

\$~R-11A to R-11C

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

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Date of Decision : October 23, 2017

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CRL.A. 99/2002

ASHOK AHSWAL

..... Appellant

Through: Mr.Mukesh Kalia,
Mr.Sudarshan Rajan, Mr.Arjun
Gadhoke & Ms.Chand Gera,
Advs.

versus

STATE OF DELHI

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Varun PS Hauz
Khas

AND

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CRL.A. 105/2002

RAJINDER KUMAR

..... Appellant

Through: Mr.Vikas Jain, Advocate.

versus

STATE OF DELHI

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Varun PS Hauz
Khas

AND

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CRL.A.852/2002

SANJAY

..... Appellant

Through: None.

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Varun PS Hauz
Khas

PRATIBHA RANI, J. (ORAL)

1. By this common judgment, the above three appeals which have been filed by the appellants namely Ashok Ahswal, Rajinder Kumar and Sanjay challenging the judgment dated 24th January, 2002 and order on sentence dated 25th January, 2002 passed in Sessions Case No.16/96, shall be disposed of. Vide impugned judgment and order on sentence, the appellants have been convicted and sentenced as under as under:-

Appellant Ashok Ahswal

- (i) Under Section 394/34 IPC R.I. for a period of seven years with fine of ₹ 500/- and in default, to undergo SI for one month
- (ii) Under Section 323/34 IPC R.I. for a period of six months
- (iii) Under Section 25 of Arms Act R.I. for a period of one year

Appellant Rajinder Kumar

- (i) Under Section 394/34 IPC R.I. for a period of seven years with fine of ₹ 500/- and in default, to undergo SI for one month
- (ii) Under Section 323/34 IPC R.I. for a period of six months

Appellant Sanjay

- (i) Under Section 394/34 IPC R.I. for a period of seven years with fine of ₹ 500/- and in default, to undergo SI for one month

- (ii) Under Section 323/34 R.I. for a period of six months
IPC
- (iii) Under Section 25 of R.I. for a period of one year
Arms Act

All the sentenced were ordered to run concurrently.

2. Briefly stating the prosecution case (as reflected in the charge-sheet) is that case FIR No.53/93 dated 28th January, 1993 was recorded at PS Hauz Khas for the offences punishable under Sections 394/397/308/120-B IPC & Section 27 of Arms Act on the complaint Ex.PW-1/A made by the complainant Anjali Gupta to the effect that she along with her family was residing on the first floor at Hauz Khas (House number withheld). On 28th January, 1993 i.e. the date of occurrence her father-in-law Sh.P.C.Gupta had gone to Malviya Nagar in connection with the renovation of the house and her mother-in-law Mrs.P.C.Gupta was present at the ground floor.

3. The complainant was taking bath in the bathroom at the first floor when at about 1.00 p.m. she noticed from the window of the bathroom that somebody wearing blue dress was going towards bedroom. She also heard the noise of '*khat-khat*' coming from the side of the bathroom and thought that some family members must be there. After taking bath, when she opened the door of the bathroom to come out, she was pushed in by three young persons in the age group of 20-25 years, whose names were revealed on enquiry as Sanjay, s/o Late Sh.Chintamani Lakhera, R/o Block-7-2A Kali Bari, Birla Mandir who was armed with long open knife, Rajinder Kumar, S/o Sh. Shyam Lal

R/o Block No.8/3B, P&T Quarters, Kali Bari who was armed with country made fire arms and Ashok Ashwal, S/o Sh.Vir Singh, R/o Infront of Karnail Singh Stadium, Pahar Ganj Railway Colony No. 1013 who was armed with *khukri*. They also hit her head on the wall. When she tried to raise an alarm accused Rajinder Kumar put his hand on her mouth. When she removed his hand and shouted, Rajinder Kumar hit on her head with a *katta* and accused Ashok Ahswal hit on her head with a *khukri*. The third accused Sanjay instructed that if she raised alarm, she would be shot and any other person who may happen to come there, should also be shot. In the meantime her mother-in-law Mrs.P.C.Gupta and their tenant Anita Jain, who was residing at the second floor, came there. On sensing their arrival and seeing them in the gallery, all the three accused persons pushed them and started running. In the process, the *khukri* of Ashok Ahswal and the rope as well the cloth with which they tried to tie her in the bathroom, were also left there. She was bleeding from her head and forehead. She alongwith her mother-in-law and tenant Anita Jain chased all the three accused persons shouting that they had hit her. While the three accused persons were running down, accused Rajinder Kumar was carrying a blue colour bag on his shoulder which contained the items stolen from her house. In the meanwhile, her father-in-law Mr.P.C.Gupta, servant Shambhu Kumar Jha and servant Vijay also reached in front of the house. She informed her father-in-law about being hit by those persons and asked him to apprehend them. In the meantime, Ramu, the servant of the tenant also chased them and they overpowered two persons after a lot of scuffle. Accused Sanjay who

