

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on :07th June, 2018

Date of decision :14th June, 2018

CRL.A.608/2004

MOHD. SALIM

..... Appellant

Through Mr. Kumar Vaibhav, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Aasha Tiwari, APP for
State with SI Yogesh Kumar,
PS Vivek Vihar.

And

CRL.A.759/2004

JAVED

..... Appellant

Through Mr. Kumar Vaibhav, Advocate.

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP for
State with SI Yogesh Kumar, PS
Vivek Vihar.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. CRL.A.608/2004 filed by the appellant Md. Salim and CRL.A.759/04 filed by Javed are being disposed of together vide this common judgment in as much as they both assail the impugned judgment dated 17.07.2004 of the learned ASJ, KKD Courts, Delhi in State case no. 27/1 in relation to FIR No. 388/98, PS Vivek Vihar registered under Section 452/392/397/411/34 of the Indian Penal Code, 1860 in which both the appellants were convicted for the offences punishable under Section 452/34 of the Indian Penal Code, 1860, Section 392/397/34 of the Indian Penal Code, 1860 and Section 411 of the Indian Penal Code, 1860 and were sentenced vide the impugned order on sentence dated 17.07.2004 to undergo RI for a period of 3 years and to pay a fine of Rs. 1,000/- each and in default of the payment of the fine to further undergo RI for one month qua the offence punishable under Section 452/34 of the Indian Penal Code, 1860 and were sentenced to undergo RI for a period of 7 years and to pay a fine of Rs. 1,000/- each and in default of the payment of the fine to further undergo RI for one month qua the offences punishable under Sections 392/397/34 of the Indian Penal Code, 1860 and both the appellants were sentenced to undergo RI for a period of six months qua the offence punishable under Section 411 of the Indian Penal Code, 1860 and all sentences were directed to run concurrently with the benefit of Section 428 of the Cr.P.C., 1973 being given to the accused persons.

2. Notice of the appeals has been issued to the State. Both the appellants were present at the time of hearing of 07.06.2018 and were

assisted by their counsel, i.e., Mr. Kumar Vaibhav, Advocate from the Delhi High Court Legal Aid Services Committee and the State was represented by the learned APP, Ms. Aasha Tiwari assisted by SI Yogesh Kumar, PS Vivek Vihar.

3. Vide order dated 04.06.2018, the nominal roll was called for from the Superintendent Jail, Delhi. The nominal roll has since been received from the Superintendent Central Jail-02, Tihar, New Delhi which indicates that the appellant Md. Salim was released on 22.08.2006 on regular bail granted in the present appeal, i.e., CRL.A.608/04 vide order dated 21.07.2006 and on the date of release had undergone 3 years 5 months and 8 days of incarceration and the unexpired portion of the sentence was 3 years and 18 days. The accused/ appellant herein, i.e., Javed in CRL.A.759/04 was reported to have undergone the entire substantive sentence of seven years after computing the period of remission as well of seven months and 23 days on 25.05.2007 and the composite fine of Rs. 2,000/- was also indicated to have been deposited on 06.08.2007 but the appellant-Javed was released from jail on 19.12.2007 as he was serving sentence in another case.

4. As per averments made in the FIR dated 10.12.1998 which is based on the statement of Smt. Urmila w/o Sh. Chander Parkash Aggarwal, r/o 28/3/1. Gali No.1, Bihari Colony, Shahdara, Delhi, the complainant Smt. Urmila's husband Sh. Chander Parkash Aggarwal who has a wholesale-retail shop at the Shahdara Mandi dealing in Onions and Potatoes had as usual left for the Mandi at 3.30 AM and she was present at her house with her two sons who were sleeping and

