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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 03rd February, 2023

Decided on: 23rd March, 2023

+ CRL.A. 593/2022 & CRL.M. 1420/2022

AZAD @ GOURAV

..... APPELLANT

Through: Mr. Vibhor Garg & Mr. Pallav
Awasthi, Advocates.

V

STATE OF GNCT OF
DELHI & ANOTHER

..... RESPONDENTS

Through: Mr. Hitesh Vali, APP for the State
with ASI Mukesh, PS Subzi Mandi

+ CRL.A. 354/2022 & CRL.M. 924/2022

JITENDER @ JITU

..... APPELLANT

Through: Mr. Vivek Chaudhary,
Mr. Baldrishan Sharma,
Mr. Dheeraj Kumar & Mr. Rishav,
Advocates.

V

THE STATE OF N.C.T. OF DELHI

..... RESPONDENT

Through: Mr. Hitesh Vali, APP for the State
with ASI Mukesh, PS Subzi Mandi

+ **CRL.A. 367/2022 & CRL.M. 939/2022**

BHARAT KUMAR GOSWAMI

..... APPELLANT

**Through: Mr. Omkar Sharma,
Advocate.**

V

THE STATE OF DELHI

..... RESPONDENT

**Through: Mr. Hitesh Vali, APP for the State
with ASI Mukesh, PS Subzi Mandi.**

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HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN

JUDGMENT

1. This common judgment shall decide three Criminal Appeals bearing no. 593/2022, 354/2022 and 367/2022 preferred by the appellants Azad @ Gaurav, Jitender @ Jitu and Bharat Kumar Goswami, respectively to impugn the judgment dated 16.03.2022 (hereinafter referred to as “**the impugned judgment**”) passed by the court of Ms. Charu Aggarwal, ASJ Central District, Tis Hazari Court, Delhi (hereinafter referred to as “**the convicting court**”) whereby the appellants along with the accused Kanhaie Jha were convicted for the offence under section 395 of the Indian Penal Code, 1860 (hereinafter referred to as “**IPC**”) and the appellant Bharat Kumar Goswami was acquitted for offence under section 397 IPC after being given the benefit of doubt; and the order on sentence dated 04.06.2022

passed by the court of Mr. Dheeraj Mor, ASJ Central District, Tis Hazari Court, Delhi (hereinafter referred to as “**the sentencing court**”) whereby the appellants along with convict Kanhaie Jha @ Kishan were sentenced to rigorous imprisonment for five years for the offence punishable under section 395 IPC and were also directed to pay a fine of Rs.25,000/- individually for the offence punishable under Section 395 IPC and in default to undergo further simple imprisonment of two months. It was further directed to pay Rs.90,000/- to the complainant as per section 357 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “**the Code**”) towards the loss suffered by him and remaining Rs.10,000/- was ordered to be paid to the State towards the expenses incurred in the prosecution of the case. Fine was not paid.

2. Section 391 IPC defines dacoity. It reads as under:-

391. Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit dacoity.

Dacoity is commission of robbery by five or more persons otherwise there is no difference between dacoity and robbery. The essential ingredients of Section 391 are:

- i. Five or more persons must act in association,**
- ii. Such act must be robbery or attempt to commit robbery,**
- iii. The five persons must consist of those who themselves commit or attempt to commit robbery or those who are present and aid the principal actors in the commission or attempt of such robbery.**

The commission of robbery in association by five or more persons is an essential ingredient of the offence under Section 391 IPC. The gravity of the offence consists in the terror it causes by the presence of a number of offenders. Abettors who are present and aiding when the crime is committed are counted in the number. For the application of Section 391 IPC it is necessary that all the persons should share the common intention of committing robbery. The accused must be shown to have committed robbery or aided in the commission of it and they must be among the body of persons who extorted money or aided them in extorting money. Section 395 IPC provides punishment for committing dacoity. It reads as under:-

395. Punishment for dacoity.—Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

3. The relevant facts as mentioned in the impugned judgment are reproduced as under:-

1. The prosecution, in this case, has filed the chargesheet against four accused persons alleging commission of offence U/s

395/398/464/471 IPC. As per the chargesheet, total five accused were involved in the alleged incident but one of the accused Sanjeet during investigation was declared Proclaimed Offender and has not been arrested till now.

2. The case of the prosecution summed up in the chargesheet is that the only victim of the incident namely Manish Aggarwal is doing the business of mattresses in the name of “Mahal International” at Village Hiran Kudna, Delhi. On 30.06.2017, he came to Chandni Chowk at “Jayanti Parveen Firm”, at 320, Kucha Ghansi Ram, Chandni Chowk, Delhi, to collect payment. On that day, at about 05:30 PM, he after collecting the payment of Rs.2,64,000/- kept by him in his bag, left Chandni Chowk in a rickshaw for Tis Hazari Metro Station. At about 05:50 PM, he reached at Tis Hazari Metro Station and while he was going at Footover Bridge, two boys followed him on Footover bridge out of whom one snatched his bag having cash and other documents. Thereafter, they both ran away from there. He (victim) chased those boys and saw that two more boys were already standing on two different bikes on the road and the boys who came on Footover Bridge sat on those bikes and ran away from the spot. The victim in his initial statement said that he can identify those boys if shown to him. On this statement of the victim, on the same day of incident, the FIR of this case was registered and investigation was carried out.

On the next day of the incident i.e. 01.07.2017, the complainant gave his supplementary statement in which he stated that one of the snatcher was also having pistol with him at the time of incident which he (victim) could not disclose on 30.06.2017, due to fear. He further said in his supplementary statement that in the bag snatched by the wrong doers, one cheque book of Syndicate Bank of his firm “Morph Industries” having account no. 91711010000032, one cheque book of State Bank of India of account no. 32015241943, two stamps of “Morph Industry” & “Mahal International” and certain photocopies of the documents, were also there. The denomination of Rs.2,64,000/- was given by him as 132 currency notes of Rs of Rs.2000/- each.

3. On 04.07.2017, accused Bharat Goswami, Kanhaie Jha and Azad @ Gaurav were arrested in FIR No. 104/17 u/s 25/54/59 Arms Act police station Crime Branch, in which they disclosed their involvement in the incident of this case. On 05.07.2017, DD No. 48 B was registered regarding the arrest of these accused persons in FIR No. 104/17 and their disclosure regarding this case. On 07.07.2017, Sub Inspector, Crime Branch, produced these accused persons in the court of Ld. CMM, Central, in muffled face, where, IO of this case moved an application for interrogation of these accused persons and after interrogation, all these three accused were arrested in the present case. IO moved an application for Test Identification Parade before the court but all these three accused refused to participate in the Test Identification Parade on the ground that they have been shown to various people and their photographs have been clicked. IO took three days Police Remand of these accused from the concerned court. Disclosure statements of these accused persons were recorded by the IO in which they alongwith accused Sanjeet (Proclaimed Offender) and Jitender @ Jitu disclosed their involvement in the incident of this case that they all in connivance with each other committed the offence of this case. As per the disclosure statements of accused Bharat Kumar, Kanhaie Jah and Azad @ Gaurav, it was accused Jitender @ Jim who used to provide information to them about the businessmen who collect payment from the area of Chandni Chowk and on receipt of the information, these three accused persons alongwith co-accused Sanjeet (PO) used to commit theft/robbery/decoity with the businessmen and in this case also, on receipt of information from accused Jitender @ Jitu regarding receiving of payment by victim of the crime, they all four, Bharat Kumar Goswami, Kanhaie Jha, Azad @ Gaurav and Sanjeet, (PO) committed robbery with him. As per the discloser statements of the accused persons, accused Kanhaie Jha and Bharat Kumar Goswami chased the victim at Footover Bridge. Accused Kanhaie Jha snatched the bag, accused Bharat Kumar Goswami showed him pistol and accused Azad & Sanjeet kept waiting for them on the bikes standing on the road. On the basis of disclosure statements of these accused persons,

accused Jitender @ Jitu was arrested but despite efforts, the police could not arrest accused Sanjeet, therefore, he was declared Proclaimed Offender.

4. During investigation, in pursuant to the disclosure statement of the accused persons, the following recoveries were effected from them:-

(i) Bharat Kumar Goswami:-

At the time of his arrest on 05.07.2017 in FIR No. 104/2017, PS Crime Branch, Rs.20, 000/- were recovered from him. As per the disclosure statement of this accused out of the robbed amount of Rs.2,64,000/-, Rs.52,000/- came to his part out of which Rs.20,000/- has been seized in the FIR no. 104/2017, U/s 25/54/59 Arms Act, PS Crime Branch.

