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

Reserved on: 15th September, 2016

Pronounced on: 20th December, 2016

\+ **CRL.A. 1095/2015**

GOVT. OF NCT OF DELHI ..... Appellant

Through: Ms. Aasha Tiwari, APP.

Versus

SACHIN @ SURAJ & ORS. ..... Respondents

Through: Ms. Divya Chugh and Ms. Katyayini, Advs. for Mr. Ajay Verma, Adv. for R-2.

Mr. Bipin Kumar and Mr. S.C. Chaturvedi, Advs. for R-3.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K. GAUBA, J:

1. This appeal by the State (Govt. of NCT of Delhi), presented with leave of this court granted by order dated 15.10.2015, assails the judgment of the court of sessions passed on 01.12.2009 in sessions case no.79/2008 acquitting the three respondents.

2. The respondents were sent up for trial on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.PC) submitted on 07.03.2008, upon conclusion of investigation into first information report (FIR) no.982/2007 of PS Dabri (police station), for offences punishable under Sections 394 and 397 read with Section 34 of the Indian Penal Code, 1860 (IPC) and Section 25 of the Arms Act, 1959 (Arms Act). The

concerned Metropolitan Magistrate took cognizance on the said report on 10.03.2008 and, after compliance with the provisions contained in Section 207 Cr. PC, committed the case to the court of sessions through proceedings recorded on 02.05.2008.

3. Upon consideration of the evidence, oral and documentary, submitted with the said police report, the Additional Sessions Judge to whom the case was allocated, put the three respondents to trial on the charge for offences under Sections 392 read with Section 34 IPC, Section 394 read with Section 34 IPC and Section 397 IPC, the gravamen of which was that on 10.12.2007, sometime around 10.05 p.m., in shop no.RZ-L2, Mahavir Enclave, Palam Dabri Road they, in furtherance of their common intention, had committed robbery by taking away ₹10,000/- from the possession of the complainant Gaurav Arora (first informant) at the point of a knife, a deadly weapon (and an air-gun), with dishonest intention of gaining wrongfully and while committing the robbery having voluntarily caused hurt to him (the first informant) and to his brother Narender, using knife (a deadly weapon) in assault on the former. The learned Additional Sessions Judge framed an additional charge against the third respondent (Guddu Prasad @ Lambu) for offence under Section 25 of the Arms Act on the allegations that on 19.12.2007, at the time of he being arrested in the course of investigation into the above mentioned FIR, he had been found to be in possession of a button- actuated knife in contravention of the notification issued by the Delhi Administration (now Govt. of NCT of Delhi).

4. The prosecution led evidence by examining eleven witnesses which include the first informant (PW-1) and his brother Narender Kumar (PW-2),

both eye witnesses to the occurrence and also being persons who had statedly been injured in the course of commission of the offence of robbery; Dr. Vinal Sharma, Medical Officer, Deen Dayal Upadhyay Hospital, New Delhi (PW-3) brought in to prove the medico legal certificates (MLCs) of PW-1 and PW-2; ASI Ram Karn (PW-4), the duty officer of the police station examined to prove the FIR (Ex. PW4/A) and endorsement on the *rukka* (Ex. PW4/B); Constable Ramanand (PW-5) who was with Sub Inspector Dilip Singh, Investigation Officer (IO) in the investigation on the date of occurrence; ASI Naresh Chander (PW-6) and HC Ram Dhan (PW-7) who were with IO and had participated in the investigation leading to the arrests of the second and third respondents on 19.12.2007; ASI Nemi Chand (PW-8), the duty officer in the police station on 10.12.2007 who had recorded the first input about the crime on the basis of call to police control room (PCR), having recorded it as DD No.32A (PW8/A) which was entrusted to the IO; Sh. J.P. Nahar, Metropolitan Magistrate (PW-9) who conducted proceedings relating to test identification parades (TIPs) on the request of the IO on 02.02.2008 and 07.02.2008 respecting the third and second respondents respectively wherein each of the said respondents had declined to participate; Constable Sandeep (PW-10) who produced the register of the *malkhana* of the police station (Ex. PW10/A) regarding deposit of certain case property on 11.12.2008; and, SI Dilip Singh (PW-11), the IO.

5. The three respondents, when confronted with the incriminating evidence and examined under Section 313 Cr. PC claimed to be innocent and falsely implicated. They declined to lead any evidence in defence.

6. On conclusion of the trial, the learned Additional Sessions Judge, by the judgment impugned before us, held the respondents to be entitled to benefit of doubts and thus acquitted them.

