

Sarvesh Kumar vs.state

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Court : Delhi

Decided On : Feb-12-2018

Appellant : Sarvesh Kumar

Respondent : State

Advocate for Pet/Ap. : Mr. K. Singhal, Mr. Prasanna, Ms. Radhika Kolluru, Mr. Saurabh Kansal, Ms. Pallavi STATE S. Kansal, Mr. Sitab Ali Chaudhary Mr.Gufran Ali, Ms. Rakhi Dubey, Mr. A.S. Juneja

Judgement :

\$~8 to 11 & 13 * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 1141/2014 KALI CHARAN Through: Mr. K. Singhal and Mr. Prasanna, Appellant STATE Advocates. versus Respondent Through: Ms. Radhika Kolluru, APP for State. CRL.A. 1143/2014 & CRL.M.(BAIL) 40/2018 SARVESH KUMAR Appellant Through: Mr. Saurabh Kansal and Ms. Pallavi STATE S. Kansal, Advocates. versus Respondent Through: Ms. Radhika Kolluru, APP for State. CRL.A. 1314/2014 CHANDER BHAN Through: Mr. Sitab Ali Chaudhary Mr.Gufran Ali, Advocates DHCLSC. Appellant and for STATE versus Respondent Through: Ms. Radhika Kolluru, APP for State. CRL.A. 1320/2014 AMIT @ MANGRU Appellant Through: Ms. Rakhi Dubey, Advocate. + + + CRL.A. 1141/2014 and connected matters Page 1 of 24 + STATE BIMLESH versus Respondent Through: Ms. Radhika Kolluru, APP for State. CRL.A. 795/2014 Through: Mr. A.S. Juneja, Advocate. Appellant versus THE STATE OF DELHI Respondent Through: Ms. Radhika Kolluru, APP for State.

ORDER

1202.2018 Dr. S. Muralidhar, J.:

1. These five Appeals are directed against the common impugned judgment dated 29th March, 2014 passed by the Learned Additional Sessions Judge-II, (North West), Rohini Courts (ASJ) in Sessions Case No.89/2012 arising out of FIR No.138/2012 registered at Police Station (PS) Model Town convicting the Appellants i.e. Kali Charan (Accused No.1: A-1), Sarvesh Kumar (A-3) Chander Bhan (A-4), Bimlesh (A-5) and Amit @ Mangroo (A-

6) for the offences under Section 120 B read with 395 IPC; convicting A-1, A-3, A-4, A-6 and the proclaimed offender (PO) Anil (A-7) of the offence of committing dacoity at the house of Mr. Kishan Lal Manchanda (deceased) at A-176, Ground Floor, Gujranwala Town Part-I, Delhi punishable under CRL.A. 1141/2014 and connected matters Page 2 of 24 Section 395 IPC; convicting Chander Bhan (A-4) for using a knife during the commission of the dacoity thus committing an offence punishable under Section 397 IPC; convicting Amit (A-6) who got recovered two gold kadas (wrist-bands) from his residence which were identified by Smt. Kamla Devi (PW-29) as those stolen from the house for the offence under Section 412 IPC; convicting A-1, A-3, A-4 and A-6 for the offence under Section 304 Part II read with Section 34 IPC. The benefit of doubt was given by the trial Court to Ram Kumar (A-2) who was acquitted of all the offences.

2. These appeals also challenge the order on sentence dated 16th April, 2014 whereby the accused were sentenced as under: (a) Bimlesh (A-5) was sentenced to Rigorous Imprisonment (RI) for a period of 4 years with a fine of Rs.2,000/- for the offence under Section 120 B read with 395 IPC and in default of payment of fine, to undergo Simple Imprisonment (SI) for 7 days. (b) Kali Charan (A-1), Sarvesh Kumar (A-3), Chander Bhan (A-4) and Amit (A-6) were sentenced to 4 years RI and fine of Rs.2,000/- and in default of payment of fine to undergo SI for 7 days for the offence under Section 120 B read with 395 IPC; for the offence under Section 395 IPC to undergo RI for life with a fine of Rs. 2,000/- and in default SI for 7 days; for the offence under Section 304 Part II IPC to undergo RI

for 10 years with a fine of Rs. 10,000/- and in default of payment, to undergo SI for one month. All sentences were directed to run concurrently. CRL.A. 1141/2014 and connected matters Page 3 of 24 (c) Chander Bhan (A-4), was additionally sentenced to undergo RI for 10 years for the offence under Section 397 IPC. (d) Amit @ Mangru was additionally sentenced for the offence under Section 412 IPC to RI for 4 years with a fine of Rs.2,000/- and in default of payment, to undergo SI for 7 days.