at 7.30 AM her daughter Nishu went to school, as a consequence of which the main gate of the house had been left open and she, the complainant was working in the kitchen and within 5-7 minutes, three boys entered into the kitchen, of whom two boys were thin, dark complexioned who had country made pistols (Katta) in their hands and were wearing black jackets and a pant. The complainant described through the FIR that one person of short height of about 5 feet with a round face with marks of pimples on his face and was wearing a black jacket and the second boy with a height of 5 feet and 6 inches and all three boys were between the age of 22-25 years of whom two of them had country made pistols and had a knife and two of these boys took the complainant within the room and tied her hands and asked her to give Rs. 12 Lakhs at the point of the revolver and snatched four gold kadas, one gold chain, one pair of gold ear tops from the person of the complainant and the complainant had checked her almirah and then taken out a yellow and the red coloured bag from which those persons took Rs.1,25,000/- and two gold sets, gold chain of the children and a ring and she and her children were bolted inside the house and the main gate of the house was also bolted from the outside and that the complainant called at No. 100 and that the neighbour of the complainant had come and opened the main gate of the house.

5. On the basis of this statement made as the complaint, the FIR was registered under Section 392/34 of the Indian Penal Code, 1860 in relation to which the appellants have been convicted and sentenced qua the offences punishable under Sections 452/34 of the Indian Penal

Code, 1860 & 392/397/34 of the Indian Penal Code, 1860 and Section 411 of the Indian Penal Code, 1860.

6. It was further stated through the FIR that the complainant can identify these three boys on seeing them who had at the point of the knife and the revolver taken away her jewellery and money on the basis of which the FIR was registered under Sections 392/34 of the Indian Penal Code, 1860.

7. As per the report under Section 173 of the Cr.P.C., 1973 submitted, the Investigating Officer prepared the site plan and inspected the spot and the crime team got the photographs of the five chance finger prints taken. The Investigating Officer recorded the statements of witnesses and on 10.12.1998, Sh. C.P. Aggarwal, husband of the complainant produced a dagger which the accused persons had brought with themselves and left behind at the house of the complainant whilst running away which was beneath a chair and the same was seized by the police and on 20.12.1998, DD No. 38 was received from PP Anaj Mandi which indicated that the accused persons namely Mehraj and Naushad had made a disclosure statement in relation to this incident whereafter the Investigating Officer took the permission of the Court and formally arrested these two persons and sought to conduct the TIP qua both these persons who declined to participate in the same.

8. It has been stated further through the charge sheet that from the accused Mehraj, 30 coins were recovered and from the accused Naushad, 4 gold kadas, 7 rings, 2 naths, one pair of ear tops, one big and one small chain and a broken chain were recovered and on

10.01.1999 on receipt of DD No. 7A, it was learnt that the accused Salim, i.e., the appellant in CRL.A.608/04 had made a disclosure statement before the Crime Branch, Adarsh Nagar and articles had been recovered and thus the Investigating Officer formally arrested the accused Salim in the instant case but the complainant could not identify the accused/appellant herein, i.e., Salim in Test Identification Proceedings but from the accused Salim, 17 silver coins were recovered and as per the report of the Finger Prints Bureau expert, the finger print of the accused/appellant Salim matched with the chance print recovered at the spot and the Investigating Officer continued with the investigation and during the course of investigation it was learnt that the accused Javed who was a convict of Krishna Nagar, had been released on interim bail and thus, the Investigating Officer with his team pursuant to the production warrants issued of the said Javed and after having sought permission for his arrest, formally arrested the said accused who was also put to Test Identification Proceedings and on 24.03.1999, the complainant Smt. Urmila identified the said accused Javed whereafter the two days police remand of the accused/appellant herein, i.e., Javed in CRL.A.759/04 was obtained and during the course of the same at the pointing out of the accused Javed a chain, a ring and tops were recovered and rest of the articles were stated to have been sold off by the applicant to an accused Sanjay Verma whereafter the accused Sanjay Verma was also arrested on 28.04.1999, it was disclosed by Sanjay Verma that he had sold off the articles of jewellery and thereafter, the Investigating Officer put the case property to Smt. Urmila for identification who had identified

part of the same as being hers. During the course of the trial, the accused Sanjay Verma was discharged vide order dated 26.07.2000 inasmuch as there was no recovery effected from Sanjay Verma nor at his behest and the other accused Mehraj was declared a proclaimed offender vide proceedings dated 28.05.2002.

