

(2011) 07 DEL CK 0166
In the Delhi High Court
Case No : Criminal A. 929 of 2010

Dinesh Kumar @ Dinu

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 100, 161, 313
Evidence Act, 1872 — Section 106, 114
Penal Code, 1860 (IPC) — Section 392, 397, 411

Citation : (2011) 07 DEL CK 0166

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Pradeep Kumar and Narinder Chaudhary in Criminal A. 929 and 1336/2010 and Ajay Verma, in Criminal A. 242/2011, for the Appellant; Manoj Ohri, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—These appeals impugn a common judgment dated 1st July, 2010 convicting the Appellant Dinesh Kumar, in Criminal Appeal No. 929/2010, Sandeep in Criminal Appeal No. 242/2011 and Rajeev Kumar and Praveen Kumar in Criminal Appeal No. 1336/2010 for offences punishable under Sections 392/411 IPC, besides convicting Appellant Praveen Kumar for offence punishable u/s 397 IPC and 25 Arms Act and the order on sentence dated 14th July, 2010 inter alia directing Appellants Dinesh Kumar, Rajeev and Sandeep to undergo rigorous imprisonment for a period of seven years for offence punishable u/s 392 IPC and three years for offence punishable u/s 411 IPC and Appellant Praveen to Rigorous Imprisonment for 10 years for offence punishable u/s 392/397 IPC and three years for offence u/s 411 IPC. The Appellants Praveen, Rajeev and Sandeep have also been directed to undergo sentence of imprisonment for a period of five years and a fine of Rs. 5,000/- u/s 25 Arms Act.

2. The prosecution case in nutshell is that on 5th December, 2004 at about 3.30

P.M. the Appellants committed robbery of 23 mobile phones, several dummy phones and about Rs. 80,000/- to Rs. 90,000/- at the shop No. 23 "Mobile India" at NWA Club Road, Punjabi Bagh and also gold chain and purse belonging to Sanjeev Kumar and Navneet Kaur. They also extended threats to Sanjeev Kumar and his assistant Navneet Kaur with pistols and restrained them by pushing them inside the cabin and tied them with rope to facilitate the commission of robbery and thereafter escaped from the spot. On registration of the FIR, investigation was carried out. On 18th December, 2004 Dinesh Kumar and Rajeev were arrested from Madipur crossing and from them mobile phones and one country made pistol of .12 bore was recovered from Appellant Rajeev. The Appellant Dinesh Kumar was found in possession of one mobile phone make Nokia along with a charger, booklet and cardboard box which had allegedly been robbed from the shop and it was also disclosed that on 10th December, 2004 he had sold one mobile phone model No. 6610 with IMEI No. 315350404912887 belonging to one Gaurav Kakkar PW4 stolen from the shop of the Sanjeev to PW5 Neeraj Sachdeva at his shop in MCD Market, Karol Bagh. The Appellant Dinesh Kumar further got recovered five mobile phones make Nokia from his house at Village Budhpur, District Baghpat, U.P. Thereafter they led the police party to Karol Bagh at Shop No. 140, MCD Market and identified Neeraj Sachdeva to be the person to whom the mobile phone was sold by the accused. On 22nd December, 2004 the Appellant Sandeep and Praveen were arrested from Gate of ISBT Kashmere Gate and a country made pistol with one live cartridge was at the instance of Appellant Sandeep. On the disclosure of co-accused Praveen country made pistol was recovered from Shakarpur Railway Crossing near safeda tree by digging out the earth. On 23rd December, 2006 Sandeep and Praveen led the policy party at sugarcane field at Village Budhpur, District Baghpat, U.P. and got recovered a bag containing 19 dummy phones, one booklet of Nokia 3105 along with other documents. On 25th December, 2004 accused Dinesh Kumar made a supplementary disclosure and at his instance, 5 mobile phones were recovered from his house at Village Budhpur, District Baghpat. During the TIP the Appellant and Sandeep was duly identified by Ms. Navneet Kaur PW3 whereas the other Appellants refused to participate in the TIP. After the charge sheet, trial was conducted and the Appellants were convicted and sentenced as above.

