

**(2011) 07 DEL CK 0461**

**Delhi High Court**

**Case No:** Criminal A. 488 of 2000

Surinder Singh

APPELLANT

Vs

State (Delhi Admn.)

RESPONDENT

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**Date of Decision:** July 8, 2011

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 34, 392, 397, 399, 83

**Citation:** (2011) 8 AD 733 : (2011) 3 JCC 2206

**Hon'ble Judges:** Mukta Gupta, J

**Bench:** Single Bench

**Advocate:** Mercy Hussain and Ajay Mehrotra, for the Appellant; Manoj Ohri, APP, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Mukta Gupta, J.

By this appeal the Appellant lays a challenge to the judgment dated 12th July, 2000 convicting him for offence punishable u/s 392 IPC and the order on sentence dated 13th July, 2000 directing him to undergo Rigorous Imprisonment for a period of one year and to pay a fine of Rs. 200/- and in default of payment of fine to further undergo Rigorous Imprisonment for a period of one month.

2. Briefly the prosecution case is that on 6th July, 1995 at about 3.00 P.M. a lady along with the Appellant came to the house of PW2 Sanjay Jaggi when his mother Smt. Shanti Jaggi and PW1 Sumitra Dass their maid servant were present. The woman who had come along with the Appellant had visited the house 10-15 days earlier also in the presence of PW2 Shri Sanjay Jaggi and his wife PW3 Kajal Jaggi. The said lady asked for water and the Appellant who was accompanying her went down stairs and returned with two boys. Thereafter the three boys took PW1 Sumitra Dass and Smt. Shanti Jaggi to the bedroom. The Appellant pulled out a knife and asked PW1 Sumitra Dass to stand by the side of the Almirah and threatened

that if she would make any noise he would kill her. The other two boys caught hold of Shanti Jaggi and one of them gagged her mouth & the other hit her on the head with the emulsion rod. They took the keys of the almirah from the drawer of the table and removed the jewellery. Thereafter they left the flat and PW1 Sumitra Dass raised an alarm.

3. On the basis of the statement of PW1 Exhibit PW1/A FIR No. 489/1995 under Sections 399/397/392/34 IPC was registered at PS Paschim Vihar, Delhi. The description of the woman who accompanied the Appellant and two others matched with one Meenu Chadha who had disposed of her flat through the agency of PW2 Sanjay Jaggi and his partner PW4 Sanjay Kapoor who used to run the business of property dealers. This Meenu Chadha could not be arrested and thus, was declared a proclaimed offender. On the 20th July, 1995 the Appellant, Anil and Balwant were arrested from Om Vihar in pursuance of a secret information. Their disclosure statements Ex.PW8/C, Ex.PW8/D & Ex.PW8/E respectively were recorded and pursuant to it recovery of some stolen jewellery was made from their house on the 21st July, 1995 wherein a gold necklace was recovered from the house of the Appellant, a pair of gold tops from the house of Anil and a gold ring from the house of the Balwant. On 21st July, 1995 all the three accused were produced in the Court and the Investigating Officer moved an application for Test Identification Parade (TIP) of Balwant and Anil however, they declined to participate. The Appellant was remanded to police custody for one day and after the said remand period an application for Test Identification Parade was filed. The Appellant also refused to participate in the same. On filing of the charge-sheet, the statements of the prosecution witness and the accused were recorded. Co-accused Balwant and Anil were acquitted giving them benefit of doubt however, the Appellant was convicted and sentenced as above.