3. It must be mentioned at the outset that Anil (A-7), who was a proclaimed offender (PO) during the trial has continued to remain a PO till date. Case of the prosecution 4. Three daily diary (DD) entries were prepared at PS Model Town on 9th June 2012 regarding information as to what had happened at House No.A-176, Gujranwala Town. The information received at 3.30 pm was reduced to writing as DD No.18 A which stated that one Constable (Ct.) Devender had called from the PCR that there is a fight going on at A-176 Gujranwala Town. Within five minutes thereafter at 3.35 pm another call was received from Lady Ct. Sumitra at the PCR that at A-176 Gujranwala Town, some bad elements had arrived. Another call was received from a neighbouring house i.e. A-175, Gujranwala Town at 3.50 pm about a fight going on.

5. What exactly happened at A-176 is spoken of first by Kamla Devi (PW- 29), the wife of the deceased on whose statement the rukka (Ex.PW-27/A) was prepared. In that statement, she said that she and her husband, the deceased Kishan Lal Manchanda, were at their house at A-176, ground CRL.A. 1141/2014 and connected matters Page 4 of 24 floor, Gujranwala Town, when at around 3.10 pm the bell rang. When her husband opened the door, he found a fruit seller holding a bag of kharbujas (muskmelons). The fruit seller entered the door. When her husband had paid the fruit seller and began to walk him outside, two boys entered. One of them was carrying a knife in his hand. They pushed her husband to the ground. Two more boys at that point entered the house. They then sat on either side of PW-29 (who incidentally was paralyzed from the waist down and confined to a wheelchair) and held her arm from either side. They threatened to stab her if she did not stay quiet. She claimed that the two boys who had entered first continued to stand over her husband. One of the two boys by her side then

opened the almirah (cupboard), took out the key for an inner almirah and proceeded to ransack the same. However, they could not open the locker of the almirah. By this point in time, there was a hue and cry going on outside upon which all the four boys ran away, and in that process took away her mobile phone. In her initial statement to the police she was clear that apart from her mobile phone, no other valuable article was taken away. The landlords son Dr. Vivek Sharma (PW-13) then helped to take her husband to the Pentamed hospital. Medical examination 6. The Medico Legal Certificate (MLC) regarding the admission of the deceased at the Pentamed hospital shows that he was brought there at around 3.40 pm with an alleged history of assault by some unknown persons at his residence at 3.20 pm as told by Mrs. Neelam Manchanda (PW-26), his daughter-in-law. Even when he was brought in to the hospital there was no recordable pulse or blood pressure. As far as injuries were concerned, the CRL.A. 1141/2014 and connected matters Page 5 of 24 MLC noted that apart from a swelling on the upper lip there was no other sign of injury all over the body. It was noted in the MLC that the doctors tried to administer CPR for 30 minutes but failed and therefore he was declared brought dead.

7. The post-mortem of the deceased was conducted on the following day i.e. 10th June 2012 at 11 am by Dr. Bhim Singh (PW-12). He found two external injuries viz., the swelling of the upper lip and a reddish abrasion 0.8 cm X 0.5 cm over the right cheek. His opinion as to the cause of death was as under: In my opinion, death was due to shock consequent upon blockage of coronaries, due to pre-existing coronary artery disease, a natural cause of death. All the injuries were ante mortem, fresh in nature and could be caused by blunt force/surface impact. Time since death was about 20 hours. Investigation 8. The investigation of the case was entrusted to Inspector Jarmender Singh (PW-30) who was the Investigating Officer (IO). He was posted at PS Model Town. The original rukka and the FIR were handed over to him by Ct. Kushal (PW-4). The IO reached the spot and met Kamla Devi (PW-29). The crime team officers were already present at the spot. The crime team report (Ex.PW-5/A) shows that they were at the spot from 4.30 to 5.30 pm. Among the articles they noticed were one pair of black chappals (slippers) and one white towel. They noticed certain blood stains which they picked up apart from the control earth. They noticed that the cupboard inside