9. During the trial, the prosecution examined 21 witnesses to prove its case. The complainant of the instant case was examined as PW-3 who has testified to the effect that on 10.12.1998, she was present at her house along with her two children and at about 7.30 am, the main gate of her house was opened and three persons came into her house and when she was present inside the kitchen, one of them pointed a revolver on her temple and asked her to go inside the room and demanded her to deliver to them as to whatever was there in the house and thereafter they took her inside the room and one of them cut the telephone wire and second took her jewellery articles worn by her and also took out one bag which was kept inside an almirah and thereafter they demanded other articles. *Inter alia* she stated that in the *thaila* which was made of cloth cash of Rs. 60,000/- - Rs.70,000/- was kept which was also taken by them and thereafter from the locker of the almirah they took out Rs.50,000/- in the denomination of Rs. 500/- kept in one bundle as well as some more jewellery articles kept inside the locker. *Inter alia* she stated that thereafter her hands were tied and her mouth was also tied with cloth and her hands were tied at the beginning and thereafter they bolted the door of the room from inside and that she raised much hue and cry and many persons gathered inside the gali and one of them came inside and opened the

doors of the room and her hands were untied. She further stated that after about half an hour or 45 minutes, the police came there and she reported the matter and lodged the complaint, i.e., Ex.PW3/A bearing her signatures. She further stated that the jewellery articles which she was wearing before the incident comprised of one gold chain, four gold bangles, one pair of gold ear tops which were removed and that the articles of jewellery lying inside the locker comprised of three gold sets, two gold kangans, two silver bangles which were gold plated, two gold nose pins, three gents gold rings, one gold small chain of her child and gold ring of small size, two pair of tops made of gold, three gold pair of jhumkis, 12 gold rings and 80 coins of silver and out of 80, one of them was of 50 grams, one of more than 20 grams and the remaining of were 10 grams of each with the statue of *Laxmi Ji and Ganesh Ji* engraved on the coin of 50 grams and 20 grams and that her total cash of Rs.1,25,000/- was looted by the robbers from her house. She further stated that she learnt of the arrest of the two persons after 4-5 days and of the third she came to know about after a month and after two months thereafter she learnt of the arrest of the 4th person.

10. During her testimony on oath, the complainant testified that though she had identified the accused Salim in the Tihar Jail, he was accompanied by 2-3 persons who were continuously staring at her so that she deliberately did not identify him and she then identified the accused, i.e., appellant in CRL.A.608/04 as being that Salim whom she had not identified inside the jail and identified him as being the person who had come to her house along with two more boys. *Inter alia* the complainant identified the accused- Javed, i.e., the appellant

in CRL.A.759/04 as being the person identified by her even in the jail in the TIP proceedings and stated that the third accused who had come to her house and had looted her was the accused Mehraj whom she identified and she stated however, that she could not identify the 4th accused Md. Naushad present in the Court. The accused Mehraj as already observed elsewhere hereinabove has already been declared a proclaimed offender and the present appeals relate to the appellants Md. Salim and Javed. *Inter alia* she testified to the effect that one of the three persons who had entered her house and looted cash and gold had a revolver and the second one had a knife and that she did not pay any attention as to what weapon he was carrying but that he was busy in removing the jewellery articles worn by her. *Inter alia* she identified the articles brought by her comprising the case property which had been released to her on Superdari as Ex.P1 to Ex.15 (1 to 45) & Ex.P16 (1 to 2) with Ex.P13 being a silver coin of 50 grams engraved with statue of *Laxmi Ji and Ganesh ji* and Ex. P14 being a silver coin of 20 grams engraved with statue of *Laxmi Ji and Ganesh ji* and 45 silver coins of 10 grams each as being Ex. P1 to Ex.P45. *Inter alia* she testified to the effect that at the time when the police came to her house, finger prints were lifted from the bed as well as from the almirah. On being cross examined on behalf of the accused Javed, the appellant of CRL.A.759/04, the complainant identified him as being the person who was armed with a revolver. She also identified the accused Salim, the appellant of CRL.A.608/04 as being the first person who came inside the kitchen and stated that she had then seen him for the first time and he had a *Katta*, i.e., the revolver

