

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 11.03.2020

+ **CRL.A. 896/2016 & CRL.M.(BAIL) 1287/2019**

RAHUL @ GOLI @ CHUWRA

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant	: Mr Dhruv Gupta and Mr Harshil Gupta,
	: Advocates.
For the Respondent	: Mr Amit Gupta, APP for State.
	: SI N.K. Singh, PS Shalimar Bagh.

JUDGMENT

VIBHU BAKHRU, J

1. The present appeal arises of a judgment dated 02.07.2016 passed by the Learned ASJ, Rohini Courts, whereby the appellant was convicted of the offences punishable under Sections 397 and Section 411 of the Indian Penal Code, 1860 (IPC). The appellant further impugns the order dated 15.07.2016, whereby he was sentenced to undergo rigorous imprisonment of seven years with a fine of ₹5,000/- for the offence committed under Section 397 of the IPC and in default in payment of fine, to undergo simple imprisonment for a period of one month.

2. The appellant was prosecuted pursuant to an FIR registered with PS Shalimar Bagh, under Sections 394/397/411/34 of the IPC and Sections 25/27 of the Arms Act, 1959. The case set up by the

prosecution is that on 26.06.2015, the complainant (Sunil) – who was a student of 12th Standard at the material time – was returning home after attending a computer class. At around 8:15 pm, he got down at Badli bus stand and while passing through a park near MGF Mall on outer ring road, he was confronted by two boys. They asked him to handover his belongings, failing which they threatened to stab him with a knife. It is alleged that in order to escape, the complainant started running, however, one of the two boys caught hold of him by his neck. The complainant tried to save himself but the boy, who had caught hold of him, told the other boy – Rahul, the appellant herein – to stab the complainant. Egged on by the boy who had caught the complainant, Rahul gave two knife blows on the complainant's hip. It is further alleged that thereafter, the said two assailants took away his mobile phone (of the brand Samsung with a SIM Card for the mobile no. 8585949213) and an amount of ₹70/-, from his pocket and ran away from the spot.

3. Thereafter, the complainant with the assistance of a passerby gave information to the PCR. The said information was passed on to PS Shalimar Bagh, and was recorded as DD no. 44A. Pursuant to this, ASI Raj Bahadur reached the spot and found that injured had already been shifted to Max Hospital by the PCR officials. ASI Raj Bahadur then reached there and obtained the MLC of the complainant. Thereafter, he recorded Sunil's complaint on the basis of which the FIR in question was registered.

4. After the conclusion of investigation, a chargesheet was filed. And, charges were framed against the appellant under Sections 397 and 411 of the IPC. The appellant pleaded not guilty and the matter was set down to trial.

5. The Trial Court, after examining the evidence as obtaining in the case, found the appellant guilty of the offence under Sections 397 and 411 of the IPC.

6. The appellant has assailed his conviction on the ground that there are various discrepancies and contradictions in the testimonies of the witness for prosecution and therefore, they ought to be discarded. It is further contended that no independent witness was joined during the investigation, thus, the testimony of the complainant, with respect to recovery of the mobile phone and belongings of the complainant, is not reliable.

Evidence

7. During the course of trial, fifteen witnesses were examined for the prosecution. Before proceeding further, it is relevant to briefly examine the evidence led by various witnesses.

8. The complainant Sunil was examined as PW-5. He deposed that at the material time, he was a student of 12th standard and was attending computer classes at APLL Institute situated at Madhuban Chowk, Delhi. He deposed that on the day of incident, at about 8:15 pm, he was returning home after his class and deboarded the bus at Badli bus stand. While passing through the MGF Mall Park, he was

confronted by two boys. They demanded his mobile phone and cash and threatened him with a knife. Hearing this, he started running away from there. One of the two boys came from the rear side and grabbed him by his neck and the other boy came in front of him. When the complainant tried to escape from their clutches, one of the boys (identified as the appellant) gave two knife blows on his right hip. As a result, the complainant fell down on the ground and both the boys took away his Samsung mobile phone (with a SIM Card for mobile no.85859492113) and cash from his pocket. Thereafter, the said boys ran away. He testified that he started shouting for help. He deposed that one person came there and helped him out by giving him his mobile phone. He deposed that he made a call at 100 number and as a result, police came at the spot and took him to Max Hospital in the PCR Van. Thereafter, police officials reached the hospital and recorded his statement (Ex.PW5/A).