the house was in a ransacked condition. Photographs were taken of the scene of crime. CRL.A. 1141/2014 and connected matters Page 6 of 24 These photographs inter alia showed a polythene bag containing three muskmelons and blood spots as well as the ransacked cupboard.

9. An important piece of evidence that emerged was the CCTV footage outside the door of the house at the time of the incident. This was produced before the IO by Mr. Dharam Pal Sharma (PW-17) who was the landlord of the premises in two CDs. One of the CDs was put in a cloth pulanda with a seal of KS. The other was kept by the IO in his case file. Both CDs were seized under seizure memo (Ex.PW-17/A).

10. As regards the arrests of the accused, according to the IO, on 12th June, 2012 i.e. three days after the incident they received secret information that (A-1) Kali Charan would come to the Prince Road, Model Town. He and the acquitted accused Ram Kumar (A-2) were arrested at around 7.30 pm. A mobile phone was recovered from A-1 during his personal search. His disclosure statement was recorded. On 13th June 2012, A-1 is supposed to have made the supplementary disclosure statement.

11. On 15th June, 2012, again on receipt of secret information, Sarvesh Kumar (A-3) was arrested. On 4th July, 2012 Chander Bhan (A-4) was arrested. One knife was recovered at his instance from under some bushes in a park near Narela, J.J.

Colony. A-4 had in fact already been arrested earlier in FIR No.167/2012 registered at PS Model Town under Sections 25, 27 and 29 of the Arms Act. On receipt of that information he was arrested in the present case. CRL.A. 1141/2014 and connected matters Page 7 of 24 12. According to PW-30, on 9th July, 2012, again on receipt of secret information, Bimlesh (A-5) was arrested near Hans Cinema, G.T. Karnal Road.

13. A Test Identification Parade (TIP) was organized on 28th June, 2012 for Sarvesh Kumar (A-3) but he refused to participate.

14. On completion of the investigation the charge sheet was filed. By order dated 8th October 2012 and 24th January 2013 charges were framed against the accused for the offences as noted hereinbefore. There were separate charges against A-4 for the offence under Section 397 IPC and additional charge against Amit (A-6) for the offence under Section 412 IPC.

15. The prosecution examined 31 witnesses. The statements of the accused under Section 313 Cr PC would be discussed when their individual involvements in the offence are dealt with later. Impugned judgment of the trial Court 16. In the impugned judgment dated 29th March, 2014 of the trial Court running into 188 pages, the following conclusions were arrived at: (i) It was evident from the Call Details Records (CDRs) of the mobile phone of A-1, as part of the strategy, after the commission of the offence he made call to the police at 100 at 15:20:42 hours to avoid any suspicion as far as he was concerned. (ii) The CDR showed that A-1 and A-6 were in constant touch with CRL.A. 1141/2014 and connected matters Page 8 of 24 each other not only on and after the date of the incident but even prior thereto. Their location in the area was also established through the CDRs. (iii) The CCTV footage and visuals corroborated the eyewitness testimonies of PWs 17, 26 and 29 regarding the presence and involvement of the accused. PW-17 and PW-29 corroborated each other on material particulars and therefore were reliable witnesses. (iv) A-1, A-3, A-4, A-6 and the PO Anil (A-7) were visible in the CCTV visuals. They were also identified by the eyewitnesses. However, A-2 (the acquitted accused) was not seen in any of the visuals and was not identified as a person present at the spot or in the vicinity thereof. (v) A-3, A-4, A-6 and the PO A-7 had entered the house and knew where the keys of the almirah were kept; they opened the almirah and took away 2 gold kadas, chain and cash of PW-29. (vi) As far as Bimlesh (A-5) is concerned, she was employed as a domestic help in the family of the victims who were senior citizens. Although she did not directly participate in the crime, she kept a watch and passed on vital information to the other accused and also remained absent from the house during the time of the occurrence. She had won the confidence of the victims being the sister of one Kamlesh, who had earlier worked in the victims family. This made it easy for A-1 to introduce her to the victims since he too, being a regular fruit seller in CRL.A. 1141/2014 and connected matters Page 9 of 24 the area, was known to them. The

