

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

Judgment Reserved on: June 01, 2016

% *Judgment Delivered on: June 03, 2016*

+ **CRL.A. 901/2015**

SRI RAM @ JAIRAM

..... Appellant

Represented by: Mr.A.Madhukar and Mr.Krish
Kalra, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr.Ravi Nayak, APP for the
State with SI Zile Singh(Retd.),
PS Gandhi Nagar.

+ **CRL.A. 805/2015**

MANOJ VERMA

..... Appellant

Represented by: Mr.J.M.Akbar, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr.Ravi Nayak, APP for the
State with SI Zile Singh(Retd.),
PS Gandhi Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Vide impugned judgment dated July 07, 2015 Sri Ram @ Jairam has been convicted for the offence punishable under Section 392/34 IPC whereas Manoj Verma has been convicted for THE offence punishable under Section 411 IPC. The other accused arrested in the case, that is, Manoj @ Appu was acquitted and no appeal has been preferred by the State in this regard. Vide order on sentence dated July 09, 2015 Sri Ram @

Jairam has been awarded rigorous imprisonment for a period of four years and a fine of ₹5,000/- in default whereof to undergo simple imprisonment for a period of six months whereas Manoj Verma was directed to undergo rigorous imprisonment for a period of two years with a fine of ₹5,000/- in default whereof to undergo simple imprisonment for a period of six months.

2. Challenging the conviction learned counsel for Sriram contends that the appellant has been convicted solely on the testimony of the so called eye witnesses. There is no recovery whatsoever either from Sri Ram or at his instance. Co-accused Manoj @ Appu, at whose instance the gold chain and pair of tops were recovered, has been acquitted. In view of the acquittal of Manoj @ Appu, Sri Ram could not have been convicted for offence punishable under Sections 392/34 IPC as per the decision of the Supreme Court reported as 1994 SCC (Cri) 1422 Malkhan Singh vs. State of Haryana. The testimony of the four alleged eye witnesses is not trustworthy and is unreliable. All four of them have narrated different version of the commission of offence and the role assigned to Sri Ram. There are material improvements and contradictions in the testimony of the witnesses. Though it is the case of the prosecution that Ram Kumar, PW-5 identified Sri Ram in the Test Identification Parade (TIP) however, the original Test Identification Parade proceedings were lost and pursuant to the order of the District and Sessions Judge, proceedings were reconstructed. Despite record of the TIP proceedings being reconstructed, original signatures of the participants of the test identification parade, Sri Ram and Ram Kumar PW-5 and the learned Metropolitan Magistrate are available on the document. Further the photocopy of this reconstructed test identification parade proceedings shows tampering of the record as the same does not contain the endorsement by

Ram Kumar that he has identified Sri Ram in the proceedings. There is no order sheet reflecting as to how and when the original test identification proceedings were brought back on record. Thus the test identification parade cannot be relied upon. Sri Ram was shown to the witnesses by the police officials as admitted by PW-5 Ram Kumar who stated that after Sri Ram was arrested in FIR No.33/2010 of PS Sunlight Colony under Section 25 Arms Act, he was called to see Sri Ram on March 19, 2010. Thus the TIP proceedings even if relied upon are meaningless. Entire investigation appears to have been done in a clandestine manner by the police officials of Crime Branch. Though chance prints were taken but the same were not sent to FSL. In any case, no report thereof has been placed on record. Only Ram Kumar, PW-5 states that 200 gram of gold and ₹1.50 lakhs were looted which were not recovered. The worker who untied the family members has not been examined in the Court. Though Archana Gaikwad, PW-2 and Shivangi, PW-3 deposed about a ring and a pair of tops of Archana and pair of gold ear ring and Mangalsutra of Shivangi being looted however, no description, weight etc. of the properties were given. Though the pair of tops and ring allegedly recovered belonged to Archana Gaikwad, but were identified by Ram Kumar.