was holding open knife in his hand was caught by her father-in-law and servants Shambhu and Vijay, while accused Rajinder Kumar, who was carrying the loaded 'katta' (fire arms), was apprehended by the servant Ramu, neighbour Naresh Khara and her husband Rajeev. The bag carried by the accused Rajinder Kumar, was found containing her brown colour jewellery box. On checking the same it was found containing one pair of pearl bangle (*kade*), two silver key chains of gold colour, two silver coins, one pearl necklace with gold pendent and one nose pin. Accused Ashok Ahswal managed to escape. Public persons gathered there and gave beatings to Rajinder and Sanjay. Somebody informed the police and she was removed to AIIMS by the police and discharged on the same day.

4. Upon completion of investigation charge-sheet was filed and five accused persons namely Rajinder Kumar, Sanjay, Deepak Kumar, Ashok Ahswal and Irshad @ Raju were charged for committing the offence punishable under Sections 394/397/308/120-B IPC & Section 27 of Arms Act.

5. In order to establish its case the prosecution examined 11 witnesses. All the accused persons in their statement under Section 313 Cr.P.C. denied their involvement in the crime and pleaded that Irshad @ Raju who was earlier employed with brother of the complainant and thereafter with her husband, had gone to demand their dues and thereafter they have been falsely implicated by the complainant and her family.

6. Learned Trial Court after considering the testimony of the witnesses i.e. complainant, her father-in-law and mother-in-law

convicted all the appellants for committing the offence punishable under Sections 394/323/34 IPC and accused Sanjay and Ashok Ahswal were also convicted for the offence punishable under Section 25 of Arms Act. They were sentenced in the manner as aforesaid. Accused Deepak and Irshad @ Raju have been acquitted of all the charges.

7. I have heard learned counsel for the appellants as well as learned APP for the State.

8. Learned counsel for the appellants have submitted that professionally all the appellants are well settled in their life and have no criminal antecedents. Learned counsel for the appellants submitted that it has been admitted by the prosecution witnesses that Irshad was an employee of the brother of the complainant and thereafter became the employee of the husband of the complainant. Despite that, this fact has been withheld by the complainant and her family members. Learned counsel for the appellants had also contended that the complainant has admitted that immediately after the arrival of the police she was taken to AIIMS and by the time she returned from the hospital all the accused persons had already been taken away to the police station. In that circumstance, she could not have given the names with complete address of all the accused persons. This raises a serious doubt about the truthfulness of her version. Learned counsel for the appellants have also pointed out the contradictions appearing in the testimony of the material prosecution witnesses especially on the aspect as to when and from where the bag containing the jewellery box was recovered and whether it was at the spot or it was recovered

subsequently from the drain. It has been contended that the independent public witnesses have not been examined. Further, who caused injuries to the accused persons has remained unexplained which is also not recorded in the FIR and shows that the accused persons have been given beatings by the police in connivance with the complainant and her family members and they have been falsely implicated in this case.

9. On behalf of the State, learned APP has contended that two of accused persons have been apprehended at the spot and the third person, namely, Ashok Ahswal was apprehended later and his name was also recorded in the FIR as mentioned by the complainant. There are no material contradictions in the testimony of the complainant, her father-in-law and husband on the issue as to how the accused persons have been apprehended from the spot.

10. With a view to appreciate the rival contentions, it is necessary to refer to the prosecution case as narrated by PW-1 Smt. Anjali Gupta – the complainant in her complaint Ex.PW1/A and whether her statement stands duly corroborated so as to prove the guilt of the appellants beyond reasonable doubt.

11. For the above purpose, it would be appropriate to refer to the sequence of events as stated in the complaint Ex.PW1/A filed by Smt.Anjali Gupta (PW-1), which also formed basis of registration of the FIR, as under:-

(i) Smt. Anjali Gupta – the complainant was taking bath in the first floor bathroom when she saw from the window of the bathroom some persons going to another room.