7. Before the contentions urged on both sides are considered, it would be proper to take note of the evidence on record.

8. At 10.18 p.m. on 10.12.2007, on the basis of telephonic intimation received through PCR, DD no.32A (PW8/A) was recorded in the police station to the effect that a thief had been apprehended (*chor pakad rakha hai*) who was carrying a weapon (*uske pas hathiyar bhi hai*), in the area of Mahavir Enclave, Palam Road, Near Shivani School. The matter was entrusted to SI Dilip Singh (PW-11), the IO, who set out for inquiry, accompanied by a constable. At 01:30 hrs, on 11.12.2007, the police station received *rukka* (Ex. PW11/A), sent by the IO, at 01:10 hours on the same date, through constable Ramanand (PW-5) who had accompanied the IO, of which statement (Ex. PW1/A) of the first informant / Gaurav Arora (PW-1) formed a part. This *rukka* resulted in registration of FIR (Ex. PW4/A) at 01:30 hours of 11.12.2007. The *rukka* and the FIR revealed that when the IO had reached the place in question, he was met by the first informant (PW-1) and his brother Narender Kumar (PW-2), both in injured state. He arranged both of them to be sent to Deen Dayal Upadhyay Hospital (hospital) by a PCR vehicle. The MLCs of the first informant (mark PW11/E) and of Narender Kumar (Ex. PW3/A) have been submitted in evidence and purport to reflect the two injured persons having been brought to the casualty of the hospital, each with history of assault sometime around 11.20 p.m. and 11.10 p.m. respectively.

9. According to the version of the first informant (PW-1) in the FIR (Ex. PW4/A), he was running a grocery shop from the premises in question and was present in the said shop with his brother at about 10.05 p.m. on 10.12.2007 when three persons had come in, one of them asking for "*zeera*" (cumin seeds). He stated that as he went inside the shop to arrange for the article demanded, the three visitors to the shop had downed the shutter and at the point of a pistol took out ₹10,000/- in cash from the cash box and started running away. In the FIR, PW-1 further stated that he and his brother PW-2 had resisted whereupon one of the said intruders had caught hold of him and another had hit him on his face and head with knife and butt of the pistol while the third intruder had beaten up his brother. The first informant (PW-1) also reported that he had caught hold of one of the said intruders while the other two had run away with the money. The first respondent was described as the person who had been over powered and apprehended on the spot by PW-1 and handed over to the IO on his arrival. In the FIR, the first informant (PW-1) gave the brief description of the other two culprits who had fled away. As per the *rukka* (Ex. PW11/A), the first respondent had also handed over an air-gun (Ex. P1) as the weapon which had been used by the first respondent in the assault.

10. After getting the FIR registered, the IO took into his possession the air-gun (Ex.P1) by a formal seizure memo (Ex. PW1/D) after preparing its sketch (Ex. PW1/C). It was stated in the police case that the shirts (Ex. P3 and P2) of PW-1 and PW-2 respectively had been found to be blood-stained on account of the injuries suffered by them in the assault and the same were also seized by separate memos (Ex. PW5A and PW6/B respectively). The

IO prepared a site plan (Ex. PW11/B) with the help of the first informant (PW-1) and interrogated the first respondent statedly leading to a disclosure (Ex. PW11/C) revealing the identity of his two associates. The first respondent was arrested at the scene of crime at 02:30 hours on 11.12.2007 vide arrest memo (Ex. PW1/B) after personal search (Ex. PW11/D) in the presence of PW-1 and PW-5, information about the said arrest having been conveyed to the mother of the first respondent.

11. The prosecution case further is that on 19.12.2007, during patrolling, on the basis of secret information, the IO, then accompanied by PW-6 and PW-7, had arrested the second and third respondents from the area of Madrasi Puliya and at the time of he being apprehended, the third respondent was found having in his possession a button-actuated knife which was seized vide formal seizure memo (Ex. PW6/B) after its sketch (Ex. PW6/A) had been prepared. The prosecution also relied upon the disclosure statements (Ex. PW6/D and PW6/C) statedly made by the second and third respondents respectively during their interrogation. It further relied upon the evidence concerning the proceedings of TIP conducted by PW-9 on 07.02.2008 and 02.02.2008 wherein the second and third respondents respectively had declined to participate, the plea of the prosecution on this basis being for an adverse inference to be drawn.

12. Undoubtedly, in the given facts and circumstances of the case, PW-1 and PW-2 were the most crucial witnesses. After all, PW-1 is the first informant of the case and he alongwith his brother PW-2 were victims of the crime committed inside the shop in their presence. Both of them, when initially examined by the public prosecutor, did not come out with the entire

set of facts but broadly confirmed the sequence of events wherein three persons had come to the shop around 10 p.m. on 10.12.2007 demanding "*zeera*" to be supplied followed by they downing the shutter and committing the robbery by snatching of money lying in the cash box and causing hurt to each with weapons indicated to be fire arm and a sharp edged object (knife). Each of the said two witnesses also spoke about one of the robbers having been apprehended on the spot and his two associates fleeing away with the looted money. PW-1 indentified the second and third respondents as the two robbers who had fled away but expressed his inability to identify the first respondent as the one who had been apprehended on the spot and handed over to the police – initially, the PCR officials. But when cross-examined by the learned additional public prosecutor, he made amends affirming that the first respondent had been "*captured*" by him. His brother (PW-2) deposed that he was unable to identify any of the three respondents and, thus, could not say whether it is they who had come to the shop and committed robbery also causing hurt to him and to PW-1. During cross-examination by the additional public prosecutor, he, however, conceded that in his statement under Section 161 Cr. PC (Ex. PW2/A), he had mentioned the name of the first respondent as the particulars of the person who had been apprehended on the spot. Curiously, during cross-examination by the counsel representing the first and second respondents, the witness (PW-2) is stated to have "correctly identified" each of them though at the same time another sentence appears in the transcript of his deposition wherein he would concede he being unable to identify any of the three persons at trial.