4. Learned Counsel for the Appellant contends that the recovery of stolen articles from the Appellant has been disbelieved by the learned Trial Court and his conviction is solely based on the testimony of PW1 Sumitra Dass who was a child witness as even on the date of her evidence before the Court she was aged 13 years. Relying on [State of Bihar, etc. Vs. Kapil Singh, etc., Arbind Singh and Krishna Nandan Singh and Others Vs. State of Bihar](#), and [State of U.P. Vs. Ashok Dixit and Another](#), it is contended that the conviction cannot be based solely on the testimony of the child witness without any corroboration thereto. Moreover, the testimony of the child witness was recorded without following the procedural safeguards and thus contrary to the law laid down in [Nirmal Kumar Vs. State of U.P.](#), was working as a maid servant and did not even know the local language. In her cross-examination she has stated that she signed her statement in Bengali and her statement was not read over to her. She did not even know whether she signed on blank or written papers. She has herself stated that one of the accused closed her mouth by putting his hand thereon and put the open knife on her neck and made her to stand facing the wall. She has further stated that after finding the keys they opened the Almirah

and removed the cash and valuable jewellery etc. Thereafter, she was made to crawl and go under the bed hence she could not see what happened. Since this alleged eye witness has not witnessed anything it is not possible that she could identify the Appellant. On the same evidence co-accused Balwant and Anil have been given the benefit of doubt whereas it has not been extended to the Appellant. The lady who accompanied the Appellant has neither been identified nor arrested nor charge sheeted nor convicted. The role of the Appellant at best was of accompanying her. PW1 has further stated that she was shown persons arrested in the police station and thus, the refusal of the Test Identification Parade by the Appellant was wholly justified and no adverse inference can be drawn. Reliance is placed on [Ravindra @ Ravi Bansi Gohar Vs. The State of Maharashtra and Others](#), and [Budh Singh \(Now in Tihar Jail\), Sher Singh \(Now in Tihar Jail\), Bishan Sarup \(Now in Tihar Jail\) and Mohd. Akhtar \(Now on Bail\) Vs. State](#),

5. It is further contended that even the identification of the case property cannot be said to be proved as PW2 Sanjay Jaggi has stated that the case property was shown to him at the police station. No memo of the recovery of the wrist watch was prepared. PW3 Kajal Jaggi has stated that the wrist watch which was in her possession was also stolen. Relying on [Venu @ Venugopal and Others Vs. State of Karnataka](#), it is further contended that no conviction for an offence u/s 392 IPC can be based without recovery of the articles robbed solely on the testimony of solitary witnesses.

6. Per contra learned APP for the State contends that PW1 Sumitra Das cannot be classified as a child witness in view of Section 83 of the Indian Penal Code. Further, no suggestion has been given to PW1 that she has been tutored. Even in her cross-examination after five years of her testimony PW1 has identified the Appellant. A perusal of the testimony of PW1 shows that she is a competent witness having attained sufficient maturity and thus, her testimony can be the sole basis of conviction of the Appellant. Even in the absence of the test identification parade, the identification in dock is substantive evidence and PW1 has duly identified the Appellant as the person who had accompanied the lady when she opened the door of the flat. It is further stated that for a conviction for offence punishable u/s 392 IPC it is not essential to prove the recovery of the robbed articles.

7. I have heard learned Counsel for the parties and perused the records. At the outset I find no infirmity in the finding of the learned Trial Court that the evidence of the three police officers PW8 ASI Jagdish Chander, PW12 Ct. Devender Singh & PW14 Inspector Jai Singh does not inspire confidence as regards the recovery of the stolen jewellery from the house of the Appellant on the 21st July, 1995. There are material contradictions between the testimonies of these witnesses as to what jewellery was recovered from the Appellant. Pursuant to the disclosure statement PW8 in his testimony has stated that the Appellant disclosed two karas and two wrist watches to be in his possession. Whereas PW12 has stated that accused Surinder pointed

towards his house in Om Vihar & produced a necklace from an almirah, PW14 deposed that a necklace was recovered from the Appellant. However PW3 Kajal Jaggi produced the wrist watch Ex.P-4 which she was wearing and stated that the said watch had also been stolen. No recovery memo of this watch has been produced nor was it stated to have been stolen by the co-accused. Nor was this watch identified by the witness and it is not understood as to how it reached the possession of PW3 as she specifically stated for the other articles recovered that she had taken those articles on superdari. However, as regards this watch nothing was stated.