(ii) Kanhaie Jha:-

At the time of his arrest on 05.07.2017 in FIR No. 104/17, PS Crime Branch, cash of Rs.1,12,000/- was recovered from him. As per the disclosure statement of this accused, out of the robbed amount of Rs.2,64,000/-, Rs.56,000/- came to his part which were seized in the FIR No. 104/17. On 08.07.2017, accused got recovered from his house one cheque book of the complainant of account no. 32015241943;-

(iii) Azad @ Gaurav:-

At the time of his arrest on 05.07.2017 in FIR No. 104/17, PS Crime Branch, cash of Rs.1,89,000/- was recovered from him. As per his disclosure statement, out of the robbed amount of Rs.2,64,000/-, Rs.52,000/- came to his part. On 08.07.2017, accused got recovered from his house two stamps of the complainant's firm and photocopy of one Aadhar Card of his wife;

(iv) Jitender @ Jitu:-

On 08.07.2017, accused Jitender @ Jitu was arrested in the present case from whose possession scooty bearing no. DL-6 SAH-9023, which he used in the crime by chasing the victim from Chandni Chowk to Metro Station Tis Hazari, cash of

Rs.2,90,000/- out of which Rs.52,000/- is shown as case property of this case AND one cheque book of account no. 91711010000032, were recovered.

5. During the course of investigation, the IO collected the Call Detail Record (CDR) of all the accused persons and the victim and on analyzing all the CDRs, it was found that on the day and time of the incident, all accused were in constant touch with each other and at the time of incident, their location is also changing with the location of the victim and they were found to be present at the spot on the date and time of the incident.

6. After completion of investigation, chargesheet was filed in the court of concerned Ld. Metropolitan Magistrate (MM), who after compliance of Section 207 IPC, committed the case to Session.

Vide order dated 19.01.2018, charge u/s 395 IPC against accused Bharat Kumar Goswami, Kanhaie Jha, Azad @ Gaurav and Jitender @ Jitu, charge U/s 397 IPC upon accused Bharat Kumar Goswami and charge U/s 392 IPC upon accused Kanhaie Jha, Azad @ Gaurav and Jitender @ Jittu was framed. However, accused Jitender @ Jitu was discharged for the offence U/s 468/471 IPC observing that the material on record is not sufficient to frame charge under these provisions. Thereafter, matter was fixed for Prosecution Evidence.

4. The prosecution in support of its case examined 23 witnesses including the complainant Manish Aggarwal as PW1 who appears to be supporting the case of prosecution, police officials who remained connected with the investigation including the Investigating Officer SI Sanjay Gupta and Nodal Officers from different telecommunication companies to establish locations of the complainant Manish Aggarwal and the convicts including the

appellants and convict Kanhaie Jha.

5. The statements of the appellants and convict Kanhaie Jha were recorded under section 313 of the Code in which they pleaded false implication and stated that false recoveries have been planted upon them. They also stated that they refused to participate in Test Identification Parade (TIP) proceedings since they were already shown to the complainant and other public persons. They were taken to the Crime Branch Office during the investigation where they were shown to many public persons including the complainant.

6. The convicting court while convicting appellants and convict Kanhaie Jha, primarily relied on testimonies of the complainant Manish Aggarwal PW1, Nodal Officers from different telecommunication companies and recoveries affected from the appellants and convict Kanhaie Jha in pursuance of their disclosure statements. The relevant portion of impugned judgment is reproduced as under:-

37. The prosecution in order to prove its case has to establish the occurrence of incident and identity of the accused persons facing trial before the court beyond reasonable doubt. In the case in hand, PW-1 Manish Aggarwal, the only victim and eye witness of the crime, is the prime witness of the prosecution around whom the entire case is revolving, who saw the assailants while committing the robbery with him.

38. The testimony of PW-1 on the incident is consistent that on 30.06.2017, at about 04:30 PM, he after collecting the payment of Rs.2,64,000/-, kept by him in a bag left Chandni Chowk in a rickshaw for Tis Hazari Metro Station where two boys stalked him, out of whom one was armed with the pistol and at the point of pistol those boys snatched his bag containing cash of Rs.2,64,000/- and certain other documents, thereafter, both the said boys ran towards the road side where two other boys were already standing on two different motorcycles and the former sat on those motorcycles and ran away from the spot. The testimony of PW-1 regarding collection of money from the area of Chandni Chowk is supported with the testimony of PW-18 Kamlesh Kumar from whose shop the said amount was collected by PW-1. Even, the Call Detail Record (Ex. PW-2/A) proved by the prosecution from the testimony of PW-2, Sh. Pawan Kumar, Nodal Officer, Vodafone, the location of PW-1, on the date and time of the incident was found to be of the spot i.e. Tis Hazari Metro Station. Nothing has come in the cross examination of PW-1 which may cast doubt on his testimony on the occurrence and may lead the case of the prosecution under the shadow of clouds.

39. As discussed hereinabove, the Prosecution has succeeded in proving occurrence of incident with PW-1. Now, the court has to evaluate whether the accused persons facing trial before the court has committed the offence as alleged against them, whether their identity is proved by the Prosecution beyond reasonable doubt and whether the material on record is sufficient to record their conviction for the incident occurred with PW-1.

40. First, I will deal with the identity of the accused persons which in a criminal case plays vital role to connect the accused with the incident, when the accused are unknown to the victim. In this case, the accused persons were unknown to the victim (PW1), therefore, their identity by PW1 assumes importance. Here, the incident is of 30.06.2017. On 04.07.2017, accused Bharat Kumar Goswami, Kanhaie Jha and Azad @ Gaurav were arrested in FIR No. 104/2017, u/s 25/54/59 Arms Act PS Crime Branch, in which their disclosure statements were recorded wherein they disclosed

their involvement in the present case alongwith accused Jitender @ Jitu and accused Sanjit (PO). The accused persons facing trial before the court were arrested in the present case on 07.07.2017. On the same day, IO moved application for their TIP but they refused to participate in Test Identification Parade on the pretext that their photographs have been clicked by the IO and they have been shown to the victim (PW-1) in the police station. The stand of accused persons that they refused to participate in the TIP proceedings since their photographs were clicked and shown to PW-1 in the police station has no merit since PW-1, during his evidence, has stated that accused persons were shown to him in the police station of Crime Branch and Subzi Mandi on 10.07.2017 i.e. after TIP proceedings, which took place on 07.07.2017. Even, accused persons during their statements recorded U/s 313 Cr.PC have stated that during their police remand, they were taken to the Office of PS Crime Branch and were shown to PW-1 further supports the statement of PW-1 that accused persons were shown to him post TIP proceedings but not prior to that, therefore, the refusal of accused persons to participate in TIP proceedings, is without any reason, hence, the adverse inference can be drawn against them.

41. Now, comes the testimony of PW-1, on the identification of accused persons, who in his initial statement Ex. PW1/A said that he can identify the assailants of the crime. At this stage, the role attributed to each accused in the crime is relevant to be mentioned. As per the Prosecution, accused Bharat Kumar Goswami and Kanhaie Jha went at the Footover Bridge and looted the bag of PW-1. Accused Bharat Kumar Goswami is alleged to have shown pistol to PW-1. Accused Azad @ Gaurav and Sanjit (PO) are alleged to be standing on the road on two different motorcycles. PW-1 during his evidence correctly identified accused Bharat Kumar Goswami as one of the robber who came at the Footover Bridge and snatched his bag. But, during chief examination PW-1 identified accused Azad @ Gaurav as assailant who was accompanying accused Bharat Kumar Goswami on the Footover Bridge. However, when he was cross examined by Ld. APP on the same day, on the identification

