

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

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Reserved on: 20<sup>th</sup> August, 2019

Decided on: 30<sup>th</sup> August, 2019

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**CRL.A. 1103/2017**

VIRENDER KUMAR @ BITTOO

..... Appellant

Represented by: Mr. Akshay Bhandari, Mr.  
Digvijay Singh and Mr.  
Akhilesh, Advocates.

versus

STATE

..... Respondents

Represented by: Mr. Amit Gupta, APP for the  
State

**CORAM:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

1. By the present appeal, Virender Kumar @ Bittoo challenges the impugned judgment dated 6<sup>th</sup> May 2017 convicting him for the offences punishable under Sections 392/411/34 IPC in FIR No. 35/2009 registered at PS Karawal Nagar and the order on sentence dated 29<sup>th</sup> September 2016 directing him to undergo rigorous imprisonment for a period of four years and to pay a fine of ₹5,000/- and in default whereof to undergo simple imprisonment for a period of one year for the offence punishable under Section 392 IPC and undergo rigorous imprisonment for a period of three years for the offence punishable under Section 411 IPC.

2. Assailing the conviction, Learned Counsel for the appellant contended that the information was received regarding the co-accused Satpal, but the appellant was arrested without any information. Complainant knew co-accused Satpal but did not know the appellant. There is no information as to how the appellant was identified. He further contended that as per the

testimony of the Investigating Officer (IO), the complainant was present at the time of the recoveries which were made from the house of the appellant and the co-accused Satpal, but the complainant in his testimony stated that the recovered articles were shown to him later on. He further contends that he did not go to the house of the co-accused and the appellant and no arrest was made in his presence. He contends that PW-3, PW-4 and PW-10, official witnesses to the recovery, have given different addresses of the house of the appellant. Two other accused persons arrested upon the disclosure statements of the appellant and co-accused Satpal, have been acquitted as complainant failed to identify them. Co-accused Ravinder who was arrested was discharged as TIP failed. No TIP of the appellant was conducted. He further contends that version of the complainant in examination-in-chief cannot be relied upon as in his cross-examination he admits that appellant and Ravinder were shown to him in police station, still he did not identify Ravinder but identified appellant in the court. He contends that Milan (PW-2) eyewitness has not been fully cross-examined. Thus his evidence cannot be looked into. However, he claims that even if taken into consideration Milan does not support the prosecution case. He further prays that the appellant be acquitted or in the alternative released on the sentence already undergone.

3. Per contra, Learned APP for the State submits that the purported improvements in the statement of the complainant are the detailed explanation of facts which could not be narrated in detail in the FIR and deposed to in the Court. He states that the complainant was examined four years after the date of incident, thus there cannot be exact recollection of the incident, thus, his evidence should be given credence. He further contends

that the complainant affirms his signature on the arrest memo of the appellant and duly identified the gold bangles which were recovered from the house of the appellant. He contends that the appellant was arrested at the instance of the complainant, thus the question of TIP of the appellant does not arise.

4. Brief facts of the case are that on 12<sup>th</sup> February 2009, at about 9:00 P.M., information was received regarding snatching at Shop No. 107, Kamal Vihar, Karawal Nagar. Aforesaid information was recorded vide DD No.20A (Ex.PW-3/A) and was assigned to HC Omkar Dutt. He along with Ct. Hemraj reached at the spot where he met the complainant and his brother. He recorded the statement of the complainant wherein he stated that on 12<sup>th</sup> February 2019 at around 8:30 P.M. his cousin brother Milan was making jewellery at his shop when two boys entered their shop and inquired about the making charges of gem studded silver ring, he stated the cost to be Rs. 250/-. In the meantime, two more boys entered the shop and one of them inquired about the price of the gold ring to which he asked them to come next morning as he felt that those boys were under influence of alcohol. One of those boys asked for water to which he refused, but, that boy insisted and he went inside to get water. In the meantime, his cousin was brought inside the shop on point of weapon. One of the boys also showed weapon to him and demanded the keys of the safe but he denied. Two boys were holding them at point of knife while other two robbed two gold bangles, nath, teeka, jhumki, ear rings, necklace and etc. which he was making weighing around 80 grams. They also took his gold chain along with jewellery manufacturing dyes. One out of the two boys who were holding him asked him “*mujhe jante ho*” he denied as he was afraid. They threatened him and left the shop.

