

**Gaurav Vs. State**

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**Court :** Delhi

**Decided On :** May-19-2014

**Judge :** S. P. Garg

**Appellant :** Gaurav

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON : April 23, 2014 DECIDED ON : May 19, 2014 + CRL.A. 151/2012 & CRL.M.B. 1626/2013 GAURAV Through : ..... Appellant Mr.Nilender Sharma, Advocate with Mr.Pawan Singh, Advocate. Versus STATE Through : + ..... Respondent Mr.Lovkesh Sawhney, APP. CRL.A. 161/2012 AMARJEET @ VAID Through : ..... Appellant Mr.Rakesh Malhotra, Advocate with Mr.Sahil Ahuja, Advocate. Versus STATE Through : ..... Respondent Mr.Lovkesh Sawhney, APP. AND + CRL.A. 162/2012 HANS GAURAV @ TANNU Through : ..... Appellant Mr.Nitin Joshi, Advocate. Versus STATE Through : ..... Respondent Mr.Lovkesh Sawhney, APP. CORAM: MR. JUSTICE S.P.GARG S.P.GARG, J.

1. Gaurav (A-1), Amarjeet @ Vaid (A-2) and Hans Gaurav @ Tannu (A-3) impugn a judgment dated 07.12.2011 of learned Additional Sessions Judge in Sessions Case No.03/10 arising out of FIR No.190/09 registered at Police Station Dwarka by which A-1 and A-3 under Section 395 IPC; and A-2 under Section 412 IPC were held guilty. By an order dated 13.12.2011, they were awarded various prison

terms with fine.

2. Allegations against the appellants, as projected in the charge- sheet, were that on 01.04.2009, at about 1.30 pm at Kamla Nehru Garden (Bonta), New Delhi, they all with their companions, Mukesh @ Vicky (since convicted), Rajiv @ Raj (since convicted), Rama (proclaimed offender) and Mussa (untraceable) committed dacoity and deprived Ms.Anju and Deepak of two gold bangles, a pair of gold tops, three rings, mobile phone make Nokia, purse containing `1,500/-, some documents, DTC pass and a cheque of Punjab National Bank. Mukesh @ Vicky armed with a knife used it to put the victims in fear. Daily Diary (DD) No.22 (Ex.Pw-6/A) was recorded at Police Post, Sector 16-B Dwarka at 4.28 p.m. regarding the incident. ASI Ashok Kumar, to whom the investigation was assigned, lodged First Information Report after recording complainant-Anjus statement (Ex.PW-2/A). Efforts were made to find out the culprits. On 04.04.2009 in supplementary statements, Complainant and Deepak disclosed that the occurrence had taken place at Kamla Nehru Vatika, Maurice Nagar and not in the area of Dwarka as reported earlier. The investigation was handed over to Insp.Sudhir Singh (PW-14). On 05.04.2009 A-1, A-3, Mukesh @ Vicky and Rajiv @ Raj were arrested from Sanjay Basti, Timarpur and brought to Police Station Dwarka. A buttondar knife was recovered from Mukesh @ Vicky; A-1 was found in possession of a mobile phone with SIM card No.9250034306. He disclosed that he had made telephone calls from this number to mobile No.9310481193 which was in possession of his friend Ramu. On 06.04.2009, all the appellants except A-2 and Mukesh @ Vicky lead the police team to the place of occurrence and pointing out memos (Ex.PW-11/D to Ex.PW-11/G) were prepared. Mukesh @ Vicky took the police team to his residence at B-205, Sanjay Basti, Timarpur, and recovered the robbed cheque which was seized by seizure memo (Ex.PW-11/H); Rajiv @ Raj recovered `1,000/- and a gold ring from his house; A-3 recovered `500/- and a pair of tops (ear ring) from his jhuggi. A-1 produced one lady purse lying behind a box in the jhuggi. On checking, it was found containing complainants DTC pass. All these documents were seized vide seizure memos. Further case of the prosecution is that, thereafter, A-1 and Mukesh @ Vicky pointed out a shop No.45, Kishore Market, Kingsway Camp, Delhi where A-2 was found present. When A-2 came to the police station in the evening, as instructed, on interrogation, his