type weapon. She categorically denied through her cross-examination that any of the accused persons used to work as a Palledars at the shop of her husband and denied that the appellants therein, i.e., Javed and Salim have been working as Palledars at the shop of her husband and had denied that her husband had a quarrel with these two boys some days prior to the incident and for that reason, she had falsely implicated them in the instant case. The complainant also testified to the effect that a knife which was lying inside the room had been left by the accused persons had been recovered and she stated that that was a long knife had been seen on the night of the incident and was handed over to the police on the next day by her husband. She however stated that she could not say which of the boys was carrying that knife but it was found lying in another room. She denied through her testimony that there was no cash lying in her house and denied that there was no articles as stated by her that had been looted. She however, stated that neither she nor any other family members received any injury during the incident and also denied that she had testified falsely.

11. The testimony of PW-2, Sh.C.P. Aggarwal, the husband of the complainant is also categorical in relation to the aspect that on 10.12.1998 on receipt of information regarding a robbery at his house, he reached at his house at about 8.30 AM and the police personnel were present there and also stated that one knife was recovered which was lying under the bed inside the room which he handed over to the police qua which the police prepared a sketch Ex.PW5/A which bore his signatures and stated it was sealed with the seal of PK and identified the knife/dagger taken out from the sealed parcel as being

Ex.P17. On being cross examined this witness denied that no dagger was recovered lying under the bed of the room. The testimony of PW-6 Santosh, the neighbor of Smt.Urmila who reached the main gate of the house of Urmila on hearing her voices and cries and stated that she had opened the gate which was bolted from inside.

12. The initial IO of the case ASI Omvir Singh testified to the apprehension of the accused persons named Mehraj and Naushad by him on 19.12.1998 at about 2.00 PM and stated their apprehension was on the basis of a secret information that two persons who had committed dacoity in Bihari Colony Trans Yamuna Area a week prior to 19.12.1998 would come that way to Budh Vihar. *Inter alia* this witness testified to the effect that the accused Naushad had led the police to his house from where there was recovery of certain gold articles effected and also testified to the accused Mehraj having made a disclosure statement and to his having led the police to his house, where 30 silver coins were got recovered and also testified to the apprehension and arrest of the accused Salim, i.e., appellant in CRL.A.608/04 and stated that he was apprehended on the pointing out of the secret informer stating that his associates have been arrested 10-15 days ago and would be come to Gokulpuri whereupon 4-5 persons of the public were asked to join the proceedings but they did not do so and that the said Salim, i.e., appellant of CRL.A.608/04 herein made a disclosure statement Ex.PW7/D and led him to the house of his sister at Kandala, District Muzaffarnagar and got 17 silver coins recovered which were seized vide Ex.PW7/E and testified further that he could identify the silver coins.

13. SI Pramod, PS Farsh Bazar posted at PS Vivek Vihar PP Anaj Mandi on 10.12.1998 stated that the statement of Smt. Urmila, i.e., the complainant had been got recorded by him, i.e., Ex.PW3/A at her house and that he made his endorsement thereon, i.e., Ex.PW9/A and had given the same to Constable Kirori Lal for the registration of the FIR and had also called for the Crime Team and the photographer at the spot and the Crime Team had reached the spot and collected the fingerprints from the spot and had taken photographs of the scene of the occurrence and that in the meantime, he had prepared the site plan Ex. PW5/DX and had prepared the portrait of the accused/ suspect as per the details given by the complainant and via wireless a text message was given. He also testified to the dagger in the instant case having been handed over by Sh. C. P. Aggarwal, husband of the complainant to him at the police station as having been recovered while she was cleaning or dusting the room, which dagger was handed over on 16.12.1998. He testified to the effect that the accused Javed was in custody in another case and was formally arrested by him and that he got conducted his TIP in which the complainant had identified him and that the accused Javed had got a chain, a ring and tops recovered from his house which were seized and sealed with the seal PK and stated that the chain in Ex.PW9/A was recovered from the accused Javed and the same was not claimed by the complainant as being belonging to her. He stated further during his cross-examination that he had taken signatures of the husband of the complainant on the seizure memo of the dagger but not on the sketch thereof and denied that he had planted the dagger.