9. PW5 further testified that he left the hospital at around 12 midnight and police dropped him to his house. On their way back, they reached Haiderpur chowk, where they noticed two boys, one of which was the accused Rahul. On seeing the accused, he pointed them to the police as the boys who had committed the offence. The police chased the accused and apprehended both of them. On personal search, a knife, the complainant's mobile phone, as well as another mobile phone were recovered from the possession of the appellant (Rahul). Besides this, a sum of ₹70/- (three currency notes of the denomination of ₹20/- each and one currency note of denomination of

₹10/-) was also recovered from his pocket. Thereafter, a sketch of the knife was prepared (Ex.PW5/B), which bears PW-5's signature at point A. The knife was thereafter kept in a *pullanda* and was sealed. He deposed that the said *pullanda* and the currency notes were seized by the police and the respective memos, Ex.PW5/C and Ex.PW5/D, bear his signatures at points A. PW-5 further handed over the clothes, which he was wearing at the night of incident, to the police.

10. In his cross-examination, PW-5 stated that at the spot, the police officials had not made him sign any documents. He stated that although he signed some documents prepared by the police, however, he did not remember when he signed the same and their exact contents.

11. Sh Prabhu Kumar, who was working as an electrician in Premier Inn Hotel, Haiderpur, Shalimar Bagh at the material time, was examined as PW-3. He deposed that on 26.06.2015 at about 8:00-8:15 pm, while going towards Automall, he saw a boy of around 18-19 years of age coming from the side of Toyota Showroom, MGF Mall. The said boy was injured and blood was coming out from his body. He was shouting for help. He made a call to 100 number from his mobile phone. He deposed that the boy (complainant) told him that he had been attacked in the park by two boys; they had injured him with a knife and had taken away his mobile phone and cash.

12. Ct. Rohtash was posted at PCR on the night of incident and he was examined as PW-6. He deposed that on the night of incident at about 8:33 pm, he received a PCR call to the effect that a boy had

been injured with a knife. After receiving this information, he reached near MGF mall where he found one boy in an injured condition. He took him immediately to Max Hospital. On enquiring, the injured person disclosed his name as Sunil.

13. ASI Raj Bahadur was posted at PS Shalimar Bagh on the day of incident and he was examined as PW-11. He deposed that on 26.06.2015 at about 8:35 pm, he received information vide DD no.44A (Ex.PW7/D) that one boy had been injured with a knife. He alongwith Ct. Raj Kumar (PW-9) reached near Premium Hotel, Haiderpur, outside MGF Mall. After making enquiries, PW-11 came to know that the injured was shifted to Max Hospital and, therefore, they proceeded to the said hospital. He obtained the MLC of the injured person, Sunil, (Ex.PW1/A) and recorded the statement of the injured person (Ex.PW5/A). He further prepared a *rukka* (Ex.PW11/A) and handed over the same to Ct Raj Kumar (PW-9). Thereafter, PW-11 proceeded to the spot, where the incident had taken place and lifted blood-stained soil, earth sample and blood with the help of gauze (Ex.PW9/A). He deposed that he drew the site plan at the instance of the complainant (Sunil) (Ex.PW5/L).

14. He deposed that he along with PW-9 and the police staff picked to drop the injured at his residence. On their way, they reached Haiderpur Chowk where they saw two persons, who were identified by the injured person (sunil) as the persons who had committed the offence. He stated that on seeing the police, the accused started to run away from there but they were overpowered by some public persons

and the police. He further testified that the injured Sunil pointed towards one of the accused persons (the appellant herein) as the one who had given a knife blow on his buttock and had also looted his mobile phone and cash. The complainant (Sunil) also identified the other accused as the one who had caught hold of him. On enquiry, his name was disclosed as Manish @ Don.

