

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 20th October, 2009*
Judgment Delivered on: 30th October, 2009

+ **CRL.APPEAL NO.645/2001**

RAJ KUMAR @RAJU & ANR.Appellant
Through: Ms.Ritu Gauba, Advocate.

versus

STATERespondent
Through: Ms.Richa Kapoor, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 10.8.2001, the learned Trial Judge has convicted appellants Raj Kumar and Jagpal Singh for the offences punishable under Section 302/34 IPC and Section 411 IPC. For the offence punishable under Section 302/34 IPC, they have been sentenced to undergo imprisonment for life and pay a fine in sum of Rs.2,000/-; in default of payment of fine to undergo RI

for two months. For the offence punishable under Section 411 IPC they have been sentenced to undergo RI for one year. We note that the charge in the case was framed against three accused; namely, Raj Nirmal Gautam, Raj Kumar and Jagpal for the offences punishable under Sections 396/34 IPC and Section 412 IPC. Accused Raj Nirmal Gautam expired during the pendency of the trial and the proceedings were abated against him.

2. Process of law was set in motion, when at 2.30 PM on 12.9.1991 Ct.Randhawa PW-24, the duty officer at PS Gokal Puri received information that a murder had taken place at Ambedkar Vihar, Tunda Nagar and made entry, being DD No. 10-A. Copy of DD No. 10-A was entrusted to SI Shoraj Singh PW-17 for investigation. Accompanied by Ct.Jitender PW-27, he went to Ambedkar Vihar and found a dead body lying on a cot inside house bearing Municipal No. A-61, Ambedkar Vihar. He learnt that the name of the deceased was Suman Lata. Within sometime, Insp. Ram Singh Chauhan PW-29, SHO PS Gokalpuri also reached the spot.

3. Insp. R.S. Chauhan met Raj Bala PW-9, sister of the husband of the deceased. He recorded her statement Ex.PW-9/A wherein she stated that when she returned from school at around 12.30 noon, she found the dead body of her sister-in-law, Suman, in the kitchen with a sutli (a thin jute cord) tied around her neck. She raised an alarm, whereupon few

neighbours collected. With their help, she removed the body of Suman outside the kitchen and cut the sutli tied around her neck. She noticed that a mangal sutra, black pearl studded ornament of silver, earrings and nose stud were missing from the person of Suman. From their almirah, a necklace, two pairs of anklets, two rings, silver jewelry of children to be worn in the neck and hands, gold pendant and jewelry belonging to Suman's brothers including three neck pieces, gold bangles and four silver tagris were missing. Insp. R.S. Chauhan made an endorsement Ex.PW-29/A under the statement of Raj Bala and handed it over to Ct.Jitender PW-27 who took the same to PS Gokal Puri where the duty officer, HC Billey Singh PW-2, registered an FIR Ex.PW-2/A for the offences punishable under Section 394/302 IPC.

4. At the spot, photographer Ct.Surender Kumar PW-3 was summoned, who took eight photographs Ex.PW-3/1 to Ex.PW-3/8 of the spot; negatives whereof are Ex.PW-4/1 to Ex.PW-4/8. Insp. R.S. Chauhan prepared rough site plan Ex.PW-29/B of the spot. He seized pieces of bangles lying there as recorded in seizure memo Ex.PW-5/C. He also seized the pieces of sutli lying in the kitchen as recorded in memo Ex.PW-17/A. After filling in the requisite inquest papers, Insp. R.S. Chauhan sent the body to the mortuary of the Civil Hospital. In the meantime, Ombir Singh PW-5 husband of deceased, Sarvesh PW-21 niece of the deceased and Murari Lal PW-8 father of

deceased also reached the spot. Insp. R.S.Chauhan recorded their statements under Section 161 Cr.P.C. From the statement of Ombir, he learnt that since a month prior to the incident, one Raj Nirmal Gautam was living as a tenant in one of the rooms of the house and that on the night prior to the incident i.e. on 11.9.1991, Raj Nirmal Gautam, his cousin Raj Kumar (appellant No.1) and one more person stayed over for the night in the room of Raj Nirmal. The three left early next morning informing that they might not return the following night; Raj Nirmal was a native of Parivrit Garh. From the statement of Sarvesh, Insp. R.S.Chauhan learnt that at around 10.30 AM on the day of incident, when Sarvesh returned from school to collect her tiffin, she saw the tenant Raj Nirmal Gautam along with two more persons in his room. One of those two persons was the same who had stayed over at their house the previous night.