14. PW-11 SI Satyawar, PS Farsh Bazar in his testimony testified that on 20.12.1998, he was posted at PP Anaj Mandi, PS Vivek Vihar and stated that the accused Naushad had been arrested in a Kalandra under Section 41.1 of the Cr.P.C. and thus, he had moved an application for transfer of the accused to the KKD Courts and had interrogated the accused there and further stated that the accused Mehraj and Naushad who had been arrested, declined to participate in the TIP proceedings. He testified further to the effect that he had received an information from the Crime Branch vide DD No. 7A of the accused Md. Salim having been arrested and had made a disclosure statement qua the present case and thus sought his production the duty MM, had directed the accused to be produced in the Court on the next day. This witness also testified to the effect that the accused Md. Salim had kept the jewellery articles in his house at Bhajanpura from where the recoveries of bangles, i.e. Ex.P12 (1 to 2) were effected. This witness further testified to the effect that the accused Salim had not been identified in the TIP proceedings and the complainant Urmila had made a supplementary statement that she could not identify the accused due to fear.

15. PW-12 Constable Shiv Om testified to the effect that on 11.01.1999, he was posted at PS Farsh Bazar and on that day he stated that the accused Salim had been arrested but wrongly pointed out to the accused Javed. The testimony of PW-14 SI Gianender Singh of the Finger Print Bureau, PTS Malviya Nagar indicates that he was working as the Finger Print Expert on 22.01.1999 at the Finger Print Bureau, PTS Malviya Nagar and on that day, he received five

developed chance prints for comparison marked as Q1 to Q5 and on receiving the photographs on 22.03.1999, he received the specimen prints of three persons namely Naushad, Mehraj and Salim and compared the chance prints with the specimen finger prints and the chance print, i.e. Q5 was found to be identical with the left thumb impression Mark-S1 which was the specimen print of the accused Mohd. Salim and testified to the effect that the other photographs did not match and testified to his report in relation thereto, Ex.PW14/A and to the developed photographs with the chance print Q5 as Ex.PW14/B and testified to Ex.PW14/C as being the developed photographs of the specimen print S1 and stated that the description of identical points was contained in Ex.PW14/D bearing the signatures of the Director which he identified at point A thereon. The photograph of Q5 was testified by the witness to be Ex.PW14/E and the negative thereof as Ex.PW14/F to Ex. PW14/I and also testified to the specimen slip of S1 from which the photographs were taken to be Ex.PW14/J. Significantly, no cross-examination of this witness was conducted on behalf of any of the accused persons on 03.09.2001 despite the factum that the accused were represented by his defence counsel on the said date as indicated by the Trial Court Record.

16. PW-15 Head Constable Rajender is indicated to have accompanied the Investigating Officer along with the accused Javed, i.e., the appellant of CRL.A.759/04 to his house at 13/5, Subhash Mohalla, Bhajanpura from where beneath a pillow in his house, a chain Ex.P17 was got recovered. PW-19 SI Mahipal testified to the

recovery of silver coins from the house of the sister of the accused Salim recovered allegedly pursuant to his disclosure statement.

17. PW-20 Constable Rajesh 174 E of the Crime Team East testified to the effect that on 10.12.1998 he and Constable Kanwar Pratap, the photographer had gone to the spot of the occurrence, i.e., H.No.2873/1, Gali no. 1, Bihari Colony, Delhi and had tried to trace the finger prints from the goods scattered there and two finger prints were lifted from the almirah locker and three finger prints from the steel pot and the finger prints lifted from the almirah were marked as Q1 & Q2 and the finger prints lifted from the steel pot were marked as Q3 to Q5 and that he had developed the questioned prints, one of them being Q5, i.e., Ex.PW14/B. He stated further that the almirah and the steel pot were lying in the same room in which the bed was lying. Both the appellants in their statements under Section 313 of the Cr.P.C. denied the evidence led against them and claimed that they have been falsely implicated with the accused/appellant Salim claiming that he was lifted from his house by the police.