He stated that he knows one of the two boys who was holding him and his name was Satpal @ Kalak. On checking, he found out that Rs. 700/-, ATM Card, RC of the motorcycle and mobile phone bearing no. 9350589395 has also been robbed. On the basis of the aforesaid statement, FIR No. 35/2009 (Ex.PW-3/B) was lodged at PS Karawal Nagar for the offences punishable under Sections 394/397/34 IPC.

5. Further investigation of the case was handed over to ASI Habib Ahmad. He prepared the site plan Ex.PW10/A at the instance of the complainant and recorded the statements of the complainant and his cousin. Complainant led them to the house of Satpal in Gali No. 2, D-Block, Dayal Pur, where search was made for him but Satpal was not found there. He also made search of the accused persons at other places but in vain.

6. On 19<sup>th</sup> March 2009, in the morning hours complainant made a telephonic call and informed him that Satpal and one of his associates can be found at Gali No. 2, D-Block, Dayal Pur. ASI Habib Ahmed constituted a raiding team comprising of HC Ajit Singh, Ct. Jitender and Ct. Suraj Pal along with the complainant who reached at the spot around 5:00 A.M. At the instance of the complainant, accused Satpal and one of his associates were apprehended. On interrogation the name of the other accused person was disclosed as Virender Kumar @ Bittoo (Appellant herein). Accused Satpal and the appellant were arrested vide arrest memos Ex. PW-4/B and Ex. PW-4/A respectively. Their disclosure statements were recorded vide Ex. PW-1/C and Ex. PW-1/B respectively. It was disclosed by the accused Satpal that he could get mobile phone of the complainant recovered and the appellant disclosed that he could get the motorcycle which was used for the crime and one pair of broken bangles which were robbed from Usha

Jewellers recovered from his house. Both the accused persons disclosed the name of co-accused persons as Arun, Ravi Bisht, Ajay @ Chintu and Anil.

7. Accused Satpal led them to his house and pointed out towards his room at ground floor and took out stolen mobile phone from his almirah. Complainant identified the mobile phone and claimed it to be his. The same was sealed and seized vide seizure memo Ex. PW-1/D.

8. The appellant led them to his house and pointed out towards the motor cycle bearing No. DL-13 SC 3889 which was seized vide seizure memo Ex. PW-4/C. Thereafter, he led them to his room at the ground floor of his house and took out transparent polythene from his almirah containing one pair of broken bangles which were stolen from Usha Jewellers. Complainant identified the broken bangles and same were sealed and seized vide seizure memo Ex. PW-1/G.

9. Thereafter, both the accused persons led them to the place of incident where pointing out memo was prepared at their instance which is exhibited as Ex. PW-1/H. He deposited the motorcycle and two sealed parcels containing mobile phone and broken bangles with MHC(M). Supplementary statement of the complainant was also recorded. He made search for other accused persons but in vain. After discussing the case with senior police officials, he added Section 412 IPC.

10. Charge sheet was filed and charge was framed against Satpal and the appellant for the offences punishable under Sections 395/412 IPC.

11. During the course of further investigation, search was made for Ravi @ Bisht, Ajya @ Chintu, Arun and Anil and Raj Kumar in pursuance of NBW as well as attachment proceeding were carried out but no clue came forward.