5. At around 12 Noon on 13.9.1991, Dr. L.K. Barua PW-18 conducted the post-mortem of the dead body of deceased Suman Lata and prepared the post-mortem report Ex.PW-18/A. He opined that the cause of death was asphyxia due to strangulation by ligature and that the time since death was 27 hours or 28 hours. After the post-mortem, Dr. L.K. Barua handed over the clothes and the jewellery on the person of the deceased to the police officials.

6. In light of the statements recorded under Section 161 Cr.P.C. of Sarvesh and Ombir, the finger of suspicion obviously pointed towards Raj Nirmal Gautam and his unnamed associates. Therefore, on 14.9.1991, accompanied by a team of police officials Insp. R.S. Chauhan went in search of Raj Nirmal Gautam to his house at Parikshit Garh, but could not trace him.

7. The police team went to village Niloha in Tehsil Mohan, District Meerut, in search of accused Jagpal. (Surprisingly, we are unable to understand how Jagpal became a suspect in the case and we shall deal with the effect of the same on the result of the appeal at a later stage.) Jagpal could not be found in his house, but an ID card of his was found and seized as recorded in seizure memo Ex.PW-23/A.

8. On 16.9.1991, in the presence of SI Ram Chander PW-23 and Gajpal Bharti PW-14, Insp. R.S. Chauhan arrested accused Raj Nirmal Gautam and appellant Raj Kumar from Bhagwanpur Khera, while they were alighting from a bus. On their personal search, various jewelry items consisting of two gold collars, pair of gold bangles, two silver tagris, a pair of silver anklets, two hath-phool, pair of bangles of a child, pair of anklets of a child, one gold chain, two chains with pendants, a hair pin set, two gold rings, gold tikka, two pairs of earrings, two tagris of a child, a key ring, toe rings, etc. were recovered and seized as recorded in seizure memos Ex.PW-14/C and Ex.PW-14/D. It may be noted that the jewelry recovery from

the person of appellant Raj Kumar is recorded in the memo Ex.PW-14/C and the one which is recovered from accused Raj Nirmal Gautam is recorded in the memo Ex.PW-14/D. On 17.9.1991, they were produced in Court for their test identification, however, both of them refused to participate therein.

9. Appellant Jagpal surrendered before the concerned Metropolitan Magistrate on 27.9.1991. On 2.10.1991, police obtained his custody from the Court and Insp. R.S. Chauhan interrogated him and recorded his disclosure statement Ex.PW-25/A. In the said statement he disclosed his involvement in the murder and theft and stated that he could lead the police team to the person to whom he mortgaged his share of the loot i.e. a silver tagri. In pursuance of his disclosure statement, Jagpal led the police team to Tulsi Ram PW-20, who produced a silver tagri which was taken into possession as recorded in the memo Ex.PW-20/A.

10. The jewelry items so recovered from the possession of the accused and at their instance, were put up for test identification proceedings. As recorded in TIP proceedings Ex.PW-4/C, Omvir PW-5 and Murari Lal PW-8 correctly identified the case property except one or two items.

11. The accused were then put to trial. As noted earlier, during the trial, Raj Nirmal Gautam expired and the proceedings against him abated. The prosecution examined 29

witnesses. We eschew reference to the formal and procedural witnesses and note the testimonies of only the relevant witnesses as per whose testimony, the learned trial Judge has returned a finding of guilt against the appellants.

12. Km. Sarvesh PW-21, deposed that on 12.9.1991, she was staying at her maternal uncle's house i.e. A-61 Ambedkar Vihar. At 7 AM that day, she left for school and returned at around 10.15 AM to take lunch. At that time accused Raj Nirmal Gautam @ Raju and appellants Jagpal and Raj Kumar were present in the house and were playing cards. Her aunt Suman gave her lunch and after that she again left for her school. When she returned at 1 PM, she saw her aunt Suman lying in the kitchen and her mausi Raj Bala and some neighbours weeping.

13. Dhani Ram PW-12 deposed that eight years back, on a day when he was near the house of Ombir and was on his bicycle, appellants Raj Kumar and Jagpal and one more person went passed him. They were in a perplexed condition and were looking here and there. Their behaviour had made him suspect some foul play on their part. When he reached close to Ombir's house, he heard some cries and went inside. Thereafter, he stayed in the house till the dead body was removed from there.

14. On being cross-examined, he stated that the appellants were not arrested in his presence, but when on the next day of the incident he went to the police station with

Ombir and his neighbours, he saw the appellants in police custody. He stated that he knew Ombir for the past 2/3 years as he had earlier done some masonry job in Ombir's house.

