

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

Judgment Reserved on: May 30, 2016

% *Judgment Delivered on: June 03, 2016*

+ **CRL.A. 675/2015**

RAHUL GURUNG

..... Appellant

Represented by: Mr.Divyanshu Pratap, Advocate.

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Represented by: Ms.Rajni Gupta, APP for the
State with ASI Mahabir Singh, PS
Moti Nagar, Delhi and SI
Rajender Kumar, PS Traffic and
SI Ajit Singh PS Janak Puri.

+ **CRL.A. 767/2015**

MOHD. KAUSAR

..... Appellant

Represented by: Mr.Divyanshu Pratap, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Ms.Rajni Gupta, APP for the
State with ASI Mahabir Singh, PS
Moti Nagar, Delhi and SI
Rajender Kumar, PS Traffic and
SI Ajit Singh PS Janak Puri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Rahul Gurung and Mohd. Kausar have been convicted for offences punishable under Section 392/34 IPC besides Rahul Gurung being convicted also for offence punishable under Section 411 IPC and Mohd. Kausar for offence punishable under Section 397 IPC vide the impugned judgment dated May 06, 2015. Vide order on sentence dated May 16, 2015 Mohd.

Kausar has been directed to undergo rigorous imprisonment for 7 years and fine of ₹5000/- for offence punishable under Section 397 IPC. Both Rahul Gurung and Mohd. Kausar have also been directed to undergo rigorous imprisonment for 3 years and fine of ₹5000/- each for offence punishable under Section 392/34 IPC besides Rahul Gurung also directed to undergo rigorous imprisonment for 2 years and fine of ₹1000/- for offence punishable under Section 411 IPC. It has also been directed that half of the amount of the total fine imposed be paid to the complainant.

2. Process of law was set into motion on receipt of DD No.20A recorded at 1.10 pm on July 12, 2012 at PS Moti Nagar informing that a robbery had taken place at House No.E-197, Karam Pura. ASI Rajinder Kumar reached the spot and recorded the statement of Ms. Sujata Raj who stated that on July 12, 2012 when her husband had gone for work and her two sons Meet Raj and Lakshay Raj and her nephew Azad had gone to school, she was all alone at home. At about 12.30 pm, one boy aged 22-23 years, medium built, wheatish complexion rang the door bell. On her asking, he informed that there was a courier in the name of her husband Tilak Raj. She opened the door. The boy asked for water. She went to the kitchen to get bottle and glass and when she came back, she found the boy in the drawing room. She asked the boy as to how he entered inside and should go outside. In the meantime, one more boy entered the house. The second boy who was aged about 27-28 years, dark complexion, stout built stated that he would sit there only and before she could say anything, that boy gagged her mouth and kept a knife on her neck and threatened her not to make noise. In the meantime, two more accomplices entered the house, one of them had pistol who was tall, fair complexion and stout built. He kept the pistol on her ear and the

fourth boy who was around 27-28 years of age, wheatish complexion and medium built sealed her mouth with packing tape and tied her hands at the back side with a string. Those boys asked her about cash and jewellery on which she pointed out towards the bedroom. They took her to the bedroom. The boy having pistol continued to hold her. Remaining three boys searched the almirahs and took out all gold and silver jewellery and around ₹15-20 thousands in cash. They put them in one black colour bag which bag was brought by the fourth boy. All the four boys kept asking about cash and kept searching. After about half an hour, they went away, however they took out the SIM card of her mobile phone, tied her with a saree and put her in the bathroom. With great difficulty, she opened her hand and desealed her mouth by a scissor. From the neighbourhood, she informed her husband about the incident, who in turn informed the police. Thus, she sought action against the boys. On the statement of Sujata Raj, FIR No.148/2012 under Sections 392/397/34 IPC was registered at PS Moti Nagar.

3. On August 11, 2012 Rahul Gurung was arrested in another case being FIR No.265/2012 under Sections 379/411/34 IPC at PS Tilak Nagar wherein with regard to recovery of one ring and a pair of ear tops, he disclosed about the involvement in the present case. Thus, Rahul Gurung was formally arrested in FIR No. 148/2012 on August 12, 2012 and when produced, he refused for test identification parade (TIP). In the TIP, the complainant identified the jewellery. Later on August 24, 2012, Mohd. Kausar was arrested in FIR No.209/2012 under Section 25 Arms Act at PS Janak Puri where he disclosed about the above-noted incident and got recovered the country made pistol. His production warrants were issued by the competent court and on August 31, 2012 he was formally arrested in FIR

No.148/2012.

4. During the course of trial, Sujata Raj appeared as PW-2 and deposed in sync with her statement on the basis of which FIR was recorded. Rest of the witnesses also supported the prosecution case and finally after recording the statements under Section 313 Cr.PC and their defence evidence both Rahul Gurung and Mohd. Kausar were convicted as above.

5. Learned counsel for the appellants contends that though it is the claim of the prosecution that Rahul Gurung was arrested on August 11, 2012 however his sister Ms. Sonica Gurung DW-1 lodged a complaint with 100 number on 6th August, 2012 wanting to know about the whereabouts of his brother at 8.21 PM vide DD No.53A. Thus, arrest of Rahul Gurung was wrongly shown. Therefore, the TIP was rightly refused by Rahul Gurung. Though on the search, a lady's ring and pair of tops were allegedly recovered from him, however, the same were not mentioned in the personal search memo. The procedure required to be followed for identification of the jewellery was not adhered to. The ring and tops were common jewellery items easily available. Hence the identification without giving specific description of design and weight cannot be relied upon. Though it is claimed that Rahul Gurung was of dark complexion, average body built-up and aged 22-23 years however Rahul Gurung is boy with fair complexion and thus, he does not match with the description given by the complainant. Though portraits of accused persons were prepared, however they were not filed and relied upon during trial. Chance prints were taken from the spot however a report thereof has not been filed. Thus, an adverse inference is required to be drawn against the prosecution. The complainant though states that she was not shown Rahul Gurung at PS Janak Puri but she states

that his photograph was shown, thus TIP proceedings were rightly refused by Rahul Gurung.