- (ii) When she was coming out of the bathroom, she was pushed back in the bathroom and all the three accused persons namely Sanjay, Rajinder Kumar and Ashok Aswal hit her head against the wall.
- (iii) Accused Rajinder attacked her with butt of '*katta*' (fire arm) and Ashok Aswal with a *khukhri* on her head.
- (iv) Accused Sanjay instructed the co-accused to shoot her if she again tried to raise alarm and also to shoot any other person who may reach there.
- (v) In the meantime, her mother-in-law Smt.P.C.Gupta and their tenant Smt.Anita Jain reached there and on seeing them, all the accused persons pushed them and were apprehended downstairs by her father-in-law Sh.P.C.Gupta, servant Shambhu and her husband Sh.Rajeev Gupta when she (complainant), her mother-in-law and their tenant raised alarm and she also informed that they have had her.
- (vi) Accused Sanjay alongwith long knife in his hand was apprehended by her father-in-law Sh.P.C.Gupta, servants Shambhu Kumar Jha and Vijay after a long scuffle.
- (vii) Accused Rajinder alongwith loaded '*katta*' was apprehended by servant Ramu, neighbour Sh.Naresh Khara and her husband Sh.Rajeev Gupta and he was also having a bag from which her jewellery box was recovered.
- (viii) The third persons i.e. accused Ashok Aswal managed to escape.
- (ix) Public persons gathered there and gave beatings to accused Rajinder Kumar and Sanjay.

(x) Somebody informed the police and PCR reached the spot and took her to AIIMS for treatment from where she was discharged after sometime.

12. When the complainant Smt.Anjali Gupta was examined as PW-1, she was questioned about the identity of the persons involved in the occurrence and she stated that the police informed her about the names of the persons involved. She also stated that she was immediately taken to AIIMS and was accompanied by her husband and father-in-law to the hospital. After half-an-hour when she returned from AIIMS, by that time, the police had already taken the persons who were apprehended to the police station. She also stated that when she made her complaint Ex.PW1/A, none of the accused were present there and she was informed about their names and addresses by the police.

13. A bare perusal of the testimony of PW-1 Smt. Anjay Gupta – the complainant, PW-2 Sh.Rajeev Gupta – her husband and PW-3 Sh.P.C.Gupta – her father-in-law reveals that there are material contradictions in their statement as to their time of arrival, manner in which the accused persons were apprehended and how their identities were established.

14. From the site plan (at page No.183 of the LCR) of the scene of crime, it can be seen that there was no window or ventilator in the bathroom facing towards the open space or room from where she could notice a person in blue dress passing from there. The tenant Smt.Anita Jain who was on the second floor, has not even cited as a witness to prove that she heard the screams of complainant on 2nd

floor and informed her mother-in-law at the ground floor and thereafter they came to first floor or saw the appellants confining the complainant in bathroom and running outside on seeing them. Smt. P.C.Gutpa – mother-in-law of the complainant has also not been cited as a witness or examined as to how she came to know about the occurrence going on at the first floor and how the tenant on the second floor communicated to her about something happening at the first floor.

15. Though as per statement of the complainant Smt.Anjali Gupta, any person who could have reached on the first floor was planned to be shot on arrival but despite the fact that all the accused persons were stated to be armed with deadly weapons like, long open knife, *khukhri*, loaded *katta*, neither the tenant Smt.Anita Jain nor her mother-in-law Smt P.C.Gupta who are stated to have reached the first floor bathroom, have suffered even a scratch. It has come on record that PW-2 Sh.Rajeev Gupta – husband of the complainant and PW-3 Sh.P.C.Gupta – father-in-law of the complainant managed to apprehend the accused persons after a long scuffle. Despite the fact that one of the accused was armed with a loaded '*katta*' and other was armed with a open long knife, none of them suffered even a scratch. On the contrary, accused Sanjay and Rajinder Kumar have suffered multiple injuries which have been attributed to beatings given by public. The Investigating Officer who happened to reach the spot soon after the occurrence did not see any public person giving beatings to appellants Sanjay and Rajinder Kumar.

16. DD No.9A recorded at 1.25 pm at PS Hauz Khas was about the quarrel and not about any robbery being committed by using deadly weapons.

17. As per statement of PW-1 Smt.Anjali Gupta – the complainant, by the time she came out of the bathroom, the accused persons had already taken away her jewellery box which was recovered from the bag carried by accused Rajinder. If the purpose of the accused persons was to commit theft/robbery, which they managed to commit in the absence of any family member being present at the first floor, any occasion to cause any injury to the lady who was taking bath in the bathroom as they had ample opportunities to escape after committing the robbery. The MLC of the complainant Smt.Anjali Gupta was prepared on 28th January, 1993 at 1.46 pm at AIIMS and the alleged history given by her is of assault. The nature of the injury has been opined to be simple by blunt object.