of accused Kanhaie Jha as one of the robber who came at the Footover Bridge alongwith accused Bharat Kumar Goswami, he (PW-1) correctly identified accused Kanhaie Jha as one of the wrong doer who came to Footover Bridge to rob his bag. The deposition of PW1 on the identification of accused Bharat Kumar Goswami is unblemished. There is some discrepancy in the identification of accused Kanhaie Jha by PW1 and this Court is conscious of the well settled law that the identification of the accused first time in the Court by the victim is weak kind of evidence unless corroborated with other relevant material. In the case in hand, apart from the identification of accused Bharat Kumar Goswami and Kanhaie Jha by PW1 in the Court, the Call detail record(Ex.PW17/E) of mobile bearing No. 9599541224, registered in the name of accused Kanhaie Jha as per CAF (Ex. PW17/D) is also duly proved by the prosecution, showing his presence at the spot on the date and time of the incident and the recovery of complainant's cheque book from his possession in pursuance to his disclosure statement is strong corroborative evidence against accused Kanhaie Jha. The minor discrepancy in the identification of accused Kanhaie Jha by PW-1 in the Court becomes inconsequential in view of the other supporting evidence in favour of prosecution and against accused Kanhaie Jha. The accused Kanhaie Jha was unknown to PW1 whose evidence was recorded in the Court after 10 months of the incident, therefore, the Court cannot rule out the possibility that due to lapse of time PW-1 might have got confused in the identity of accused Kanhaie Jha with accused Azad but when Ld. APP specifically pointed out towards accused Kanhaie Jha, he (PW-1) recollected that it was Kanhaie Jha who was accompanying accused Bharat Kumar Goswami at the time of snatching his bag. The truthfulness and trustworthiness of PW-1 can be gathered from his further deposition that when Ld. APP specifically pointed out towards accused Azad and Jitender for their identification by PW1, he categorically denied to identify them saying that he did not see these two accused persons on the day of incident. No previous enmity between Bharat Kumar Goswami & Kanhaie Jha and victim (PW1) has come on record due to which the later would have falsely implicate them. From the deposition of PW-1, the

prosecution has duly proved the identity of accused Bharat Kumar Goswami and Kanhaie Jha that on the day of incident, they went on the Footover Bridge of Tis Hazari Metro Station and robbed the bag of PW- 1.

42. *Next*, is the identity of accused Azad @ Gaurav and Jitender @ Jitu. So far as, the accused Azad is concerned, as per Prosecution he was standing on the motorcycle on the road. He was identified by PW-1 in the court as one of the wrong doer who came over the Footover Bridge but when Ld. APP pointed out towards accused Kanhaie Jha, PW-1 identified accused Kanhaie Jha as a robber who came over the Footover Bridge. The identification of accused Azad by PW-1 was not required in view of the role attributed to him in the incident as since beginning it is the case of the prosecution that PW-1 actually saw only two accused who came over Footover Bridge and only observed that those two robbers sat on the motorcycle of other two persons standing on the road and out of those two persons standing on the road, one is alleged to be accused Azad. The case against him has to be proved by the prosecution from the circumstances and other connecting evidence on record against him. As per the Customer application form (Ex. PW-17/A) of mobile bearing no. 9958081077 is in the name of accused Azad @ Gaurav and as the CDR (Ex. PW-17/B) of this number, on the date and time of the incident, he was present at the spot. In pursuant to disclosure statement of accused Azad, apart from the cash of Rs.52,000/- of this case, two stamps of complainant's firm and photocopy of one Aadhar Card of complainant's wife were also recovered from his possession which further corroborates the case of the prosecution that accused Azad was involved in the incident happened with PW-1 and assisted other co-accused persons in committing the robbery.

43. *Insofar as*, the identity of accus4ed Jitender @ Jitu. *Even*, his identification by PW-1 was not required since as per own case of the prosecution, he was not seen by PW-1. The role assigned to him in the crime is that he used to provide information to the accused persons about the businessmen who used to collect payment from the area of Chandi Chowk. He is alleged that on the

day of incident, he was chasing PW-1 from Chandni Chowk to Tis Hazari Metro Station. The prosecution has to prove the case against him from the circumstances and the other evidence on record. As per the Prosecution, one sim bearing no. 8510967074, was recovered from the possession of this accused during his personal search which was found in the name of one Swati Gupta. During investigation, police recorded the statement of father of Swati Gupta who said that the said sim bearing no. 8510967074, was never in the name of his daughter and the photographs on the Customer Application Form (CAF) is also not of his daughter. The prosecution has established that the sim of the above mobile number was recovered from the possession of accused Jitender @ Jitu and he has failed to explain as to how the said sim came in his possession and the CDR placed on record by the prosecution is inconsonance with the case of prosecution that the user of said sim was chasing PW-1 from Chandni Chowk to Tis Hazari Metro Station and was in continuously in touch with other accused persons and on the date and time of incident he was present at the spot. In pursuance to the disclosure statement of this case, even the recovery of case property i.e. cheque book and cash of PW-1 was also effected from this accused.

44. The other connecting evidence against the accused persons are the recoveries effected from them in pursuant to their disclosure statements. As already noted in para no. 4 of this order, that part of robbed cash amount, both cheque books, two stamps of complainant's firm and one photocopy of Aadhar Card of his wife were recovered from the possession of the accused persons. The accused have failed to explain as to how the stamps, cheque books and photocopy of Aadhar Card of complainant's wife came into their possession which are his (PW-1) personal/private property over which no one else can have access. Not even a suggestion has been put to the witnesses to confront the recoveries effected from the accused persons. The cash recovered from the accused persons have already been released on superdari in favour of PW1 vide order dated 17.07.2017 passed by Ld.MM. The argument of defence counsels that no independent witness has joined the proceedings is without any force as these days no public person

wants to join the police or court proceedings may be due to apprehension that they themselves might not get entangled in any criminal case in future.

45. The Call detail records of accused Kanhaie Jha, Jitender @ Jitu and Azad @ Gaurav proved by the prosecution are also evident to hold that on the day and time of the incident, accused persons were present near or at the spot and were continuously in touch with each other.

46. This court also does not agree with the argument of Ld. Defence Counsel that the essential ingredient of Section 395 IPC are missing in the case in hand since only four accused have faced trial and no fifth accused has ever been brought by the prosecution before the court. As per the case of the prosecution as deposed by PW-1, four persons were present at the spot at the time his bag was robbed. Out of those four persons, two had come over the Footover Bridge, two were standing on motorcycles on the road with whom the earlier two ran away and the role of fifth accused Jitender @ Jitu surfaced during the investigation that he used to provide information of the businessman who collect payment from the area of Chandni Chowk to other four accused persons. The prosecution has duly proved the involvement of five accused in the crime. It is settled law that in a case of decoity if one or some of the accused are proclaimed offender or have been acquitted the benefit would not go to the other accused persons. The prosecution in order to prove its case for the offence of decoity is required only to prove that five or more persons were involved in the robbery. In the case in hand, there is overwhelming evidence to record that five accused persons went at the spot out of whom accused Bharat Kumar Goswami and Kanhaie Jha robbed the bag of PW-1, accused Azad @ Gaurav and Sanjeet (P.O.) assisted the first two accused in committing robbery and similarly the fifth accused Jitender @ Jitu was also present at the spot and assisted other four accused persons in committing robbery. Non-arrest of accused Sanjit cannot benefit the other four accused facing trial before the court. In view of the

aforesaid discussion, the prosecution has duly proved its case against the four accused facing trial before the court U/s 395 IPC.

47. Accused Bharat Kumar Goswami is also charged for the offence U/s 397 IPC on the allegations that he at the time of robbery shown pistol to PW-1. During examination in chief, PW-1 correctly identified accused Bharat Kumar Goswami who shown him the pistol. During cross examination of this PW conducted by Ld. APP, he said that accused Kanhaie Jha was wearing helmet at the time of incident which was without glass. During cross examination of PW-1 conducted by counsel of accused Bharat Kumar Goswami, he said that the person who aimed gun on him was wearing a helmet. The statement of PW-1 that at the time of incident, accused Kanhaie Jha was wearing the helmet and he shown him the pistol entitles the accused Bharat Kumar Goswami for benefit of doubt for the offence U/s 397 IPC.

48. In view of aforesaid discussion, the material on record is sufficient to record conviction of all 4 accused persons namely Bharat Kumar Goswami, Kanhaie Jha, Azad @ Gaurav and Jitender @ Jeetu for the offence U/s 395 IPC, accordingly, they are convicted under the said provision. However, accused Bharat Kumar Goswami is given benefit of doubt for the offence U/s 397 IPC. Accordingly, accused Bharat Kumar Goswami is acquitted for the offence U/s 397 IPC. Conviction of the accused persons have been recorded for the offence u/s 395 IPC, therefore, there is no need to record their separate conviction for the offence u/s 392 IPC charged against them.

