THE COURT OF SH. KAPIL KUMAR
METROPOLITAN MAGISTRATE-05, CENTRAL,
TIS HAZARI COURTS, DELHI

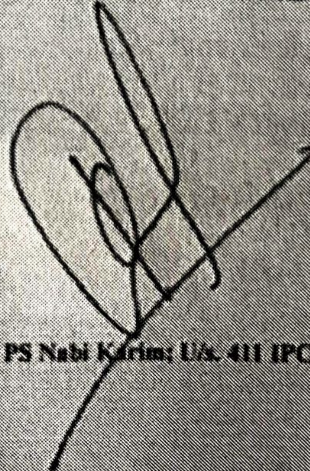
CNR No. DL CT-02-000086-2010
CIS No. 287673/16
FIR No. 37/10
PS. Nabi Karim
State Vs Jitender
U/s. 411 IPC and 103 DP Act

JUDGMENT
(Through VC)

1) The date of commission of offence	: 09.07.2010
2) The name of the complainant	: Amritansh Rastogi S/o Sh K.D Rastogi.
3) The name & parentage of accused	: Jitender S/o Bhagwan Dass
4) Offence complained of	: 411 IPC and 103 DP Act.
5) The plea of accused	: Pleaded not guilty
6) Final order	: Acquitted
7) The date of such order	:01.07.2020

Date of Institution : 27.11.2010

Judgment announced on : 01.07.2020



THE BRIEF REASONS FOR THE JUDGMENT:

1) The case of prosecution against the accused is that on 09.07.2010 at about 6:30 PM at Pusa Road, near Metro Station Karol Bagh, Delhi he was found in possession of stolen mobile phone make Blackberry Curve 8520 bearing IMEI no. 359429034401594 which was stolen from the possession of Amritansh Rastogi on 07.04.2010 at Sadar Bazar, near Gali no.8 Multani Dhanda, Nabi Karim, Delhi, which he dishonestly received or retained knowing the same to be the stolen property. It is further case of the prosecution that at the same time the accused was found in the possession of 59 other mobile phones along with laptops of which he failed to produce any documents as to the ownership proof or any satisfactory reply as to the possession thereof.

2) After completion of investigation, charge sheet was filed against the accused. In compliance of Sec. 207 Cr.PC, documents supplied to the accused. Arguments on point of charge were heard. Vide order dated 27.05.2011, a charge u/s. 411 IPC and section 103 DP Act was framed upon the accused, to which he pleaded not guilty and claimed trial.

3) In support of its case, prosecution has examined 12 witnesses. After conclusion of prosecution evidence statement of accused was recorded U/s 313 Cr.PC(as per section 281(1) Cr.PC) in which accused denied all the allegations and opted not to lead DE.

4) I have heard the arguments of Ld. APP for State and Ld Counsel for accused. I have also perused the record carefully.

5) It is the cardinal principle of criminal justice delivery system that the prosecution has to prove the guilt of the accused beyond reasonable doubts. No matter how weak the defence of accused is but the golden rule of the

criminal jurisprudence is that the case of prosecution has to stand on its own legs.

6) The fact as to the theft of the mobile phone in question came on record vide virtue of testimony of complainant of the present case namely Amritansh Rastogi examined as PW5 by the prosecution. PW5 deposed that on 07.04.2010 at about 8:10 PM when he was present near a vegetable shop his wallet and the mobile phone were stolen. He was not able to see the thief. He deposed that he had given a written complaint in the police station which is Ex.PW5/A and the same was taken to the police station by PW6 Ct Sajjan Singh and the FIR Ex.PW2/A was registered by PW2 HC Khurshid Ali, who was working as duty officer on that day. He deposed that during the investigation he was informed that his mobile phone has been recovered which he got released from the police station vide orders of the court by executing a superdarinama Ex.PW5/B. He deposed that in the year 2011 his mobile phone got slipped from his pocket while he was travelling in a train and thus cannot produce the mobile phone in the court. However PW5 identified the mobile phone in question by virtue of photographs of the mobile phone vide Ex.P1(colly).