conspiracy to commit the offence was proved by the circumstantial evidence and this involved A-5 as well. (vii) As far as Chander Bhan (A-4) is concerned, it was he alone who wielded the knife. The common intention of other accused to use the knife was not proved. He also slashed the knife at PW-17 when he tried to intervene but PW-17 managed to duck and save himself. (viii) The deceased was already suffering from multiple ailments including Coronary Artery disease. This was within the knowledge of A-1 and A-5 and passed on by them to the other accused. It was accordingly held that A-2, A-3, A-4 and A-6 were guilty of the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC. (ix) A-1, A-3 to A-6 were part of the larger conspiracy hatched by the other accused including A-7 to commit armed dacoity at the house of the victims and were, therefore guilty of the offence under Section 120- B read with Section 395 IPC.

17. The trial Court by the separate impugned order on sentence dated 16th April 2014 sentenced the Appellants in the manner noticed hereinbefore.

18. This Court has heard the submissions Mr. K. Singhal, Mr. Prasanna, Mr. Sitab Ali Chaudhary, Mr. Gufran Ali, Mr. Saurabh Kansal, Ms. Pallavi S. Kansal, Mr. A. S. Juneja and Ms. Rakhi Dubey all learned counsel for the CRL.A. 1141/2014 and connected matters Page 10 of 24 Appellants and Ms. Radhika Kolluru, Learned APP for the State. The presence of the Appellants 19. The presence of first A-1 at the house at around 3.10 pm on 9th June 2012, followed by the other four accused i.e. A-3, A-4, A-6 and A-7 has been spoken to by PW-29. Although PW-29 seemed confused about the names Kamlesh and Bimlesh (A-5), she identified A-5 as the person working at their house as a part-time maid. Therefore as far as the identity of the accused present at the house at the crucial time is concerned, PW-29 was categorical and there is nothing in her cross examination on this aspect that can be said to favour any of the accused.

20. The eyewitness testimony of PW-29 finds substantial corroboration, as regards the presence of the accused from PW-17 i.e. the landlord. He received a call from the receptionist working in the clinic of his son Dr. Vivek Sharma (PW-13) at around 3.15 pm on 9th June 2012 about the noise from the house of the

deceased. It appeared that the deceased was scolding someone. Initially PW-17 ignored the message since the deceased habitually used to speak in a loud voice. However some time later, PW-17 came down stairs to pick up his purse. He found that the entrance of the house of the deceased was open. When he looked inside he found an unknown person dressed in a sky blue coloured shirt standing inside the house. He asked that person what the matter was and asked him to call the deceased. At this, the person went inside while PW-17 waited near the gate. He then came back to the door and told PW-17 that the deceased was not well (unki tabiyat kharab hai). On this PW-17 thought it necessary to enquire about the health CRL.A. 1141/2014 and connected matters Page 11 of 24 of the deceased and took two steps inside the house. At that time, the man inside the house shouted aa gaya. PW-17 became apprehensive and suspicious and tried to catch hold of the man. There was a scuffle during which PW-17 and the man reached the roadside and PW-17 raised an alarm chor chor. The said person managed to get himself freed from the grip of PW-17 and ran away leaving behind his chappals (slippers). Soon thereafter three more persons emerged from the house and ran behind the first person in quick succession. One of them left behind his towel. PW-17 stated that the last person slashed a knife at his neck but he saved himself by ducking.