15. Raj Kumar PW-15 deposed that at about 11 AM on 12.9.1991, when he was at Johripur bus stand, three persons including appellants Raj Kumar and Jagpal hired his TSR for Bhagwanpur Khera. On the way, he overheard their conversation wherein they were discussing whether they should have killed 'her' or not. He dropped them to their destination and continued with his work. On the next day when he read in the newspaper about the murder of a lady in Ambedkar Nagar, he himself went to PS Gokal Puri and informed about the three persons who hired his TSR. On being cross-examined he stated that on 13.9.1991, he had disclosed the description of the appellants to the police.

16. Ombir Singh PW-5 deposed that he resides at Municipal No.A-61 Ambedkar Vihar with his wife, three children, his sister Raj Bala and niece Sarvesh. Raj Nirmal Gautam @ Raju was a tenant in one of the two rooms in their house. At around 9.00 PM on 11.9.1991, Raj Nirmal came to the house along with appellant Raj Kumar and one more person named Dharmender @ Babloo. He i.e. Ombir offered them tea and thereafter joined them in a game of cards. After sometime he went to his room and slept. Raj Nirmal, Raj Kumar and Dharmender stayed for the night and left early next morning at

6.30 AM. While leaving, Raju told him that he was going to his village and may not return for the night. At around 7.30 AM, Raj Bala and the children left for school. He i.e. Ombir also left for his office at around 7.35 AM. At around 2.30 PM, he received telephone call at his office informing him that his wife had met with an accident. He reached home by 3.30 PM and found the dead body of his wife. His almirah was found lying unlocked and all the goods therein lying scattered. A number of jewellery items including two gold collars, tikka, bangles, a pair of silver anklets, two silver Tagris, pendants and hair pins were also found missing. He learnt that Raj Nirmal had taken rupees hundred as loan from his wife on the day of the incident. This made him suspect Raj Nirmal to be the culprit as Raj Nirmal had taken loan from them on a number of previous occasions as well.

17. Raj Bala PW-9 deposed that she was a teacher and on 12.9.1991, along with her two nephews, she left for school at 7.30 AM. At 12 Noon when the school closes, she sent her nephews home with an Aaya. Since the teachers were required to stay back to check answer sheets, she stayed back. After sometime the aaya returned and informed her that Suman, i.e. her bhabhi, was not in the house. On learning this, she returned home at around 12.30 PM and found her bhabhi Suman lying in the kitchen with her face covered with a dupatta and a sutli tied around her neck. She raised an alarm, on hearing which,

some ladies of the neighbourhood reached and helped her cut the sutli from Suman's neck and move her body outside the kitchen. One of them informed the police, who reached and made enquiries. That on the night prior to the date of the incident, appellant Raj Kumar, Raj Nirmal Gautam and one more person had slept in their house.

18. On being cross-examined she stated that on the day of the incident accused Raj Nirmal, Raj Kumar and the third person left the house early morning before she left for school.

19. Smt. Javitri Devi PW-26 deposed that she was working as an aaya in Gyan Sarovar Public School. Raj Bala was a teacher in the same school and that one day, at about 12 Noon she had gone to drop the two nephews of Raj Bala, who were also studying in the said school, to Gali No. 2 Ambedkar Vihar. That time, Raj Bala's bhabi was not present in the house and a girl child was lying in the staircase and weeping. She rushed back to Raj Bala and narrated the scene to her.

20. Tulsi Ram PW-20 deposed that at about 7.45 AM on the day of the incident when he was returning from Bhagwanpur Khera, accused Jagpal met him and told him that his i.e. Jagpal's mother was seriously ill and he needed money for her treatment. Jagpal showed him a silver Tagri and said that he wanted to mortgage it. Tulsi Ram refused to mortgage it but kept the tagri and gave him rupees one thousand to be returned after a week. Jagpal returned only after twenty days,

that too with the police. He i.e. PW-20 handed over the Tagri to the police. In his cross-examination by the defence counsel he stated that his father-in-law Tota Ram was involved in a murder case at PS Gokal Puri. But he denied knowing the investigating officer of the said case. He further denied the suggestion that he was deposing falsely at the instance of the prosecution to save his father-in-law.

