

\$~28-29 (*common order*)

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 21st May, 2019

+ CRL.A. 444/2002

RAJ KUMAR

..... Appellant

Through: Mr. Jatin Rajput, Advocate

Versus

STATE

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP
for the State

+ CRL.A. 479/2002

ANIL

..... Appellant

Through: Mr. Deepak Anand, Advocate

Versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP
for the State

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. Both these appellants were found guilty and convicted by the court of sessions by judgment dated 30.03.2002 rendered in sessions case no.37/2000, whereby they were convicted on the charge for offences punishable under sections 394/397 of the Indian Penal Code, 1860 (IPC). By order dated 02.04.2002, they were sentenced to undergo rigorous imprisonment for seven years with fine of Rs.3,000/- each.

2. These appeals were filed to assail the aforesaid judgment and order on sentence. The sentences were suspended and the appellants were released on bail by orders dated 05.12.2005 and 02.02.2006 respectively. The appeals were admitted and put in the list of regulars. Their turn has come up for hearing seventeen years after they had been presented.

3. The proceedings on the appeals would show that the trial court record was requisitioned and placed before the court. While the appeals remained pending, the said record went missing from the registry. It may be mentioned here that similar loss of trial court record has been reported in more than one hundred criminal appeals. It has earlier been reported that upon information being placed before the Hon'ble the Chief Justice, some fact-finding-inquiries were made, but no official was held accountable or responsible. Pursuant to the administrative directions, issued by the Chief Justice, some endeavour was made to reconstruct the missing record. Partially reconstructed record was submitted by the court of sessions as per its report dated 23.01.2019. The said partly reconstructed record has been shared with the counsel for the appellants and the Additional Public Prosecutor for the respondent/State. All sides have confirmed that it is not possible to reconstruct the remainder. The learned counsel on all sides including the Additional Public Prosecutor for the State further agree that these appeals can be considered and adjudicated upon on the basis of partially reconstructed record, no useful purpose being served, in view of what is observed hereinafter, by remitting the case for a *de*

novo trial. The impugned judgment mercifully summarises crucial part of the material evidence that was adduced at the trial leading to the conviction.

4. The gravamen of the charge against the appellants essentially was that on 24.03.1999 at about 10:30 a.m. they had accosted Shiv Lal (PW-2), the complainant (the victim), at T-point of D-2 Block, Madangir within the jurisdiction of Police Station Ambedkar Nagar, at a time when he (PW-2) was carrying cash of about Rs.31,000/- in a cloth bag meant for deposit in his account with State Bank of India, Phase-II, Madangir, the money representing the sale proceeds from the mother dairy booth (No.064) where he was functional as a contractor. It is alleged that the appellants had thrown chilli powder into the eyes of the victim (PW-2) and made an attempt to forcibly snatch the cloth bag from his hand and when he had resisted they inflicted knife injuries on his hand, relieving him of the cloth bag containing the cash and running away.

5. It has been the case of the prosecution that on basis of some information, the investigating officer (IO), Sub Inspector K.P. Malik (PW-8), arrested one Akbar Khan (A-1) on the night of 28-29.03.1999 and pursuant to his disclosure, upon interrogation, the appellants, *i.e.*, Raj Kumar (A2) and Anil (A3) were arrested. The interrogation of A3 led to recovery of the cloth bag (without money) along with a set of pay-in-slips. It is also the case for the prosecution that another person (found to be a juvenile) was also involved and complicit, separate

proceedings having been initiated against him (the juvenile) before the Juvenile Justice Board.

6. The prosecution sought to prove complicity of the appellants and Akbar Khan (A1) on the basis primarily of the evidence of Shiv Lal (PW-2), supported by proof as to the recovery of the cloth bag with pay-in-slips, the same having been identified by the complainant during test identification (TIP) proceedings, this besides refusal to join the TIP on the part of the appellants. The trial court believed the evidence, particularly the testimony of PW-2, to return finding of guilty holding that the appellants had snatched the cloth bag from the hands of PW-2 after throwing *chilli* powder in his eyes and having caused injuries on his hand with knives. It convicted the appellants for offence under section 394 read with section 397 IPC. It may, however, be added here that the trial court did not believe the case of the prosecution against Akbar Khan (A1) who was consequently acquitted.