13. Both witnesses (PW-1 & PW-2) identified the air-gun (Ex. P1) which had been seized from the person caught at the scene of crime and it having been handed over to the police. PW-2 proved the seizure memo (Ex. PW1/D) and its sketch (Ex. PW1/C). PW-2 also proved the seizure of his blood stained shirt (Ex. P2) vide memo (Ex. PW6/B) and that of his brother (Ex. P3), seizure whereof vide separate memo (Ex. PW5/A) was proved by constable Ramanand (PW-5). PW-1 affirmed that the first respondent was arrested in his presence vide arrest memo (Ex. PW1/B) to which he is a signatory as an attesting witness.

14. The prosecution had examined PW-3 to bring on board the MLCs of PW-1 and PW-2 (vide documents mark PW11/E and Ex. PW3/A respectively). PW-3, however, only proved the latter, which is the MLC of PW-2, recorded by him in the hospital on the night of 10.12.2007, it revealing the witness (PW-2) having suffered two lacerated wounds, one measuring 3 x .5 x .25 cm on the right frontal region and the other measuring 1 x .5cm on the left occipital region. Though he was presented as the author of the other MLC (mark PW-11/E) which purportedly pertains to PW-1, PW-3 denied any such role performed by him expressing inability to identify the concerned medical officer by his hand-writing also pointing out that the photocopy (original admittedly not being available, it having been misplaced – per the evidence of PW-11) shown to him does not even bear signatures of any doctor.

15. PW-6, PW-7 and PW-11 are witnesses to the arrests of the second and third respondents on 19.12.2007 and recovery of knife from the possession of the third respondent. They proved the arrest memos of the second and

third respondents (vide Ex. PW7/B and PW7/A respectively), prepared after personal search vide separate memos (Ex. PW6/F and PW6/E respectively). In their deposition, they also proved the memo (Ex. PW6/B) regarding the seizure of knife after its sketch (Ex. PW6/A) had been prepared. The knife (Ex. P1) is button- actuated and has a blade of the length of 11 cms and thus falls foul of the prohibition notified under the Arms Act. These witnesses also referred to the documents (Ex. PW6/D and PW6/C) stated to be disclosures, upon their interrogation after arrests, made by the second and third respondents.

16. The trial Judge was not impressed with the prosecution evidence primarily because of the inability on the part of PW-2 to identify any of the three respondents as members of the group of robbers and also on account of hesitation shown by PW-1 in the initial part of his testimony to identify the first respondent as the person who had been apprehended on the spot. The learned trial Judge also found the evidence respecting arrests of the second and third respondents and the seizure of knife from the third respondent on 19.12.2007, in this context unreliable.

17. We have gone through the evidence on record in entirety with the assistance of learned additional public prosecutor for the State and the learned counsel / *amicus curiae* for each of the three respondents and are of the view that the learned trial Judge has failed to consider the evidence in correct perspective and has jumped to conclusions by reading some of the material in isolation, in so far as the case of the prosecution against the first respondent is concerned. But, before we come to the most crucial parts of

the evidence, there are certain other areas which need consideration and comment.

18. The two material witnesses, both victims (PW-1 and PW-2) have deposed affirming that at the time of commission of the robbery, each of them was subjected to assault and had received injuries. The documents (mark PW11/E and Ex. PW3/A) purport to confirm this position. It is a sad commentary, however, on the manner in which the IO maintained the police diary and the manner in which the trial court proceeded to gather evidence on this subject that the medical record relating to the injuries of PW-1 could not be strictly proved. For reasons which were not properly explained, not the least during court deposition, the IO had lost the possession of the two original MLCs. He seems to have somehow arranged photocopies from the hospital record but then failed to note that the MLC of PW-1 was not recorded by PW-3. Even a perusal by naked eye would show that both the documents are not in the same hand. Yet, the name only of PW-3 was mentioned in the chargesheet with reference to both the MLCs.

19. If the original MLCs had been lost (or misplaced) it should not have been difficult for the IO to immediately obtain a properly authenticated copy of each of the MLCs, also ascertaining the full particulars of their respective authors, and assist the trial Judge in securing the evidence in affirmation. The public prosecutor seems to have been equally casual in introducing evidence. PW-3 had informed the court during the opening lines of his deposition that he was not the medical officer who had prepared the MLC of PW-1. If it were so, some effort on the part of the trial court to call upon the hospital authorities to produce the office copy of the MLC retained by the

hospital administration, and also its author as witness, would have been in order. From the manner in which the trial proceeded, it is clear that all concerned could not care less. This, to our mind, is most disturbing.