12. On 8<sup>th</sup> October 2009, accused Ajay @ Chintu was arrested vide arrest memo Ex.PW-7/A, his personal search was conducted vide memo Ex.PW-7/B and his disclosure statement was recorded vide Ex.PW-7/C. On 9<sup>th</sup> October 2009, SI Habib Ahmed moved an application for TIP of Ajay but he refused to participate in the same. He took one day police remand of Ajay and made efforts for recovery at his instance but in vain. Thereafter, he led them to the place of incident where pointing out memo was prepared at his instance exhibited as Ex. PW-7/D.

13. On 24<sup>th</sup> October 2009, at about 10:30 A.M. accused Arun was arrested from his house vide arrest memo Ex.PW-7/A, his personal search was conducted vide memo Ex.PW-7/B and his disclosure statement was recorded vide Ex.PW-7/C. In pursuance of his disclosure statement, motor cycle bearing No. DL 1 SR 5872 was recovered from his house and same was seized vide seizure memo Ex. PW-8/D. Thereafter, he led them to the place of incident where pointing out memo was prepared at his instance which is exhibited as Ex. PW-8/C. On the same day an application for TIP of Arun was moved but he refused to participate in the same. During the course of investigation, the complainant identified accused Arun as one of the robber. On completion of investigation, supplementary charge sheet was filed for offences punishable under Section 395/412 IPC.

14. Accused Ravi was declared proclaimed offender by the concerned court. Later Ravi was arrested and sent for trial where the learned Trial Court discharged him for offences punishable under Section 395 IPC and his case was transferred to Ld. Metropolitan Magistrate for trial under Section 174-A IPC.

15. Raju (PW-1), complainant deposed in sync with his statement made

before the police. He identified accused Satpal, the appellant, accused Ravi @ Ravinder as the person who entered his shop on the day of the incident. He stated that accused Satpal and the appellant were apprehended from same place at the same time. He also stated that he was called by the police for joining TIP at Tihar Central Jail, but at that point of time during TIP he was unable to identify the accused person due to lapse of time. He identified the accused Ravinder Bisht as the person who committed robbery in his shop. Accused Satpal was the person who inflicted injury on his temporal region with a knife. Though he had not sustained sharp injury, the accused used the knife in a way like he was slapping him with the knife. He further stated that he took his mobile phone and two bangles on superdari vide superdarinama Ex. PW-1/J.

16. In his cross-examination Raju stated that in his statement to the police he stated that he sensed that the accused persons might go after drinking water but the said fact has not been recorded in his statement before the police. He further stated that he made statement to the police that he saw one person had pointed out one country made pistol on forehead of his brother, but only word 'Hathiyaar' has been mentioned in his statement. It is also not mentioned in his statement that another accused person pointed out knife on his stomach. It is also not mentioned that the weight of silver items was about half a kilogram. The fact that after removing all these items, all the offenders tied his legs with his belt, one of the offender gave him a knife blow on right temporal region and offenders slapped his brother has also not been recorded in his statement. The fact that the offenders were on motorcycle and that his mobile phone was kept on the counter has also not been recorded. He further stated that there was no landline installed at his

shop and his brother Milan was not having any mobile instrument. He stated that he was having two mobile phones and he and his brother used to use the same mobile phones. The number of mobile phones were 9211807074 and 9350589395. The mobile phone number 9211807074 was registered in the name of his uncle Cheddi Lal and the second number was in his name. He did not take any bill at the time of purchase of second mobile phone. He further stated that he did not tell IMEI number of his mobile phone to the police. He stated that he made a call on 100 number from his mobile bearing no. 9211807074. He stated that the accused Satpal was not arrested in his presence as he left the spot after informing the police and went to his shop. He stated that he was called to the police station to identify the accused Satpal and his statement was recorded. He further stated that he does not have any proof of purchase of any gold. He also stated that the appellant was shown to him in police station on his date of arrest and he identified him. Accused Ravinder Bisht was also shown to him in police station after his arrest. He further stated that he did not visit the house of Virender to make recovery.

