

Jaswant @ Kale Vs. State

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Court : Delhi

Decided On : Feb-11-2014

Judge : V. K. Jain

Appellant : Jaswant @ Kale

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision:

11. 02.2014 + CRL.A. 1478/2013 JAINUL UMAR Through: Appellant Mr. Rajpal Singh, Adv. versus STATE Through: + Respondent Mr. Feroz Khan Ghazi, APP for State CRL.A. 1479/2013 JASWANT @ KALE Through: Appellant Mr. Rajpal Singh, Adv. versus STATE Through: Respondent Mr. Feroz Khan Ghazi, APP for State CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

(Oral) On 15.06.2011, on receipt of copy of DD No.24A, SI Arvind Kumar of Police Station Gandhi Nagar, reached house No.2931, Gali No.3, Kailash Nagar, where the complainant Raj Kumar Srivastava was present and recorded his statement. The complainant alleged that on the aforesaid date at about 10.15 PM, when he was present in his house, a boy aged about 22-25 years with dark complexion and

slim body structure entered his room and enquired about one Mr Jain.. When he asked the boy as to who he was, he started searching the almirah, took out Rs 2,00,000/- kept in the almirah and sought to move. At this stage, two more young boys came inside. They had covered their faces with a cloth. When the complainant objected to the money being taken, the boy who had entered the room first took out a pistol like weapon and aimed at him. One of the two boys who had entered the room later also aimed a pistol like weapon at him. In the meanwhile, his wife Babita came in the room and being scared, she asked the robbers to take whatever they had with them. She handed over her gold chain, Mangalsutra, ring, etc. to them. The complainant also handed over gold Kada he was wearing to those boys. Thereafter, when they were going out of the house, his younger brother Rakesh reached there and tried to apprehend them, but those persons fired at him with a pistol like weapon and escaped towards main road Gandhi Nagar.

2. This is also the case of the prosecution that on 03.07.2011, the appellant Jainul Umar was arrested in a case registered vide FIR No.178/2011 and during interrogation, he confessed to involvement of himself as well as the appellant Jaswant and another person Jahid in the aforesaid robbery from the house of the complainant Raj Kumar Srivastava. The appellant Jainul Umar is alleged to have got recovered on a stolen ring from his room in house in Vikas Kunj, Behta, Hazipur, U.P., where it had been kept in a match box. The appellant Jainul refused to join the TIP before a Metropolitan Magistrate on 08.07.2011, whereas the appellant Jaswant refused to join TIP before the Metropolitan Magistrate on 12.07.2011. After completion of investigation, both the appellants were prosecuted for their involvement in the aforesaid incident of robbery.

3. Both the appellants were charged with offence punishable under Section 392 of IPC read with Section 342 and 397 thereof. The appellant Jainul Umar was also charged under Section 411 of IPC. Since the appellants pleaded not guilty to the charge against them, the prosecution examined as many as 23 witnesses in support of his case. No witness, however, was examined in defence.

4. The complainant Raj Kumar Srivastava came in the witness box as PW1 and stated that on 15.6.2011, at about 10.15 PM, when he was present in the house and the door of the ground floor was open, a boy came inside the room and enquired about Jain Sahab. The complainant told him that no person by that name was there and enquired as to how he had come inside. Thereupon, that boy took out a pistol in his hand. Immediately thereafter, two boys who had covered their faces with plain cloth came inside. One of those two boys was carrying a pistol with him, whereas the other person took out two-three knives from the bag he was carrying. The first boy started searching the almirah and two boys who had come later asked him who was inside the house. When he told them that his wife was inside, they took him there and asked him to take out the gold kada which he was wearing. He handed over the Kada to them. The intruders then asked his wife to take out all the articles of jewellery which she was wearing. He claimed that his wife was wearing Mangalsutra, earrings and two rings, which the robbers took away. He further stated that cash amounting to Rs 2,00,000/- and two gold rings lying in his almirah were also taken away by the robbers. While leaving the house, the robbers put him and his wife in a room and bolted it from outside. When the robbers were leaving his house, his brother Rakesh came in and the robbers fired a shot on him. This according to the complainant was later told to him by Rakesh. The door was opened by Rakesh and thereafter police was informed.