18. It is again surprising that DD No.9A was recorded at 1.25 pm which was assigned to SI Mukesh Kumar, within 21 minutes the police has not only reached the spot and taken stock of the situation but had also been able to manage to cover the distance from the spot to AIIMS so as to get her MLC prepared at 1.46 pm i.e. within 21 minutes of recording of DD No.9A. This casts a serious doubt about the truthfulness of the prosecution story.

19. It has already been noted that Smt.Anita Jain – the tenant on the second floor and the mother-in-law Smt.P.C.Gupta who was present at the ground floor at that time, have not been cited as witnesses. The two public witnesses cited in this case are Shambhu Kumar Jha and

Vijay, who were stated to be servants of the complainant's family but their address has been given as R-16, Ansal Chambers-I, R.S. Automobiles, Bhikaji Kama Place. Both of them remained unexamined as summons sent to these two witnesses at the above address were received with the report that no such person ever worked or resided at the above address. If they were working as servants with the complainant's family, their addresses, contact number and permanent address must be available with the complainant or her husband/father-in-law. But no effort was made to produce them which also created a serious doubt in the prosecution case. Not only that, even the neighbour Sh.Naresh Khara has also not been examined as a witness. Even the Investigating Officer SI Mukesh Kumar remained unexamined as a witness. The report of the Process Server on the summons of SI Mukesh Kumar (Investigating Officer) is to the effect that that he was declared proclaimed offender on 30th November, 1995 in case FIR No.159/1987 under Section 302 IPC, PS Vivek Vihar.

20. There are also serious contradictions in the testimony of PW-1, PW-2 & PW-3 as to from where the bag containing jewellery box of the complainant was recovered. While as per the complaint Ex.PW1/A, jewellery box was recovered from appellant Rajinder Kumar who was carrying loaded 'katta' and was apprehended by PW-2 Sh.Rajeev Gupta – husband of the complainant, servant Ramu and Naresh Khara (neighbour).

21. As per PW-2 Sh.Rajeev Gupta (husband of PW-1), the person who had run away (Appellant Ashok Aswal) had thrown the jewellery

box in a drain near one of their neighbour's house which was recovered by the police. PW-3 Sh.P.C.Gupta (father of PW-2) stated that one person who was running, threw the jewellery box on the road and managed to escape in a three wheeler scooter. This box was handed over by his neighbour to him after picking it up from road. Thus, there are material contradictions on this issue. It is relevant to mention here that the recovery from the said jewellery box is not of any precious jewellery but of silver coins, silver key chains, pearl bangles etc. There are also material contradictions as to whether the father-in-law (PW-3) was present at that time on the ground floor or he returned from Malviya Nagar and by chance happened to reach at that time.

22. It is a case where there are material discrepancies in the statement of PW-1, Smt.Anjali Gupta, PW-2, Rajiv Gupta, her husband and PW-3, Sh.P.C.Gupta, her father-in-law on vital aspects. The most crucial witness in this case i.e. the tenant on the second floor, Smt.Anita Jain and the mother-in-law Smt. P.C.Gupta who was on the ground floor and stated to have reached there, have not even been cited as witnesses. The two persons apprehended from the spot i.e. Sanjay and Rajinder Kumar have been sent for medical examination late in the evening at 7.38 p.m. As per their MLC, accused Rajinder suffered CLW scalp 3 cm parieto occipital region, swelling around eyes, abrasion, 1X1 cm nose and abrasion left hand 2X3 cm and accused Sanjay suffered swelling around eyes and swelling base of nose. It remained unexplained that how Smt.Anjali Gupta who suffered a simply injury by a blunt object was taken to

AIIMS by the police within 21 minutes of recording the DD entry, reaching the spot, taking her from there and then travelling upto AIIMS but two accused persons who were also handed over to the police and were taken away from the spot before Smt.Anjali Gupta could return from AIIMS within half an hour, have been sent for medical examination at 7.38 p.m. This shows that the injury received by the two accused persons and attributed to the public persons were caused during the above period. The prosecution was duty bound to explain the injury received by the above two accused persons as well the inordinate delay in sending them for medical examination.

