

**(2013) 08 DEL CK 0059**

**Delhi High Court**

**Case No:** Criminal Appeal 1247 of 2011 and Criminal M.B. 952 of 2013 and Criminal A. 441 of 2012 and Criminal M.B. 759 of 2012

Surinder Kumar @ Nanhe

APPELLANT

Vs

State NCT of Delhi <BR> Harish  
@ Kale Vs The State

RESPONDENT

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**Date of Decision:** Aug. 29, 2013

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 34, 392, 397, 411

**Citation:** (2013) 3 JCC 2152

**Hon'ble Judges:** S.P. Garg, J

**Bench:** Single Bench

**Advocate:** K. Singhal, for the Appellant; M.N. Dudeja, APP, for the Respondent

**Final Decision:** Allowed

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**Judgement**

S.P. Garg, J.

Surinder Kumar @ Nanhe and Harish @ Kale (the appellants) impugn a judgment dated 13.07.2011 of learned Additional Sessions Judge in Sessions Case No. 881/2007 arising out of FIR No. 637/2007 PS Nangloi by which they were held guilty for committing offence punishable u/s 392 read with Section 397/34 IPC. By an order dated 20.07.2011, they were sentenced to undergo RI for seven years with fine Rs. 2,000/- each. Allegations against the appellants were that on the night intervening 6/7.08.2007 at 01.30 A.M. near Abhinandan Vatika, Main Rohtak Road, Delhi, they with their associates Davender, Bijender Lochab, Rohan Arora (since expired) robbed Const. Shri Kishan of his mobile phone, motorcycle and a purse containing cash and I-card. Harish @ Kale and Surinder Kumar @ Nanhe were armed with country made pistols and used them while committing robbery. Subsequently, they were also found in possession of motorcycle made Bajaj Discover bearing No. DL-4-SAY 7916 which they received or retained knowing or having reasons to believe the same to be a stolen property. Bijender was also charged u/s 411 IPC being in

possession of stolen mobile make Nokia-6600. The Investigating Officer lodged First Information Report after recording Shri Kishan's statement (Ex. PW-2/A). During the course of investigation, the assailants were apprehended and from their possession country made pistols were recovered. The Investigating Officer recorded statements of the witnesses conversant with the facts. On completion of investigation, a charge-sheet was filed against all of them including Ajit @ Master who was found in possession of Santro Car No. DL-8CG-4984 used in the crime. The prosecution examined thirteen witnesses to prove its case. In their 313 statements, the accused persons pleaded false implication. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, convicted both the appellants. Being aggrieved, they have preferred the appeals.

2. I have heard the learned Addl. Public Prosecutor and appellants' counsel and have examined the Trial Court record. Rohan Arora expired during the trial and proceedings against him were dropped as abated. Ajit @ Master was discharged vide order dated 28.02.2008. Court's observations in the said discharge order are relevant to note. The prosecution had alleged that after their arrest, the five assailants arrested on 09.08.2007 led the police party to Jhajjar, and got apprehended Ajit @ Master who was found in possession of Santro Car No. DL-8CG-4984. Ajit @ Master also recovered leather purse and I-card of the complainant - Shri Kishan. It was pointed out by the defence counsel that newspaper report recorded that the five assailants apprehended on 09.08.2007 had got recovered Santro Car, Bajaj Discovery Motorcycle, Nokia Phone, Uniform and I-card of Const. Shri Kishan. If that be so, the recoveries from Ajit @ Master were doubtful. Recovery memo dated 19.08.2007 regarding police uniform, name plate, barret cap of Const. Shri Kishan was false. Presence of all the five accused persons at Jhajjar for the arrest of Ajit was doubtful at 06.15 P.M. The Trial Court agreed with defence pleas and doubted Ajit's apprehension at the instance of co-accused persons and recovery of Santro Car and I-card etc. from his possession on the alleged date. Accordingly, Ajit @ Master was discharged. The accused persons were acquitted of the charge u/s 411 IPC regarding recovery of I-card, leather purse, police uniform, name plate and barret cap. It is significant to note that State did not challenge the discharge order and it attained finality. The prosecution did not explain the discrepancies and defects in the prosecution case as noticed in the discharge order which caused dent in the version narrated by the police in the charge-sheet.

3. The incident took place at 01.30 A.M. Daily Diary (DD) No. 52A (Ex. PW-1/C) was recorded at 02.24 A.M. on getting information from Const. Ram Bhuj of PCR about the incident. Const. Ram Bhuj has not been examined. The DD entry does not record the name of the victim. PW-13 (SI Suneel Kumar), Investigating Officer went to the spot and met Const. Shri Kishan at 03.40 A.M. The complainant had sustained injuries and was medically examined at Maharaja Agarsen Hospital which was at a short distance from the place of occurrence. The MLC (Ex. PW-12/A) reveals that Shri

Kishan went to Maharaja Agarsen Hospital at 04.15 A.M. He had no visible injuries on the body. There are discrepancies in the statements of the witnesses as to how Shri Kishan went to Maharaj Agarsen Hospital. Complainant claimed that he, of his own went to the hospital for examination. PW-3 (Const. Sunil Kumar) who accompanied the Investigating Officer gave a contradictory version that the complainant was got medically examined by the Investigating Officer. The Investigating Officer failed to explain as to why the complainant was not taken for medical examination. MLC (Ex. PW-12/A) shows that he was taken to hospital by Const. Sunil Kumar. The prosecution failed to explain the discrepancies. Rukka was sent at 03.40 A.M. The MLC (Ex. PW-12/A) recorded arrival time of the patient at 04.15 A.M. It creates doubt if FIR was lodged promptly.