20. Mercifully, however, in the present case, both PW-1 and PW-2 had not suffered any serious injuries. Both survived to tell their story. The hurt suffered by each of them is not described by anyone, not even by the witnesses themselves, to be grievous in nature. Their shirts, though seized (vide Ex. PW5/A and PW6/B) statedly bearing blood stains were not sent for examination to Forensic Science Laboratory (FSL); this further lapse on the part of the investigating agency, of course, being no reason to question the credibility of their word. In the facts and circumstances, the only drawback for the prosecution case due to absence of proper proof of MLC of PW-1 is that the nature of his injuries cannot be confirmed to be such as caused by a sharp edged weapon (i.e. knife), as is claimed by him and his brother (PW-2) in their court depositions.

21. On the foregoing facts and in the circumstances, we find no reasons to disbelieve PW-1 and PW-2 with regard to their word that at the time of commission of robbery they were assaulted by the three intruders into their shop and as a result they were injured.

22. The material exhibit (P1) described as air-gun was snatched from the hands of the person who was caught on the spot. This piece of evidence, though proved, *inter alia*, through the seizure memo (Ex. PW1/D) and sketch (Ex. PW1/C) during the testimony of PW1, PW-5 and PW-11 does not lead to the conclusion about use of a fire-arm. There is no ballistics

report obtained in this regard. The article is described in the evidence as an equipment meant for "inflating rubber balloons". PW-5 was clear in describing it as a gun which is not meant to discharge a cartridge. It appears this article was used by the robbers more as a prop. PW-1 and PW-2 clearly mistook it as a fire- arm. It is clear from their testimony that they are not acquainted with fire-arms, which is why, PW-1 would describe it as a gun at one stage and pistol at another while PW-2 would also refer to it variously as a pistol or a *desi katta*. The fact, however, remains that there is nothing to show that a fire arm was used as weapon of offence. Even the article (Ex. P1) snatched from the hands of one of the culprits (the one apprehended at the spot) was used only as a blunt weapon (its butt being statedly employed to hit on the head of PW-1). The deficiency in proper description of such article by PW-1 or PW-2, in our opinion, ought not be used adversely to doubt their veracity as the wrong perception on their part stems from their sheer ignorance.

23. According to the prosecution case, first respondent had been apprehended on the spot by PW-1 and when the IO, with accompanying constable, arrived at the scene after the matter arising out of DD no.32A (Ex. PW8/A) had been entrusted to him, he (first respondent) was handed over to him (IO). This is what has been affirmed by the latter (PW-11) as indeed by constable Ramanand (PW-5) who was accompanying him at that point of time. According to the evidence of PW-5 and PW-11, the interrogation of the first respondent had resulted in certain disclosures which were reduced into writing (vide Ex. PW11/C). This communication by the arrestee (first respondent) with the IO (PW-11), even if in the presence of a

public person (PW-1), as shown by the document (Ex. PW11/C), is hit by the inhibition of the general rule in Sections 24 and 25 of the Indian Evidence Act, 1872 (Indian Evidence Act) proscribing proof of confession made by an accused to a police officer, unless, by way of exception, the prosecution is able to show some part of such information received from the arrestee (accused) to have led to discovery of a fact in its wake within the meaning of the saving clause in Section 27. The document (Ex. PW11/C), upon being read in the light of these rules of evidence, impels search for evidence respecting discovery in the nature of the stolen property or of the mobile phone (also claimed to have been snatched), or identity of the partners-in- crime (of the maker of such disclosure) with corroborative proof of their complicity.

24. We note here that the particulars of the accomplices statedly disclosed, by the first respondent, in the above-said statement to the IO described one of them being Sher Singh @ Sheru, resident of Gali no.2, Mahavir Enclave, Dabri and the other simply as "*Lambu*". It is this input which the IO claims to have received from the first person arrested (first respondent), alongwith the secret information, which is claimed to have led to the arrest of the second and third respondents, found in the company of each other, on 19.12.2007, at about 8.00 p.m. in the area of Madrasi Puliya within the jurisdiction of the same police station. As mentioned earlier, the word of PW-11 on this score is sought to be supported by that of PW-6 and PW-7.

25. We must observe here that while recording the depositions of PW-6, PW-7 and PW-11 with regard to the circumstances leading to the arrests of

the second and third respondents and the steps in investigation conducted thereafter by the IO (PW-11), the prosecution adduced evidence – and the learned trial court allowed it to do so – respecting the interrogation and disclosures made by the said two persons (vide Ex. PW6/D and PW6/C respectively). Even the perusal of the report under Section 173 Cr. PC (charge-sheet) would reveal that no fact was claimed to have been discovered on the basis of such statements allegedly made by the second and third respondents during interrogation after their respective arrests. If it were so, these two documents (PW6/C and PW6/D) were irrelevant and inadmissible, they being clearly hit by the provisions contained in Sections 24 to 26 of Indian Evidence Act. In this view, it was improper on the part of the prosecution to lead evidence on this score and improper on the part of the trial court to allow it to do so. We do not wish to say more on this subject save for observing that a little care and caution in gathering evidence only to the extent what is relevant and admissible would have assisted the trial court in steering clear of what is unnecessary.