15. PW-11 deposed that an informal search of the appellant was conducted by him and he found one button operated knife from the right pocket of his trousers. A sum of ₹70/- was also recovered from his pocket, the same consisted of four currency notes – three notes of the denomination of ₹20/- and one currency note of denomination of ₹10/-. The injured Sunil identified the cash recovered as belonging to him that was robbed by the accused. On enquiry, one of the accused disclosed his age as seventeen years and therefore, he was kept in custody of SI Manish (PW-15). He further deposed that during the investigation, he requested 2-4 passersby to join the investigation but all of them refused to do so. Thereafter, he arrested the accused (Ex.PW5/E). On a personal search (Ex.PW5/F), one mobile without sim was also recovered from the accused Rahul, however, the complainant Sunil did not identify this mobile phone. On further enquiry, the accused Rahul disclosed that he had thrown his shirt in the bushes in Kanchi Park in order to hide his identity and had also hidden the stolen mobile phone in the said park. His disclosure statement was recorded as Ex.PW9/B. He deposed that next morning, a search was conducted in the said park by PW-11 alongwith Ct. Raj

Kumar, where the accused Rahul himself took out one mobile set of Samsung make from the bushes and handed over the same to him. The accused also took out his shirt from nearby bushes. Further, the accused pointed out the place of incident where he had robbed the mobile phone and cash from the complainant (Ex.PW9/E).

16. Ct. Raj Kumar, who was posted at PS Shalimar Bagh as constable on the night of incident, was examined as PW-9. He deposed that the same was recovered from Kanchi Park, Shalimar Bagh at the instance of the appellant. The appellant had disclosed that he had hid the mobile phone in the bushes of the said park and the mobile phone (Samsung) was recovered from the bushes in said park.

17. SI Manish, who was the In charge of the ER vehicle on the night of incident, was examined as PW-15. He deposed that after the treatment of Sunil in the Max Hospital, he had taken him to the spot in his ER vehicle. There, site plan was prepared by the IO at the instance of Sunil. After completing the proceedings at the spot, they went to drop Sunil to his residence, which was located in village Sahipur, Shalimar Bagh. On their way, when they reached near the Post Office, Haiderpur, the complainant (Sunil) pointed towards two boys who were present there. He identified them as the ones who had robbed him and injured him with a knife. He further deposed that on seeing the police vehicle, the two boys started running to escape from the spot; however, with the help of the public and the police staff, they were overpowered. The two boys identified themselves as Manish @ Don and Rahul. Thereafter, proceedings with respect to Rahul were

carried out by ASI Raj Bahadur and with respect to Manish, the proceedings were carried out by PW-15.

18. In his cross-examination, PW-15 stated that no independent witnesses from the adjoining area were called for by the IO in his presence, before arresting the accused Rahul.

19. The accused Rahul @ Goli's statement was recorded under Section 313 of the Cr.P.C., wherein he denied being apprehended by the police near the Post Office at Haiderpur. He stated that neither was he present at the said Post Office nor did he try to run away from that spot. He stated that police had falsely and wrongly lifted him from his house. He further denied giving knife blows to the complainant and stated that after lifting him from his house, the police took his photographs and showed them to the complainant, who at the instance of police wrongly and falsely identified him. He further stated that neither any knife nor any mobile phone or money was recovered from his possession and the same had been falsely planted on him by the police.

Reasons and Conclusion

20. The appellant has served about six years of his sentence (including remission).

21. A careful examination of the testimony of various witnesses reveals that there are several inconsistencies in their testimonies. ASI Raj Bahadur Singh (who deposed as PW11) had testified that on 26.06.2015, he was on night emergency duty along with Ct. Raj