4. Complainant admitted in his deposition that he had not made any departure entry after his duty was over. He, in the cross-examination admitted that he had made call at No. 100 at the night intervening 6/7.08.2007 at about 1.30 A.M. The PCR form has not been produced. The PCR officials who recorded the call have not been examined. It is unclear if any PCR official went to the spot to attend the call. The complainant further admitted that he did not state the number of Santro Car in PCR call. DD No. 52A (Ex. PW-1//C) contains two numbers of Santro Car. In the statement (Ex. PW-2/A), the complainant described complete number of Santro Car used in the incident. The complainant gave the number of the assailants as "four". In his Court statement, he disclosed that assailants were "five" in number.

5. The complainant in his statement (Ex. PW-2/A) did not reveal if the assailants were armed with country made pistols or that any of them used these to commit robbery on his person. However, in his Court statement, PW-2 (the complainant) made vital improvements and deposed that the appellants were armed with country made pistols and used to rob him. The prosecution has failed to reconcile the two versions.

6. In the cross-examination, the complainant admitted that he had informed his brother-in-law Ajay who came to the spot and took him to Maharaja Agarsen Hospital for medical examination. None of the police witnesses has claimed arrival of PW-6 (Ajay) at the spot. PW-6 (Ajay) himself did not testify that he was informed about the incident and he went to the spot immediately or got the complainant admitted at Maharaja Agarsen Hospital. He was not associated in the investigation and no memo bears his signatures.

7. Vital discrepancies have emerged in the statements of the prosecution witnesses regarding the circumstances in which the appellants and their associates were apprehended. PW-7 (HC Surender Singh) deposed that they had no prior information about the arrival of the accused on 09.08.2007 on motor-cycles. However, PW-8 (HC Subhash Chander) and PW-13 (SI Sunil Kumar) deposed that they had prior secret information in that regard. The witnesses have given divergent versions as to the time when they reached Rani Khara Road market to intercept the

vehicles and the duration for which the vehicles were checked. There are contradictory versions as to how and in what manner the three assailants on another motorcycle were apprehended. Some of the witnesses have deposed about the availability of barricades and some have denied it. PW-7 (HC Surender Singh) deposed that the second motorcycle arrived after ten minutes and the three assailants Bijender, Devender and Rohan were apprehended at the pointing out of Harish and Surender. PW-8 (Subhash Chander) stated that Harish and Surender disclosed that three assailants had passed through that road ahead of them on the motorcycle and they took them towards the opposite direction. After 500 yards they pointed towards a motorcycle coming from the opposite direction on the wrong side. PW-13 (SI Sunil Kumar) disclosed that three other accused persons were present at Swaran Park, Mundka, One motorcycle CBZ was stopped and Bijender, Rohan Arora and Devender were apprehended from there.

8. All the five assailants were arrested on 09.08.2007. The Test Identification Proceedings were conducted on 14.08.2007 and 17.08.2007. PW-2 (Shri Kishan) did not claim that he had gone with the Investigating Officer to participate in the TIP. The accused persons were not arrested at his instance and he was not associated at the time of their apprehension. In his Court statement, he merely deposed that on 18.08.2007, he had gone to the police station Nangloi to collect his mobile phone and identified Harish, Rohan Arora and Surender there. He did not elaborate as to when he came to know about the recovery of his mobile phone and motorcycle and apprehension of the assailants. The mobile phone taken on superdari was not produced as it was allegedly stolen. No other independent witness was associated at any stage of investigation. Recovery of articles and Ajit @ Master's apprehension on 19.08.2007 was not believed.

9. Taking into consideration the contradictions/omissions which are of such magnitude that they materially affect the trial, the appellants' conviction cannot be sustained. The discrepancies in the evidence of eyewitness, if found to be not minor in nature, are a ground to disbelieve and discredit their evidence. The prosecution is bound to prove its case beyond reasonable doubt. In [Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan](#), the Supreme Court observed:

17. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason, that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such

cases, while keeping in mind the distance between "may be" true and "must be" true, the Court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The Court must ensure, that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.

In the light of above discussion, the appeals are allowed. The conviction and sentence of the appellants are set aside. The appellants be set at liberty forthwith if not required in any other case. Pending applications also stand disposed of. Trial Court record be sent back forthwith. Copy of the order be sent to the Superintendent Jail.