21. Vide impugned judgment and order dated 10.8.2001, the learned Trial Judge has convicted the appellants for the offences punishable under Sections 302/34/411 IPC. In doing so, the Trial Judge has relied upon the recoveries of jewelry effected pursuant to the arrest and disclosure statements of the appellants. He has held that the recoveries being of a heavy nature and the appellants having failed to explain their possession of the same, coupled with the fact that recoveries were effected shortly after the murder, leads to an inference that the appellants committed the murder and then took away the property. Support has also been derived from the testimonies of Dhani Ram PW-12 and Raj Kumar PW-15. While PW-12 deposed of seeing the appellants near the house of the deceased in a perplexed state, PW-15 deposed of having driven them towards Bhagwanpur Khera in his TSR and on the way overhearing their conversation about a murder.

22. It was urged before the learned trial Judge has been urged in the Appeal on behalf of both the appellants, that charge in the case was framed for the offences punishable under

Sections 396/412/34 IPC, which Sections have no application to the facts of the present case. That such framing of a wrong charge has caused prejudice to the appellants and requires the proceedings against them to be quashed. The plea has been negated.

23. We concur with the view taken by the learned trial Judge on the said issue. Section 396 IPC provides punishment for the offence of commission of murder while committing dacoity; Section 412 IPC provides punishment for the offence of receiving or retaining property knowing the same to be the fruits of a dacoity.

24. We are surprised at the charge being framed pertaining to dacoity for the reason dacoity requires participation of five or more persons. As per the charge-sheet laid, only three persons were named as accused and it was not stated therein that two or more unknown persons or persons who had absconded had participated in the crime. Thus, there was no occasion to frame the charge pertaining to murder being committed during dacoity. But, the question is, whether any prejudice has been caused to the accused.

25. Surely, the accused do not understand the nuances of the law. The difference between robbery and dacoity is technical with reference to the number of persons who participate. In both, the common element is the commission of the offence of theft with the use of violence. If the number of

persons is five or more, the same acts constitute dacoity and when the number is less than five the offence would be of robbery. Thus, in the instant case, the accused were fully made aware that the substance of the allegation against them was of using force while committing the theft and in the process killing Suman Lata. They were also made aware that the substance of the allegation against them was of being found with stolen property. We may note that the witnesses of the prosecution who deposed to the theft of the jewelry were effectively and fully cross-examined by the accused as also the witnesses relating to the recoveries. Similarly, the appellants were made aware that the substance of the allegation against them was of being found to be in possession of stolen property.

26. In the decision reported as *2003 IV AD (Cr.) 287 State vs. Mohd. Afzal*, while dealing with a similar situation pertaining to a defective charge, this Court observed:-

“Section 218 Cr.P.C. embodies the fundamental principle of criminal law that the accused person must have notice of the charge which he has to meet. However, it cannot be read pedantically to provide escape route to an accused. Justice Vivian Bose in the judgment reported as reported as *AIR 1956 SC 116 Willie (William) Slaney vs. State of M.P* observed:-

“that in judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts ought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself.”

The said enunciation of law has stood the ground till date. Section 215 of the Code states that no error either in stating the offence or the particulars required shall be regarded as material unless the accused was misled by the error or defect resulting in a failure of justice."

27. Having repelled the contention that the defective charge has resulted in a prejudice to the appellants, we proceed to deal with the merits of the case, with reference to the evidence led at the trial.

28. We take up firstly the evidence against appellant Jagpal. As held by the learned Trial Judge, the incriminating evidence against Jagpal is his disclosure statement where under it was disclosed that he had mortgaged a silver tagri with Tulsi Ram PW-20 from whom said tagri was recovered and the identification of the tagri by Omvir PW-5 and Murari Lal PW-8 as also refusal by Jagpal to participate in the test identification proceedings. Further, learned Trial Judge has relied upon the testimony of Dhani Ram PW-12, as per whom Rajkumar, Jagpal and one more person went past him near the house of Omvir and all were in a perplexed condition. The learned Trial Judge has also referred to the testimony of Rajkumar PW-15, as per whom three persons, two of whom were Rajkumar and Jagpal had hired his TSR from near Johripur Bus Stand and on the way were discussing whether they should have killed a lady or not. We may note that the learned Trial Judge has not referred to the testimony of Km.Sarvesh PW-21

who has stated that on the day of the murder, the appellants and Raj Nirmal Gautam were seen by her in the house.

29. Pertaining to the testimony of Rajkumar PW-15, the TSR driver, we hold that his testimony does not inspire any confidence for the reason it mitigates against human conduct for three offenders to publicly discuss the commission of an offence by them and that too a heinous and a serious crime of murder. Qua the presence of appellant Jagpal in the house, we note that as per Omvir PW-5 and Raj Bala PW-9, the three persons who had stayed in the room in their house taken on rent by Raj Nirmal Gautam were, Rajkumar, Dharmender and Raj Nirmal Gautam. Thus, the testimony of Km.Sarvesh PW-21, insofar she alleges that Jagpal was the third person seen by her in the company of Rajkumar and Raj Nirmal Gautam has to be taken with a pinch of salt or being the result of a deliberate statement falsely made by her. Similarly, same taint visits the testimony of Rajkumar PW-15.

