

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

RESERVED ON : 22nd JULY, 2016
DECIDED ON : 29th JULY, 2016

+ **CRL.A. 231/2016 & Crl.M.B.510/2016 & Crl.M.A.3927/2016**

RAMESH @ NANKU Appellant

Through : Mr.Puneet Singhal, Advocate.

versus

STATE OF NCT OF DELHI Respondent

Through : Mr.Amit Gupta, APP.

+ **CRL.A. 431/2016 & Crl.M.B.918/2016**

SOMNATH @ VICKY Appellant

Through : Mr.Arun Gaur, Advocate.

versus

THE STATE NCT OF DELHI Respondent

Through : Mr.Amit Gupta, APP.

AND

+ **CRL.A. 229/2016**

RAJU @ TINKU Appellant

Through : Mr.Saurabh Kansal with Ms.Pallavi
S.Kansal, Advocates.

versus

STATE OF NCT OF DELHI Respondent

Through : Mr.Amit Gupta, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in these appeals is a judgment dated 12.01.2016 of learned Addl. Sessions Judge in Sessions Case No.73/15 (Old No.179/09) arising out of FIR No.86/09 PS Rajouri Garden by which Ramesh @ Nanku (A-1), Somnath @ Vicky (A-2) and Raju @ Tinku (A-3) were held guilty for committing offences under various Sections. By an order dated 14.01.2016, they were awarded various prison terms with fine.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 14.03.2009 at around 11.45 p.m. at foot over bridge, Ring Road, Rajouri Garden, Delhi, the appellants in furtherance of common intention with their associates Bablu Kumar @ Arjun (since convicted) and Montu @ Sanjay (not arrested) committed dacoity using deadly weapons and deprived complainant Ashok Yadav of his vehicle Tata Sumo bearing registration No.RJ-02 TA 0110 along with documents; mobile phone make Nokia etc. Police machinery came into motion on getting information about the occurrence vide DD No.8/A (Ex.PW-22/A) recorded at PS Rajouri Garden at 05.48 a.m. on 15.03.2009. The Investigating Officer after recording Ashok Yadav's statement (Ex.PW-5/A) lodged First Information Report. The complainant was medically examined. Statements of the witnesses conversant with the facts were recorded. Efforts were made to find out the assailants but to no effect.

3. Further case of the prosecution is that vide DD No.45B (Ex.PW-7/A) recorded at PS Rajouri Garden at 01.55 p.m. information was received that the appellants A-1, A-2 and one Bablu Kumar @ Arjun have been arrested in case FIR No.92/09 registered under Sections 353/186/307/411/34 IPC and Sections 25/27 Arms Act at PS Vikas Puri. The accused persons were arrested in this case. Certain recoveries were

effected. Upon completion of investigation, a charge-sheet was filed against all the appellants and Bablu Kumar @ Arjun in the Court. In order to establish its case, the prosecution examined twenty-three witnesses. In 313 Cr.P.C. statements, the accused persons denied their involvement in the crime and pleaded false implication. They did not examine any witness in defence. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the appellants have preferred these appeals. It is unclear if conviction has been challenged by co-convict Bablu Kumar @ Arjun.

4. I have heard the learned counsel for the parties and have examined the file. The occurrence took place on the night intervening 14/15.03.2009 at around 11.45 p.m. In the statement (Ex.PW-5/A), the complainant gave detailed account as to how and in what manner, he was deprived of his vehicle and other valuable articles by the assailants. Since the FIR was lodged promptly without any delay there was least possibility of the complainant to concoct a false story of commission of robbery. It is relevant to note that the complainant had sustained injuries during the commission of crime and was taken to Dr.Baba Saheb Ambedkar Hospital, Rohini, Delhi, at 03.40 a.m. on the intervening night of 14/15.03.2009. He was medically examined there vide MLC (Ex.PW-1/A); he had suffered various injuries on different body parts. These injuries being not self inflicted lend credence to the complainant's version. The complainant had not named any of the assailants in the complaint (Ex.PW-5/A).