Kumar (who testified as PW9). He stated that on that date, at about 8:35 p.m., he received information vide DD No. 44A (Ex.PW7/D) that one boy had been injured with the knife. He went to the spot near Premium Hotel, Haiderpur outside MGF Mall Park and saw blood marks in the park near MGF Mall. On inquiries, he was informed that PCR Van had taken the injured to the Max Hospital. He thereafter reached Max Hospital where he obtained the MLC (Ex.PW1/A) of the injured (Sunil). He stated that he recorded the statement of the injured after he was declared fit for making the statement. In his cross-examination, he stated that he was permitted to make inquiries from Sunil (the injured) at 10 p.m. He thereafter prepared a *rukka* (Ex.PW11/A) and handed it over to Ct. Raj Kumar (PW9), who left the hospital for getting the FIR registered. He further testified that he left Max Hospital after SI Manish (PW15) arrived at the hospital and proceeded to the spot. After registration of the FIR, Ct. Raj Kumar (PW9) also came to the spot and handed over the original *rukka* and a copy of the FIR to him. He stated that he lifted blood stained soil; earth sample; and blood with the help of gauze, from the spot. He stated that thereafter SI Manish Kumar came to the spot in a Government gypsy along with injured and at the instance of the injured, he prepared the site plan (Ex.PW5/L).

22. He testified that while he, along with Ct. Rajesh Kumar and other staff, were going to leave the injured at his home, they saw two persons who were identified by the injured (Sunil) as the assailants. They tried to run away but were apprehended by public persons and

police staff. One of the two boys was the appellant and was identified by Sunil as the boy who had inflicted the knife injuries and had looted his cash and his mobile phone. Sunil identified the other boy as the one who had caught hold of him. PW11 testified that Rahul was searched and a button operated knife and ₹70/- were recovered from him. The amount recovered was in three currency notes of ₹20/- denomination and one currency note of the denomination of ₹10/-. The co-accused of the appellant (the boy who had allegedly caught hold of Sunil) disclosed his age as seventeen years and he was kept in the custody to SI Manish. The sketch of the knife was drawn and the knife was converted into a *pullanda* and thereafter, sealed. The seizure memo (Ex.PW5/C) was prepared. The cash recovered was also kept in a plastic container and sealed. PW11 testified that he arrested the appellant and a search memo was prepared. He testified that on searching the appellant, a mobile phone was recovered but Sunil did not identify that to be his mobile. He also testified that the father of the injured – Sunil, was present there and Sunil informed him of the IMEI Number of his mobile phone. He stated that since Sunil was not feeling well, he sent him home.

23. PW1 testified that thereafter, he recorded the disclosure statement of the appellant (Ex.PW9/B). In the morning, the appellant was taken from the lock up to Kanchi Park, Shalimar Bagh and the appellant led them to spot from where he took out one mobile phone set of Samsung make from the bushes of the park and the same was handed over by him along with a shirt. The shirt as well as the mobile

phone, were taken into possession vide memos exhibited as Ex.PW9/C and Ex.PW9/D, respectively.

24. In his cross-examination, PW11 stated that he had prepared the site plan prior to the arrival of Ct. Raj Kumar at the spot. He also stated that Ct. Raj Kumar had reached the spot after arrival of SI Manish. SI Manish had accompanied the injured to the spot. This is inconsistent with the testimony of Ct. Raj Kumar (PW9). In his cross-examination, PW9 stated that he and ASI Raj Bahadur Singh (PW11) had reached the spot at about 08:30 p.m. ASI Raj Bahadur Singh, who was also the Investigating Officer, had made inquiries from the persons that were gathered there and also recorded the statement of one person. He stated that they remained at the spot for about fifteen minutes and thereafter proceeded to Max Hospital, where they reached at about 9:30 pm. He stated that the Investigating Officer (ASI Raj Bahadur Singh) had recorded the statement of the injured in his presence and thereafter, he had left for the police station with the *rukka* at about 10:40 p.m. He stated that he reached the Police Station at about 10:50 pm and after registration of the FIR, he returned to the spot. He stated that they remained at the spot at about thirty to forty-five minutes and SI Manish along with the injured reached the spot after his arrival at the spot with the FIR.

25. Thus, whilst PW11 had testified that the site plan had been prepared at the instance of the injured and prior to arrival of Ct. Raj Kumar (PW9), Ct. Raj Kumar(PW9) had testified that he had arrived at the spot before SI Manish and the injured. PW11 had deposed that

he had prepared the site plan prior to arrival of Ct. Raj Kumar with the view to explain why Ct. Raj Kumar's signatures did not appear on the site plan. This raises doubts whether the site plan was prepared at the instance of the complainant. These doubts as to the case of the prosecution are further accentuated as the complainant does not testify being taken the spot after leaving Max Hospital.