30. Normal conduct of the accused who commit dacoity would be to share the booty equally amongst them. Thus, the recovery of all the stolen property from appellant Rajkumar and Raj Nirmal Gautam, save and except a silver tagri which is claimed to be the recovery at the instance of Jagpal assumes considerable importance. Indeed, we find it strange that the share of the booty of Jagpal was a single silver tagri of virtually insignificant value. The gold articles recovered from the

person of appellant Rajkumar and the deceased accused Raj Nirmal Gautam runs into lakhs. We note that the weight of the gold jewellery recovered, as per the seizure memo from appellant Rajkumar is about 325 grams and the jewellery recovered from Raj Nirmal Gautam is about 600 grams.

31. Is Tulsi Ram PW-20, the person who claims mortgage of the silver tagri with him by Jagpal, a trustworthy witness? The answer is 'No'. Our reason for the answer is manifold. Firstly, as per his testimony, he did not know Jagpal and he was not a jeweler. How did he know that the tagri was made of silver. No reasonable person would give Rs.1,000/- to a stranger and keep as security a white metallic object without ascertaining that the metallic object is silver and is valued at least Rs.1,000/-. That apart, Tulsi Ram admitted that his father-in-law was an accused in a murder case registered at PS Gokulpuri i.e. the same police station where the instant FIR was registered. Thus, there is every possibility of Tulsi Ram being under the influence of the police.

32. That Jagpal refused to participate in the test identification proceedings is a matter of fact and we find that he has given no satisfactory explanation for refusing to do so.

33. But, finding a serious improbability in the quality of the substantive evidence led against him, we are inclined to give the benefit of doubt to appellant Jagpal who claims to be falsely implicated. Though not urged before us, from the

record of the learned Trial Judge, we note that when he was arrested, from the possession of Jagpal an identity card issued by Kisan Inter College, Meerut was recovered as per which Jagpal was a student of Class-IX in the year 1991. The innocent faced photograph of Jagpal on the identity card, which is at page No.399 of the Trial Court Record appears to show his being a minor. We are simply noting the said fact for the reason no issue of Jagpal being a minor was urged.

34. Pertaining to the evidence against Rajkumar we note that the recovery of gold jewellery belonging to the deceased weighing about 325 grams from him has not been denied by learned counsel for the appellant who simply submitted that it was not believable that a person would be carrying so much jewellery with him.

35. Surely, the police could not have planted 325 grams of gold jewellery on Rajkumar. We further note that in the complaint Raj Bala has told about some of the jewellery articles which were stolen, some of which were recovered from Rajkumar when he was arrested. Rajkumar's presence along with the deceased co-accused Raj Nirmal Gautam and one Dharmender at the house where the crime was committed in the previous evening and the morning of the crime has been proved through the testimony of Omvir and Raj Bala.

36. Thus, we concur with the view taken by the learned Trial Judge pertaining to the conviction of Rajkumar as he was

found in possession of a fairly substantial fruit of the crime soon after the crime was committed and the presumption of his being a participant in the crime of dacoity and murder can be drawn.

37. We are surprised that the learned Trial Judge has convicted Jagpal of the offence punishable under Section 411 IPC for the reason the evidence against him shows that he participated in the robbery and not that he dishonestly received stolen property. The evidence on record justifies his conviction for the offence of robbery punishable under Section 392 IPC.

38. The appeal accordingly stands disposed of by setting aside the impugned judgment and order dated 10.8.2001 convicting appellant Jagpal of the offence punishable under Section 302/34 IPC and the offence punishable under Section 411 IPC. He is acquitted of the charges framed against him. The appeal is dismissed insofar it relates to appellant Rajkumar for the offence of murder. The appeal filed by him pertaining to his conviction for the offence punishable under Section 411 IPC is allowed. But, he is convicted for the offence punishable under Section 392 IPC, for which offence we punish him to undergo rigorous imprisonment for one year.

39. Since Rajkumar and Jagpal are on bail, the bail bond and surety bond furnished by Jagpal are discharged. The bail

bond and surety bond furnished by Rajkumar are cancelled
who is directed to surrender and suffer the remaining sentence.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

OCTOBER 30, 2009
Dharmender