7. The appellants, being aggrieved by the impugned judgment and order on sentence dated 04.06.2022 passed by the sentencing court, filed the present appeals. The appellant Azad @ Gaurav challenged the impugned judgment primarily on the grounds that the impugned judgment is wrong, erroneous and was passed without application of judicial mind and in violation of

settled principles of law. The convicting court has erred in holding that the prosecution has successfully established the guilt for the offence punishable under section 395 IPC. The impugned judgment is based on assumptions, presumptions, conjectures and surmises. The appellant has been falsely implicated in the present case. The supplementary statement dated 01.07.2017 made by the complainant was an afterthought. The alleged recoveries at instance of the appellant in pursuance of disclosure statement cast doubt on the investigation and prosecution case as the alleged recoveries were planted on the appellant. The complainant wrongly identified the appellant who came on the foot-over bridge and snatched the bag from him, whereas as per the prosecution the appellant was waiting under the foot-over bridge on bike. The convicting court did not record the statement under section 313 of the Code properly which violates the fundamental principles of natural justice. The convicting court has committed a grave error in drawing adverse inference against the appellant due to refusal to participate in TIP as the appellant was shown to public persons while in police custody in FIR bearing no. 104/2017. The trial court has committed a grave error in relying on CDRs.

7.1 The appellant Jitender @ Jitu challenged the impugned judgment

primarily on the grounds that the impugned judgment is based on conjectures and surmises and is as such not sustainable under law. The prosecution has failed to prove its case beyond reasonable doubt. The complainant Manish Aggarwal PW1 got registered an unnamed FIR and in his testimony, the complainant didn't identify the appellant as one of the accused in the present case. The appellant was arrested on basis of disclosure statements made by the other co-accused. The prosecution has failed to prove guilt of the appellant beyond reasonable doubt.

7.2 The appellant Bharat Kumar Goswami challenged the impugned judgment on the grounds that the convicting court committed a grave error on law and facts while passing the impugned judgment. There is no suitable evidence that PW18 delivered a parcel containing Rs. 2,64,000/- in 132 currency notes in denomination of Rs. 2,000/-. The testimony of the complainant Manish Aggarwal PW1 was not consistent qua the involvement of the appellant. The complainant has not deposed that the appellant had snatched his bag and as such no offence is made out against the appellant. The complainant Manish Aggarwal has improved his statement by adding that the appellant was having pistol with him and said pistol/gun was never recovered by the Investigating Officer. The Investigating Officer did not

collect the CCTV footage from cameras installed near place of occurrence which happened to be a crowded place and no public person was included in the investigation. The appellant was not in continuous touch with other co-accused as reflected from the CDR and as such the appellant was not involved in the crime. The convicting court committed a grave error while observing that the stand of accused that they refused to participate in the TIP proceeding since their photographs were clicked and shown to the complainant Manish Aggarwal PW1 in the police station has no merits. The convicting Court has failed to appreciate that there was no credible evidence against the appellant to connect him with the alleged offence and the appellant, in statement under section 313 of the Code, has denied the allegations leveled by the prosecution. The impugned judgment was passed in a mechanical manner by ignoring relevant material enough for the acquittal of the appellant. The impugned judgment is based on conjectures and surmises and passed without application of the judicial mind in a proper manner. The appellants also raised other grounds to challenge the impugned judgment and prayed that impugned judgment and order on sentence dated 04.06.2022 be set aside.

8. In the adversarial system, every person accused of an offence is always

presumed to be innocent so that burden lies upon the prosecution to establish guilt of the accused beyond reasonable doubt and all ingredients of the offence with which the accused is charged. The accused enjoys the right to silence. The doubts to be raised by the accused must be of a reasonable man and must be actual and substantial doubts as to the guilt of accused arising from the evidence or lack of it, as opposed to mere apprehensions. The Supreme Court in **Shivani V State of Maharashtra**, AIR 1973 SC 2662 emphasized that our jurisprudential enthusiasm for presumed innocent must be moderated by the pragmatic need to make criminal justice potent and realistic. The Supreme Court in **State of U.P V Shankar**, AIR 1981 SC 897 observed that it is the function of the court to separate the grain from the chaff and accept what appears to be true and reject the rest. In **Krishna Mochi V State of Bihar**, 2002 CrI LJ 2645 it was observed that there is a sharp decline in ethical values in public life and in present days when crime is looming large and humanity is suffering and society is so much affected, thereby duties and responsibilities of the courts have become much more. It was observed as under:-

Now the maxim “let hundred guilty persons be acquitted, but not a single innocent be convicted” is, in practice changing world over and courts have been compelled to accept that “society suffers by wrong convictions and it equally suffers by wrong acquittals”.

8.1 The Supreme Court in **Sujit Biswas V State of Assam**, (2013) 12 SCC 406 held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. In **Jose V Sub Inspector of Police, Koyilandy and others**, (2016) 10 SCC 519, the Supreme Court held as under:-

In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or nonexistent but as entertainable by an impartial prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted.

9. The perusal of the impugned judgment reflects that the convicting court primarily relied on the testimony of the complainant Manish Aggarwal PW1 who supported case of the prosecution. It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the

State in giving evidence. The role of a witness is paramount in the Criminal Justice System of any country. A witness, by giving evidence relating to the commission of an offence, performs a sacred duty of assisting the court to discover the truth. The witnesses play an integral role in the dispensation of justice.

9.1 The complainant Manish Aggarwal PW1 mainly deposed that he on 30th June, 2017 collected payment of Rs.2,64,000/- from Jayanti Praveen situated at Kucha Ghazi, Chandni Chowk against supply of mattresses which was kept in a handbag and said fact is supported by the testimony of PW18 Kamlesh Kumar. The complainant Manish Aggarwal PW1 thereafter proceeded towards Tis Hazari metro station in a battery rickshaw and at about 6 pm, he alighted from battery rickshaw near the foot over bridge of Tis Hazari Metro Station and started climbing the foot over bridge. Suddenly two boys came and out of them one pointed a *katta* (small pistol) and snatched the bag which was containing 132 currency notes in denomination of Rs.2,000/- amounting to Rs.2,64,000/-, cheque book issued in favour of Mehal International, cheque book issued in favour of the complainant Manish Aggarwal PW1 by State Bank of India, Rohini and two rubber stamps in name of Mehal International and Morph Industries. The

complainant Manish Aggarwal PW1 further deposed that those two boys ran away downstairs and sat on two separate motor bikes which were already in starting position and two other boys were already sitting on those two motor bikes. The complainant Manish Aggarwal PW1 chased those four boys and saw them at the spot. The police came at spot and statement Ex. PW1/A of the complainant Manish Aggarwal PW1 was recorded. The complainant Manish Aggarwal PW1 further deposed that subsequently Rs.1,80,000/- were recovered from the offenders. The complainant Manish Aggarwal PW1 identified stamps and cheque books as Ex. PW1/B to Ex. PW1/D. The complainant Manish Aggarwal PW1 identified the appellant Bharat Kumar Goswami who pointed a gun at him and appellant Azad @ Gaurav who was accompanied the appellant Bharat Kumar Goswami but he could not identify who snatched the bag from him.

9.2 The complainant Manish Aggarwal PW1 during cross examination conducted by the Additional Public Prosecutor identified convict Kanhaie Jha who snatched the bag from him and was standing along with the appellant Bharat Kumar Goswami. The complainant Manish Aggarwal PW1 could not identify the appellant Azad @ Gaurav who was sitting on a motor bike which was standing downstairs of foot over bridge and was in starting

position and on pillion seat of which the appellant Bharat Kumar Goswami sat after the incident. The complainant Manish Aggarwal PW1 also could not identify the appellant Jitender @ Jitu as the person who chased him after collecting money from Kucha Ghansi Ram.

9.3 It is worth mentioning here that the complainant Manish Aggarwal PW1 in statement Ex. PW1/A, did not mention about pointing of gun at him by one of the offenders and that the bag was containing two stamps and two cheque books. The complainant Manish Aggarwal PW1, in supplementary statement recorded on 01.07.2017, mentioned that one of the offenders out of two was having a *katta* (pistol) and the bag was so containing cheque book issued by Syndicate Bank in favour of his firm Morph Industries having account no. 91711010000032, cheque book issued by State Bank of India having account no. 32015241943, two stamps of “Morph Industry” & “Mehal International” and certain photocopies of the documents and 132 currency notes in the denomination of Rs.2,000/- amounting to Rs.2,64,000/-.