21. This entire narration by PW-17, corroborates what PW-29 stated about the presence first of A-1 and then of A-3, A-4, A-6 and A-7. This also finds corroboration from the CCTV footage which was played in this Court and viewed by the learned counsel for the accused as well as the learned APP. The impugned judgment of the trial Court has also discussed in detail the CCTV footage with the time stamp for each frame showing the presence of the accused. This Court finds that the said recording by the trial Court of what is seen in the CCTV footage at the relevant time is accurate. It reads as under: 15:09:47:-

"The accused Kali Charan passes in front of the premises on a cycle. 15:11:06:-

"Two persons (i.e. accused Chander Bhan and PO accused Anil) entered and hide themselves in the passage. 15:12:00:-

"The accused Kali Charan with white head gear/ Pagri enters the house. CRL.A. 1141/2014 and connected matters Page 12 of 24 15:13:33:-

"The accused Kali Charan gets the door of the house opened while the accused Chander Bhan and PO accused Anil who were waiting in the passage enter the house from the door which is got opened by Kali Charan. 15:13:45:-

"The accused Kali Charan comes out and runs out from the building. 15:15:26:-

"Person with blue shirt i.e. accused Sarvesh Kumar enters the building and the portion of the victims. 15:17:16:-

"Another person with White T-shirt (i.e. accused Amit @ Mangru) enters the building and the portion of the victims. (Here, I may observe that the Call Detail Records of the accused Amit @ Mangru establishes that he had made a call to the accused Kali Charan at 15:16:06 which call lasted for 21 seconds only after which the accused Amit @ Mangru had entered the building and the timing of the CCTV visuals coincide with the said call). 15:18:36:-

"The witness Sh. D.P. Sharma is seen in a Kurta- Pyjama. He is seen coming out of the building and then again entering the same as if talking to someone standing inside. 15:19:25 to 15:19:26:-

"The accused Sarvesh in blue shirt comes out of the building and while running away' slightly trips over and his chappal/ slipper is left behind. He is followed by accused Amit @ Mangru in a double coloured sweat shirt which a towel on his shoulders which he drops while running away. The PO accused Anil and the accused Chander Bhan follow Amit @ Mangru outside with witness D.P. Sharma also following them as if trying to stop them when Chander Bhan is seen with a knife in his hand CRL.A. 1141/2014 and connected matters Page 13 of 24 which he is waving at Sh. D.P. Sharma and in the air while running away. 15:19:30:-

"All the-assailants are shown to have crossed the main gate and escaped on the right side of the building on the road outside. 22. Learned counsel for the accused Appellants were unable to persuade this Court that any doubt remained as regards to the presence of A-1, A-3, A4, A-6 and A-7 at the scene of occurrence after the

CCTV footage was played. Although it was urged that the tampering of the CCTV footage was possible, the Court notes that the footage runs for almost five minutes and there appears to be absolutely no gap as regards the time and date stamp. Plainly, it is a continuous footage. This Court, therefore, concurs with the conclusion in this regard by the trial Court. Stolen articles 23. As regards what was stolen from the house, there appears to be some merit in the contention on behalf of the Appellants that in her very first statement to the police on the basis of which the rukka was prepared, PW-29 was categorical that what was stolen from the house was only a mobile phone and nothing else.

24. According to PW-26, PW-29s daughter in law, who claims to have reached there after the incident, PW-29 is stated to have told her about four gold bangles, one mangal sutra and an amount of ten thousand rupees being robbed. This somehow does not tally with the statement made to the police CRL.A. 1141/2014 and connected matters Page 14 of 24 by PW-29 in the first instance more than one hour thereafter. Consequently the Court is not satisfied with the evidence led by the prosecution as regards the recovery of the two gold kadas and other articles at the pointing out of the accused. Further the mobile phone stated to have been stolen from PW- 29 was also not recovered.

25. It was urged by Mr. Singhal, learned counsel for A-1, that if the only stolen article i.e. the mobile phone was not recovered, then the offence under Section 395 IPC is not made out.

26. The Court is unable to agree with the above submission. In *Shyam Behari v. State of U.P* AIR 1957 SC320 the accused, who were more than five in number, failed in their attempt to commit the robbery since the villagers raised hue and cry. As a result the miscreants ran away without the booty. They were chased by some villagers who caught hold of one of the dacoits. He fired a pistol shot which hit a villager who subsequently died. The Supreme Court held that the offence of dacoity was complete. It ended the moment the dacoits fled the spot. The killing of one villager by one of the dacoits was a separate transaction. Hence, although the offence under Section 396 IPC may not be attracted the offences under Sections 395 and 302 IPC were certainly attracted.

