

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

% *Judgment Reserved on: May 26, 2016*
Judgment Delivered on: June 02, 2016

+ **CRL.A. 550/2015**

SEIKH ISARAT Appellant
Represented by: Mr. Kumar Vaibhav, Mohd.
Faraz, Advs.
versus

STATE Respondent
Represented by: Mr. Ravi Nayak, APP with SI
Mahesh PS S.B. Dairy.

+ **CRL.A. 765/2015**

SEIKH MUJIBA @ JALIL Appellant
Represented by: Mr. Saurabh Kansal, Ms. Pallavi
S. Kansal, Advs.
versus

STATE Respondent
Represented by: Mr. Ravi Nayak, APP with SI
Mahesh PS S.B. Dairy.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
MUKTA GUPTA, J.

1. Sheikh Isarat and Sheikh Mujiba @ Jalil have been convicted for offences punishable under Sections 457/34, 392/34 and 342/34 besides Sections 397 and 411 IPC; Sheikh Isarat has also been held guilty for offence punishable under Section 25 Arms Act. Vide the order on sentence dated

February 28, 2015 the appellants have been directed to undergo rigorous imprisonment for a period of 7 years for offence punishable under Section 392 read with 397 IPC and to pay a fine of ₹5000/- each, simple imprisonment for a period of 3 years for offence punishable under Section 457/34 IPC and a fine of ₹5000/- each, simple imprisonment for a period of 6 months for offence punishable under Section 342/34 IPC and simple imprisonment for a period of 2 years for offence punishable under Section 411 IPC. Seikh Isarat has also been directed to undergo simple imprisonment for a period of 1 year for offence punishable under Section 25 Arms Act.

2. Process of law was set into motion on receipt of DD No.6B at 12.40 AM on December 22, 2011 at PS Shahbad Dairy informing that thieves have entered Iskon Temple near Engineering College, Sector 25, Rohini. SI Arun Kumar reached the spot where he recorded the statement of Bimlesh Kumar Jha on the basis of which FIR No.405/2011 under Sections 392/397/34 IPC was registered at PS Shahbad Dairy.

3. Bimlesh Kumar Jha stated that he was residing with his family at B-286, Baljeet Vihar, Nithari and was a permanent resident of Nepal. For the last 9 months he was working as Chowkidar at Iskon Temple, Rohini. On December 21, 2011 he was on night duty from 8.00 PM to 8.00 AM. At around 12.10 AM while he was taking the round of mandir, suddenly two persons jumped the main gate and entered the mandir. They kept a knife on his neck where after two more persons entered the mandir. One person latched the bolt of the door of the room in which President Keshav Murari and Brahmchari Nand were sleeping. Thereafter the four of them went to the room where idols were kept and threatened him to keep quite or else he

would be killed. One person broke the lock of the gate and three of them entered inside and took out four idols and donation box. In the meantime, one man continued standing with a knife on his neck. Thereafter, the person who has kept knife on his neck snatched the key of the lock on the main gate, opened the main gate and all of them ran away with the articles. Bimlesh Kumar Jha ran and opened the door of the room of President Keshav Murari and Brahmchari Nand where after Keshav Murari rang up 100 number. The person who had kept knife on his neck was aged 35-40 years, one was around 18-20 years of short height, stout built and the other two aged 40-42 years and thin built. All four of them after entering the temple by showing knife had looted the idols and donation box.

4. SI Arun Kumar with Const.Ashok and complainant Bimlesh Kumar made search of the accused when near Ganda Nala of Sector 24, Rohini it was informed that thieves who looted the idols and money from Iskon Temple were sitting in a park nearby. When they reached the place at about 3.45 PM; on the identification of Bimlesh Kumar Jha two persons were apprehended whose names were revealed as Seikh Isarat who had put knife on the neck of Bimlesh at the time of committing robbery from whose formal search one button-dar knife was recovered and the other person was carrying one blue colour bag which contained coins amounting to ₹4340.25. The other accused revealed his name as Seikh Mujiba @ Jalil. The bag contained three metal idols of God Prabhu Pat, Narsingh and Goddess Laxmi which were identified by the complainant. Both the accused led to the corner of the park and from under the bushes got recovered the donation box looted from Iskon Temple by them. Incriminating articles were sealed, memos prepared along with disclosure statements and the two were formally

arrested.