26. PW11 had testified that father of Sunil was present when the appellant was searched, after being identified by Sunil (the injured). None of the other witnesses have testified to the aforesaid effect. SI Manish (PW15) had testified that after treatment of the injured (Sunil), he had taken Sunil to the spot near MGF Mall and after concluding the proceedings, they were taking the injured to his residence (which was in Village Sahipur, Shalimar Bagh). On the way, the injured had pointed out towards two boys who were present and had identified them as the assailants who had robbed and injured him. On seeing the police vehicle (Gypsy), they tried to run away from the spot but were apprehended. Neither SI Manish nor Ct. Raj Kumar had testified that the appellant's father was present at the spot. There is also no mention that he was present at the hospital. It is not SI Manish's testimony that the appellant's father had accompanied them from hospital to the spot or had arrived at the spot and was accompany then when the injured allegedly spotted the appellant and the co-accused. None of the witnesses had testified that the appellant's father had arrived at the spot. He was not examined as a witness by the prosecution. Ct. Raj Kumar (PW9), had testified that after the proceedings at the spot, he

along with Investigating Officer and staff were going to leave Sunil at his home and when they reached the Post Office, Haiderpur, two persons were identified by the injured as his assailants. Thus, according to his testimony, the father of the injured did not accompanying them from the spot to leave Sunil (injured) to his home. As to how and when the appellant's father arrived, if at all, at the spot (Haiderpur chowk) where the appellant and the co-accused were apprehended, remains unanswered.

27. PW11 had mentioned that the injured had informed him of the IMEI number of his mobile phone. However, Sunil (PW5) has not testified to that effect. This is also not mentioned in Sunil's statement (Ex.PW5/A). It is difficult to accept that any person would have remembered the IMEI Number of a phone from memory. The explanation that the father of the injured was present when the IMEI number was disclosed to the Investigating Officer (PW11) also cannot be believed as there is no mention of Sunil's father joining the proceedings at any stage and his mysterious presence at Haiderpur Chowk is not explained.

28. As noticed above, SI Manish had testified that he had taken Sunil in his vehicle after his treatment. However, Dr. Priya Govil, who was examined as PW2, testified that the injured had left against medical advice (LAMA).

29. PW5 had testified that he remained at the hospital at about 12 midnight. He stated that the police officials were taking him to drop him at his house and on the way when they reached Haiderpur Chowk,

they noticed two boys including the appellant and on seeing them, he told the police that they were the ones who had committed the offence. The police officials chased them and apprehended both the accused. He stated that the personal search of the accused was taken in his presence and a knife was recovered. He further stated that beside the knife, two mobile phones were recovered from the possession of the appellant including one mobile phone (Samsung) that belonged to him. Apart from the above, the appellant had ₹70/- with him (three currency notes in the denomination of ₹20/- and one currency note in the denomination of ₹10/-) and he could identify the said currency notes as his. PW5 identified his mobile phone (IMEI No. 351748/05/401142/3) without SIM, which was exhibited as Ex. P-8.

30. This testimony is inconsistent with the testimony of the Investigating Officer (PW11), SI Manish (PW15) and Ct. Raj Kumar (PW9). Whereas according to PW9, on searching the appellant, one button operated knife and ₹70/- were recovered. According to PW11, one button operated knife, a mobile phone and ₹70/- were recovered from the appellant. But, according to the complainant (PW5), two mobile phones, including the one belonging to him, were recovered.

31. PW15, in his examination-in-chief, did not testify as to recovery of any article. His examination-in-chief is silent as to recovery of either the knife, mobile phone or any money.

32. It is also relevant to mention that the personal search memo (Ex.PW5/F) records the recovery of “*One purse containing Rs.180/-*” and “*One mobile phone w/o Sim Callbar*”.

33. The personal search memo of the appellant bears the signature ASI Raj Bahadur Singh (PW11) and witnessed by Sunil (PW5) and Ct. Raj Kumar (PW9). This search memo is not consistent with the testimony of any of the witnesses. On the contrary, it belies the testimony that on search of the appellant, ₹70/- belonging to Sunil were recovered. The memo indicates that a purse containing ₹180/-, as well as a mobile phone were recovered. There is no mention of this mobile phone by PW9 or PW15.