10. The prosecution to prove the arrest of the appellants Azad @ Gaurav and Bharat Kumar Goswami and the convict Kanhaie Jha on 04.07.2017 in FIR bearing no. 104/2017 under section 25 of the Arms Act, 1959 by Crime

Branch and recoveries affected from them in pursuance of their disclosure statements examined PW8 HC Neeraj, PW9 HC Ajay, PW10 ASI Jaswinder and PW12 ASI Parmod who deposed that on 04.07.2017 they arrested the appellants Azad @ Gaurav and Bharat Kumar Goswami and convict Kanhaie Jha and their disclosure statements Ex. PW8/A, Ex. PW9/A and Ex. PW10/A respectively were recorded. PW12 ASI Parmod deposed that Rs. 20,000/- were recovered from the appellant Bharat Kumar Goswami, Rs. 1,89,000/- were recovered from the appellant Azad @ Gaurav and Rs. 1,12,000/- were recovered from the convict Kanhaie Jha. The Investigating Officer SI Sanjay Kumar Gupta PW23 arrested appellants Azad @ Gaurav and Bharat Kumar Goswami and convict Kanhaie Jha in the present case vide arrest memos Ex. PW20/ A, Ex. PW20/G and Ex. PW20/D respectively and also recorded their disclosure statements. SI Sanjay Kumar Gupta PW23 at their instance, also recovered and seized scooty bearing registration no. DL 6SAH 9023 stated to be used by the appellant Jitender @ Jitu while chasing the complainant Manish Aggarwal PW1 and also arrested the appellant Jitender @ Jitu vide arrest memo Ex. PW14/A. SI Sanjay Kumar Gupta PW23 also recorded disclosure statement Ex. PW14/C of the appellant Jitender @ Jitu and in pursuance of which recovered Rs.

2,90,000/- which were seized vide seizure memo Ex. PW11/A. During further investigation, SI Sanjay Kumar Gupta PW23 also recovered cheque book Ex. PW1/D issued by Syndicate Bank at the instance of the appellant Jitender @ Jitu which was seized vide seizure memo Ex. PW20/K, cheque book Ex. PW1/C at the instance of convict Kanhaie Jha which was seized vide seizure memo Ex. PW20/L, two stamps Ex. PW1/D at the instance of the appellant Azad @ Gaurav which were seized vide seizure memo Ex. PW20/M.

10.1 It is worth mentioning that as per prosecution, the robbed amount was Rs.2,64,000/-. The appellant Bharat Kumar Goswami received Rs.52,000/- and out of which Rs.20,000/- has been recovered and seized in the FIR no. 104/2017. The convict Kanhaie Jha got recovered Rs.1,12,000/- during investigation of FIR bearing no. 104/2017 which included Rs.56,000/- which came to his share out of the robbed amount and on 08.07.2017 also got recovered one cheque book of account no. 32015241943 belonged to the complainant Manish Aggarwal PW1. The appellant Azad @ Gaurav got recovered Rs. 1,89,000/- during the investigation of FIR 104/2017 which included Rs. 52,000/- out of the robbed amount and on 08.07.2017 also got recovered two stamps of the complainant Manish Aggarwal PW1 and

photocopy of one Aadhar Card of his wife. The appellant Jitender @ Jitu on 08.07.2017 got recovered Rs.2,90,000/- which included Rs.52,000/- out of robbed amount and one cheque book of account no. 91711010000032.

11. The prosecution to establish location of the complainant Manish Aggarwal PW1 and offenders examined different Nodal Officers from various telecommunication companies.

11.1 The prosecution to prove location of the complainant Manish Aggarwal PW1 near place of occurrence examined PW2 Pawan Kumar, Nodal Officer, Vodafone and PW7 Rajeev Ranjan, Nodal Officer, Reliance Jio. PW2 Pawan Kumar, Nodal Officer, Vodafone proved the CDR of SIM no 8860449949 for period with effect from 01.6.2017 to 02.07.2017 as Ex. PW2/C and said mobile number as per CAF Ex. PW 2/A was in the name of the complainant Manish Aggarwal PW1. PW7 Rajeev Ranjan, Nodal Officer, Tata Tele Services proved CDR of SIM no 9212649949 for period with effect from 01.6.2017 to 02.07.2017 as Ex. PW7/B and location chart as Ex. PW7/C and said SIM as per CAF EX. PW3/A was in the name of the complainant Manish Aggarwal PW1.

11.2 PW3 Yatin Chawla, Nodal Officer, Reliance Jio proved CDR of SIM no 7678626077 for the period with effect from 01.6.2017 to 02.07.2017 as

Ex. PW3/B which as per CAF Ex. PW3/A was in the name of Suraj Kumar. As per prosecution, convict Kanhaie Jha was using SIM no 7678626077.

11.2.1 PW16 Pawan Kumar, Alternate Nodal Officer, Vodafone Idea Ltd. had brought record of SIM No. 8506066815 and 851096707. PW16 proved the CDR of SIM no 8510967074 as Ex. PW16/B which as per CAF Ex. PW16/A was in the name of Swati Gupta. PW16 also proved CDR of SIM no 8506066815 as Ex. PW16/C. As per prosecution, the appellant Jitender @ Jitu got issued said SIM no. on the basis of forged documents and was using said SIM no.

11.2.2 PW-17 Rajeev Vashisht, Nodal Officer, Bharti Airtel has brought the record of SIM no 9958081077, 9599541224 and 99111082067. SIM no 9958081077 as per CAF Ex. PW17/A was in the name of Gaurav and proved the CDR of SIM no 9958081077 as Ex. PW17/B. SIM no 9599541224 as per CAF Ex. PW17/D was in the name of Kanhaie Jha and proved the CDR of SIM no.9599541224 as Ex. PW17/E. SIM no 99111082067 as per CAF Ex. PW17/F was in the name of Sandeep and proved CDR of the SIM no 99111082067 as Ex. PW17/G.

12. The prosecution from the quality and quantity of evidence led by it established following facts:-

- i. The complainant Manish Aggarwal PW1 on 30th June, 2017 collected payment of Rs.2,64,000/- from Kucha Ghasi, Chandni Chowk against supply of mattress and kept said amount in a handbag.
- ii. The complainant Manish Aggarwal PW1 proceeded towards Tis Hazari metro station and at about 6 pm alighted from battery rickshaw near the foot over bridge of Tis Hazari Metro Station and started climbing the foot over bridge.
- iii. The appellant Bharat Kumar Goswami came at foot over bridge and pointed a small gun on the complainant Manish Aggarwal PW1. The appellant Azad @ Gaurav was accompanying the appellant Bharat Kumar Goswami. The complainant Manish Aggarwal PW1 in cross examination conducted by Additional Public Prosecutor identified the convict Kanhaie Jha who snatched bag from him and was standing along with the appellant Bharat Kumar Goswami.
- iv. The boys ran away downstairs and sat on two separate motor bikes which were already started and two other boys were already sitting on those two motor bikes.
- v. PW5 ASI Anand Pal recorded statement Ex. PW1/A of the complainant Manish Aggarwal PW1.
- vi. The appellants Azad @ Gaurav and Bharat Kumar Goswami and convict Kanhaie Jha were arrested on 04.07.2017 in FIR bearing no 104/2017 under section 25 of the Arms Act, 1959 by Crime Branch.
- vii. During investigation of FIR bearing no 104/2017, out of robbed amount of Rs. 2,64,000/-, Rs. 20,000/- were recovered from the appellant Bharat Kumar Goswami, Rs. 52,000/- were recovered from the appellant Azad @ Gaurav and Rs. 56,000/- were recovered from the convict Kanhaie Jha
- viii. The appellants Azad @ Gaurav, Bharat Kumar Goswami and convict Kanhaie Jha were arrested were formally on 07.07.2017 in present FIR by the investigating officer SI Sanjay Kumar Gupta PW23 and during investigation their respective statements Ex.