3. Learned counsel for Manoj Verma contends that though the alleged robbery took place on February 08, 2009 however two accused were arrested on March 19, 2010. It is highly unbelievable that a jeweller will keep stolen jewellery with him and that too for more than one year. The recovery from the shop of Manoj Verma was fabricated. No public witness was associated with the recovery. Manoj Verma was apprehended by Crime Branch officials at around 3.30/4.00 PM on March 19, 2010 in which regard

a PCR call was made. Thus the arrest of Manoj Verma shown at 9'O clock on March 19, 2010 is falsified. Further Manoj @ Appu, at whose instance the recovery has been made has been acquitted. In view thereof Manoj Verma could not be convicted for offence punishable under Section 411 IPC.

4. Learned APP for the State submits that there are no contradictions in the testimonies of Archana Gaikwad PW-2, Shivangi PW-3, Sachin PW-4 and Ram Kumar PW-5, eye witnesses of the case. Since they were present on separate floors they have deposed as to what transpired in their presence. Sri Ram has been identified in TIP proceedings, which were exhibited by the learned Metropolitan Magistrate PW-6 Smt.Sunena Sharma, the then learned Metropolitan Magistrate. Officers of Crime Branch PW-15 ASI Ragender and Constable Vikal PW-9 deposed how they arrested Sri Ram and deposed about the further recoveries made. There being ample evidence on record and Sri Ram having been identified by the witnesses and the recovery of a pair of tops and ring of Archana Gaikwad from Manoj Verma the learned Trial Court rightly convicted the appellants for the offences noted above.

5. The case of the prosecution in nutshell is that on February 08, 2009 DD No.20A was received at PS Gandhi Nagar whereupon SI Puran Mal, PW-10 went to the spot and recorded the statement of Ram Kumar Gaikwad who stated that he was running a goldsmith shop from the first floor of his residential house. At about 7.15 PM on February 08, 2009 while he and his workers Sachin and Prashant were present in the Shop, three boys came and offered to sell a ring. When he declined the same on the ground that he does not purchase jewellery from strangers, one of the boys having knife in his hand, the second having two country made pistols and the third having a bag

started beating him. He and his workers were made to sit and 200 grams of gold and ₹1.50 lakhs were looted. The three of them closed the door of the shop from outside. One boy kept a watch at the door from outside whereas two of them went to the second floor which was being used as their residence. There the two boys robbed a gold chain, two rings and a pair of tops from his wife Archana Gaikwad and a gold Mangalsutra and a pair of gold ear tops from his sister-in-law Shivangi. Thus FIR No.32/2009 was registered at PS Gandhi Nagar for offences punishable under Sections 392/397/34 IPC.

6. On March 20, 2010 HC Ragender Singh, SOS Crime Branch, Sunlight Colony telephonically informed about arrest of Sri Ram, Manoj @ Appu and Manoj Verma in case FIR No.33/2010 under Section 25 Arms Act wherein they made a disclosure with regard to their involvement in the present case. Thus three of them were arrested in the present case. Pursuant to the production warrants, Sri Ram was identified in test identification proceedings by Ram Kumar whereas Manoj @ Appu refused to take part in the test identification parade.

7. Since the conviction of Sri Ram hinges on the testimony of four witnesses, that is, PW-2 to PW-5 it would be relevant to note their testimony. Archana Gaikwad, PW-2 deposed that on February 08, 2009 at about 7.30 PM when she was present on the second floor and cooking, two persons entered her house. Both of them were carrying knives in their hands. They threatened them not to raise alarm and hand over all the valuables pursuant to which two gold karas, one gold chain and a pair of ear ring worn by her and a gold mangalsutra and a pair of ear ring worn by Shivangi were taken by those person. Besides few other jewellery articles