17. The appellant in his statement recorded under Section 313 Cr.P.C stated that he was lifted from his house and was falsely implicated in the present case. He stated that he did not make any disclosure statement to the police and that the police obtained his signature on blank papers. The owner of the motorcycle recovered bearing no. DL-13-SC-3889 is his father. He stated he being friend of co-accused Satpal has been falsely implicated in the present case.

18. Contention of the appellant that the information was with regard to the co-accused Satpal but the appellant was also arrested without any

information, deserves to be rejected for the reason, it was on the information given by the complainant that Satpal was available at the place when the police along with the complainant reached at the spot and on his identification, arrested Satpal. Since appellant was also one of the accused and present at the spot, on his identification and pointing out, appellant was also arrested. Name of Satpal whom Raju, the complainant identified, has been mentioned in the FIR itself. Complainant stated that though he did not know the other accused prior to the incident, however, he could identify them. In his cross examination also, Raju admits that presence of Satpal was informed to police officer Habib and the police arrived after half an hour. Police met him at Gate No. 2, Dayalpur. Even though he subsequently stated that Satpal was not arrested in his presence, it is evident that on his information and identification that Satpal was arrested. Raju having admitted his presence at the place of incident and the appellant having been also arrested with him, it is but natural that the arrest of the appellant took place in the presence of Raju. Though Raju stated that he left the spot after informing the police for his shop, however, he admits having signed the arrest memo, disclosure statement as also the seizure memo pursuant to the recovery at the instance of the appellant and Satpal. Since the appellant was arrested in the presence of the complainant, no further test identification was required and Raju having seen the appellant subsequently in the police station, does not belie his version. Merely because co-accused Ravinder was discharged as his test identification proceedings failed, would not be a ground to discharge the appellant, who from the evidence on record is evident to have been arrested in the presence of the complainant. The complainant also identified the two broken bangles recovered at the instance

of the appellant which were stolen from his shop and had received the same on superdari.

19. Learned counsel for the appellant has heavily relied on the confrontations made to the complainant to show that there were improvements in his statement, however the confrontations as noted in para 16 above do not affect the veracity of the complainant as these were further details he made in his deposition which were not required to be narrated in the FIR itself. In the FIR, the complainant stated details of the goods robbed including the mobile phones giving the number as well which were recovered at the instance of co-accused Satpal. He has clearly stated that he and his brother were threatened with a weapon and merely not stating country made pistol, would not change it from a weapon. In FIR, complainant also stated that while leaving, the accused threatened him and his brother.

20. Milan (PW-2), brother of the complainant did not appear for cross examination. It is trite law that testimony of a witness who has not been subjected to cross examination by the accused, cannot be looked into. In the present case, the plea of appellant is that even if he has not been cross examined, testimony of Milan (PW2) whatever he has stated in his examination-in-chief be looked into because Milan does not say that they robbed two bangles thereby belying the recovery. A perusal of the testimony of Milan would reveal that in his cross examination, he has supported the entire prosecution case and that accused took away the jewellery items displayed in the show case of the shop. Mere non-mentioning of the bangles separately by him, would not lead to the

conclusion that the bangles were not robbed during the incident.

21. Be that as it may, since complete evidence of Milan has not been recorded in which case, even the learned APP would have had the benefit to cross examine or re-examine him, the part testimony of Milan cannot be looked into.

22. In view of the evidence of complainant, Raju as also the recovery from the appellant, this Court finds no error in the impugned judgment of conviction. As regards the order on sentence, appellant has been awarded rigorous imprisonment for a period of four years and to pay a fine of ₹ 5000/- in default whereof, to undergo simple imprisonment for a period of one year for offence punishable under Section 392 IPC. The sentence of rigorous imprisonment for a period of four years and a fine of ₹ 5000/- needs no modification, however, the in default sentence for a period of one year is excessive and is reduced to simple imprisonment for a period of three months. The order on sentence is accordingly modified.

23. Appeal is disposed of.

24. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellant.

25. TCR be returned.

**(MUKTA GUPTA)**  
**JUDGE**

**AUGUST 30, 2019**

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