committed by the accused was well justified.

47. After conducting the investigation, PW 9 filed the chargesheet before the learned Trial Court wherein it was alleged that the appellants along with accused Sikki and Akhtar, one other accused Vidhyaram, who could not be arrested and two others, who were stated to be absconding indulged in the offence on 14.04.1998.

48. Moreover, the learned Trial Court has specifically recorded in the impugned judgement that the police tried their best to arrest

the other accused persons, namely Vidhya and Suresh, but they could not be traced. Therefore, the contention of the learned counsel for the appellants that there is no finding of the Court below to the effect that there were five persons at the time of committing dacoity does not survive at all.

49. Now, the question for consideration is whether with the above evidence available on record, the conclusion of the learned Trial Court having held the appellants guilty of the offences punishable under Sections 395/412 IPC is justified or not?

50. Primarily, there is no reason why the version of complainant (PW3) should not be believed. She had the first hand information relating to the crime being suffered at the hands of the accused persons. Her statement before the Trial Court did not appear to be vacillating. Therefore, I am of the considered view that the reliance placed upon her version by the learned Trial Court was well justified for proceeding against the appellants for the offences falling under Sections 395/412 IPC.

51. All the more, as per the uncontroverted version of complainant PW3, star witness of the prosecution, four young persons entered one by one in the house forcibly. Appellant Shiv Kumar had entered first of all with revolver, proclaimed accused Akhtar was having chhuri in his possession and the other two intruders, who demanded the key of the chest from her and dragged her to the bathroom, were not before the learned Trial Court as they could not be arrested despite best efforts of

the police. PW3 also described during her cross-examination that one of the intruder who was not present was wearing blue colour jeans. Her version finds corroboration with the testimony of Inspector R.K. Rathi (PW7), who joined the investigation with PW9. During his examination, he clearly stated that the accused persons led the police party to the house of accused Vidhya but his house was found locked and on enquiry from landlord, they came to know that the said accused had left to his village. At the cost of repetition, it is stated that appellant Allaudin was working as domestic servant in the house of complainant PW3 and was well aware about the valuable goods being kept in the house. Appellant Allaudin admitted in its disclosure statement that he alongwith appellant Mahmood made a plan to commit robbery in the house in question. As disclosed by him, at the time of alleged incident, appellant Shiv Kumar alongwith three other persons (thereby reaching the figure of four as given by PW3) entered the house and appellant Mahmood was standing outside in the street for watch and ward. As per the chargesheet, three appellants, co-accused Sikki and Akhtar, another accused Vidhyaram, who could not be arrested and two others, who were stated to be absconding were indulged in the offence of 14.04.1998.

52. Even if the contention of the learned counsel for the appellants that PW3 had categorically stated in her examination-in-chief that appellant Mahmood was not among the intruders at that time is believed, even then on the basis of the discussion in the preceding paragraph, it can safely be presumed that the dacoity was committed

by more than five persons because as per the provisions of Section 391 IPC, it is not necessary that all the five persons must commit or attempt to commit robbery. If the total number of those who are committing or attempting to commit or are present and aiding such commission or attempt is at least five, all of them are guilty of dacoity.

53. Therefore, I am not able to countenance the contention of the learned counsel for the appellants that the basic ingredient of involvement of minimum of five persons for the offence punishable under Section 395 IPC was lacking in this case. Therefore, the conviction for the offences alleged against the appellants of their involvement with other accused does not call for any interference.

54. The next question remains to be examined is whether conviction of less than five persons for dacoity is justified?

55. In ***Raj Kumar @ Raju Vs. State of Uttaranchal (2008) 11 SCC 709***, the Supreme Court held as under:

“21. It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than

five persons - or even one - can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity.”

56. While relying upon the case of **Raj Kumar @ Raju** (*supra*), this Court in the case of **Joginder @ Joga Vs. State NCT of Delhi**, **ILR (2013) VI Delhi 4089**, held as under:-

“7. Further even if in the present case only two accused have been convicted the conviction under Section 395 and 397 IPC can still be based as PW1 and PW2 have clearly stated that besides the Appellant 4 or 5 more persons were involved and the non trial or conviction of the other 4 or 5 persons would not vitiate the conviction of the Appellants for offences under Section 395 and 397 IPC.”

57. In view of the aforesaid discussion, I am of the considered opinion that there is no infirmity or illegality in the impugned judgment so as to warrant interference by this Court into the conviction and sentence awarded by the learned Trial Court. Appeal is without merit and is dismissed accordingly.

58. Since all the appellants are on bail. Their bail bonds and surety bonds are cancelled.

59. It is pertinent to mention here that this Court vide order dated 23.11.2015 has observed that appellant No.1 Allaudin has already completed the sentence awarded by the learned Trial Court, which is evident from the letter dated 11.05.2015 of the Jail Superintendent of Rohini, Delhi. Therefore, it is directed that the appellant No.1 be set free, if not required in any other case. As

regards appellants No. 2 and 3, they will serve the remaining period of sentence imposed upon them. Since both the aforesaid appellants are on bail, therefore, they are directed to surrender forthwith before learned Trial Court/Successor Court or Jail Superintendent and serve the remaining sentences imposed on them.

60. The Registry of this Court is directed to send a copy of this judgment to the concerned Jail Authorities for information and compliance.

61. TCR be remitted back to learned Trial Court.

**SURESH KAIT
(JUDGE)**

FEBRUARY 04, 2016
sb