5. PW-3 Smt. Babita Srivastava is the wife of the complainant Raj Kumar Srivastava. She stated that on the day of this incident, on hearing some noise, she came in the room in which her husband was sitting and saw one boy moving towards inside the room and covering her husband with a pistol and a knife. She also noticed two boys who had covered their faces with handkerchief were searching their almirah. According to her, she was wearing mangal sutra and two gold rings on the aforesaid day, which the robbers made her remove on the point of pistol and knives. The key of the almirah kept in her room was also taken from her and they took out her purse containing Rs 10,000/-, besides golden earrings and golden chain. She also claimed to have seen currency notes of Rs 2,00,000/- in the hand of one of two boys who had taken it from the alimrah of her husband. She also deposed with respect to the robbers taking away the gold kada which her husband was wearing in his hand and stated that she as well as her husband were

put inside the room and its sliding door was closed. When both the appellants were present in the Court, she failed to identify them as the robbers. She, however, identified the gold ring Ex-P-1, which was stolen from her possession on the aforesaid date.

6. PW-2 Rakesh Kumar Srivastava, brother of the complainant, was examined as PW-2 and then as PW-13. When he examined as PW2 on 19.12.2011, he stated that on the aforesaid date, when he came near his house, after parking his vehicle, he saw a boy standing at the main door of the house from outside. When he asked the boy as to why he was doing so, he claimed that he had a talk with the complainant in this regard. He further stated that when he was parking his vehicle, he saw two boys coming out of the house and both of them went towards left side of the street. He identified the appellants, Jainul Umar and Jaswant, as the two boys who had left towards the left side of the street and claimed that one of them was carrying a black colour in his hand. The witness further stated that he called his brother Raj Kumar Srivastava, whereupon he was pushed away by the third person, who thereafter ran away. He raised alarm and chased that boy. He also saw both the accused standing near a tree at a distance of about two houses from their house. The third robber gave a call to both of them, whereupon they fired at him and one bullet hit his left arm. The witness claimed that he hid himself behind a car which was parked nearby and later returned to the house after the accused persons had run away. He also claimed that he had shown his injured arm to the police, but he was not taken to the hospital. Since the witness had not brought the record relating to his treatment, his further examination was deferred on that date. When he came in the witness box as PW-13 on 19.04.2012, this witness claimed that when he reached the door of the house, three persons came out of the house. When he asked them about it, they could not give any satisfactory reply and started running away. When he tried to stop them, they fired from their weapons, and fled away towards Gandhi Nagar. He also stated that he did not have with him any record relating to his treatment.

7. PW-8 Sushil Kumar is a mechanic to whom a car bearing registration No.DL3C N5123 was handed over by his nephew for sale. He stated that on 26.06.2011, one of his relatives Parvin Kumar came to his shop along with appellant Jaswant and

at that time Jaswant paid him Rs 40,000/- for purchase of the car. The sale letter was, however, issued in the name of Parvin Kumar since Jaswant did not have any ID proof in his name at that time. PW-9 Amit Kumar has corroborated the deposition of PW-8 Sushil Kumar. He stated that car bearing registration No.DL3C N5123 was given by him to Sushil Kumar for sale and later on being called by Sushil Kumar he had gone to his shop, where Parvin Kumar was present with the appellant Jaswant Kumar. Parvin Kumar introduced Jaswant as the person who wanted to purchase the car. Jaswant then handed over Rs 40,000/- to him though the sale papers were executed in the name of Parvin Kumar since Jaswant was not having ID proof with him. PW-16 Manoj Kumar Gupta stated that car bearing registration No.DL3C N5123 was purchased by his friend Amit Kumar from a doctor at Modi Nagar, but since he did not have any ID proof with him, the car was transferred in his name. He claimed that the car remained in the possession of Amit he being its actual owner and after some time, it was sold by him to Parvin Kumar for a consideration of Rs 40,000/-.