18. During the course of the submissions that were made on behalf of the accused/appellant Javed, who as already observed hereinabove has completed his substantive sentence on 25.05.2007 and deposited the fine on 06.08.2007 and was released from jail on 19.12.2007 as he was serving the sentence in another case as indicated by the nominal roll received from the Dy. Superintendent, Central Jail-02, Tihar New Delhi, though, it was contended on behalf of the accused-appellant Javed that he has been falsely implicated and that no recoveries were effected from him, the evidence on the record as analyzed vide the

impugned judgment categorically brings forth the recovery of a ring and a pair of gold tops from the possession of the appellant which have also been identified by PW-3 Smt. Urmila, the complainant of the instant case who also identified the appellant Javed during the course of the TIP proceedings and also identified the appellant before the Trial Court as being the person who had pointed a revolver on her temple and had asked her to go inside the room and asked her to deliver whatever was there in her house. Furthermore, the robbed ring and a pair of tops were recovered pursuant to the disclosure statement of the accused/appellant Javed vide his disclosure statement Ex.PW9/D which were seized vide a seizure memo Ex.PW1/A.

19. A further contention was raised on behalf of the accused/appellant herein, Javed that he had been falsely implicated in the instant case, inasmuch as he had been convicted in a case under Section 392 of the Indian Penal Code, 1860 previously and thereafter was being unnecessarily involved in other cases and also been hooked under the NDPS Act and had been beaten by the police and thus cognizance was taken qua an offence punishable under Section 323/506 of the Indian Penal Code, 1860 against a police official and it was thus submitted that he was being falsely implicated by the police personnel and that there had been a pre-meditated arrest. It was also submitted on behalf of the appellant Javed that the allegations against him were not substantiated, inasmuch as no revolver was recovered from him also. It was also submitted on behalf of the appellant that the alleged knife mentioned by the complainant was also produced by the husband of the complainant before the police and had not been

recovered from the accused / appellant Javed. It was further submitted on behalf of the appellant Javed that he was arrested on 22.03.1999 much after the date of the incident, i.e., 10.12.1998 and that the allegations levelled against him had not been conclusively established and that the impugned judgment was based on conjectures and surmises and was not sustainable in law.

20. As already observed hereinabove, the testimony of the complainant, PW-3 Smt. Urmila is categorically against the appellant Javed in relation to his presence at the time of the commission of the offence and of his active participation in the same of pointing the revolver at her temple and compelling her thus to hand over the articles of jewellery and cash to him and his associates and that part of the stolen robbed articles also were recovered pursuant to his disclosure statement. The testimonies of the prosecution witnesses examined do not in any manner support the contention of the appellant Javed that he has in any manner been falsely implicated due to cognizance having been taken on his complaint against the police official in relation to injuries sustained by him. Thus, there is no infirmity in the impugned judgment dated 15.07.2004 qua the conviction of the appellant Javed in relation to the commission of the offences punishable under Section 452/34 of the Indian Penal Code, 1860, Sections 392/397/34 of the Indian Penal Code, 1860 and Section 411 of the Indian Penal Code, 1860. The said appellant Javed, i.e., appellant of CRL.A.759/04 having already undergone the impugned sentence dated 17.07.2004, there is nothing more that survives in the

instant appeal in relation to the appellant Javed and thus the CRL.A.759/04 filed by the appellant Javed is thus dismissed.

21. The appellant Md. Salim, i.e., appellant of CRL.A.608/04 *inter alia* contends to the effect that his identity as being one of the persons involved in the commission of the offences punishable under Section 452/392/397/411/34 of the Indian Penal Code, 1860 is not brought forth even remotely inasmuch as the testimony of PW-3, the complainant Smt. Urmila is discrepant and inconsistent in relation to his identity inasmuch as she was unable to identify the appellant during the course of the TIP proceedings which were duly proved through the testimony of Ms. Mamta Tayal, the then learned MM, as PW-21 and the TIP proceedings Ex.PW21/D, inasmuch as though the accused, i.e., the appellant herein Md. Salim stated that he wanted to participate in the TIP proceedings voluntarily, the witness PW-3 Smt. Urmila, i.e., the complainant after observing the complete line of the persons who were present in the TIP proceedings along with the appellant Salim, stated that she was not able to identify him amongst the persons standing in the queue in the room and she rather categorically stated “*Veh aadmi jisne vardat anya logo ke sath milkar hamare sath ki thi, veh insan in sab logo me se koi na hai*”, and the learned MM thus, observed through the proceedings dated 13.01.1999 which were concluded that the witness had failed to identify the accused.