27. Further explained by the Supreme Court in *Manmeet Singh @ Goldie v. State of Punjab* (2015) 3 SCC (Cri) 44: Section 391 IPC defines dacoity to be an offence, if five or more persons conjointly commit or attempt to commit a robbery or where CRL.A. 1141/2014 and connected matters Page 15 of 24 the whole number of persons conjointly committing or attempting to commit a robbery and persons present and aiding such commission of attempt, amount to five or more. In terms of section 391 IPC in such an eventuality every person so committing, attempting or aiding is said to commit dacoity. 28. Thus even an attempt to commit dacoity is punishable under section 395 IPC. In the present case, although the stolen article viz., the mobile phone of PW-29 may not have been recovered, the evidence clearly proves that at least five persons i.e. A-1, A-3, A-4, A-6 and A-7 were involved in the robbery that was attempted at A-176, Gujranwala Town. The offence of dacoity punishable under Section 395 IPC is clearly made out as far as the said accused are concerned. A-4 guilty of the offence under Section 397 IPC 29 The fact that Chander Bhan (A-4) was holding a knife is spoken to by PW-29 consistently both in her statement first made to the police and later in her deposition in Court where she identified him as the one who was holding the knife.

30. That apart, PW-17 clearly states that A-4 slashed at him with the knife as he was running away but that PW-17 somehow managed to avoid it. Even the CCTV footage bears out what PW-17 deposed, namely that A-4 was carrying a knife. Therefore, as far as A-4 is concerned his conviction for the offence under Section 397 IPC does not call for any interference. Case against A-5 Bimlesh not proved 31. The court at this stage would like to deal with the role of Bimlesh (PW- CRL.A. 1141/2014 and connected matters Page 16 of 24

5) in the offence. Although PW-30 stated that A-5 was arrested almost a month later on 9th July, 2012 on the basis of secret information, the evidence of Sub Inspector Manoj (PW-27) shows that she was present at the scene of occurrence soon after the other accused had fled. PW-27 went with PW-4 to the spot on receiving DD No.20A. His precise statement in this regard in his cross examination by counsel for A-5 was as under: I had seen Bimlesh at the spot when I reached there. I reached at the spot along with Constable Kushal. I do not know whether accused Bimlesh was taken to the Police Station or not. 32. Turning to the

statement made by Bimlesh under Section 313 Cr.P.C in answer to question No.27 that she had been working at the house of the PW- 29 for three to four months prior to the date of the incident and was aware of all the details of the house, she stated as under: It is incorrect that I was referred by accused Kali Charan. This witness deposed falsely under the pressure of IO. I used to work two hours in the morning 8 AM to 10 AM and two hours in the evening 4 PM to 6 PM. 33. The above answer explains how she might not have been present during the time when the crime took place which was around 3:10 pm to 3:15 pm. She was also asked about the deposition of PW-26 who had asked PW-29 to remove A-5 as maid servant. While denying this she stated as under:-

"It is incorrect and falsely deposed under the pressure of IO because I already lodged complaint against the police persons of PS Model Town to DCP for using third degree with me by the male police officials on which I received serious injuries. I was never referred by the co-accused Kali Charan. My real sister was already working in the said house prior to me. She never informed to her mother in law regarding the nature and character of mine. CRL.A. 1141/2014 and connected matters Page 17 of 24 34. When she asked that if she had anything else to say A-5 Bimlesh stated as under: I am innocent. I have been falsely implicated. I was taken to police station on the date of incident i.e. 09.06.2012 for inquiries and the police called me every day from 09.06.2012 to 13.06.2012 and during this period I was subjected to third degree torture by male police officers after removing my clothes as a result I got the grievous injuries. Thereafter, I was released by the police in this case but due to inhuman act of the police I was admitted in LNJP hospital on 20.06.2012 copy of which MLC in Mark X. I also lodged two complaints to senior officers against the cruel behaviour of the police officials on 15.06.2012 and 18.06.2012 which was already marked A and B and the courier receipts are now marked X1 to X4. I remained in the touch of police from 09.06.2012 to 09.07.2012 but the police did not arrest me during this period. The IO arrested me in this case falsely only to save the police personal against whom I lodged the complaint. 35. There was a pointed cross-examination of the IO (PW-30) by learned counsel for A-5 on the above aspects of Bimlesh being called every day to the PS from 9th June to 13th June and being subjected to third degree torture by the male police officers, which he of course denied.