8. PW-20 Head Constable Subhash Chand stated that on 06.07.2011, they apprehended the appellant Jaswant from house No.2/6, Ambika Vihar, Shiv Vihar, Karawal Nagar and brought him to police station where he was interrogated and he made a disclosure statement Ex.PW20/A. He proved another disclosure statement of the appellant which is Ex.PW-20/E and further stated that both the appellants were taken to 2/6, Ambika Vihar (Shiv Vihar), Karawal Nagar, where the appellant Jaswant pointed out the car No.DL3CM5123 and the said car was seized on being pointing out by him. The RC of the car was recovered from the room of the appellant Jaswant in house No.2/6, Ambika Vihar, Karawal Nagar. He further stated that on 17.7.2011, the appellant Jainul Umar got recovered a ladies ring from his rented room in Vikas Kunj, Behta, Hazipur, U.P., and the said ring was seized after it had been duly sealed. The key, according to the witness, was recovered from the rags and old junk in the room. PW-22 SI Arvind Kumar is the Investigating Officer of this case who inter alia stated that with respect to the disclosure statement made by the appellant, Jainul Umar and recovery of one ladies ring from his room in Vikas Kunj, Behta, Hazipur, U.P.

9. PW-6 Smt. Sunaina is the Metropolitan Magistrate before whom the appellant Jaswant refused to join TIP on 12.07.2011. PW-7 Shri S.K. Arora is the Metropolitan Magistrate before whom the appellant, Jainul Umar refused to join TIP on 08.07.2011. PW-10 Shri J.P. Nahar is the Metropolitan Magistrate who conducted the proceedings for identification of the case property. According to him, on 23.07.2011, the witness Smt. Babita had appeared before him and identified the ring.

10. In their respective statements under Section 313 Cr.P.C., the appellants denied the allegations against them and they also claimed that they did not know each other.

11. The conviction of the appellants has been challenged by their counsel on the following grounds: i. Neither of the appellants are identified, either by the complainant Shri Rajkumar Srivastava or by his wife Smt. Babita Srivastava. ii. PW2 Rakesh Srivastava who identified the appellants in the Court claims to have been injured when two of the boys involved in the robbery fired at him but, no record of his medical treatment has been produced. It is also pointed out that according to the witness he had shown his injured arm to the Investigating Officer whereas, when the Investigating Officer came in the witness box he denied that the witness had shown his injured arm to him. iii. The wife of the complainant deposed with respect to theft of Rs.10,000/- in cash, gold earrings and gold chain kept in her purse from the internal room, whereas no such theft was claimed by her husband. iv. Nothing has been recovered from the possession of the appellant- Jaswant. v. There is no proof of the appellant Jainul Umar being tenant of the room from which one ring is alleged to have been recovered. vi. In the FIR, there was no allegation of the boy, who entered first having a weapon with him. vii. There was no allegation in the FIR that one of the boys had 2-3 knives with him.

12. I see no reason to disbelieve the deposition of the complainant Shri Rajkumar Srivastava and his wife Smt. Babita Srivastava with respect to theft of cash and jewellery from their house in the night of 15.6.2011. The incident of robbery was reported to the police control room on the same date and was duly recorded there before the Investigating Officer reached the place of occurrence. The complainant