lying in the briefcase were also taken. She identified Sri Ram as one of the two persons who had come inside the house. She further stated that initially they were reluctant to hand over the jewellery to them, but Sri Ram caught hold of her four year old son, she snatched her son from his hands and told him to take away whatever he wanted. According to her Sri Ram tied her and Shivangi with sarees and when he was doing so Manoj @ Appu said '*Kaam ho gaya, chalo*'. While leaving Sri Ram threatened them not to raise alarm. In cross-examination this witness admitted that they do not deal in the jewellery but keep solid gold which is stamped. She was confronted with the previous statement where it was not recorded that both of them were carrying knives and threatened them not to raise alarm and also with the portion where it was not recorded that besides the jewellery worn by Archana and Shivangi, they took away other gold articles, that is, two-three gold chain, six gold lockets, 8-10 small children rings lying in the brief case. She was also confronted with her previous statement wherein it was not recorded that Sri Ram caught hold of her son whom she snatched and told him to take away whatever he wanted. She was also confronted with the previous statement wherein it was not stated that the accused tied her and Shivangi with Sarees, at the main door the other accused said '*kaam ho gaya, chalo*' and while leaving threatened them.

8. Shivangi, PW-3 deposed in sync with what her sister-in-law Archana Gaikwad deposed however, she stated that out of the two persons who entered the house, one was carrying handbag and the other was carrying katta (country made pistol). She identified Sri Ram to be one of them and that Manoj @ Appu was not accompanying Sri Ram. She deposed in sync with what Archana deposed with regard to taking away of jewellery articles

and that from the briefcase the two boys took away some bangles, one gold set, one chain and three rings. In cross-examination she stated that the ground floor and the first floor of the house were not visible from the second floor and the faces of the accused persons were not covered. She was confronted with the portions of her examination in chief wherein she improved by saying that Sri Ram caught hold of Avishkar, five year old son of Archana and put katta on his head and asked them to hand over mobile phone and other valuables and that Archana was wearing two gold karas, one chain, a gold ear ring and the jewellery items were taken away. She admitted that the design, weight of various jewellery articles was not given.

9. Sachin PW-4 deposed that he was working at the shop of Ram Kumar which was situated on the first floor of the building. On February 08, 2009 at about 7.15 PM he along with co-worker Prashant and the owner was present at the shop when three persons came inside. One of them wanted to sell a ring to Ram Kumar which he refused to purchase stating that he does not purchase jewellery from unknown persons. According to him, one person went to the other side of the counter where Ram Kumar was sitting and started beating him. One person was carrying two country made pistols, one each in his both hands and one was carrying knife. He identified Sri Ram as the same person who started beating the owner Ram Kumar but stated that Manoj @ Appu was not amongst the three persons. According to him Sri Ram was not the person who was carrying two country made pistols or the knife but Sri Ram collected the gold lying in the counter and put it in his pocket. Thereafter, Sri Ram and his other associates went upstairs and returned within ten minutes. According to him Sri Ram took out the cord of the telephone and tied both hands of Ram Kumar and thereafter with his

associates went to the second floor. In cross-examination he was confronted with the improvements made and he stated that the culprit who was holding the gun in his hand was not present in the Court. He also admitted that he did not know what was taken out by the assailants from the almirah nor did he know the articles taken from the counter and the house.

10. Ram Kumar, PW-5 maker of the FIR deposed in sync with his statement on the basis of which FIR was registered. He also stated that after more than a year he went to Tihar Jail where he identified Sri Ram in TIP proceedings. He also identified the case property comprised of gold chain and the tops in the TIP. He however, failed to identify Manoj @ Appu. He was also confronted with the major portions of his examination in chief wherein he stated that one of the assailants took out a knife from his jacket and put on his face, the threats given by the assailants, that the other assailant took out cord of the telephone and tied his hands and mouth with telephone wire and the third boy closed the door after leaving the shop.