disclosure statement was recorded and it led to his arrest on 07.04.2009. A-2 recovered two kadas purchased by him from A-1 and Mukesh @ Vicky from his shop. witnesses conversant with the facts were recorded. Statements of The appellants declined to participate in the Test Identification Proceedings. The complainant identified the articles in Identification Proceedings in the court. After completion of investigation, a charge-sheet was submitted against the appellants; they were duly charged and brought to trial. The prosecution examined 14 witnesses in all to establish the appellants guilt. In 313 statements, the appellants pleaded false implication and denied their complicity in the crime. After considering the rival contentions of parties and on appreciating the evidence on record, the trial court by the impugned judgment held all of them guilty for the offences mentioned previously. Being aggrieved and dissatisfied, they have preferred the appeals. It appears that Rajiv @ Raj and Mukesh @ Vicky have not challenged their conviction.

3. I have heard the learned counsel for the parties and have examined the file. The occurrence took place at around 01.30 pm at Kamla Nehru Garden (Bonta) where the complainant had gone with her boy friend Deepak. Intimation to the police regarding the incident was conveyed and DD No.22 (Ex.PW-6/A) was recorded at 4.28 pm. The Investigating Officer after recording complainants statement (Ex.PW2/A) lodged First Information Report at 07.45 pm. The complainant in her deposition explained the delay in lodging the report. In her statement (Ex.PW-2/A), the complainant had told the place of occurrence near Sector 13, Bus Stand, Dwarka. She explained that initially she did not disclose the correct place of incident due to fear. It has come on record that the complainant was a married woman and had gone along with her friend Deepak to Kamla-Nehru Garden (Bonta). Apparently, to avoid annoyance of her family members, she did not disclose at first instance that the occurrence had taken place at Kamla Nehru Garden (Bonta). Subsequently, in her supplementary statement, she revealed the true crime spot. In the complaint (Ex.PW-2/A), the complainant gave detailed account as to how she was deprived of her valuable articles. In her Court statement as PW-3, she deposed that on 01.04.2009 when she was sitting in the park near Delhi University, North Campus along with her friend Deepak, at about 01.00 p.m. four/five individuals came and inquired from them as to what they were

doing there. One of them took away her ear rings (tops), diamond ring, two other gold rings, two gold bangles (karas) and mobile phone make Nokia. The other assailant showed them a knife and threatened to kill if they raised alarm. Another assailant took away all the articles lying in her bag which contained a small purse in which a blank cheque drawn on PNB bank was lying. The assailants got her signatures forcibly on it and took it away. They also took away `500/ cash and DTC pass lying in the purse. Deepak was deprived of his gold ring and cash `500/- or 1000/-. She identified Mukesh @ Vicky to be the assailant who was armed with a knife. She identified A-1, A-3 and Rajiv @ Raj who were the other assailants and had taken away her articles. In the cross-examination, she claimed that articles (Ex.P-1 to Ex.P-4) identified by her in the court belonged to her and she used to wear them. She denied the suggestion that the assailants were shown to her in the police station and she identified them at the instance of the Investigating Officer. On scanning her testimony, it reveals that despite in-depth crossexamination, no material discrepancy could be elicited to disbelieve the version given by her. No ulterior motive was assigned to the complainant to falsely recognize and identify the appellants with whom she had no prior acquaintance or animosity. Adverse inference is to be drawn against the appellants for declining to participate in the Test Identification Proceedings. Nothing has come on record to show if on any specific date, the assailants were shown to the complainant in the police station. There are no cogent reasons to disbelieve the complainant who was categorical to recognize and identify the assailants in the court and to attribute a specific role to each of them. The complainant had direct confrontation with the assailants during day time when she was deprived of her valuable articles and had reasonable and ample opportunity to note and observe their broad features. She had volunteered to participate in the Test Identification Proceedings. PW-4 (Deepak) though did not identify the assailants, nevertheless, was sure that he and Anju were robbed of their valuable articles by three/four individuals. He testified that after four or five days of the incident, he came to know that the appellants had been apprehended by the police. The police made enquires from him and he narrated the incident to them. He further admitted that the incident had taken place on 01.04.2009 when he and Anju Bharti were sitting in a park near Delhi University at around 01.00 p.m. He further admitted that all the ornaments of Anju and cash `200-300 were

robbed from them at knife point. They became frightened by the incident and returned to their respective houses. Deepaks (PW-4) statement can be considered to corroborate the complainants version to the extent it supports the prosecution case. The accused persons did not claim their presence at the relevant time at any other specific/particular place. They did not examine any witness in defence to falsify the prosecution case about their presence at the spot.