PW20/C, Ex. PW20/J and Ex. PW20/F were also recorded. The appellant Jitender @ Jeetu was also arrested and his disclosure statement Ex. PW14/C was recorded and during investigation he got recovered Rs. 2,90,000/- including Rs. 52,000/- out of robbed amount.

ix. The appellant Jitender @ Jeetu during further investigation also got recovered one cheque book of Syndicate Bank Ex. PW1/D which was seized vide seizure memo Ex. PW20/K. The convict Kanhaie Jha also got recovered cheque book Ex. PW1/C which was seized vide seizure memo Ex. PW20/L. The appellant Azad @ Gaurav also got recovered two seals Ex. PW1/B which were seized vide seizure memo Ex. PW20/M.

x. As per CDR, the location of the appellants and the convict Kanhaie Jha were traced near place of occurrence.

13. The perusal of the impugned judgment reflects that the convicting court to establish presence of the complainant Manish Aggarwal PW1 at the place of occurrence and incident relied on testimonies of the complainant Manish Aggarwal PW1 and PW2 Pawan Kumar, Nodal Officer, Vodafone. The combined testimonies of the complainant Manish Aggarwal and PW2 Pawan Kumar clearly proved the presence of the complainant Manish Aggarwal PW1 at the place of occurrence at the time of the incident.

13.1 The appellants Azad @ Gaurav and Bharat Kumar Goswami and the convict Kanhaie Jha were arrested in the present case on 07.07.2017 and they had refused to participate in TIP on the grounds that they have been shown to the complainant Manish Aggarwal PW1 in police station and their photographs were also clicked. The convicting court observed that as per the

testimony of the complainant Manish Aggarwal PW1, the appellants Azad @ Gaurav and Bharat Kumar Goswami and the convict Kanhaie Jha were shown to him in police station on 10.07.2017 i.e. post TIP proceedings and the convicting court due to this did not accept reasons for refusal to participate in TIP by the appellants Azad @ Gaurav and Bharat Kumar Goswami and the convict Kanhaie Jha and drew adverse inference against them.

13.2 The convicting court also believed the testimony of the complainant Manish Aggarwal PW1 including cross examination conducted by Additional Public Prosecutor regarding the participation of the appellant Bharat Kumar Goswami as person who pointed pistol at the complainant Manish Aggarwal PW1 and convict Kanhaie Jha as person who snatched bag from the complainant Manish Aggarwal PW1 irrespective of a discrepancy in the testimony of the complainant Manish Aggarwal PW1 regarding identification of the convict Kanhaie Jha. The convicting court, to establish identity of the convict Kanhaie Jha, also drew support from CDR Ex. PW17/E in respect of SIM no 9599541224 which as per CAF Ex. PW17/D was registered in name of the convict Kanhaie Jha and recovery of cheque book belonged to the complainant Manish Aggarwal PW1 at the

instance of the convict Kanhaie Jha in pursuance of his disclosure statement.

13.3 The convicting court, to connect the appellant Azad @ Gaurav with incident and to establish his presence at the spot at time of occurrence, relied on circumstantial evidence i.e. CDR Ex. PW17/B in respect of SIM no 9958081077 which as per CAF Ex. PW17/A was registered in name of the appellant Azad @ Gaurav and recovery of Rs. 52,000/- out of robbed amount of Rs. 2,64,000/- and two stamps belonged to the complainant Manish Aggarwal PW1 and photocopy of Aadhar Card of his wife.

13.4 The convicting court in respect of the appellant Jitender @ Jitu observed that he was not required to be identified by the complainant Manish Aggarwal PW1 as the complainant Manish Aggarwal PW1 did not see the appellant Jitender @ Jitu. The convicting court to connect the appellant Jitender @ Jitu with the offence relied on CDR Ex. PW16/B of SIM no 8510967074 which as per CAF Ex. PW16/A was in the name of Swati Gupta but was recovered from the possession of the appellant Jitender @ Jitu and recovery of part robbed amount and cheque book belonged to the complainant Manish Aggarwal PW1.

13.5 The impugned judgment reflects that the convicting court, to connect the appellants and convict Kanhaie Jha relied on CDR and the recoveries

effected from them during the investigation. The convicting court also did not accept the plea that no offence punishable under section 395 IPC is made out. The convicting court observed that as per testimony of the complainant Manish Aggarwal PW1, four persons were present at the spot at the time of incident out of which two were present on foot over bridge while two were sitting on motor bikes on road and further role of the appellant Jitender @ Jitu surfaced during the investigation. The convicting court held that offence was committed by five person and non arrest of accused Sanjeet who was declared PO did not extend any benefit to the appellants and convict Kanhaie Jha.

14. The respective counsels for the appellants and the Additional Public Prosecutor for the respondent/State advanced arguments. Relevant record perused.

14.1 The counsel for the appellant Bharat Kumar Goswami advanced oral arguments and also submitted written arguments. The counsel for the appellant Bharat Kumar Goswami argued that the prosecution could not prove that the complainant Manish Aggarwal PW1 had received 132 currency notes of denomination of Rs. 2000/- each total amounting to Rs. 2,64,000/- and the testimony of PW18 is not sufficient to prove this fact.

The testimony of the complainant Manish Aggarwal PW1 is not consistent regarding the alleged involvement of the appellant Bharat Kumar Goswami. The appellant Bharat Kumar Goswami was acquitted for the offence punishable under section 397 IPC by the convicting court. The investigating officer neither included any public person in investigation nor seized CCTV footage from cameras stated to be installed near place of occurrence. The appellant Bharat Kumar Goswami refused to participate in Test Identification Parade (TIP) for justified reasons. The impugned judgment is liable to be set aside.

14.2 The counsel for the appellant Jitender @ Jitu advanced oral arguments and also submitted written arguments. The counsel for the appellant Jitender @ Jitu argued that the impugned judgment is not sustainable in law and is based on conjectures and surmises. The prosecution has failed to prove its case beyond the reasonable doubts. The complainant Manish Aggarwal didn't identify the appellant Jitender @ Jitu as one of the accused in the present case and only deposed that when he started from Kucha Ghasi Ram after collecting money then he suspected that one person was chasing him from the said place and chased him up to the place from where he hired a rickshaw but he cannot say whether the appellant Jitender @ Jitu had chased

him. The appellant Jitender @ Jitu arrested only on the basis of the disclosure statement made by the co-accused during the police interrogation. The alleged recovery from the appellant Jitender @ Jitu cannot be believed under given facts and circumstances. The appellant is the sole bread earner of his family comprising of wife and two minor children. The counsel for the appellant Jitender @ Jitu argued that appeal be allowed and conviction be set aside.

14.3 The counsel for the appellant Azad @ Gaurav argued that impugned judgment was passed without proper appreciation of material brought on record. The testimony of the complainant Manish Aggarwal PW1 is self contradictory in material aspects and cannot be relied upon and did not support the case of the prosecution. The complainant Manish Aggarwal PW1 failed to identify the appellant Azad @ Gaurav as the person who was present at the spot and as such his testimony has no value. The testimony of the complainant Manish Aggarwal PW1 is not corroborated by any other evidence. The alleged recoveries alleged to be made at the instance of the appellant Azad @ Gaurav are planted and such recoveries are highly improbable. No public witness was included at time of alleged recovery. The convicting court committed gross error while placing reliance on CDR and

mere alleged presence in the close vicinity of place of occurrence cannot be a ground of conviction. The counsel for the appellant Azad @ Gaurav argued that the conviction cannot be sustained.

14.4 The Additional Public Prosecutor for the respondent/State supported the impugned judgment argued that the prosecution has led sufficient evidence qualitatively and quantitatively to prove guilt of the appellants as per law. He referred testimony of the complainant Manish Aggarwal PW1 during arguments and argued that the testimony of the complainant Manish Aggarwal is trustworthy and can be safely relied on. The Additional Public Prosecutor also supported arguments by referring recoveries stated to be affected from the appellants and testimonies of the Nodal Officers.

15. In a criminal trial the evidence is to be weighed not counted and the court should not adopt a mechanical approach in appreciating evidence of prosecution. Although criminal jurisprudence requires a high standard of proof for imposing punishment on an accused, it is equally important that on hypothetical grounds and surmises, prosecution evidence should not be brushed aside and disbelieved to give undue benefit of doubt to the accused.