5. Crucial testimony is that of the complainant PW-5 Ashok Yadav. In his Court statement, he categorically identified the appellants and their associate Bablu Kumar @ Arjun to be the assailants. Specific and definite role was assigned to each of them in the commission of crime. He

deposed that on that night, he had picked six boys in his Tata Sumo bearing RJ-02 TA 0110 at Rajouri Garden's flyover. When he reached near PWD, Dhaula Kuan, two boys came to him on the pretext to give fare. They opened the door and after giving a knife blow on his right eye brow; pushed him to the back seat. Two other boys sitting on the backseat pulled him from his neck; one of the boys carrying a pistol sitting besides him, pulled his collar and pushed him to the backseat. He was made to sit on the back seat floor in between the front and back seat. One of the boys snatched the key of the vehicle; the other snatched his purse containing his Driving Licence, ₹1,000/-, some documents and mobile make Nokia 1208. They threatened him not to raise noise or else he would be killed. They pointed out an open knife at his head. One of the boys took driver's seat and started driving the vehicle. One of the boys gagged him and the other pulled his hair, still the other one pressed his neck. After some time, he became semiconscious. The assailants threw him in the 'nala' at Sector 15 – 16, Rohini. He came out of it and reached a taxi stand nearby. The police was informed subsequently. Identifying A-1 in the Court and assigning a specific role to him, he disclosed that he had given injury on his right eye brow by a knife and had driven the vehicle. Referring towards A-2, he disclosed that he was the individual who was sitting on the backseat and had come along with A-1 to the driver's seat. Pointing at A-3, he disclosed that he had put 'katta' on his head; he was carrying a knife and he went to the backseat where he was made to sit on the floor.

6. This witness was cross-examined at length. He reiterated that six passengers were picked by him from the bus stand under the pedestrian foot-over-bridge in Rajouri Garden. He admitted that light was not 'on'

inside the Tata Sumo and it was dark. Mobile make Nokia 1208 was purchased by him from one Tejpal Yadav about a year back. He clarified that one passenger was dropped by him at Naraina.

7. On scanning the entire testimony of the complainant, it reveals that material facts stated by him have remained unchallenged and uncontroverted in the cross-examination. No ulterior motive was assigned to this witness for making false statement against the accused persons who were not acquainted with him prior to the incident. In the absence of any prior animosity or ill-will, the complainant was not expected to rope in innocent individuals and the real offenders. Being an injured witness, his statement stands on higher footing; his presence at the spot cannot be doubted. This witness during investigation had participated in the Test Identification Proceedings. The appellants, however, declined to join the Test Identification Proceedings. Adverse inference is to be drawn against them for not participating in the Test Identification Proceedings. In the Court, the complainant had no slight hesitation to identify and recognise the appellants to be the individuals who had played active role in the commission of the crime. No suggestion was put to the complainant if none of them was present at the relevant time at the spot. The accused persons also did not examine any witness in defence to falsify the positive testimony of the complainant and to claim their presence at some other specific place at that odd hours. The accused persons did not offer any explanation as to why they were present for any particular purpose at that place during night time at foot over bridge, Rajouri Garden. Since the complainant had direct confrontation with the assailants and had remained with them for sufficient period, he had got reasonable opportunity to see and observe their broad

features and faces which facilitated him to correctly identify the miscreants in the Court.

8. It is pertinent to note that A-1 and A-2 were apprehended in a case FIR No.92/09 at PS Vikas Puri on 27.03.2009 and only on getting information vide DD No.45B (Ex.PW-7/A) on 27.03.2009, they could be arrested in this case. A-1 and A-2 have been convicted and sentenced in the said case. No extraneous consideration can be imputed to the police officials in this case as they were not instrumental in effecting their arrest. Their involvement in the crime surfaced only when they made disclosure statements in the case FIR No.92/09 at PS Vikas Puri. The police of PS Rajouri Garden was not aware about their involvement in this case as the complainant had not named them in the FIR.