3. Learned Counsel for the Appellant Dinesh Kumar contends that the role assigned to the Appellant is that he was standing outside the shop providing safety to other three accused for committing the offence. No person has witnessed the presence of the Appellant. One mobile phone was allegedly recovered on the search of the Appellant on 18th December, 2004. It is further alleged that he sold one mobile phone in Gaffar market and PW5 Neeraj Sachdeva the shop keeper and PW1 Pramod Kumar, his employee testified about his selling the said mobile phone. However, PW4 Gaurav Kakker who had purchased this mobile phone and had given it for repair at "Mobile India" has not identified the phone and has only handed over the cash memo Ex. PW4/A. PW3 Navneet Kaur failed to identify the Appellant as an accused who was standing

outside. The identification by PW10 Sanjeev Kumar, the owner of the shop is also an improvement as he has not stated this fact in the Statement u/s 161 Code of Criminal Procedure PW10 Sanjeev Kumar has stated in his testimony that he saw three persons inside and one person outside. On confrontation with his statement it was found that in the statement u/s 161 Code of Criminal Procedure he had only stated about two persons. Thus, the presence of the Appellant is not proved at the spot. Since this part of his statement is a material improvement it has to be excluded from consideration. Besides this statement of PW10 there is nothing to implicate the Appellant in the alleged offences. Moreover, no public person was associated at the time of arrest nor when the mobile phones were allegedly recovered. No public persons were even associated at the time of recovery at Baghpat. The chance print though lifted do not resemble with that of the Appellant. Besides PW3 Navneet Kaur there were two other employees who were though cited but not examined as witnesses. Thus, the best evidence was kept back by the State and the Appellant has been falsely implicated. Though as per the Statement of PW3 Navneet Kaur it is alleged that the robbery continued for two hours, however, no other person witnessed it. PW5 Neeraj Sachdeva, the owner of the shop at Gaffar Market though very vigilant but did not bother to take any document when the mobile phone was further sold by him. The Appellant examined his father as DW1 who deposed that the Appellant was arrested on 17th December, 2010 and not on 18th December, 2010 as claimed. However, neither the contentions raised by the learned Counsel for the Appellant nor the defence of the Appellant has been considered in the impugned judgment. Reliance is placed on *Staila Sayyed v. State* 2008 (4) JCC 2840 to contend that the absence of chance print proves the innocence of the Appellant. Relying on *Jaivir Singh v. State* 1996 JCC 166 it is contended that failure to join the public witnesses is contrary to Section 100 Code of Criminal Procedure Regarding omission and material improvement in the testimony, reliance is placed on *State v. Rajendra Singh* 1998 SCC (Cri.) 1605. In view of the testimony of witnesses and material witness having failed to identify the Appellant being present at the spot, the Appellant is entitled to be acquitted of the charge u/s 392/411 IPC. The Appellant Dinesh Kumar has already undergone imprisonment for a period of five years five months. Thus in the alternative it is prayed that the Appellant be released on the period already undergone.

4. Learned Counsel for the Appellant Sandeep while reiterating the contention raised by the learned Counsel for the Dinesh Kumar contends that the identification of the Appellants and the other accused persons is not as per the requirement of law. The recovery of the country made pistol from the Appellant does not link him to the factum of offence of robbery as PW 10 failed to identify the country made pistol recovered from the Appellant. The recovery of 19 dummy mobile phones is improper. PW3 Navneet Kaur took part in the TIP however, PW10 Sanjeev Kumar the owner of the shop did not take part in the TIP. Thus, an adverse inference should be drawn against the prosecution. PW3 Navneet Kaur has admitted that she identified two accused persons in the police