26. It has been argued by the learned counsel for the second and third respondents that no recovery of any article or property connected to the robbery in the shop of PW-1 on the night of 10.12.2007 has been effected from them. Though the IO claims to have ascertained the full particulars of atleast one of the associates of the first arrestee (first respondent) on 11.12.2007 (to the extent of his name and also the *alias* used) and his residential address (to the extent of number of the street and locality), there is no evidence showing any search for such accomplice (who had fled away with the stolen money) immediately in its wake. The evidence of the IO is

conspicuously silent about the steps he took for searching out the accomplices who had made good with the booty. Though the second and third respondents are shown arrested on 19.12.2007, steps for confirming their involvement by arranging TIP were not initiated immediately. The evidence of PW-9, the Metropolitan Magistrate, who presided over the said TIP proceedings, shows that the application (Ex. PW9/A) for such purpose was moved on 17.01.2008, four weeks after the arrests on 19.12.2007. The copy of the proceedings on the said application (page 409 of the trial court record) shows the matter had to be adjourned several times on account of neglect on the part of the IO and the Station House Officer (SHO) of the police station. The proceedings (Ex. PW9/B) concerning the third respondent show that the Magistrate was able to finally complete the exercise on 02.02.2008. Similarly, the proceedings (Ex. PW9/E) show that it was only on 07.02.2008 that the TIP proceedings concerning second respondent were concluded. Both the third and the second respondents had declined to join the TIP by their statements before the Magistrate, each taking a position that their photographs had been taken and they had been shown to the witnesses.

27. The first informant (PW-1) had reported loss of ₹10,000/- from the cash box of his shop on account of robbery. During his court deposition, he reiterated this fact. But, during cross-examination, he clarified that the amount of money had been mentioned in the complaint by approximation. His brother (PW-2), during his cross-examination, however, contradicted him by stating that the "safe of the shop contained ₹300-400" at the time of the incident. We assume he was referring to the amount of money kept in

the cash box of the shop. Some clarity on this subject should have been ascertained by the additional public prosecutor by way of re-examination, or by the learned trial Judge by exercising his power under Section 165 of the Indian Evidence Act. It appears both were just not interested. Be that as it may, in our opinion, not much would turn on this discrepancy. The FIR and the deposition of PW-1 clearly show that it was PW-1 who was in-charge of the shop. He, being the person running the shop, would definitely know better. He mentioned the presence of his brother (PW-2) at the relevant point of time as if per chance. It has to be borne in mind that the shop which he was running was a grocery shop, a kind one notices in nooks and corners of various residential localities of the city. They are small establishments which generally do not maintain formal accounts. PW-1 was not called upon by anyone to produce books of accounts of his shop. His word that he was running a shop of grocery items from the said premises has gone unchallenged. The fact that there was a cash box lying in the shop is proved both by PW-1 and PW-2. A cash box in such grocery shop is ordinarily bound to have some amount of cash lying in it. PW-1 is honest and candid in stating that he had mentioned the amount of money lying in the cash box by approximation. No money was recovered from either the first arrestee (first respondent) or the later arrestees (second and third respondents). In these facts and circumstances, the lack of clarity as to the exact amount lost is inconsequential.

28. We do note that PW-2 has failed to identify any of the three respondents. His failure to identify second or third respondent as the culprits could have been understood and appreciated. After all, the incident

occurred over a short duration (12 to 14 minutes per PW-1). None of the robbers was known by face (not the least by name) from before to PW-1 or PW-2. The persons put in such situation may have failed to remember, beyond the time lag, their physical features so as to be able to confirm the identity at court deposition. PW-1, while identifying the second and third respondents, showed hesitation in confirming the identity of the first respondent. When declared hostile and cross-examined by the additional public prosecutor, he did state that the first respondent was captured by him while his two associates had succeeded in running away with the money.

29. The learned trial court, noticing the above omission on the part of PW-2, and hesitation on the part of PW-1, to identify has chosen to extend the benefit of doubts to order acquittal. The State argues that this view of the trial court cannot be upheld because the evidence of PW-5 and PW-11 with regard to the arrest of the first respondent on the spot, upon he being handed over by PW-1 to the police, has not even been considered.

30. Before we proceed further, we feel it necessary to extract two paragraphs of the impugned judgment which read as under :-

> *"10. Thus, from the above submissions of the respective parties, following points arises for determination in this case :*
>
> *(i). Whether the prosecution has been able to prove its case against all the accused persons beyond reasonable doubt, if so, its effect?*
>
> *(i). Final order.*
>
> *11. For the reasons to be recorded hereinafter, while discussing the points for determination, my findings are as under :*

Point No.1 : No

Final Order : All the three accused persons are acquitted as per the operative part of the judgment."

31. The Code of Criminal Procedure contains detailed provisions to control, guide and regulate the procedure to be followed by various authorities involved in enforcement of the criminal law, including the criminal courts entrusted with the task, amongst others, of conduct of inquiries and trials. It is trite that criminal law – substantive or procedural – must be construed and applied strictly. A criminal trial must ordinarily conclude with a judgment. Chapter XXVII of Cr. PC contains provisions under the heading "judgment" including on the subject of "language and contents of judgment" in Section 354. The clause "(b)" of sub-section (1) of Section 354 of Cr. PC requires that every judgment of the criminal court "*shall contain the point or points for determination, the decision thereon and the reasons for the decision*".