6. Mohd. Kausar who was initially arrested in FIR No.209/2012 under Section 25 Arms Act PS Janak Puri has been acquitted in the said case. Thus, the very basis of arrest and recovery of pistol is required to be discarded. The appellant could not have disclosed FIR number in the disclosure statement however the same find mentioned in the disclosure statement.

7. Learned APP for the State contends that even assuming there are some defects in the investigation, the same does not discredit the credible statement of the complainant. No suggestion has been given for false implication. There was no previous enmity of the complainant with the appellants. During TIP where similar jewellery was mixed, pair of tops and ring of the complainant were identified. The seizure memo notes recovery of pair of tops and ring which were recovered immediately and after the arrest, search memo was prepared when recovery of ₹170/- was made. The initial search was under Section 102 Cr.PC whereas pursuant to the arrest, personal search was under Section 51 Cr.PC.

8. Sujata Raj deposed in sync with her statement on the basis of which FIR was registered. She pointed out towards Rahul Gurung to be the person who came as a courier boy and Mohd. Kausar as the person who was carrying pistol in his hand. In cross-examination, she reiterated that first of all Rahul Gurung came inside and thereafter Mohd. Kausar. She stated that after the incident, she had seen Mohd. Kausar at the police station where she was called, it may be police station Janakpuri and she was not called for judicial TIP of the accused persons. She explained the time taken in untying

herself whereafter she went to the neighbour's house and reiterated that one boy of the boys was standing with her by pointing a pistol on her head and other boys were searching the house and almirahs.

9. Smt. Kavita, PW-3 neighbour has corroborated the version of Sujata Raj and stated that she came to her house on July 12, 2012. She was in a perplexed condition, was weeping and told her "chori ho gai". Sujata also stated to her that they were four persons.

10. Rahul Gurung was arrested in FIR No.265/2012 PS Tilak Nagar on 11th August, 2012 and when produced on August 12, 2012, no police custody remand was taken and he was formerly arrested in this case whereafter straightway he was sent to judicial custody. He remained in judicial custody till August 17, 2012 when he was produced in Court. Information with regard to arrest of Rahul Gurung was given to PS Moti Nagar vide DD No.11B exhibited as Ex.PW11/A on August 12, 2012 at 2.00 am in the night and on the same date at 2.00 PM he was produced in Court No.136 and the investigating officer of this case was asked to report in the Court itself. On August 12, 2012 he was sent to judicial custody and an application was moved for his TIP for which he was produced on August 17, 2012 in muffled face when he refused to undergo TIP. The plea taken by Rahul Gurung vide Ex.PW-17/B was that he had been shown to many persons by the police since he was arrested on August 06, 2012. No suggestion was given on behalf of Rahul Gurung to Sujata Raj, PW-2 that he was shown to her in the police station. The only suggestion which was denied was that she identified the accused persons at the instance of police. Though Sonika Gurung states that she lodged a complaint on 100 number in the month of September, 2012 however neither the date nor the particulars

of the information nor the copy thereof has been placed on record. In cross-examination she admitted that on August 11, 2012 she was informed by the police on her mobile with regard to arrest of his brother.

11. As regards identification of Mohd. Kausar, he was arrested in FIR No.209/2012 under Section 25 Arms Act PS Janak Puri. On August 27, 2012, an application for production warrants was filed by ASI Rajender Singh PW-22 for Mohd. Kausar to be produced in the above noted case whereafter he was produced on August 31, 2012 in muffled face and was formally arrested in the above noted case. Application for TIP was moved on the same date but Mohd. Kausar refused to participate in the TIP proceedings on the ground that his photographs have already been taken by the police in the police station. No suggestion has been given to ASI Rajender Kumar PW-22 investigating officer that he had shown the photographs of Mohd. Kausar before he refused the TIP or that any of his photographs were taken. Merely because Mohd. Kausar has been acquitted in FIR No.209/2012 PS Janak Puri under Section 27 Arms Act would not belie the version of the complainant in the present case.

12. TIP of jewellery items has been conducted by Shri Harvinder Singh learned Metropolitan Magistrate PW-17 who stated that similar articles were mixed and Sujata Raj identified her ear tops and ring. No cross-examination of this witness has been conducted and thus the TIP proceedings of the jewellery cannot be assailed. The contention that portraits were prepared but not exhibited and chance prints lifted but report was not exhibited deserves to be rejected for the reason pursuant to the arrest, accused persons have been duly identified and even if sketches have not been placed on judicial file, the same would not belie the version of the complainant. Even

accepting that chance prints lifted did not match with that of the appellants, the same does not rule out that the accused persons did not commit the offence though vice-versa if the chance prints found were matched with the appellants, the same would have clearly proved that appellants were involved in the case.

13. For the discussion aforesaid, I find no merit in the present appeals. The same are dismissed.

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

15. TCR be returned.

(MUKTA GUPTA)
JUDGE

JUNE 03, 2016
‘v mittal’