station on 24th December, 2004. PW3 Navneet Kaur has not identified the Appellant in the Court and has assigned no role to the Appellant. PW10 Sanjeev Kumar has identified the Appellant, in the Court but did not participate in the TIP. Thus the Appellant has not been identified by the witnesses. Despite the fact that 12 chance prints were lifted from the spot but no report of CFSL was filed and hence adverse inference should be drawn against the prosecution. It is also stated that no TIP of the articles was got conducted. Even the recovery of dummy mobiles phone was on the joint disclosure of the Appellant Sandeep along with Praveen and is thus inadmissible. Allegedly on the joint pointing out a black raxine bag has been recovered from sugar cane field from under the foliage. It is improbable that the Appellant would keep the dummy mobile phones. It is alleged that the bills and cheques were recovered along with the dummy mobile phones which is also highly improbable. Reliance is placed on State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others, , Kanan and Others Vs. State of Kerala,

5. Learned Counsel for the Appellants Rajeev and Praveen reiterate the submissions made by the learned Counsel for the Appellants Sandeep and Dinesh. It is further contended that the Appellant Praveen cannot be convicted for the offence punishable u/s 397 IPC. In the alternative, he further contends that Appellants have been in custody for more than six years four months and thus they are released on the period already undergone.

6. Learned APP for the State on the other hand contends that the refusal of the TIP by the witness is incorrect. Appellants Dinesh and Rajeev were arrested on 18th December, 2004 and application for sending them to judicial custody was moved immediately. They were sent to judicial custody and only on their refusal, an application dated 24th December, 2004 was filed for their police custody remand which was granted for two days. Both PW10 Sanjeev Kumar and PW3 Navneet Kaur had gone for TIP however, the Appellants Dinesh and Rajeev refused to undergo TIP and hence adverse inference should be drawn against them. As regards Sandeep and Praveen who were arrested on the 22nd December, 2004, an application was filed on 23rd December, 2004 when they were sent to judicial custody till 5th January, 2005. Only after the TIP of the Appellant Sandeep was conducted and the Appellant Praveen refused the same, the application for police custody remand was moved on 5th January, 2005. Thus there is no question of any witness having seen the Appellants in police custody. PW3 Navneet Kaur in the judicial TIP conducted correctly identified the Appellant Sandeep. Thus the stand of the Appellants in the statements u/s 313 Code of Criminal Procedure that Appellants Dinesh and Rajeev were allegedly shown in the Police Station while in custody is contrary to the record.

7. According to the learned APP, the Appellants Rajeev, Sandeep and Praveen have been duly identified by PW10 Sanjeev Kumar and PW3 Navneet Kaur. Further even if it is assumed that the identification of Dinesh in the testimony of

PW10 is an improvement, Dinesh has been identified as the person who sold the mobile phone robbed from the complainant's shop in Gaffar Market soon after the incident. Since soon after the incident the Appellant Dinesh was in possession of mobile phone a presumption u/s 106 of the Evidence Act arises which he has to discharge. PW10 Sanjeev Kumar has clarified the role of the fourth person, that is, Dinesh and thus reliance can be placed on his testimony. PW1 Parmod Kumar the employee at the shop in Gaffar market has not only identified the Appellant Dinesh but also the mobile phone and the receipt. Similarly PW5 Neeraj Sachdeva the employer of PW1 Parmod Kumar also identified the Appellant Dinesh, mobile phone and the receipt. On the disclosure of the Appellants there were recoveries of mobile phones, receipt etc which were duly identified. There is no dispute to the fact that the katta recovered was the one which was used on the date of the incident. As regards the joint disclosure it is contended that it is the duty of the Court to find out which accused made the first disclosure and thus on that basis convict the accused. Reliance in this regard is placed on State (Govt. of NCT of Delhi) v. Navjot Sandhu 2005 (XI) SCC 600. The evidence of the police witness is reliable in unearthing the sequence of events. It is contended that reliance on the decision of Pradeep Saini (supra) by the learned Counsel for the Appellant is misconceived.