32. We must record our disapproval of the "points for determination" formulated by the learned trial court in the impugned judgment, as quoted above. The two questions mentioned as "points for determination" arise, almost as an unexceptional rule, at the end of the judgment in every criminal case. After all, the prosecution must prove, and the trial court must hold that the prosecution has proved, the guilt of the accused beyond the pale of all reasonable doubts before he can be pronounced guilty and convicted and be handed down the punishment in accordance with law. If the prosecution fails to discharge its onus to prove, acquittal is the order that would necessarily follow. Using the above extracted questions as "points for

determination" is fraught with the risk of the trial court missing out on the core questions of facts and law as indeed evidence having a bearing thereupon.

33. More than eight decades ago, the learned judge of the court of Judicial Commissioner Sind in judgment reported as *Mitho vs. Emperor AIR 1934 Sind 89: 1935 Crl.LJ 53* observed as under:

> *"A great deal of our time would have been saved if the learned Judge who tried this case had taken pains to follow exactly the provisions of the Code of Criminal Procedure. Section 367 of the Cr PC, lays down that every judgment shall contain the point or points for determination. We have in this case, six several prisoners who are accused of no less than seven separate offences, yet the learned Judge has framed one point for decision only. It is in these words:*
>
> *"Whether the accused or any of them is guilty of the offences with which they stand charged.*
>
> *Such a compliance with the provisions of Section 367 of the Cr PC, is perfunctory and perilous. To ascertain and define distinctly those points which require decision is the very ground stone of a sound and stable judgment. If this be wanting, the house is built upon sand. A fundamental defect may be altogether overlooked. This is what has in fact happened in the present case."*

34. We find the approach in the impugned judgment to be similarly perfunctory. Given the factual matrix of the case, the points for determination which the court was called upon to consider and address

concerned the identity of the persons who had entered the shop of PW-1 on the stated date and time, the declared purpose of such visit and acts of commission or omission indulged in after gaining such entry besides the nature of injuries or loss suffered at the hands of such visitors. This list of points for determination is only illustrative and not exhaustive. We hope the trial courts will bear in mind the responsibility they bear and the expectation of them to adhere to the prescribed procedure.

35. Coming back to the case against the first respondent, the fact remains that the trial court did not take into account the evidence of constable Ramanand (PW-5) and SI Dilip Singh (PW-11) regarding the circumstances leading to his arrest. It is the submission of the learned public prosecutor that the judgment of the trial Judge in this regard being perverse – the evidence in entirety not having been considered – it is imperative that this court records conclusions which are properly made out. *Per contra, i*t has been argued by the learned *amicus curiae* representing him that the opinion expressed by the learned trial Judge is also a possible view and, therefore, this court should avoid substituting the same with a different finding.

36. There may not be a quarrel with the proposition that if the judgment of acquittal rendered by the trial court cannot be said to be perverse, it is not proper for the appellate court to supplant the view thus taken with its own conclusions. But the said norm is not unexceptional. In *Atambir Singh @ Chota Babla v. State of Delhi (2015) 222 DLT 163 (DB),* one of us (R.K. Gauba, J) speaking for a division bench of this court summarized the law on the subject as under:-

68. It is well settled and has been the consistent view of the Supreme Court that in an appeal against acquittal, the appellate court possesses full and unfettered power to review at large all evidence and to reach the conclusion that, upon such evidence, the order of acquittal should be reversed. It is rather under bounden duty to scrutinize the probative material de novo. Undoubtedly, it must bear in mind that rebuttable innocence attributed to the accused in the case of acquittal stands on a weightier footing. In this view, it would be slow in upsetting the findings returned by the trial court if supported by convincing reasons and comprehensive consideration. If, however, the view taken by the trial court upon such review, reappreciation and reconsideration of the evidence is found to be unreasonable or perverse leading to serious illegality, the appellate court would not hesitate in interfering and reaching its own conclusion. Thus, if the evidence recorded in the judgment of acquittal shocks the conscience of the appellate court or shows that norms of legal process have been disregarded or substantial and great injustice had been done, the same can be interfered with. [Surajpal Singh v. State, AIR 1952 SC 52; State of Bombay v. Rusi Mistry, AIR 1960 SC 391; Sanwat Singh v. State of Rajsthan, AIR 1961 SC 715; Jadunath Singh v. State of U.P., (1971) 3 SCC 577; Damodarprasad Chandrikaprasad v. State of Maharashtra, (1972) I SCC 107; Shivaji Sahabrao Bodade v. State of Maharashtra, (1973) 2 SCC 793; Chandrappa v. State of Karnataka (2007) 4 SCC 415; S. Ganesan v. Rama Raghuraman (2011) 2 SCC 83; Jugendra Singh v. State of U.P., (2012) 6 SCC 297; State of M. P. v. Dal Singh, (2013) 14 SCC 159; and Mritunjoy Biswas v. Pranab Alias Kuti Biswas & Anr. (2013) 12 SCC Cases 796]".