36. The prosecution story is that A-5 was in touch with A-1 on a mobile phone before and after the incident. However, no CDRs of her mobile phone appear to have been collected. There were no recoveries made at her instance. Her absence from the house at the time of occurrence appears to not be unusual given the hours of her work. Keeping in view all the above circumstances, the Court is not satisfied that the prosecution has been able to prove beyond reasonable doubt that A-5 was also involved in the conspiracy CRL.A. 1141/2014 and connected matters Page 18 of 24 of the other accused to commit the crime. In the considered view of the Court, she is entitled to the benefit of doubt and, therefore, the Court acquits her of the offence under Section 120B read with Section 395 IPC. Offence of criminal conspiracy 37. The Court is also not entirely convinced about the prosecution having proved that all the accused entered into a criminal conspiracy before the commission of the crime of dacoity. As pointed out by learned counsel for the accused, Section 391 which defines dacoity itself contemplates the coming together of five or more persons for a common object. Section 391 IPC envisages five or more persons conjointly committing or attempting to commit a robbery. The word conjointly refers to a united or concerted action of those participating in the transaction. Under Section 391 IPC every person committing, attempting or aiding the offence is said to commit dacoity. The scheme of the provisions of the IPC pertaining to dacoity reveals that every stage has been made punishable. Assembling to commit dacoity is punishable under Section 402 IPC. Preparing for dacoity is punishable under Section 399 IPC. Both the attempt as well as the successful accomplishment of the object viz., robbery is equally punishable under Section 395 IPC.

38. Therefore, in the above context, if the prosecution seeks to bring home separately a charge of criminal conspiracy punishable under section 120 B IPC, it will have to prove the ingredients of that offence. Otherwise, it would mean that in every case punishable under Section 395 IPC, the offence under Section 120 B is automatically proved. The offence of dacoity no doubt CRL.A. 1141/2014 and connected matters Page 19 of 24 implies that the accused have come together to pursue a common object but it is a different thing to show that there was an express agreement before hand between all of them to commit the crime. There has to be evidence to that effect against each of the conspirators.

39. In *State v. Nalini* (1999) 5 SCC 253 the Supreme Court explained what was necessary to be proved by the prosecution to bring home the charge of criminal conspiracy. It was held: A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy supra the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.

40. In the present case, two factors that require to be taken note of in the above context is that with the acquittal of A-5 for the offence punishable under Section 120-B IPC, the prosecution narrative regarding the conspiracy gets altered. Secondly, barring exchange of phone calls between A-1 and A- CRL.A. 1141/2014 and connected matters Page 20 of 24 6 just before the commission of the crime there is no evidence against each of the accused to show the previous agreement or meeting of their minds. In this context, a distinction has to be drawn between the accused coming together to commit a crime with a common intention and conspiring to commit a crime. The Court accordingly extends the benefit of doubt to the remaining accused i.e. A-1, A-3, A-4 and A-6 and acquits them of the offence under Section 120 B read with Section 395 IPC. The offence under Section 304 Part II read with Section 34 IPC⁴¹

Turning now to the offence under Section 304 Part-II IPC, the Court finds that the reasoning of the trial Court that A-1 and A-5 knew of the precarious medical condition of the deceased and would have passed on this information to the other accused, who therefore knew that the consequence of pushing him to the ground

would likely be fatal is a bit farfetched. The Court has already acquitted A-5 of the charge of criminal conspiracy. There is no independent evidence to show that A-1 or for that matter any of the other accused knew of the heart condition of the deceased.