8. I have heard learned Counsel for the parties and perused the record. A perusal of the evidence shows that though PW3 did not identify the Appellants in the Court, however PW10 Sanjeev Kumar, owner of the mobile shop "Mobile India" identified them in the Court. As regards PW3 turning hostile is concerned, the prosecution has proved the complaint in which it is recorded that the wife of Appellant Dinesh Kumar @ Dinu threatened the witness PW3. In so far as the Appellants Rajeev Kumar, Praveen Kumar and Sandeep are concerned, it is not a case where PW10 had a fleeting glimpse of them. The Complainant was tied by them and his shop was ransacked. All this happened in front of him and went on for a considerable time. His hands were tied however his eyes were open thus he witnessed each and every person and action. The reason for refusal of the T.I.P. by Appellants Dinesh, Rajiv and Praveen is also not germane to the facts of the case. Immediately on their arrest, the Appellants were sent to judicial custody wherein their T.I.P. was got conducted and only on their refusal that the witnesses had identified them in the police station. Further, Appellant Sandeep was duly identified by PW2. Though, this is not a substantive piece of evidence, however the substantive evidence is of PW10 identifying the accused in the witness box cannot be ignored. The evidence of identification of the Appellants by PW 10 is further strengthened by the other evidence of recovery of the mobile phones etc. at their instance thus lending reliability to the testimony of PW10.

9. As regards the Appellant Dinesh, there is no doubt that the statement of PW10 is a material improvement. He has not stated in his statement Ex.PW 10/A, the rukka on the basis of which the FIR was registered, that there was a fourth person who was standing outside and ensuring the safety of the three accused inside. In his statement, he had mentioned only about three accused. Moreover

Dinesh has been identified by PW10 for the first time as he had refused the TIP. PW10 did not get sufficient opportunity to see Dinesh as he was allegedly standing outside the main gate, thus if at all PW10 can be said to have seen Appellant Dinesh, it would have been a fleeting glimpse. However, the complicity of Appellant Dinesh Kumar is proved from the recoveries pursuant to the disclosures made by him. Pursuant to the disclosure of Appellant Dinesh Kumar, he took the police to the shop at Gaffar Market where he sold the mobile phone. He was duly identified by PW1 Pramod Kumar and PW5 Neeraj Sachdeva as the person who had sold the mobile phone to them and at the time of selling, he had deposited photocopy of his driving license which gives his name as Dinesh Kumar. Moreover, the testimony of PW4 that a day prior to the incident, he had given this mobile phone for repair at the shop of PW10 on 4th December, 2004 further corroborates the testimony of PW10 Sanjeev Kumar, PW1 Pramod Kumar and PW5 Neeraj Sachdeva. Thus the fact that Dinesh was involved in the offence of robbery is proved by the fact that soon after the incident he was found in possession of the robbed mobile phones. Reliance in this regard is placed on Gulab Chand Vs. State of Madhya Pradesh, . From the chain of circumstances and in view of the presumption u/s 114(a) of the Indian Evidence Act, no other inference can be arrived at except that Appellant Dinesh was a part of the said robbery.

10. Great emphasis has been laid by the learned Counsels for the Appellants on non-joining of public witnesses. In this regard it would be apt to note that the witnesses of recovery have been cross-examined at great length. Nothing has been elicited in their cross-examination. Thus, mere non-joining of public witnesses will not discredit the otherwise credible testimony of the Police witnesses.

11. Learned Counsels for the Appellants have strenuously argued that the chance prints were lifted from the spot, however the CFSL report in this regard has not been filed, thus indicating that the Appellants are not involved in the offences alleged. I find no merit in this contention. The robbery took place in a shop where number of people come. The incident occurred around 5.30 PM. Thus, in such a place finger prints of number of customers, employees would be available. Merely because the CFSL report has not been filed for the reason that no report of the finger prints tallying with that of the Appellants was received, does not lead to the inference that the Appellants did not commit the offences alleged.