37. We have examined the evidence on record and are of the view that the learned trial judge fell into grave error by reaching conclusions only upon reading the testimonies of PW-1 and PW-2, ignoring altogether from consideration, the evidence of PW-5 and PW-11, which default renders the impugned judgment wholly perverse. In the facts and circumstances narrated by PW-1 and PW-2 there is not the least any doubt about the commission of robbery on the stated date, time and place and further as to the fact that in the said commission of robbery both PW-1 and PW-2 were subjected to physical assaults and consequently sustained injuries. For reasons which are apparently not of any control of the said witnesses, the prosecution failed to bring on record evidence about the nature of injuries inflicted by the robbers or the nature of weapon put to use in causing such bodily harm. There is, however, no reason why the testimony of PW-1 and PW-2 should be disbelieved about they having been injured and the intruders having removed money from the cash box lying in the shop run by PW-1 in the process. Taking away money from the cash box in the stated facts and circumstances is obviously an act committed with intention to gain wrongfully and, therefore, dishonest. Such acts, read together, constitute primarily the offence of theft defined in Section 378 IPC, hurt having been voluntarily caused in such transaction rendering it a case of robbery within the meaning of the expression defined in Section 390 IPC which is punishable under Section 392 IPC, this besides attracting the penal clause contained in Section 394 IPC which provides for punishment for the act of voluntary causing hurt in committing robbery.

38. In our considered opinion, the learned trial court erred on the question of identity of the first respondent. Before we set out our reasons for dissociating from the view taken by the trial judge on this score qua the first respondent, we may refer to a landmark judgment of the Supreme Court having bearing on the discussion at hand.

39. In *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat (* AIR 1983 SC 753), the Supreme Court while dealing with an appeal in a case involving charge, *inter alia*, of the offence of rape considered the defence argument about discrepancies in the evidence and observed as under:-

> **"***5**…….** Over much importance cannot be attached to minor discrepancies. The reasons are obvious:*
>
> *(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
>
> *(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*
>
> *(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*
>
> *(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*
>
> *(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation.*

And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment".

40. In a case of robbery at the point of weapon (even if it were not a weapon but perceived by the witness to be one), particularly where the victim were assaulted, he having been taken by surprise in late hours of the night with no hope for any help, intervention or rescue coming his way immediately, it is quite natural for an individual to feel traumatized and be concerned more about personal safety or that of one's valuable property than be preoccupied meticulously noting the details of the incident or registering (mentally) the physical features of the perpetrators of the crime. It is not only that the power of observation differs from person to person but also that the retention in memory of the facts so observed would also vary according to the individual's faculties especially if there is a time lag. As further observed in *Bharwada Bhoginbhai Hirjibhai* (supra), the discrepancies which do not go to the root of the matter cannot be attached with undue

importance, more so when the all important *"probabilities-factor"* echoes in favour of the version narrated by the witnesses.

41. In *Jisan and Ors. vs. State Crl. A. 550/2012,* decided on 21.07.2015, this Court ruled as under:-

> *"47. Small contradictions by themselves are no reason to throw the case out. It has been held time and again that discrepancies do not necessarily demolish the testimony. Proof of guilt can be sustained despite little infirmities (Narotam Singh V. State MANU/SC/0140/1978: 1978 CR. L.J. 1612 (SC). No undue importance can be attached to such discrepancies as do not go to the root of the mater or do not shake the basic version of witnesses. (Lallan v. State MANU/UP/0287/1988: 1990 Cr.L.J. 463]. It was ruled in Ramni v. State, (MANU/SC/0596/1999 : JT 1999 (6)SC 247] that all discrepancies are not capable of affecting the credibility of witnesses. Similarly, all inconsistent statements are not sufficient to impair the credit of a witness."*

42. While there can be no two opinions as to the fact that it is incumbent on the prosecution to prove, by cogent evidence, the complicity of the accused in the crime, in *Visveswaran vs. State (2003) 6 SCC 73*, the Supreme Court ruled as under:-

> *"11. ....The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt".*

43. While PW-1 does appear to have shown some hesitation in positively identifying the first respondent as one of the robbers caught by him on the spot, his cross-examination at the hands of the public prosecutor bringing in positive confirmation on that score, it cannot be ignored that he had come face to face with him almost eight months after the incident. What, however, nails the case against the first respondent is the unchallenged testimony of PW-5 and PW-11 about the first respondent being the person who was handed over by PW-1 to the latter (PW-11) upon they arriving at the scene in the wake of DD No. 32 A (Ex. PW-8/A). There is not even a whisper of suggestion given during the cross-examination of these witnesses putting across any theory other than that of the first respondent having been apprehended and handed over to PW-11 by PW-1 before the FIR was registered on the basis of *rukka* Ex.PW-11/A. Noticeably, the name and particulars of the first respondent were mentioned by PW-1 in his statement (Ex.PW-1/A) which was the basis of the said *rukka* leading to the registration of the FIR (Ex.PW-4/A). Further, the first respondent did not challenge the evidence about his arrest at the stated date, time and place vide arrest memo (Ex.PW-1/B) and personal search memo (Ex.PW-11/D). In his statement under Section 313 Cr.P.C., he offered no explanation about his presence at the spot, though coming with a vague plea that he had been falsely implicated in place of another person who had been actually involved in the crime.