5. Learned counsel for appellant Seikh Isarat contends that there are contradictions and remarkable improvements in the statements of the witnesses before Court. The witnesses have tried to set up an entirely new case. With change in the version by the witnesses, the prosecution has not been able to lay down the foundational facts of the case. Keshav Murari PW-1 has drastically improved his version in his examination-in-chief stating that when he heard the noise from outside he tried to open the door failing which he peeped from the window and saw that PW-2 was being held by a person who had put a knife on his neck. He also deposed that he called the other priest namely Upender Vaman who came after 10 minutes of the incident when the thieves had already gone. According to Upender Vaman he found two Police men in the street around Sector 24 and they nabbed the accused persons who were walking in the park at a distance of around 25 meters. However Upender Vaman has not been examined as a witness. Though PW-1 stated that after he made the call to the PCR, the Police did not come to the temple and reached directly to the place where the accused persons were arrested, however PW-1 did not witness any arrest memo, seizure memo, pointing memo or personal search memo etc. Further PW-1 stated that no paper work was done in his presence and he had come to the temple at 2.30 AM on the same night after arrest of the accused persons whereas FIR itself was registered at 2.30 AM and thus no arrest could have taken place by that time. There is a serious discrepancy as to whether appellants were arrested at 5.30 AM or 6.00 and 6.30 PM. Even the statement of PW-2 is conflicting from the entire case set up by the prosecution. Const.Ashok PW-5 who was part of the investigating team

stated that the secret informer met him around 5.30 AM, however the accused were apprehended in the evening at 6.00 and 6.30 PM. He again stated that accused persons were arrested in the morning. The appellants have not been identified properly before the Court and there is confusion in the testimony of PW-1 on this count. PW-3 categorically stated that he could not identify the accused persons, as face of one of them was covered and the other was standing in the dark. PW-5 identified Seikh Mujiba as Seikh Isarat and Seikh Isarat as Seikh Mujiba in the Court. Relying upon State of H.P. Vs. Lekhraj & Anr. (2000) 1 SCC 247 it is contended that the inconsistencies and discrepancies in the prosecution case are not minor and destroy the prosecution case itself.

6. Learned counsel for Seikh Mujiba in addition contends that even as per the prosecution case knife was recovered from Seikh Isarat and there being no allegation that Seikh Mujiba used the knife, his conviction under Section 397 IPC is contrary to law. Appellant has been falsely implicated. Out of the 6 prosecution witnesses PW-2 is the only eye-witness. PW-1 and PW-3 though did not state that they saw the incident in their statement recorded under Section 161 Cr.P.C. but materially improved their deposition in Court and stated that they witnessed the incident from the window of the room in which they were locked. Though PW-1 stated that PW-3 identified the accused, however PW-3 stated that he could not identify them. Further PW-2 reached the park after 10 minutes of the apprehension of the appellants and thus he could not have identified the appellants. Thus none of the witnesses identified the appellants as accused persons who committed robbery at the temple.

7. Learned APP for the State submits that the prosecution case is

required to be bifurcated into two places one at the temple where the offence of robbery occurred and second at the park where the appellants along with the looted articles were apprehended. On the one hand, the evidence of all the three witnesses PW-1 to PW-3 is about what happened at the temple and thereafter the evidence of Bimlesh Kumar Jha PW-2 and the two Police officers who apprehended the appellants. There is no inconsistency in the evidence of the complainant and the Police officers and the conviction can be sustained on their testimonies. Moreover witnesses having not been confronted with their previous statements, thus the appellants cannot now say that there are improvements and contradictions in their testimony.