11. In the present case TIP of Sri Ram, Manoj @ Appu and the case property was conducted by Smt.Sunena Sharma, PW-6, the then learned Metropolitan Magistrate. When she was examined on September 23, 2010 though the TIP proceeding in respect of the case property was on record however, the TIP proceedings of Sri Ram and Manoj @ Appu were not on record. Later pursuant to the order of the District Judge, the TIP proceedings were reconstructed. However, on record there are original TIP proceedings purportedly signed by Smt.Sunena Sharma on March 25, 2010. Even in the absence of order sheets noting that how these original proceedings were retrieved, one thing which is very glaring is that TIP proceedings were dated March 25, 2010 duly signed by Ram Kumar stating

that '*mai witness ko pehchanta hoon*'. On March 27, 2010 an application Ex.PW-6/H was filed by the Investigating officer asking for the papers of TIP proceedings conducted on March 25, 2010. The copy so collected by the Investigating Officer at running pages 27 and 29 of the Trial Court record do not note the endorsement '*Mai witness ko pehchanta hoon*' though signatures of Ram are present. One fails to understand that at what stage this endorsement was got done from Ram in the TIP proceedings. The authenticity of the TIP proceedings is thus doubtful and the same cannot be relied upon.

12. Indubitably, if the witnesses have had fair time to see the accused, even in the absence of test identification parade, identification of the accused in the Court is substantive evidence and if reliable, conviction can be based thereon. However, as noted above though each of the witnesses identified Sri Ram, as per Archana Gaikwad, Sri Ram and the other accused were carrying knives in their hands. As per Shivangi two persons entered their house, one was carrying a handbag and the other country made pistol. According to her Sri Ram caught hold of Avishkar, five year old son of Archana and put a katta on his head. As per Sachin, one person came to the counter and wanted to sell a ring which Ram Kumar refused to accept stating that he does not purchase jewellery from unknown person, that person went other side of the counter where Ram was sitting and started beating him whereas out of the two other assailants one was carrying two country made pistols one each in both hands and the other one was carrying a knife. According to Sachin, Sri Ram was the person who started beating Ram Kumar. Sri Ram collected gold lying on the counter and put in his pocket. Thus according to Sachin, Sri Ram was neither carrying knife nor a

pistol on two points. As per Ram Kumar when he refused to purchase the gold ring from Sri Ram he took out a knife from his pocket and put on his face. He does not say that other two persons were carrying any weapon or not. Thus the version of all the four witnesses is different as to the weapon of offence carried by Sri Ram. Therefore, it will be unsafe to rely upon their testimony to convict Sri Ram for offence punishable under Section 392/34 IPC.

13. As regards Manoj, according to ASI Ragender PW-15 and Constable Vikal PW-9 from the Crime Branch, Sunlight Colony that on March 19, 2010 after at about 4.15 PM they apprehended two boys, that is, Sri Ram and Manoj @ Appu whereafter Manoj @ Appu made a disclosure which was recorded and he led them to the shop of Shiv Jewellers, Pradhan Wali Gali and got recovered one gold chain and two tops. According to PW-15 and PW-9, Manoj Verma was arrested at 9.00 PM.

14. Manoj Verma led defence evidence and examined Rakesh Kumar, a neighbour who was also running a gold jewellery shop as DW-3W-1. Rakesh Kumar deposed that at about 3.30/4.00 PM four persons in civil dress came to the shop of Manoj Verma and took him away in which regard he made a PCR call. PCR call was placed on record which was recorded at 5.10 PM informing that Manoj Verma has been lifted by four men in civil dress. This belies the version of ASI Ragender and Constable Vikal that at 4.15 on the pointing out of secret information they apprehended Sri Ram and Manoj @ Appu after recording the disclosure statement and sending the ruqqa etc, Manoj led them to the shop of Shiv Jewellers, Pradhan Wali Gali from where they got recovered one chain and two tops and after completing the proceedings at the shop of Manoj Verma, he was arrested at his shop.

15. Thus granting the benefit of doubt to both Sri Ram and Manoj Verma, they are acquitted of the charges noted above. The impugned judgment of conviction and order on sentence are set aside. The sentence of Manoj Verma was suspended by this Court vide order dated July 15, 2015 pending hearing of the appeal. Bail bond and the surety bond of Manoj Verma are discharged. Sri Ram @ Jairam who is in custody be released forthwith, if not required in any other case.

16. Appeals are disposed of.

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

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

JUNE 03, 2016
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