15.1 The prosecution to connect the appellant Bharat Kumar Goswami with offence, relied on the testimony of the complainant Manish Aggarwal PW1

who in his deposition identified as the person who pointed *katta* (pistol) on him although the convicting court vide impugned judgment had acquitted the appellant for offence punishable under section 397 IPC. The testimony of the complainant Manish Aggarwal PW1 proved involvement of the appellant Bharat Kumar Goswami along with the convict Kanhaie Jha regarding snatching of the bag from him despite minor discrepancy in deposition of the complainant Manish Aggarwal PW1. Every contradiction discrepancy or improvement is not fatal for prosecution. It is only major contradiction, discrepancy or improvement on material facts shaking the very genesis of prosecution case which matters for creating doubt on prosecution case. The Supreme Court in **Pawan Kumar @ Monu Mittal V State of Uttar Pradesh and another**, (2015) 7 SCC 48 observed that when a witness is examined at length it is quite possible for him to make some discrepancies and no true witness can possibly escape from making some discrepant details. It was further observed that courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. The testimony of the complainant PW1 can be safely relied on regarding the involvement of the appellant Bharat Kumar

Goswami in commission of offence and his presence at spot at that time. The convicting court was justified and rightly relied on the testimony of the complainant Manish Aggarwal PW1 regarding criminality of the appellant Bharat Kumar Goswami in snatching the bag from the complainant Manish Aggarwal PW1.

15.1.1 There is no legal force in arguments advanced by the counsel for the appellant Bharat Kumar Goswami that the prosecution could not prove that on day of incident, the complainant Manish Aggarwal was carrying Rs. 2,64,000/- . The combined testimony of the complainant Manish Aggarwal PW1 and PW18 Kamlesh Kumar proved that on day of the incident the complainant PW1 was carrying Rs.2,64,000/- with him.

15.1.2 The counsel for the appellant Bharat Kumar Goswami also argued that incident happened at public place but no public person was included in the investigation and the CCTV footage was also not collected by the investigating officer. It is correct that the Investigating Officer neither included any public person in the investigation nor made efforts to collect CCTV footage from any camera that might be installed on the vicinity of the incident. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid

emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. It was observed in **Kuna @ Sanjaya Behera V State of Odisha**, 2017 SCC Online Supreme Court 1336 that the conviction can be based on the testimony of single eye witness if he or she passes the test of reliability and that is not the number of witnesses but the quality of evidence that is important. The Supreme Court in **Veer Singh & others V State of UP**, (2014) 2 SCC 455 observed as under:-

Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided Under Section 134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable.

No public person joined and included in investigation. The conviction can be based upon the testimonies of eyewitness. The prosecution does not require a number of eye witnesses to prove its case beyond reasonable doubt. Even if there is one eye witness and his testimony is up to the mark, the conviction can be based upon the same. In **Namdeo V State of**

Maharashtra, (2007) 14 SCC 150, the Supreme Court held as under:-

In the leading case of Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793, this Court held that even where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs." In Anil Phukan v. State of Assam, (1993) 3 SCC 282 : JT 1993 (2) SC 290, the Court observed; "Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect.

It is not the quantity but the quality of the evidence which matters in a criminal trial. The testimony of the complainant Manish Aggarwal PW1 is trustworthy and is reliable as to the criminality of the appellant Bharat Kumar Goswami. If the IO did not include any public person in the investigation, it is not fatal to the case of the prosecution. There is legal force in the arguments advanced by the Additional Public Prosecutor that the testimony of the complainant Manish Aggarwal PW1 is sufficient to connect

the appellant Bharat Kumar Goswami with offence.

16. The convicting court, to connect the appellant Jitender @ Jitu relied on CDR Ex. PW16/B in respect of SIM no 8510967074 although said SIM no as per CAF Ex. PW16/A was issued in name of Swati Gupta but seized from possession of the appellant Jitender @ Jitu. The convicting court held that CDR Ex. PW16/B proved that user of SIM no 8510967074 i.e. the appellant Jitender @ Jitu was chasing the complainant Manish Aggarwal PW1 from Chandni Chowk to Tis Hazari Metro Station and was in constant touch with other accused(s). It is pertinent to mention that there is no incriminating evidence in testimony of the complainant Manish Aggarwal PW1 against the appellant Jitender @ Jitu. The complainant Manish Aggarwal PW1 did not identify the appellant Jitender @ Jitu as the person who was chasing him.

16.1 The convicting court also relied on CDR Ex. PW17/B in respect of SIM no 9958081077 which as per CAF Ex. PW17/A was issued in name of the appellant Azad @ Gaurav to establish his presence at the spot. The convicting court also relied on CDR Ex. PW17/E in respect of SIM no 9599541224 which as per CAF Ex. PW17/D was issued in name of convict Kanhaie Jha to establish his presence at the spot. CDR data may be an important and effective piece of evidence which may facilitate and assists

courts in ascertaining the presence of different participants in commission of an offence including the complainant and proposed accused at one particular place or location which may be their presence at or near the place of occurrence. However, CDR data can only be taken as supporting or corroborative piece of evidence and conviction cannot be made solely on basis of CDR data. CDRs proved and relied on by the prosecution only proved that the appellants Jitender @ Jitu and Azad @ Gaurav, on day of incident, were present near place of occurrence/incident but it is not proved that they have actually participated in commission of offence as per complaint Ex. PW1/A. The respective counsels for the appellants Jitender @ Jitu and Azad @ Gaurav rightly argued that CDR data cannot be safely relied on to establish their criminality for the offence punishable under section 395 IPC. The argument advanced by the Additional Public Prosecutor regarding reliance on CDR data is without much force.

17. The complainant Manish Aggarwal PW1, in complaint Ex. PW1/A and subsequent supplementary statement recorded on 01.07.2017 gave details of articles contained in bag stated to be snatched from the complainant Manish Aggarwal PW1. The bag was stated to be containing 132 currency notes of denomination of Rs.2,000/- total amounting to Rs. 2,64,000/-, one cheque

book of Syndicate Bank issued in favour of Morph Industries in respect of account no 91711010000032 Ex. PW1/D, one cheque book of State Bank of India in respect of account no 32015341943 Ex. PW1/C, two stamps of Morph Industries and Mahal International Ex. PW1/B and photocopies of certain documents.

17.1 The appellants Azad @ Gaurav, Bharat Kumar Goswami and convict Kanhaie Jha were arrested on 04.07.2017 in FIR bearing no 104/2017 under section 25 of the Arms Act, 1959 by Crime Branch. Thereafter out of robbed amount of Rs. 2,64,000/-, Rs. 20,000/- were recovered from the appellant Bharat Kumar Goswami, Rs. 52,000/- were recovered from the appellant Azad @ Gaurav and Rs. 56,000/- were recovered from the convict Kanhaie Jha.

17.2 The appellants Azad @ Gaurav, Bharat Kumar Goswami and convict Kanhaie Jha were formally arrested on 07.07.2017 in the present FIR by the investigating officer SI Sanjay Kumar Gupta PW23 and during the investigation their respective statements Ex. PW20/C, Ex. PW20/J and Ex. PW20/F were recorded. The appellant Jitender @ Jitu was also arrested and his disclosure statement Ex. PW14/C was recorded and during the investigation Rs. 2,90,000/- got recovered which were seized vide seizure

memo Ex. PW11/A. The appellant Jitender @ Jitu, during further investigation also got recovered one cheque book Syndicate Bank Ex. PW1/D which was seized vide seizure memo Ex. PW20/K. The convict Kanhaie Jha also got recovered cheque book Ex. PW1/C which was seized vide seizure memo Ex. PW20/L. The appellant Azad @ Gaurav also got recovered two seals Ex. PW1/B which were seized vide seizure memo Ex. PW20/M.

17.3 The convicting court to establish criminality of the appellants Azad @ Gaurav and Jitender @ Jitu, also relied on recoveries affected at their instance in pursuance of the disclosure statements. Section 27 of the Evidence Act, 1872 incorporates the theory of confirmation by subsequent facts i.e. statements made in police custody are admissible to the extent that they can be proved by subsequent discovery of facts. The Supreme Court in **Raju Manjhi V State of Bihar**, Criminal Appeal No. 1333/2009 decided on 2nd August, 2018 held as under:-

It is true, no confession made by any person while he was in the custody of police shall be proved against him. But, the Indian Evidence Act, 1872 provides that even when an accused being in the custody of police makes a statement that reveals some information leading to the recovery of incriminating material or discovery of any fact concerning the alleged offence, such statement can be proved against him.