8. Bimlesh Kumar Jha PW-2 deposed in sync with his statement on the basis of which FIR was registered. He reiterated that the said persons put the latch from outside the room where Keshav Murari, President of the temple and Brahmchari Nand were present. Out of four persons, one put knife on his neck and two persons asked for the key but he did not give the key at that time. Somehow the boys broke the lock of the main temple and took out the idols installed over there and the donation box. The boys also inquired about gold idols and the cash kept. In Court PW-2 identified Seikh Isarat and Seikh Mujiba @ Jalil as the two persons who kept knife and committed the robbery. The complete incident took place in a span of 30-35 minutes. After the boys went, he opened the latch of the door of the room of Keshav Murari and Brahmchari Nand. After the PCR call was made they reached the park in nearly 10 minutes and the accused were apprehended and articles recovered.

9. Even though learned counsel for the appellants contends that there are exaggerations in the statements of Keshav Murari PW-1 and Brahmchari

Nand PW-3, however they have not been confronted with their previous statement to show what improvements have been made. Be that as it may, from the testimony of the two Police officers SI Arun Kumar and Const.Ashok which corroborates the testimony of Bimlesh Kumar PW-2, the prosecution has proved beyond reasonable doubt the offences committed by the appellants. It is trite law that to show that witness has improved in his deposition he is required to be confronted with his previous statement.

10. The discrepancies and previous statements having not been brought to the notice of the witnesses so that they could render the explanation, the same cannot be now used by the appellants in view of the law laid down in the decision reported as 1998 (3) SCC 561 State of U.P. vs.Nahar Singh (dead) & Ors. wherein the Supreme Court reiterating the principle of law laid down in (1893) 6 The Reports 67 Browne vs.Dunn, held:

“14. The oft quoted observation of Lord Herschell, L.C. in Browne v. Dunn, (1893) 6 The Reports 67 clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a

witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing."

11. Learned counsels for the appellants have vehemently contended that the entire prosecution case is belied by the arrest memos of Seikh Isarat and Seikh Mujiba Ex.PW-2/H and Ex.PW-2/I respectively wherein their time of arrest has been shown as 6.00 PM and 6.30 PM respectively. It is thus contended that from the time noted in the arrest memo, the entire prosecution case that immediately after the incident both Seikh Isarat and Seikh Mujiba were apprehended in the park and recoveries made from them is belied. No doubt the arrest memos notes the time as 6.00 PM and 6.30 PM as noted above, however SI Arun Kumar who appeared as PW-6 stated that at 12.45 AM he received the information where after he along with Const.Ashok reached the spot and Const.Ashok came back with the rukka at about 3.00 PM at the spot. However, the rukka was received and entry in this regard was made in DD No.5A at 2.35 AM. It is thus apparent that the witnesses have confused in their statement and the memos with regard to whether the time was ante meridiem or post meridiem. However, Const.Ashok PW-5 has clarified the facts and stated that at about 5.00/5.30 AM they reached near the drain of Sector 24,25 divider where they met

secret informer and from there they went to the park where complainant Bimlesh Kumar identified both accused persons who were involved in the incident. According to Const.Ashok and SI Arun Kumar the entire investigation took place in the wee hours of the morning of December 22, 2012 and thus the timing of arrest noted as 6.00 PM and 6.30 PM and as deposed to by SI Arun Kumar and noted in the arrest memos is an error which is required to be ignored.

12. The recoveries have been made immediately and at that hour it was not expected that public persons could be associated. Merely because Upender Vaman has not been examined, the same would not belie the testimony of Bimlesh Kumar, the complainant. Even ignoring the testimony of PW-1 and PW-3 Keshav Murari and Brahmchari Nand who have improved in their deposition in the Court that they saw the appellants as they peeped through the window, the conviction of the appellants can safely be based on the testimony of the complainant Bimlesh Kumar and the Police witnesses who made search and arrested the accused immediately thereafter from a park nearby.

13. As per complainant Bimlesh Kumar Jha the two persons who kept the knife on his neck, i.e. used the knife, were the appellants present in Court. There is no confrontation to the witness with the previous statement. Thus, both the appellants having used the knife they are liable to be convicted for the offence punishable under Section 397 as well.

14. I find no error in the impugned judgment of conviction and order on sentence. Appeals are dismissed. Appellants will undergo the remaining sentence.

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

JUNE 02, 2016
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