and his wife could gain nothing by concocting a false story of robbery of various articles of jewellery and cash from their house. It is true that there are discrepancies between the deposition of PW2 Shri Rajkumar Srivastava and his wife Smt. Babita Srivastava but the discrepancies are not on the core aspect of the case and can be safely attributed to the time lag between the date of incident and the date on which they were examined in court. Some variations, here or there, in the deposition of the witnesses are bound to occur with the passage of time and it is only in the case of tutored witnesses that the statements flow parrot-like without even natural variations. The courts need to appreciate that normally the witnesses are not examined in the Court soon after the incident witnessed by them and, therefore, it may not always be possible for every person to correctly recall all the details of the incident witnessed. Of course, he /she is not likely to forget the main incident of this nature, experienced by him/her. The Courts need to recognize that not everyone has equal capacity of observation, retention and recollection, which varies from individual to individual and it is not natural for the honest and otherwise reliable witnesses to differ on some minor details, which by themselves, do not constitute the main incident witnessed by them. It was observed by Honble Supreme Court in *Leela Ram (dead) through Duli Chand versus State of Haryana and Anr.* [AIR 1999 SC3717] that the discrepancies unless they are vital in nature cannot by itself affect the credibility of a witness and unless contradictions are on material dimension they should not be used to jettison the evidence in its entirety and trivial discrepancies ought not to obliterate otherwise acceptable testimony of a witness. The approach of the court while evaluating the testimony of a witness should be to see whether his/her evidence, when examined as a whole, appears to be true, or not. If the impression formed by the court is that the witness appears to be truthful and trustworthy, his/her evidence needs to be scrutinized taking into consideration the discrepancies and infirmities pointed out in his/her evidence and the court should then evaluate the testimony of the witness, to decide whether the evidence given by him/his in the court stands impeached or shaken, rendering him/her unworthy of reliance, in the light of the discrepancies or infirmities pointed out in his/her testimony. Both of them have corroborated each other in saying that three boys were involved in the incident of robbery. Both of them have emphatically stated that two of the intruders had covered their face whereas the

face of the third person was not covered. Both of them stated that the theft took place from the almirah kept in the first room as well all the articles which Smt. Babita Srivastava was wearing. There is no contradiction in their deposition as regards articles which Smt. Babita Srivastava was wearing and which the robbers had made her remove, the said articles being mangal sutra, earrings and two rings. Both of them have deposed with respect to theft of Rs.2.00 lakh from the almirah and Shri Rajkumar Srivastava. Both, the complainant and his wife also deposed with respect to the complainant being made to hand over the karah which he was wearing in his hand to the robbers. It is true that Rajkumar Srivastava did not depose with respect to theft of the purse containing Rs.10,000/-, gold earrings and gold chain from the almirah of Smt. Babita Srivastava, but, that would be of no consequence considering that the ring recovered by the police was not amongst the articles about which the complainant did not depose. In any case, even if the theft of the purse containing Rs.10,000/- gold earrings and gold chains is excluded from consideration, the theft of other articles of jewellery as well as cash amounting to Rs.2.00 lakh from the almirah of the complainant cannot be disputed. Therefore, the factum of robbery, in my view, has been duly established from the deposition of the complainant Shri Rajkumar Srivastava and his wife Smt. Babita Srivastava. As regards the complainant not alleging, in the FIR, that the boy who had entered the room first had taken out the pistol before searching the almirah and removing cash from there, in my view, the said omission would be inconsequential since, no person is likely to allow an intruder to search his almirah and take out the cash kept therein unless that intruder is armed and intimidates the occupants using either by showing the arm to them or in some other manner. Therefore, the boy who entered the room first must necessarily have taken out a pistol before the almirah was searched and the cash kept therein was taken out. Moreover, there is absolutely no cross examination of the complainant on this aspect. When he was cross examined, no question was put to him with respect to the aforesaid omission. If the appellant wanted to contradict the witness in this regard, it ought to have cross examined him on this aspect and confronted him with the FIR.