23. Though the investigation officer SI Mukesh Kumar has not been examined but statement of PW-7 SI S.P.Tomar has another story to tell. Contrary to the contents of DD No.9A recorded at 1.25 p.m. at PS Hauz Khas. He stated that the **call was received regarding a dacoity**. SI Mukesh Kumar reached the spot. He alongwith SHO and other police staff also reached the place of occurrence. But no DD entry of departure by SI S.P.Tomar and SHO for the scene of crime has been placed on record. As per statement of PW-7 SI S.P.Tomar, one bag was recovered from the possession of the accused Rajinder which was containing the jewellery items. This is in contradiction with the version of PW-2 Sh.Rajiv Gupta who stated that the bag was recovered from a drain near one of his neighbor's house and of PW-3, Sh.P.C.Gupta that the bag was found on the road by some neighbour. PW-7 also stated that he took the accused persons for medical examination and after that he handed over the accused persons to SI Mukesh Kumar. He left the spot at 4.00 p.m. along with accused

Sanjay and Rajinder for medical examination in AIIMS and reached there in 10-15 minutes and they travelled by TSR. It is not explained that if the spot was left at 4.00 p.m., where SI S.P.Tomar along with two accused persons was till 7.38 p.m, which is the time when MLCs of the two accused namely Rajinder and Sanjay were prepared.

24. Generally in the criminal cases discrepancies or contradictions in the evidence of witnesses are bound to occur for the reason that there is always a gap between the date of occurrence and the date of deposition before the Court. It is only when such contradictions are material and going to the root of the matter so as to create a suspicion in the mind of the Court about the truthfulness of the version of the witnesses to the occurrence or there is clear improvement in their deposition, it is not safe to rely on such evidence. Having gone through the evidence of the prosecution witnesses and the material contradictions and improvements appearing in the testimony of PW-1, 2 and 3 as well the improbabilities surfacing in the deposition of PW-1, 2 and 3, non-examination of independent public witnesses, no enquiry into the injuries being suffered by the accused persons and they being not taken to the hospital immediately thereafter for the treatment whereas extraordinary haste was shown in respect of the injury suffered by the complainant which was simple in nature by blunt object, I am of the opinion that the learned Trial Court failed to appreciate that guilt of the accused persons was not proved beyond reasonable doubt.

25. It is a classic case where the DD No.9A was only in respect of a quarrel but PW-7 SI S.P.Gautam deposed that the DD No.9A was

recorded in respect of a dacoity being committed and without any request from SI Mukesh Kumar, who visited the spot, he (PW-7 SI S.P.Gautam) along with SHO rushed to the spot which is enough to show that the local police did not fairly investigate the case. No departure or arrival entry of the SHO or SI S.P.Gautam in respect of DD No.9A has been placed on record. SI Mukesh Kumar himself was a proclaimed offender and was wanted in a murder case. In such circumstance, untrustworthy testimonies of PW-1, PW-2 and PW-3 were not sufficient to form basis for conviction of the accused person. The most unbelievable aspect is that the servants who are supposed to be inside the house of their employer whether at the ground or first floor of the complainant or at the second floor of the tenant, all were already present on the road in front of the house to assist PW-2 & 3 in apprehension of the accused persons. Accused Sanjay and Rajinder Kumar were stated to be armed with deadly weapons i.e. long knife and loaded fire arm but they preferred to receive beatings at the hands of public without using weapons in their hand as if it were show pieces and could not have been used even for self defence.

26. The basic principle of criminal jurisprudence is that accused is presumed to be innocent until his guilt is proved beyond reasonable doubt. In the case in hand the evidence of PW-1, 2 and 3 is wholly inconsistent on all vital aspects including the manner of apprehension of the accused persons, recovery of the weapons from them as well recovery of the bag containing jewellery box of PW-1. Even the MLC of PW-1, Anjali Gupta which was prepared within minutes of the

incident does not corroborate her oral version as she did not receive any injury with a sharp weapon like *khukri*.

27. Going by the material on record, I am unable to agree with the findings recorded by the learned Trial Court which has brushed aside the vital aspects involved in the prosecution case and in a very non-conventional way convicted all the accused persons.

28. In view of the above discussions, I am of the view that learned Trial Court committed an error in relying on the testimony of the prosecution witnesses in convicting the accused persons for committing the offence punishable under Sections 394/323/34 IPC and under Section 25 of Arms Act.

29. Resultantly, all the three appeals are allowed. The appellants are acquitted of the charges complained of. Their bail bonds stand discharged.

30. TCR be sent back alongwith copy of the order.

31. A copy of the order be also sent to the concerned Jail Superintendent for information.

PRATIBHA RANI
(JUDGE)

OCTOBER 23, 2017

'pg/st'