8. Thus, the only evidence that remains against the Appellant in the present case is the testimony of PW1 Sumitra Dass. Admittedly PW1 Sumitra Das was aged 12 years at the time of commission of offence. However she cannot be termed as a child witness who can be swayed by tutoring and is not competent to answer the question. This witness in her examination-in-chief and cross-examination has rationally stated the entire sequence of events. There is no suggestion given to this witness that she has been tutored. Thus, her testimony cannot be discarded for the reason that she is a child witness and conviction can be based without corroboration thereon.

9. However, what has to be looked into in the present case is whether on the basis of the sole testimony of this witness the prosecution has been able to prove its case against the Appellant beyond reasonable doubt. In her cross-examination PW1 has stated that she could not understand what the lady was talking to mataji as they were talking in Punjabi and she did not understand Punjabi. As far as her statement is concerned on the basis of which FIR was registered i.e. Exhibit PW1/A this witness in her cross-examination stated that she did not know whether she signed a blank or written paper. She further stated that she signed in Bengali and cannot say what was written on the paper. It is stated that the contents of the statement were not read over & explained to her. From a perusal of the language used in the statement it is evident that the said statement was not of PW1 as she could not have been so good in Hindi which was not her mother tongue.

10. There is yet another aspect, that is, whether PW1 had sufficient opportunity to see the Appellant. As per her statement the Appellant came along with one lady to their house. After ringing of the door bell the woman wished Namaste to Mataji and asked for a glass of water. She gave a glass of water to that lady and then the lady asked a glass of water for the Appellant; she gave a glass of water to the Appellant. Thereafter the Appellant went downstairs and called two more boys. All those persons wanted to see the house. When she was showing the house one of them closed her mouth by putting hand thereon and showed her open knife by putting the same on her neck. Those persons then tied the mouth of Mataji with cloth and asked for the keys from her. PW1 stated that since she was recently employed by them she did not know about the keys. Then those persons asked for keys from

Mataji but Mataji refused to give the keys, they gave fist blows to her & all this while PW1 was made to stand facing the wall. In the meantime, those persons found the keys and opened the Almirah and removed the cash and jewellery etc. PW1 was then made to crawl and go under the bed and thus, she could not see what happened. After those persons left she called the aunty from the neighbourhood and one person from the neighbourhood called the police. It is thus apparent that there were only two occasions when she saw the Appellant, once when he entered the house with the lady and secondly, when she gave the glass of water as soon thereafter he went downstairs and after coming with the two boys PW1 was made to stand to facing towards the wall. Rest of the facts she has stated by perceiving the same through voices and not by seeing. According to PW1 it was not the Appellant who had gagged her mouth and made her face towards the wall. This witness has deposed that she was called in the Police Station and shown the person who were arrested & has identified all the accused present in the Court to be the ones who were shown to her. Without any other corroborating evidence it will be highly unsafe to base the conviction of the Appellant as the identification of the Appellant by this witness is based on the glimpse of the Appellant for a few seconds at the time of incident.

11. The Hon'ble Supreme Court in [Malkhansingh and Others Vs. State of Madhya Pradesh](#), held that the failure to conduct TIP cannot be always fatal to the prosecution case as the substantive evidence is the evidence of identification in the Court and the test identification parade provides corroboration to the sworn testimony of the witness in the Court as to the identity of the accused. It was held that in appropriate cases the Court may accept the identification in Court even without insisting on such or other corroboration. Undoubtedly, in the present case the conviction of the Appellant could have been based on the sole testimony of PW1 even in the absence of the TIP in case the witness has had sufficient time to identify the Appellant. In the absence of any corroboration to the testimony of PW1 merely identifying in the witness box when the witness has only seen the Appellant for a few seconds is not sufficient to hold that the prosecution has proved the case beyond reasonable doubt against the Appellant.

12. In my considered opinion the Appellant is also entitled to the benefit of doubt as given to the two other accused that is Balwant and Anil Kumar by the learned Trial Court in the present case. The appeal is accordingly allowed. The judgment dated 12th July, 2000 convicting the Appellant for offence punishable u/s 392 IPC and the order on sentence dated 13th July, 2000 is set aside. Appeal is allowed, the Appellant is acquitted of the offence charged. The Bail bond and the surety bond are cancelled.