7) By virtue of testimony of complainant it is came on record that the mobile phone of the complainant make Blackberry was stolen from his possession on 07.04.2010. Since the complainant was not able to see the person who removed the mobile phone from his possession and as such there is no question of identification of the accused by the complainant.

8) The case of the prosecution against the accused is that of receiving of stolen mobile phone and not the theft thereof. The prosecution is relying heavily on the testimony of two police officials of PS Karol Bagh who have

allegedly affected the recovery of mobile phone from the possession of the accused. Those two police officials are the main witnesses of the present case. The remaining police officials are formal witnesses as to the formal arrest of the accused, shifting of mobile phone from PS Karol Bagh to PS Nabi Karim, the preparation of some formal documents in the present case. To appreciate the case of the prosecution as to the recovery of mobile phone in question and other mobile phones the testimony of those two police officials that is of PW7 Ct Diwan and PW8 SI Satender are required to be examined carefully.

9) PW7 Ct Diwan and PW8 SI Satender deposed on the same lines that on 09.07.2010 they were doing patrolling in the area of PS Karol Bagh along with SI Mann Singh(not examined as witness). They deposed that when they reached near metro station Pusa Road they noticed the accused(correctly identified) was having a black colour bag in his hand and going towards Pusa Road. They deposed that accused started moving speedily and on suspicion the accused was apprehended and the bag was checked. The bag was found containing 60 mobile phones. The accused was asked as to the ownership of the mobile phones for which the accused could not reply satisfactorily. They deposed that the mobile phones were seized vide seizure memo Ex.PW7/A and the accused was arrested vide kalandra Ex.PW7/B. They deposed that the accused made the disclosure statement as to the four other laptops which were recovered from his house. The laptops were seized vide Ex.PW8/A. They deposed that one of the mobile phone recovered was of the complainant of the present case. They identified the mobile phone for which the present FIR was registered vide photographs already Ex.P1(colly). Thereafter the accused was arrested by the IO of the present

case namely SI Abdul Gaffar examined as PW11 by the prosecution. The mobile phone which was lying in the PS Karol Bagh who shifted to PS Nabi Karim by ASI Preet Singh examined as PW12 by the prosecution vide road certificate no.7/21/2010 Ex.PW10/B for which the relevant entry was made in register no.19 vide Ex.PW3/A by PWHC Khyali Ram.

10) The manner in which the alleged recovery was effected by PW7 and PW8 from the possession of accused does not instill the faith of this court. The reasons for the same are many which will be discussed one by one in this part of the judgment.

11) The first reason which creates some doubt in the factum of alleged recovery is that the mobile phones were recovered from the possession of the accused near metro station. The timing of recovery is of 6:30 PM. There must have been availability of public persons at that place. There was absolutely no attempt on the part of the police officials to join any independent public persons during the recovery proceedings. The importance of joining public persons in the recovery proceedings has been emphasized by Hon'ble High Court and Supreme Court several times. The reference to the following judgments would be beneficial at this juncture. In the judgment titled as **Anoop Joshi Vs. State 1999(2) C.C. Cases 314 (HC)**, Hon'ble High Court of Delhi has observed as under:

> "18. *It is repeatedly laid down by this court that in such cases it should be shown by the police that sincere efforts have been made to join independent witnesses. In the present case, it is evident that no such sincere efforts have been made, particularly when we find that shops were open and one or two shopkeepers could have been persuaded to join the raiding party to*

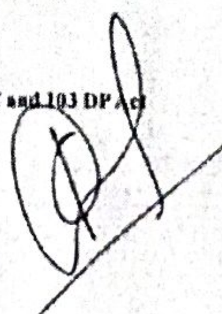
witness the recovery being made from the appellant. In case any of the shopkeepers had declined to join the raiding party, the police could have later on taken legal action against such shopkeepers because they could not have escaped the rigours of law while declining to perform their legal duty to assist the police in investigation as a citizen, which is an offence under the IPC".