42. The MLC does not bear out the cause of death being as a result of any injury suffered by the deceased during the dacoity. Apart from the swelling on the upper lip and an abrasion on the right cheek, there is no injury that could connect the cause of death of the deceased, viz., the blockage of coronaries, due to pre-existing coronary artery disease which PW-12 termed as being the "natural cause of death, to the external injuries which were caused by the accused. CRL.A. 1141/2014 and connected matters Page 21 of 24 43. Consequently, the Court is not satisfied that the testimony of the eye witnesses and the medical evidence is sufficient to prove the guilt of the accused for the offence under Section 304 Part-II IPC. While it is unfortunate that a 75 year old person died in the manner that he did soon after the incident, the evidence brought on record is not sufficient to hold that it was the accused who were responsible for that death. The accused are, therefore, entitled to the benefit of doubt even as regards this offence. Offence under Section 412 IPC⁴⁴ As regards the offence under Section 412 IPC qua A-6, the Court finds that there was no TIP conducted for the two gold kadas. They were identified in the Court by Ct. Ajeet (PW-25) and PW-29 to whom they belonged. But there is no justification shown for not conducting a TIP for getting the said two gold bangles identified by PW-29. In the absence of the TIP, their identification in the Court loses significance. This is coupled with the fact that in her initial statement to the police PW-29 maintained that except her mobile phone (which was never recovered) no other valuable article was missing.

45. For the above reason the Court is of the view that the benefit of doubt in relation to the offence under Section 412 IPC ought to be granted to A-6.
Summary of conclusions 46. The result of the above discussion is as under:-

"i) A-5 Bimlesh is acquitted of the offence under Section 120B read with Section 395 IPC and the impugned judgment dated 29th CRL.A. 1141/2014 and connected matters Page 22 of 24 March 2014 of the trial Court to that extent is

hereby set aside. The corresponding order on sentence qua A-5 also stands set aside. ii) A-1, A-3, A-4 and A-6 are also acquitted of the offence under Section 120B read with Section 395 IPC and the impugned judgment dated 29th March 2014 of the trial Court to that extent is hereby set aside. The corresponding order on sentence qua the said accused also stands set aside iii) A-6 Amit is acquitted of the offence under Section 412 IPC and the judgment of the trial Court to that extent and the corresponding order on sentence of the trial Court is accordingly set aside. iv) A-1, A-3, A-4 and A-6 are acquitted of the offence under Section 304 Part-II read with Section 34 IPC. The impugned judgment of the trial Court to that extent and the corresponding order on sentence are hereby set aside. v) The conviction of A-1, A-3, A-4 and A-6 for the offence under Section 395 IPC and the further conviction of A-4 Chander Bhan for the offence under Section 397 IPC are upheld. Sentence 47. On the question of sentence, as far as A-1 and A-3 are concerned, they have no previous conviction and their jail conduct is stated to be satisfactory. A-4 and A-6, however, have a past criminal record.

48. Keeping in view the above factors, this Court modifies the impugned CRL.A. 1141/2014 and connected matters Page 23 of 24 order on sentence of the trial Court sentences A-1 Kali Charan, A-3 Sarvesh Kumar, A-4 Chander Bhan and A-6 Amit to 8 years RI with the fine amounts and the default sentences as awarded by the trial Court remaining unchanged, for the offence under Section 395 IPC. Further, as regards A-4 Chander Bhan, his further sentence of 10 years RI for the offence under Section 397 IPC remains unchanged. The sentences are directed to run concurrently.

49. As far as A-5 is concerned, her surety bonds and bail bonds stand discharged. A-5 is directed to comply with the requirements of Section 437- A Cr PC to the satisfaction of the trial Court at the earliest.

50. The surety bonds and bail bonds furnished by A-1 and A-6 are cancelled. They will surrender on or before 20th February, 2018 in order to serve out their remaining sentence failing which the SHO of PS Model Town will take the requisite steps to apprehend them and send them to jail.

51. The appeals and application are disposed of in the above terms. The trial Court record be returned forthwith along with a certified copy of this judgment. S. MURALIDHAR, J.

I.S. MEHTA, J.

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