13. It is true that neither Shri Rajkumar Srivastava nor his wife has identified the persons involved in the robbery but, both the appellants were duly identified by

PW2, Rakesh Kumar Srivastava. Though this witness did not produce the record of his treatment, I find that his brother, complainant Rajkumar Srivastava, also corroborated his deposition with respect to the injury in his arm when he stated that Rakesh suffered a pellet injury on his right arm. Non-production of the medical record would not be of much consequence since the witness would not be expecting that he would be required to produce the said record at the time he was examined in the court and, therefore, may not have retained that record. In fact, he had nothing to gain by concocting a false story of pellet injury. Had he not been a truthful witness there was no need for him to claim that he had received a pellet injury. He knew that on his referring to the pellet injury he could be asked about the treatment which he obtained for the said injury and, therefore, had he not been true, he would certainly have refrained from making any claim in this regard. This witness cannot be said to have been introduced later, because in the FIR itself, it was stated that when the intruders were getting out of the house, Rakesh reached there and tried to apprehend them, whereupon the assailants fired upon him with a pistol-like weapon and thereafter they ran towards main road Gandhi Nagar.

14. Though it is contended by the learned counsel for the appellants that the time of the incident being past 10:00 p.m., there would be darkness outside the house and the witness could not have been in a position to identify the assailants, I find that there is no material on record to suggest that there was no light outside the house of the complainant. The court can take judicial notice of the fact that the streets in Delhi are lighted in the night. The light would also be coming out not only from the house of the complainant but also other houses in the locality. During cross-examination of the witness Shri Rakesh Srivastava no suggestion was given to him that there was darkness outside the house of the complainant and, therefore, he was not in a position to identify the persons involved in the robbery. In his statement under Section 161 of Cr.P.C., this witness told the police that there was darkness but that was said with respect to the place from where the assailants disappeared after being chased by the witness and not with respect to the house of the complainant. In fact, even in his statement under Section 161 of Cr.P.C. this witness gave the approximate age of the persons whom he had seen coming out of the house. He also had an interaction with them when he asked them as to how they were coming out of the house. He also tried to stop them

though he could not succeed, on account of the shots fired towards him. Therefore, it would be difficult to say that this witness was not in a position to identify the persons involved in the robbery.

15. Admittedly both the appellants refused to join TIP before a Metropolitan Magistrate. The appellant Jaswant refused to join TIP on the ground that he was shown to some unknown person in the police station and even his photograph was clicked in the room of the SHO. The same was the ground given by the appellant Jainul Umar for refusing to join TIP on 8.7.2011. There is no material on record to suggest that either of the appellants was shown to PW2 Shri Rakesh Kumar Srivastava in the police station at any time on or before 12.7.2011. There is no material on record which would show that the photographs of the appellants were taken in the room of the SHO. In fact, when Mr. Rakesh Srivastava was cross-examined it was not even suggested to him that the appellants or their photographs had been shown to him at any point of time on or before 12.7.2011. The witness clearly stated in his examination dated 19.4.2012 that it was on 17.7.2011 that he had seen the appellants coming out of Karkardooma Courts and had identified them. Thus, there is no escape from the conclusion that the appellants Jainul Umar and Jaswant refused to join TIP without any justification. The inevitable inference, therefore, would be that had they joined TIP, they would have been identified by the witness Shri Rakesh Srivastava and that precisely was the reason why they did not agree to join the said proceedings. Identification by Shri Rakesh Srivastava during the course of trial coupled with the prior refusal of the appellants to join TIP, in my view is sufficient to establish their identity as the persons involved in the incident of robbery which took place on 15.6.2011.

16. It has come in the deposition of Mr. Rakesh Srivastava that both the appellants had fired at him, when he chased them in order to apprehend them. The fire arms were also shown to the complainant Mr. Raj Kumar Srivastava and his wife Smt. Babita Srivastava, when the robbers committed theft of jewellery and cash, etc. from their house. Thus, the appellants put the complainant and his wife Smt. Babita Srivastava, in fear of death or of instant hurt, in committing the theft. They also used the firearms in carrying away the property obtained by theft. They used fire arm in committing the robbery when they threatened the complainant and his

wife by showing a gun to them and they used the fire arm in carrying away the stolen property by firing at PW2 Rakesh Kumar Srivastava.