17.4 The prosecution to prove the factum of recovery from the appellants examined PW8 HC Neeraj, PW9 HC Ajay, PW10 ASI Jaswinder and PW12 ASI Parmod who arrested the appellants Azad @ Gaurav and Bharat Kumar Goswami and convict Kanhaie Jha on 04.07.2017 in FIR bearing no 104/2017 under section 25 of the Arms Act, 1959 and affected recoveries affected from them in pursuance of their disclosure statements. These prosecution witnesses deposed that on 04.07.2017, they arrested the appellants Azad @ Gaurav and Bharat Kumar Goswami and convict Kanhaie Jha and their disclosure statements Ex. PW8/A, Ex. PW9/A and Ex. PW10/A respectively were recorded. PW12 ASI Parmod deposed that Rs. 20,000/- were recovered from the appellant Bharat Kumar Goswami, Rs. 1,89,000/- were recovered from the appellant Azad @ Gaurav and Rs. 1,12,000/- were recovered from the convict Kanhaie Jha.

17.4.1 The Investigating Officer SI Sanjay Kumar Gupta PW23 arrested appellants Azad @ Gaurav and Bharat Kumar Goswami and convict Kanhaie Jha in the present case vide arrest memos Ex. PW20/ A, Ex. PW20/G and Ex. PW20/D respectively and also recorded their disclosure statements. SI Sanjay Kumar Gupta PW23 at their instance also recovered and seized scooty bearing registration no DL 6SAH 9023 stated to be used

by the appellant Jitender @ Jitu while chasing the complainant Manish Aggarwal PW1 and also arrested the appellant Jitender @ Jitu vide arrest memo Ex. PW14/A. SI Sanjay Kumar Gupta PW23 also recorded disclosure statement Ex. PW14/C of the appellant Jitender @ Jitu and in pursuance of which recovered Rs. 2,90,000/- which were seized vide seizure memo Ex. PW11/A. During further investigation, SI Sanjay Kumar Gupta PW1 also recovered cheque book Ex. PW1/D issued by Syndicate Bank at the instance of the appellant Jitender @ Jitu which was seized vide seizure memo Ex. PW20/K, cheque book Ex. PW1/C at the instance of convict Kanhaie Jha which was seized vide seizure memo Ex. PW20/L, two stamps Ex. PW1/D at the instance of the appellant Azad @ Gaurav which were seized vide seizure memo Ex. PW20/M. The recovered amount was also having part of the robbed amount.

17.5 The recoveries affected from the appellants as detailed hereinabove do inspire much confidence. There is nothing in the respective testimony of the police/prosecution witnesses who affected recoveries which can shake credibility of their testimonies about recoveries. The robbed amount and other articles stated to be recovered at the instance of the appellants and convict Kanhaie Jha were also identified by the complainant Manish

Aggarwal PW1. There is nothing in the prosecution evidence which can make the recoveries improbable. The quantum and quality of evidence led by the prosecution regarding the recoveries is convincing and can be safely relied upon. There is no legal and factual force in the arguments advanced by the respective counsels for the appellants that alleged recoveries are highly improbable under given facts and circumstances of the case. The convicting court was justified in believing that the recoveries alleged to have been made from the appellants and convict Kanhaie Jha. There is legal and factual force in arguments advanced by the Additional Public Prosecutor that at the instance of the appellants and convict Kanhaie Jha recoveries were affected.

17.6 The counsel for the appellant jitender @ jitu relied on the judgment of **Bijender @ Mandar V State of Haryana** decided by the Supreme Court in criminal appeal no.2438 of 2010. It was observed as under:-

19.Unmindful of these age-old parameters, we find that the Prosecution in the present case has miserably failed to bring home the guilt of the Appellant and Courts below have been unwittingly swayed by irrelevant considerations, such as the rise in the incidents of dacoity. In its desire to hold a heavy hand over such derelictions, the Trial Court and the High Court have hastened to shift the burden on-the Appellant to elucidate how he bechanced to be in possession of the incriminating articles, without primarily scrutinizing the credibility and admissibility of the recovery as well as its linkage to the misconduct. We say so for the following

reasons:

Firstly, the High Court and the Trial Court failed to take into consideration that the testimony of ASI Rajinder Kumar (PW-14) exhibited no substantial effort made by the police for conducting the search of the residence of the Appellant in the presence of local witnesses. The only independent witness to the recovery was Raldu (PW-8) who was admittedly a companion of the Complainant.

Secondly, the Complainant (PW-4) as well as Raldu (PW-8) have unambiguously refuted that neither the passbook, nor the red cloth was recovered from the possession of the Appellant, as claimed in his disclosure statement.

Thirdly, while the Complainant (PW-4) negated his signatures on the recovery memo (EX. PD/2), on the other hand, Raldu (PW-8) also neither enumerated the recovery memo (EX. PD/2) in the catalogue of exhibited documents, nor did that he affirm to having his endorsement.

Fourthly, the recovered articles are common place objects such as money which can be easily transferred from one hand to another and the 'red cloth with 'Kamla' embossed on it, as has been racceded by the Investigating Officer, Rajinder Kumar (PW-14), can also be easily available in market.

Fifthly, the recovery took place nearly a month after the commission of the alleged offence. We find it incredulous, that the Appellant during the entire time period kept both the red cloth and the passbook in his custody, along with the money he allegedly robbed off the Complainant.

Sixthly and finally, there is no other evidence on record which even remotely points towards the iniquity of the Appellant.

However, under the facts and circumstances of the case, it does not provide any help to the defence of the appellant jitender @ jitu.

18. However the convicting court was not justified in convicting the appellants for the offence punishable under section 395 IPC. The prosecution could prove that the appellant Bharat Kumar Goswami had participated in snatching of bag from the complainant Manish Aggarwal PW1 and subsequently recoveries as detailed herein above were affected at the instance of the appellants and convict Kanhaie Jha. The impugned judgment convicting the appellants for the offence punishable under section 395 was passed on factually and legally unsustainable surmises and assumptions and without adequate support of evidence. It is proved that the appellant Jitender @ Jitu and Azad @ Gaurav received/retained the stolen property. The prosecution, from the quality and quantity of evidence, could only prove guilt of the appellant Bharat Kumar Goswami for offence punishable under section 379/356/34 IPC and guilt of the appellants Jitender @ Jitu and Azad @ Gaurav for the offence punishable under section 411 IPC.

19. The Criminal Appeals bearing no 593/2022, 354/2022 and 367/2022 preferred by the appellants Azad @ Gaurav, Jitender @ Jitu and Bharat

Kumar Goswami, respectively to challenge the impugned judgment passed by the convicting court whereby appellants along with the convict Kanhaie Jha were convicted for the offence under section 395 IPC is partly allowed. The appellant Bharat Kumar Goswami is convicted for offences punishable under section 379/356 IPC and the appellants Jitender @ Jitu and Azad @ Gaurav are Convicted for offence punishable under section 411 IPC.

19.1 As a consequence, order on sentence dated 04.06.2022 passed by the sentencing court is also modified. The appellant Bharat Kumar Goswami is sentenced to undergo rigorous imprisonment for a period of two years along with fine of Rs. 2000/- in default of payment of fine to further undergo simple imprisonment of two months for offence punishable under section 379 IPC and to undergo rigorous imprisonment for a period of six months along with fine of Rs. 500/- in default of payment of fine to further undergo simple imprisonment of one month for offence punishable under section 356 IPC. Both the sentences shall run concurrently. The benefit of section 428 of the Code is extended to the appellant Bharat Kumar Goswami.

19.2 The appellants Jitender @ Jitu and Azad @ Gaurav are individually sentenced to undergo rigorous imprisonment for a period of two years along with fine of Rs. 2000/- in default of payment of fine to further undergo

simple imprisonment of two months for the offence punishable under section 411 IPC. The benefit of section 428 of the Code is extended to the appellants Jitender @ Jitu and Azad @ Gaurav.

20. It is made clear that nothing in this judgment or any observation made in this judgment regarding convict Kanhaie Jha shall not cause any prejudice to him in any litigation or legal remedy already initiated or to be initiated by him.

21. If the appellants or any of them have already completed the period of incarceration, they will be released forthwith as per the rules.

22. The copy of this judgment be sent to the appellants for information and to the concerned Jail Superintendents for necessary compliance immediately. The copy of judgment shall also be sent to the concerned trial court for information.

23. The pending appeals along with pending applications, if any, stand disposed of.

(SUDHIR KUMAR JAIN)
JUDGE

MARCH 23, 2023
N/PJ