12) In the judgment titled as **Nanak Chand Vs. State of Delhi** reported as **DHC 1992 CRI LJ 55** it was observed by Hon'ble High Court that :-

"that the recovery is proved by three police officials who have differed on who snatched the Kirpan from the petitioner and at what time. The recovery was from a street with houses on both sides and shops nearby. And, yet no witness from the public has been produced. Not that in every case the police officials are to be treated as unworthy of reliance but their failure to join witnesses from the public especially when they are available at their elbow, may, as in the present case, cast doubt. They have again churned out a stereotyped version. Its rejection needs no Napoleon on the Bridge at Arcola".

13) The support could also be drawn from the judgment titled as **State of Punjab v. Balbir Singh,** AIR 1994 SC 1872, the Hon'ble Supreme Court held that:

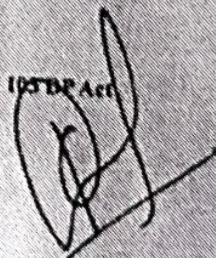
"It therefore emerges that non-compliance of these provisions i.e. Sections 100 and 165 Cr.P.C. would



*amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. Of course, in such a situation, the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been complied with and further consider whether the weight of evidence is in any manner affected because of the non-compliance. It is well-settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official **but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration.** This again depends on question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions." [Emphasis supplied]*

14) Being guided by the aforesaid judgments it could be said that the police officials of PS Karol Bagh who alleged effected the recovery from the possession of the accused certainly made crucial omissions in the recovery proceedings by not joining public persons and this omission is going to the roots of the present case as this court looks for the independent corroboration considering the fact that the mobile phones were recovered at a public place and there was ample opportunity for the police officials for calling independent persons to join the proceedings. Merely mentioning that the public persons were asked to join the proceedings is not believable. The IO could have mentioned the names of those persons who were asked to join the proceedings. Nothing in this regard was deposed by any of the witness and this creates a gaping hole in the case of the prosecution.

15) It is also came on record by virtue of testimony of PW7 and PW8 that the case property was sealed after preparation of seizure memo. The seal was



lying in the possession of police officials only. It appears that no efforts was made to hand over the seal after use to independent person. I am conscious of precedent laid down by Hon'ble Delhi High Court in **Safiullah v. State, *1993 (1) RCR (Criminal) 622***, that:

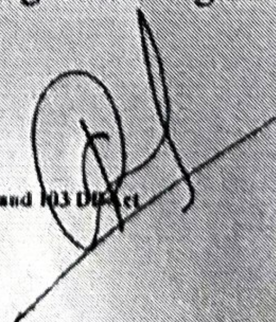
> "10. The seals after use were kept by the police officials themselves. Therefore the possibility of tampering with the contents of the sealed parcel cannot be ruled out. It was very essential for the prosecution to have established from stage to stage the fact that the sample was not tampered with. Once a doubt is created in the preservation of the sample the benefit of the same should go to the accused."

Hon'ble Punjab & Haryana High Court also held in **Ramji Singh vs. State of Haryana, *2007 (3) RCR (Criminal) 452, that***

"7. The very purpose of giving seal to an independent person is to avoid tampering of the case property."

No seal handing over memo is on record. The case property is lying in the same police station where the police official having the possession of seal were posted. There was ample opportunity for tampering with the case property. Hence, considering the legal position, the benefit of doubt should be given to the accused.

16) There is nothing on record as to any documentary proof as to the presence of PW7 and PW8 near metro station at the relevant time. There was no attempt on the part of the prosecution to prove on record the relevant departure entries of PW7 and PW8 when they left police station for patrolling or to attend any emergency duty. Police officials are required to make the necessary entries as per Punjab Police Rules. The prosecution could have easily brought these documents but nothing in this regard has been done.



17) The accused was allegedly apprehended near metro station. There was no attempt on the part of police officials to seize the relevant CCTV Footage. Every metro station has CCTV Cameras. Those video recordings could have been crucial for the present case but this evidence was allowed to be destroyed by the police officials.