22. Significantly, the accused/appellant Salim was arrested on 11.01.1999 qua the incident dated 10.12.1998. Undoubtedly, PW-3 Smt. Urmila, the complainant identified the appellant during her

testimony before the Trial Court stating that he was the person involved with the other two boys who had come to her house and stated that she had deliberately not identified the accused/appellant Salim in the TIP proceedings in the jail as she was terrorized by the other persons who were staring at her. Significantly, there was no application that the complainant moved after the conducting of the TIP proceedings to so submit before the Trial Court nor to the Magistrate nor to the Investigation Officer nor did she move an application seeking any kind of protection. Thus, in the instant case the infirm testimony of the complainant, i.e., PW-3 Smt Urmila does not suffice to bring forth the allegations against the appellant Mohd. Salim in relation to the alleged commission of the offences punishable under Section 392/397/34 of the Indian Penal Code, 1860 and the conviction of the appellant Mohd. Salim in relation to the alleged commission of the offences punishable under Section 392/397/34 of the Indian Penal Code, 1860 is set aside.

23. However, the same does not suffice to dislodge the presence of the accused/appellant Md.Salim in the house of the complainant at the time of the alleged commission of the offence. This is so, inasmuch as the specimen finger print of the appellant Salim S1 has been compared with the chance finger print Q5 recovered from the steel pot in the room while the offence of robbery was committed. Much reliance has been placed on behalf of the appellant/ Salim on the aspect that the steel pot in question from which the chance finger print Q5 was lifted was not seized by the Investigating Agency and it has been submitted on behalf of the appellant that the specimen finger prints of the

appellant were received by the Finger Print Bureau only on 22.03.1999, i.e., much after the arrest of the appellant, i.e., 11.01.1999 and thus the probability of false implication and false specimen finger prints having been planted cannot be ruled out.

24. It was further submitted on behalf of the appellant that no permission was taken also by the Investigating Agency to take the specimen finger prints of the appellant Salim. Significantly, the permission to arrest the appellant Md. Salim was granted on 11.01.1999 by the learned MM, KKD Courts Shahdara and after permission on the same day had been granted to the Investigating Agency to interrogate him for 30 minutes as prayed by SI Satyawar. Thus, the contention that the specimen finger prints were planted cannot be accepted nor can the contention of the chance finger prints being planted be accepted inasmuch as Ex.PW14/A, the report of the Director, Finger Print Bureau, Delhi Police, Delhi admissible under Section 293 of the Cr.P.C., categorically states that the requisition of the services of the Crime Team was received from PS Vivek Vihar on 10.12.1998 and Ex. PW20/A, the SOC Visitation report indicates that the chance print Q5 apart from the other chance prints Q1, Q2, Q3 & Q4 were taken from the steel pot at H.No.2873/1, Gali No. 1, Bihari Colony on 10.12.1998. The identical ridge characteristics found in the chance print Q5 and the specimen thumb impression of the appellant Md. Salim on the steel pot are detailed in Ex.PW14/D to the effect:-

- “1. Point No. 1 is ridge ending and it is starting point.
2. To the North West of point No. 1 with one ridge intervening, point No. 2 is a ridge ending.

3. To the North East of point No. 2 with no ridge intervening, point No. 3 is a Bifurcation.
4. To the North West of point No. 3 with one ridge intervening, point No. 4 is a Enclosure.
5. To the North East of point No. 4 with one ridge intervening, point no. 5 is a ridge ending.
6. To the South West of point No. 5 with three ridge intervening, point No. 6 is a Enclosure.
7. To the South West of point No. 6 with no ridge intervening, point No. 7 is a ridge ending.
8. To the South West of point No. 7 with one ridge intervening, point No. 8 is a ridge ending.”