12. The recoveries from Appellant Dinesh are of mobile phones, i.e. one from his possession, one having sold at the shop of PW5 Neeraj Sachdeva and five from his house. The EMEI Nos. and the receipts of these phones had been handed over by PW10, the complainant soon after the incident, much before the recoveries were effected.

13. Before discussing the joint disclosures by Appellants Praveen and Sandeep are concerned, it would be appropriate to reproduce the relevant part of the decision rendered by Hon"ble Supreme Court in State (Govt. of NCT of Delhi)

(supra):

145. Before parting with the discussion on the subject of confessions u/s 27, we may briefly refer to the legal position as regards joint disclosures. This point assumes relevance in the context of such disclosures made by the first two accused viz. Afzal and Shaukat. The admissibility of information said to have been furnished by both of them leading to the discovery of the hideouts of the deceased terrorists and the recovery of a laptop computer, a mobile phone and cash of Rs 10 lakhs from the truck in which they were found at Srinagar is in issue. Learned Senior Counsel Mr. Shanti Bhushan and Mr. Sushil Kumar appearing for the accused contend, as was contended before the High Court, that the disclosure and pointing out attributed to both cannot fall within the ken of Section 27, whereas it is the contention of Mr Gopal Subramaniam that there is no taboo against the admission of such information as incriminating evidence against both the accused informants. Some of the High Courts have taken the view that the wording "a person" excludes the applicability of the section to more than one person. But, that is too narrow a view to be taken. Joint disclosures, to be more accurate, simultaneous disclosures, per se, are not inadmissible u/s 27. "A person accused" need not necessarily be a single person, but it could be plurality of the accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr Gopal Subramaniam. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. With these prefatory remarks, we have to refer

to two decisions of this Court which are relied upon by the learned defence counsel.

14. A perusal of the testimony of PW14 Inspector Ishwar Singh shows that though it was stated that both of them disclosed, however reference was made to the Appellant Sandeep first pointing out the place from where recovery is made. Moreover, in the present case 19 dummy mobile phones in a rexine bag along with papers were thrown. Thus, the possibility of the two Appellants throwing & concealing the same together cannot be ruled out. Therefore on facts it cannot be said that both the Appellants did not possess the knowledge of concealment of the rexine bag.

15. Learned Counsels have next contended that the recoveries from the Appellants cannot be relied upon as no TIP of the properties allegedly recovered was conducted. The recovered articles have been duly identified by PW10 the complainant. Moreover, PW10 had furnished the receipts etc. of the mobile phones which depicted their EMEI No. which were found on the mobile phones recovered. Further, amongst the items recovered were cheque Ex.X21; settlement slip printed by credit machine bearing the name of Mobile India dated 2nd December, 2004 Ex.X22; slip issued by Bank of India reflecting the receipt of amount of Rs. 66,000/- deposited by mobile India Ex.X23 etc. These items are clearly identifiable and connect the Appellants to the offences charged beyond reasonable doubt.

16. In view of the specific deposition of the PW10 that Appellant Praveen pointed out pistol on him and PW3 that when Appellant Rajeev tied them Appellant Sandeep kept the mobile phones in the bag, I find no ground to acquit Praveen for offence u/s 397 IPC.

17. In view of the evidence of PW17 K.C. Varshney, Asstt. Director FSL that Ex.F1 to Ex.F3 were in working condition and were firearms and cartridges A1 and A2 ammunitions as defined in the Arms Act, and as the recoveries made at the instance of the Appellants inspire confidence, the judgment impugned convicting the Appellants Rajeev, Sandeep and Praveen for offence punishable u/s 25 Arms Act is well founded.

18. Thus, I find no infirmity in the impugned judgment convicting the Appellants for offences punishable u/s 392/411 IPC and Appellant Praveen Kumar for offence 397 as well. In view of the fact that the Appellants committed robbery in a shop in daylight at gun point, I do not find any reason to reduce the sentence of the Appellants.

19. The appeals are dismissed.