7. Having heard the learned counsel on all sides and having gone through the record, particularly the summary of evidence as set out in the impugned judgment, this court is of the opinion that the guilt of the appellants has not been brought home beyond all reasonable doubts. The reasons may be set out hereinafter.

8. It is noted that in the statement leading to registration of the FIR Shiv Lal (PW-2) had projected as if he did not know the persons who had forcibly robbed him of his money. He described them by their physique, height and description, noticeably placing them as persons

from South India (*madrasis*). It has come out at the trial that none of the persons who were brought to trial in the court of sessions, or before the juvenile justice board, match such description. All the four persons are natives and local residents of Delhi. What renders the word of PW-2 incredible is the revelation brought out during trial that he knew the appellants from before. If this were so, his statement to the police should have indicated past acquaintance. There is no explanation why this element was missing from the FIR.

9. As per the case in the FIR, only two persons were involved in the crime. Yet, the police, for some inexplicable reasons, held up four persons including Akbar Khan (A1). PW-2 would not at all implicate A1 in the crime. He was, thus, acquitted. As per the consistent version of PW-2, robbers were only two in number. He identified both the appellants as the said two robbers. On close scrutiny, however, his evidence in this regard does not inspire confidence.

10. As per the version in the FIR, *chilli* powder had been thrown into the eyes of PW-2 before attempt was made to snatch the cloth bag containing the cash amount. In the MLC, there is not even a remote reference made of any hurt being caused by *chilli* powder. No injuries in the eyes are indicated nor has it been explained as to how with *chilli* powder in his eyes he was able to see the persons who had blocked his way and were snatching away his money from his hands. PW-2 spoke about knife injuries having been inflicted on his hand. In the MLC, an injury on the shoulder also surfaced. There is no explanation as to how the injury on the shoulder was sustained. The MLC, in fact,

renders the word of PW-2 highly doubtful. It notes all the injuries to be lacerated wounds. If knives were used to inflict the injuries, the resultant wounds would not be lacerations.

11. The prosecution had relied on the evidence of one Rakesh for corroboration, he also being projected as an eye witness. Rakesh was not examined at the trial, this leading to an adverse inference to the effect that, if examined, he would not have either supported the case of robbery or of complicity of the appellants in the said crime.

12. The case of the prosecution about complicity of A1 Akbar Khan has been disbelieved. He was the first person to be arrested on the basis of some information. Apparently, the basis of the said information itself was false. Since PW-2 is consistent in his version that only two persons were involved and he identified A2 and A3 as the said persons, it has to be assumed that the entire case against A1 from the beginning was wholly unfounded. If so, it is questionable as to how A1 could have led the investigating agency to the two appellants who were arrested statedly on the disclosure of the former.

13. There is no recovery made from A2 (Raj Kumar). Recovery is shown to have been made from A3 (Anil). But then, that is only an empty cloth bag with pay-in-slips. The evidence in this regard is adduced through the mouthpiece of the investigating officer (PW-8) and a constable (PW-5) accompanying him. Both the said witnesses have materially contradicted each other, changing the place of recovery, the former referring to a garbage dump and the latter describing the place as Birla School. Strangely, the pay-in-slips were

found totally intact, not even soggy, even after more than five days of exposure to elements. If they had been thrown into garbage dump, the fact that they were unspoilt and still fresh as mint renders the version of recovery incredible.

14. For the foregoing reasons, serious doubts exist as to the extent of truthfulness of the prosecution case, in general, and the veracity of PW-2, in particular. Benefit will have to be extended to the appellants. The impugned judgment and order on sentence against the appellants are, thus, set aside. The appellants are acquitted. Bail bonds of appellant Raj Kumar are discharged.

15. Appellant Anil was taken in custody on execution of non-bailable warrants issued pursuant to and on account of his absence at the hearing. He shall be released from jail forthwith, unless required in any other case.

16. Both the appeals are disposed of in above terms.

R.K.GAUBA, J.

MAY 21, 2019

vk