9. Certain recoveries effected during investigation further strengthen the prosecution case. The robbed mobile (Ex.P1) recovered from A-2 was identified by the complainant in his Court statement.

10. I do agree with the appellants' contention that certain contradictions and discrepancies have appeared about the exact number of the assailants. The police had filed charge-sheet only against four accused persons; three of which are the appellants and one was Bablu Kumar @ Arjun who has been convicted along with them. Admittedly, the 'fifth' accused could not be arrested during investigation and no charge-sheet was filed against him. His identity and address could not be established. In the complaint (Ex.PW-5/A), the complainant had specifically disclosed that at the time of incident, there were only 'four' assailants. He elaborated that initially he had picked six passengers. When the vehicle reached near PWD office, two of them fled due to fear. The other 'four' deprived him of the

vehicle and inflicted injuries to him. He was certain to state that the 'four' individuals had decamped with his vehicle. Apparently, at the time of making complaint, the complainant had not informed that assailants were 'five' in number. The Investigating Officer PW-23 (SI Sanjay Kumar) disclosed that after a few days in the supplementary statement, the complainant gave the number of the assailants as 5 – 6. Since identity of fifth alleged assailant could not be established and he could not be charge-sheeted and also initial version of the complainant was that there were 'four' individuals, benefit of it should go to the accused persons. The prosecution was unable to prove with certainty that the number of the assailants was five. Before an offence under Section 395 IPC can be made out there must be assembly of five or more persons.

11. In the light of above discussion, conviction under Section 395 IPC is altered to Section 394 IPC. In the absence of clinching and cogent evidence on record to prove commission of offence punishable under Section 482 Cr.P.C., conviction under that Section cannot be sustained and is set aside. Conviction under other offences stands confirmed.

12. A-1 has been awarded maximum imprisonment for seven years each under Sections 395/34 IPC and under Section 397 IPC. Since sentence under Section 397 IPC cannot be altered or modified as it is the minimum one it is affirmed. A-1 shall undergo RI for seven years with fine ₹2,000/- for commission of offence punishable under Section 394 IPC read with Section 397 IPC.

13. A-2's Nominal Roll dated 09.05.2016 reveals that he has undergone three years, seven months and twenty-nine days incarceration besides remission for fifteen days as on 09.05.2016. He is involved in two

other FIRs No.01/14 and 435/15 PS Kirti Nagar. He has been convicted in case FIR No.92/09 under Sections 186/353/307/411/34 IPC and Sections 25/27/54/59 Arms Act and sentenced to undergo RI for three years with fine ₹4,500/-. He has been awarded maximum imprisonment for seven years under Sections 395/34 IPC and under Section 397 IPC. Since sentence under Section 397 IPC cannot be altered or modified, it is affirmed. A-2 shall undergo RI for seven years with fine ₹2,000/- for commission of offence punishable under Section 394 IPC read with Section 397 IPC

14. A-3's Nominal Roll dated 19.02.2016 reveals that he has undergone three years, five months and twenty-five days incarceration besides remission for one month and fifteen days as on 18.02.2016. He is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. Offence under Section 395 IPC for which he was awarded RI for seven years has been modified to Section 394 IPC. Considering the facts and circumstances of the case, the Sentence Order is modified and he shall undergo RI for five years with fine ₹2,000/- under Section 394/34 IPC; default sentence for non-payment of fine shall be SI one month. A-3 shall surrender before the Trial Court on 5th August, 2016 to serve out the remainder period of sentence.

15. A-1 and A-2 have been convicted in case FIR No.92/2009 under Sections 186/353/307/411/34 IPC and Sections 25/27 Arms Act and sentenced to undergo RI for three years each by a judgment dated 14.01.2016. Both of them were also convicted by the same Court in this FIR on 14.01.2016. Interest of justice requires that sentences in both the cases should run concurrently.

16. Accordingly, it is ordered that sentences in both the FIRs (FIR No.86/2009 and FIR No.92/2009) shall run concurrently.

17. The appeals stand disposed of in the above terms. Pending applications also stand disposed of. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

JULY 29, 2016 / tr