25. The photographs Ex.PW14/B of the chance print and Ex. PW14/C, the specimen thumb impression brings forth the presence of the appellant in the house of the complainant on the date 10.12.1998 as being established beyond a reasonable doubt. Apparently that the presence of the appellant Md. Salim in the house of the complainant on 10.12.1998 was not lawful has to be presumed in the circumstances to be with an intent to commit an offence within the ambit of ‘*criminal trespass*’ in terms of Section 441 of the Indian Penal Code, 1860 and with the appellant thus having entered into the house of the complainant had thus committed house trespass in terms of Section 442 of the Indian Penal Code, 1860 and is thus held to have committed an offence punishable under Section 448 of the Indian Penal Code, 1860. In view of the discrepant testimony of PW-3 Smt. Urmila, i.e., the complainant who at the stage of the TIP proceedings

conducted at the Tihar Jail, Delhi stated that she was unable to identify the appellant qua which she stated that she deliberately did not identify the appellant qua which she gave no complaint at any stage till the recording of her testimony as PW-3 in Court, the ingredients of the alleged commission of the offence punishable under Section 452 of the Indian Penal Code, 1860 are not brought forth against the appellant, inasmuch as the alleged *Katta* in the hands of the appellant has also not been recovered.

26. As regards, the alleged commission of the offence punishable under Section 411 of the Indian Penal Code, 1860 to the effect that 17 silver coins belonging to the complainant were recovered at the behest of the appellant Md. Salim, it is essential to observe that in the FIR and in the supplementary statements dated 06.06.1999 and 19.05.1999 made by Smt. Urmila the complainant, there was no mention of any of her silver coins having been stolen. In these circumstances, the ingredients of the alleged commission of the offence punishable under Section 411 of the Indian Penal Code, 1860 are also not brought forth against the appellant. The appellant Mohd. Salim is thus convicted qua the commission of criminal house trespass into the house of the complainant and thus convicted under Section 448 of the Indian Penal Code, 1860. As the allegations against the appellant Mohd. Salim qua the alleged commission of offences punishable under Sections 392/397/34 of the Indian Penal Code, 1860 and Section 411 of the Indian Penal Code, 1860 have not been established, he is acquitted in relation thereto. The appellant, Mohd. Salim is however convicted in relation to FIR No.388/98, PS Vivek Vihar qua the proved

commission of the offence punishable under Section 448 of the Indian Penal Code, 1860. The appellant vide the impugned judgment had been sentenced to undergo Rigorous Imprisonment for a period of 3 years, to pay a fine of Rs.1,000/- and in default of the payment of the fine to further undergo Rigorous Imprisonment for a period of one month for the offence punishable under Section 452/34 of the Indian Penal Code, 1860 and to undergo Rigorous Imprisonment for a period of 7 years, to pay a fine of Rs.1,000/- and in default of the payment of the fine to further undergo Rigorous Imprisonment for a period of one month qua the offence punishable under Section 392/397/34 of the Indian Penal Code, 1860 and was sentenced to undergo Rigorous Imprisonment for a period of six months qua the offence punishable under Section 411 of the Indian Penal Code, 1860 with directions that the sentences would run concurrently with the benefit of the period of detention undergone having already been directed to be set off in terms of Section 428 of the Cr.P.C., 1973.

27. As observed elsewhere hereinabove, the appellant has already undergone a period of 3 years, 5 months and 8 days of incarceration as on 22.08.2006 on which date he was released on regular bail in terms of bail granted vide order dated 21.07.2006 in CRL.M.(BAIL)1183/06 in the instant appeal. The maximum sentence that can be imposed for the offence punishable under Section 448 of the Indian Penal Code, 1860 is a period of imprisonment that may extend to one year or to pay a fine that may extend to Rs.1,000/- or with both.

28. In the circumstances of the case, the appellant Mohd. Salim having already undergone a period of 3 years 5 months and 8 days of

incarceration, he is sentenced to undergo Rigorous Imprisonment for a period of one year which he has already undergone. The fine and the balance sentences imposed on the appellant vide the impugned order on sentence dated 17.07.2004 are thus set aside and CRL.A.608/04 is disposed of accordingly.

ANU MALHOTRA, J

JUNE 14, 2018/NC