17. As far as appellant Jain-UI-Umar is concerned, the case against him finds further corroboration from the recovery of the stolen ring of the wife of the complainant pursuant to a disclosure statement made by him. Ex.PW20/E is the statement made by the appellant Jain-ul-Umar while he was in police custody. The aforesaid disclosure statement has been proved by HC Subhash Chand and SI Arvind Kumar. In the said statement, the appellant, inter alia, stated that the gold ring had been kept by him in his rented room in Vikas Kunj. Since pursuant to the aforesaid disclosure statement, a gold ring lying a rags in the aforesaid room was actually recovered, the disclosure statement made by the appellant Jain-UI-Umar is admissible in evidence under Section 27 of the Evidence Act to the extent, that a ring was lying in the aforesaid room. Three possibilities arise from the statement made by the appellant Jain-UI-Umar while in custody. The first possibility is that he had himself kept the stolen ring in the room in which it was found; the second possibility is that he had seen some one keeping the ring in the said room and the third possibility is that someone had told him that the ring was lying in that room. Since the appellant has not told the court as to how he had come to know that a ring was lying in the room in Vikas Kunj, the inevitable inference would be that he had himself kept the ring in the room in which it was later on found by the police.

18. The disclosure statement made by the appellant Jain-UI-Umar coupled with the recovery of the stolen ring Ex.P1, which was seized vide memo Ex.PW20/H, would show that the aforesaid ring had come into possession of the said appellant before he was arrested by the police on 3.7.2011. Since the appellant Jainul Umar had come in possession of the ring, which was a stolen property, soon after its theft on 15.6.2011, a statutory presumption under Section 114 of the Evidence Act can be drawn that either he had committed theft of the said ring and he had received or retained it knowing or having reason to believe the same to be stolen property. In the facts and circumstances of the case and also considering that the appellant Jain-ul-umar does not claim to have obtained the said ring from some other person, the presumption should be that he had committed theft of the said ring and that is how it came to be recovered at his instance on 17.7.2011. The ring

Ex.P1 was duly identified by Smt. Babita Srivastava in the judicial TIP conducted by Mr. J.P. Nahar, Metropolitan Magistrate. It was held by the Honble Supreme Court in Erabhadrappa alias Krishnappa versus State of Karnataka [AIR 1983 SC446 that where a lady witness identifies the stolen articles such as ornaments and sarees at the trial without prior TIP, the testimony of such a witness was not inadmissible in evidence for want of prior TIP, as ladies have uncanny sense of identifying their own belongings, particularly the articles of personal use. A particular article may be identified by any particular mark on it or by its frequent use or observation which causes a permanent impression on the mind of identifier that leads to recognition of the article. Since the aforesaid ring belonged to her, she must have been wearing it from time to time and, therefore, she was in a position to identify the said article in the TIP. More importantly, the appellant does not claim that the aforesaid ring belongs to him. Therefore, I do not see any reason to disbelieve the deposition of Smt. Babita Srivastava with respect to the ownership of the ring Ex.P1 and its theft from their house in the night of 15.6.2011.

19. In view of above discussion, the conviction of the appellants under Section 392 of IPC read with section 34 and 397 thereof cannot be faulted with. However, there was no justification for a separate conviction of the appellant Jainul Umar under Section 411 of IPC, for being in possession of the stolen ring. Both the appellants have been sentenced to rigorous imprisonment for seven (7) years each, which is the minimum punishment prescribed for the offence proved against them. The fine imposed on them also cannot be said to be excessive. However, while maintaining their conviction as well as the substantive sentences awarded to them, as also the fine imposed on them under Section 392/397/34 of IPC, it is directed that in the event of default to pay fine, they shall undergo SI for 15 days each, as against six months each, awarded by the learned trial Judge. The separate conviction of appellant Jain-ul-Umar under Section 411 of IPC is also set aside. The appeals stand disposed of accordingly. The LCR be sent back along with a copy of this order. One copy of this order be sent to the concerned Jail Superintendent for information and necessary action. FEBRUARY11 2014/bnesh Crl. Appeal Nos.1478 & 1479 of 2013