4. Robbed articles identified by the complainant in Test Identification proceedings were recovered from the appellants. She also identified these articles (Ex.P-1 to Ex.P-4) in her Court statement. The police is not expected to plant all these articles of substantial value on their own. The accused persons did not examine any family member to controvert the prosecution case about its recovery from their respective houses. Some of these articles were having special and distinctive features and were not expected to be in their possession. They did not offer any explanation as to how these articles which did not belong to them came into their possession. All the relevant contentions of the appellants have been dealt with in the impugned judgment. The findings of the trial court that A-1, A-3, Mukesh @ Vicky and Rajiv @ Raj deprived the complainant and Deepak of the valuable articles after putting them in fear cannot be faulted.

5. Appellants conviction under Section 395 IPC, however, cannot be sustained as the prosecution was unable to establish the exact number of the assailants committing the crime. In her statement (Ex.PW2/A), the complainant did not give exact number of the assailants. In her Court statement, she described their number as four or five. In the later part of the examination, after identifying A-1, A-3, Mukesh @ Vicky and Rajiv @ Raj, she disclosed about presence of two more individuals with the appellants. PW-4 (Deepak) gave the number of assailants as three or four. Leading question was put by the Public Prosecutor to the complainant-Anju if A-2 was among the assailants who took away her articles on the day of incident. It appears that initially A-2 was a suspect in the crime. During investigation, the appellants alleged associates Rama and Mussa could not be apprehended. Rama was declared Proclaimed Offender whereas Mussa could not be traced. It cannot be inferred with certainty that they were with the appellants at the time of commission of incident as their association with them could not be

ascertained. Since the prosecution was unable to establish beyond doubt the exact number of assailants, conviction and sentence under Section 395 IPC is not permissible and is altered to Section 392/34 IPC.

6. Allegations against A-2 were that he received or retained two gold kadas belonging to the complainant knowing or having reasons to believe the same to be a robbed property. A-2 himself was a suspect along with his associates in the crime. The police visited his shop on 06.04.2009 when A-1 and Mukesh @ Vicky allegedly pointed out it in police custody and pointing out memos (Ex.PW-11/M and Ex.PW-11/N) were prepared. However, A-2 was not arrested at that time. Shop in question was not searched to recover the robbed articles. Notice was served upon A-2 to arrive at Police Station Dwarka and he accordingly went in the evening to the police station where he was interrogated and arrested. At that stage, there was no incriminating material against A-2 to put him under arrest. Again, no recovery was effected of the stolen/robbed articles at his instance on 06.04.2009. It is alleged that on 07.04.2009, A-2 took the police team to his shop at Kishore Market and produced two kadas allegedly purchased by him from A-1 and Mukesh @ Vicky. It is highly unbelievable that after coming to know about his involvement in the incident on 06.04.2009, A-2 would retain/keep the robbed articles intact at his shop. No explanation has been given as to why these two kadas were not recovered when A-1 and Mukesh @ Vicky had led the police team to A-2s shop on 06.04.2009. It is unclear as to who was available in the shop on 07.04.2009 and who opened it as A-2 was already in the police custody. No independent witness was associated at the time of recovery of these kadas on 07.04.2009 which were not recovered pursuant to the disclosure statement of A-1 and Mukesh @ Vicky from his shop. No evidence has been collected to ascertain if A-2 was aware that these kadas were robbed articles. It was not investigated as to when the kadas were sold by A-1 and Mukesh @ Vicky to A-2 and if so for what consideration. Considering these deficiencies, A-2s conviction under Section 412 cannot be sustained. He deserves benefit of doubt and is acquitted.

7. In the light of the above discussion, appeal filed by A-2 is accepted. Conviction and sentence recorded under Section 412 IPC is set aside. Conviction and sentence of A-1 and A-3 are sustained under Section 392/34 IPC only.

8. The appeals stand disposed of in the above terms. Trial Court record be sent back forthwith along with the copy of this order. Copy of the order be sent to Superintendent Jail for information. All pending application(s) also stand disposed of. (S.P.GARG) JUDGE May 19, 2014/sa

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