18) Another fact which came on record during the trial and makes the most important document of the present case i.e seizure memo Ex.PW8/A under cloud of doubt. During the cross examination PW7 Ct Diwan deposed that Ex.PW8/A bears his signatures at point B. Ld Defence Counsel confronted PW7 to the copy of Ex.PW8/A which was given mark PW7/D1 and to that PW7 admitted that this photocopy of seizure memo does not bears his signatures. This photocopy was given to the accused when the charge-sheet was filed. Ld Defence Counsel argued that IO prepared the set of documents of the accused at the time of filing of charge-sheet but thereafter realised that seizure memo does not bears the signatures of any witness and thereafter to correct that mistake asked PW7 to put his signatures on seizure memo but the IO forgot to get the another photocopy of the seizure memo prepared and handed over unsigned copy of seizure memo to the accused and this makes it crystal clear that PW7 was planted as a witness afterwards or the documents was tempered later on. The submissions of Ld Defence Counsel has merits. If the signatures of PW7 were appended later on the seizure memo Ex.PW8/A or PW7 was planted as a witness afterwards than in either of the case Ex.PW8/A is not a credible document and the accused is certainly entitled to have benefit of this fact. The entire case of the prosecution was dependent upon the seizure memo and this crucial document could not sustain the test of credibility.

19) Further there was no attempt on the part of the prosecution to bring on record the identification of 59 other mobile phones and laptops which were recovered allegedly from the possession of accused. The accused has been charge for the offence U/s 103 DP Act and the same required that it is to be proved as to what articles was with the accused for which he could not reply satisfactorily as to the possession thereof or produce any document qua the ownership of the same. Those mobile phones and laptops were not brought in the court during trial nor the photographs of the same were produced during the trial. Merely deposing that the accused was having 59 other mobile phones without proving the identification of those mobile phones in the court is of no consequence. The very basis of the offence U/s 103 DP Act that is the specific identification of any article in question is not proved by the prosecution. The offence U/s 103 DP Act also fails.

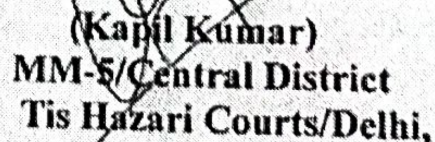
20) In view of the above-discussion the recovery proceedings are completely doubtful and the seizure memo is proved to be a document not worthy of credit. In the judgment titled as ***"S.L.Goswami v. State of M.P" reported as 1972 CRI.L.J.511(SC)*** the Hon'ble Supreme Court held:-

> "...... *In our view, the onus to proving all the ingredients of an offence is always upon the prosecution and at no stage does it shift to the accused. It is no part of the prosecution duty to somehow hook the crook. Even in cases where the defence of the accused does not appear to be credible or is palpably false that burden does not become any the less. It is only when this burden is discharged that it will be for the accused to explain or controvert the essential elements in the prosecution case, which would negative it. It is not however for the accused even at the initial stage to prove*

something which has to be eliminated by the prosecution to establish the ingredients of the offence with which he is charged, and even if the onus shifts upon the accused and the accused has to establish his plea, the standard of proof is not the same as that which rests upon the prosecution ...."

21) The onus and duty to prove the case against the accused is upon the prosecution and the prosecution must establish the charge beyond reasonable doubt. It is also a cardinal principle of criminal jurisprudence that if there is a reasonable doubt with regard to the guilt of the accused the accused is entitled to benefit of doubt resulting in acquittal of the accused. Reference may also be made to the judgment titled as **Nallapati Sivaiah v. Sub Divisional Officer, Guntur reported as VIII(2007) SLT 454(SC).**

22) In view of the aforesaid discussion, in my opinion accused has been able to raise a probable defence creating doubt about the existence or veracity of the prosecution version which renders the same untrustworthy. Accordingly, accused Jitender is acquitted of the charge leveled against him. File be consigned to Record Room after due compliance and subject to furnishing of bail bonds U/s 437A Cr.PC.



Announced through VC
on 01.07.2020

(Kapil Kumar)
MM-5/Central District
Tis Hazari Courts/Delhi,