34. More importantly, the search memo does not mention that a knife was recovered from the appellant.

35. Interestingly, PW5 has not testified that he had gone to the spot after leaving the hospital, and had assisted any of the police officials in making the site plan. According to his testimony, he remained in the hospital till 12 midnight and had left the hospital and was going towards his house along with police officials who were taking him to drop him at his house and on the way, they had noticed the two accused. This is inconsistent with the testimony of police officials (PW9, PW11 and PW15), who have testified that the appellant had come to the spot along with PW15, after leaving the hospital.

36. The Trial Court had not noticed several inconsistencies in the testimony of witnesses. Although the Trial Court did notice that there was an inconsistency regarding recovery of the mobile phone, it considered the same as trivial and not affecting the case of the

prosecution. This Court is unable to concur with the said view. The inconsistencies in the testimonies are not immaterial or trivial. The entire case set up by the prosecution was that the appellant and the co-accused were identified as the persons who had assailed the complainant (Sunil) and the fact that they had committed the crime was established by recovery of the knife; sum of ₹70/- (three currency notes of ₹20/- and one currency note of ₹10/-); and the recovery of the mobile phone.

37. In view of the inconsistencies in the testimonies as well as evidence obtaining in this case, the case of the prosecution regarding recovery, cannot be accepted as the same is fraught with doubts.

38. This Court is also skeptical about the prosecution's case that the injured had coincidentally identified the appellant while travelling in a vehicle (Gypsy) in the middle of the night. Such a coincidence is clearly improbable.

39. The prosecution sought to explain the presence of the appellant at Haiderpur Chowk in terms of a disclosure statement allegedly made by him (Ex.PW9/B). The said disclosure statement records that the appellant and the co-accused were sitting near the MGF Park drinking liquor and after he had consumed liquor, they desired to drink some more and therefore, they started scouting for a prey for money (*paise ke lie shikar ki talaash karne lage*). Thereafter, the appellant had allegedly recorded that he had accosted the complainant (Sunil) and after assailing him had dispossessed of his mobile phone and money and had run away from the spot. He stated that the complainant had

raised an alarm and people had collected there. Therefore, he had taken out the SIM and thrown it away and had thrown the mobile phone in the bushes. He stated that thereafter, he and the co-accused proceeded towards Haiderpur for drinking liquor but on seeing the police Gypsy, they had attempted to run away but were caught by public and were beaten.

40. It is at once clear that the events narrated in the disclosure statement do not conform to the time frame of the events as set up by the prosecution. As testified by Ct. Rohtash (PW6), the PCR call was made at 08:33 p.m. Thus, if the prosecution's case that the appellant was the person who had assaulted the complainant is accepted, the appellant would have secured the necessary funds for purchasing more liquor – the object for which he had committed the robbery – before 08.33.p.m. It would be logical to assume that he and his co-accused would have immediately proceeded to purchase liquor for their consumption. This is also the statement allegedly made by the appellant. Therefore, the appellant and the co-accused would have reached Haiderpur Chowk in fifteen to twenty minutes. It certainly would not have taken them four hours to get to Haiderpur Chowk. It is, thus, difficult to accept that while the appellant and the co-accused were proceeding to purchase liquor after assaulting the complainant; the complainant who had been taken to hospital; he had been treated; his statement had been recorded, he had come back to the spot; he had assisted the Investigating Officer in making the site plan; and on the way to his home some time after 12 am, spotted the two accused. The

entire story as to how the appellant and the co-accused were found, seems improbable.

41. In view of the above, this Court is unable to accept that the prosecution has established, beyond reasonable doubt, that the appellant had committed offences under Sections 397/411 of the IPC.

42. The appeal is, accordingly, allowed and the appellant is acquitted.

43. The pending application is disposed of.

44. The Jail Authorities are directed to release the appellant forthwith, provided he is not wanted in any other case. The personal bond and sureties, if any, furnished are discharged.

MARCH 11, 2020
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VIBHU BAKHRU, J