44. The evidence of PW-5 and PW-11 about apprehension of first respondent on the spot and he having been arrested at the instance of PW-1 in evidence is beyond reproach. The initial hesitation of PW-1 to identify

him, therefore, pales into insignificance. The complicity of the first respondent in the crime thus has been established through the evidence led by the prosecution at the trial.

45. We, however, are not persuaded to upturn the view taken by the learned trial court vis-à-vis the second and third respondents. There are far too many lapses on the part of the investigating officer and the prosecution in proving their complicity. The description given in the FIR respecting the accomplices of the first respondent as had run away was rather sketchy. Even the disclosure attributed to the first respondent about his accomplices was vague. No recovery of the looted property has been affected from either of them. There is no evidence showing any connection between the knife (Ex.P-1) allegedly seized from the third respondent and the injuries suffered by PW-1 and PW-2 in the case at hand. The basic precautions to collect evidence confirming the identity of these two individuals were not taken. As noted earlier, there was inordinate delay in arranging TIP in their respect. Though noting that the trial court has failed to elaborately discuss or given proper or detailed reasons for such result in the impugned judgment, we are not inclined to interfere with the judgment of acquittal in respect of second and third respondents.

46. Having concluded that the complicity of the first respondent in the offences punishable under Sections 392 and 394 IPC against PW-1 and PW-2 has been proved we must add that the charge for the offence under Section 397 IPC must fail qua him for the reason the evidence of PW-1 and PW-2 lacks clarity as to which out of the three robbers had actually wielded or used knife (Ex.P-1) as a weapon in the incident. In all probability, the first

respondent could not have been the person using such deadly weapon in the commission of robbery inasmuch as he is one who was holding the air gun, seized from his hands and gathered as evidence by the investigating officer by formal seizure memo (Ex.PW-1/D). But, the evidence clearly establishes that the first respondent was aided and assisted by two accomplices in the commission of robbery, he apparently having shared common intention with them though their identity could not be brought home.

47. For the foregoing reasons, we dismiss the appeal of the State in so far as it challenges the acquittal of second and third respondents. We partly allow the appeal setting aside the judgment dated 01.12.2009 of the trial court vacating the order of acquittal of the first respondent. We hold him guilty on the charge for offences punishable under Sections 392 and 394 IPC read with Section 34 IPC and convict him accordingly.

48. The trial court record reveals that the first respondent having been arrested in the early morning hours of 11.12.2007 remained in custody till he was acquitted by the impugned judgment dated 1.12.2009 of the trial court. In the process, he remained in custody during the investigation and trial for a period of ten days less than two years. When the criminal leave petition No. 186/2012 (from which the present appeal arises) was filed by the State to challenge the judgment of acquittal, in spite of notice he did not appear. This resulted in duress process being issued. He was arrested upon execution of the non-bailable warrants and produced in the court on 24.07.2014 but directed to be enlarged on bail. He jumped bail again and, thus, fresh warrants had to be issued. Eventually, he was produced by his

brother in the court on 16.08.2016 and by our order passed on the said date, has been kept in detention pending decision on the appeal.

49. It has been argued on behalf of the convicted first respondent that he is a person from poor strata of society with no past criminal record. The learned *amicus curiae* submitted that since he is the sole bread earner of the family which includes small children, a lenient view may be taken in the matter of punishment so that he is able to redeem himself. The learned public prosecutor submitted that the court may take an appropriate view on the subject of punishment.

50. Having regard to the totality of the facts and circumstances of the case, the nature of crime committed and the fact that PW-1 suffered monetary loss as a result of commission of robbery in the course of which he with his brother were physically assaulted, for recompense of which there is no scope, given the poor financial status of the first respondent (convict), in our opinion, a sentence of rigorous imprisonment for three years (03) with fine of rupees one thousand (₹1,000) on each count should meet the ends of justice in the case. We order accordingly.

51. Both substantive sentences shall run concurrently. In case of default of payment of fine shall suffer further rigorous imprisonment for fifteen (15) days each. He shall be entitled to set off for the period of detention already undergone in terms of Section 428 Cr. PC.

52. The Registrar General shall issue warrant of commitment of the first respondent (convict) to jail to make him undergo the sentence awarded in the case at hand, also serving upon him a copy of this judgment in

accordance with law, duly informing him through the Superintendent (Jail) of the right to appeal.

53. Having regard to the procedural issues of import which have come up for consideration in this case, we direct that a copy of this judgment be circulated amongst all the judicial officers by the District & Sessions Judge (HQ). Registry to send the copy accordingly.

(R.K. GAUBA)
JUDGE

(GITA MITTAL)
JUDGE

December 20, 2016
yg/nk