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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on : January 12, 2009
Judgment delivered on : January 19, 2009

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Criminal Appeal No.43/2006

Mohd. Javed Ahmad @ Haseen	...	Appellant
	Through: Mr. Sumeet Verma,	
	Advocate	
	<i>versus</i>	
The State	...	Respondent
	Through: Mr. Amit Sharma,	
	Additional Public	
	Prosecutor for State	

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

SUNIL GAUR, J.

1. Appellant has been convicted and sentenced for criminally trespassing into the house of the complainant Raj Malhotra(PW-2) on 11th September, 2001 at about 1.45pm and he attempted to commit robbery by pointing country made pistol towards Raj Malhotra (PW-2) and Roma Malhotra (PW-5), but the appellant was apprehended at the spot and Sub Inspector Satish Kumar (PW-17) on receipt of DD No.17-A reached the spot and thereafter the law was set to motion. Not

only the country made pistol but also a kitchen knife was recovered from the pocket of the appellant/accused. Spot proceedings were conducted and in pursuance of the disclosure statement of the appellant/accused, the motorcycle used in the commission of this offence was got recovered from the co-accused Rohit. One of the co-accused was sent up for trial before a juvenile court and after the investigation, two co-accused of the appellant i.e. Balkishan and Ashok Kumar were charge-sheeted in this case alongwith the appellant.

2. The facts of this case as detailed by the trial court are as follows :-

“On 11.09.2001, on receipt of DD No.17-A, SI Satish Kumar alongwith Ct. Rajesh Kumar reached at the spot i.e. 8-A/97, WEA Karol Bagh and simultaneously HC Virender has also reached over there and he found crowd gathered there and appellant Javed was produced before him by complainant Rajesh Malhotra along with one country made pistol which was loaded and it was told to SI that appellant alongwith his associates had came there with intention to commit robbery. On checking, SI found the country made pistol loaded. He prepared the sketch of pistol Ex.PW.2/B. Live cartridges were also recovered from the possession of the appellant with kitchen knife. Sketch of live

cartridges was prepared vide memo Ex.PW.2/D and sketch of kitchen knife was prepared vide memo Ex.Pw.2/C. The recovered pistol and live cartridges were sealed in pullanda with the seal of SK and taken into possession vide memo Ex.PW.2/A and two live cartridges were taken into possession vide memo Ex.PW.2/E and knife was taken into possession vide memo Ex.PW.2/F and sealed with the seal of SK and seal after use was given to Rajesh Malhotra. Appellant was having injuries on his person and he was sent for medical examination through ASI Vijay alongwith other staff. Investigating Officer recorded statement of Rajesh Malhotra Ex.PW.2/H and made endorsement thereon and sent the rukka to police station Karol Bagh for registration of this case through HC Virender Singh, he also prepared the site plan at the instance of the complainant vide Ex.PW.17/C and also recorded supplementary statement of the complainant. Roma Malhotra, sister-in-law of the complainant was also interrogated and her statement was also recorded. After medical examination, appellant was also interrogated and made his disclosure statement ex.PW.13/B. Appellant was arrested vide memo Ex.PW.13/A and his personal search was conducted vide memo Ex.PW.2/C. During the PC remand, appellant took

the police party to Patel Nagar, K-65 and got one motorcycle recovered from co-accused Rohit besides one mobile which were taken into possession vide memos Ex.PW.12/A and Ex.PW.17/D, co-accused Rohit was also arrested. During investigation, SI Satish Kumar received a secret information that one of the accused wanted in this case would come near Kundan Dhaba Sarai Rohilla T Point. Accordingly, Investigating Officer alongwith Ct Sudhir, HC Virender and Ct. Rajesh and appellant Javed reached at the spot and arrested co-accused Bal Kishan at the pointing out of the appellant. Co-accused Ashok was also arrested from there at the pointing out of co-accused Bal Kishan. Disclosure statement of co-accused persons were also recorded. One country made pistol alongwith one cartridge was recovered from the toilet of 8A block which was also seized. After completion of investigation, charge-sheet was filed against these accused in the court concerned.

3. Before the trial court, they pleaded not guilty to the charges framed against them for the offences under Section 452/393/397 read with Section 120-B of the IPC. Appellant was also charged for the offence under Section 27 of the Arms Act.

4. During the trial, evidence of seventeen witnesses was recorded but this case rests mainly upon the testimony of

complainant Raj Malhotra (PW-2), his wife Roma Malhotra (PW-5) and that of Investigating Officer Sub Inspector Satish Kumar (PW-17). Appellant in his statement under Section 313 Cr.PC before the trial court had denied the prosecution case and had stated that Rajesh Malhotra (PW-2) was a builder and he had worked as a labour contractor with him and because dues were demanded by the appellant/accused for the construction of building no.12-B at Patel Nagar, Delhi, he has been falsely implicated in this case and that, he was not arrested at the spot but was arrested from the Gymkhana Club, where he was called by the complainant (PW-2). Although, appellant desired to lead evidence in his defence but lateron, he had made a statement before the trial court that he does not want to lead any evidence in his defence.

5. After the trial, vide impugned judgment of 11th November, 2005, appellant stands convicted for commission of the offences under Section 452/393/398 of IPC and Section 27 of the Arms Act and vide order dated 16th November, 2005 of the trial court, he stands sentenced to RI for seven years and a fine of rupees two thousand for the offence u/s 398 of the IPC and to RI for five years and to a fine of rupees one thousand for the offence u/s 393 of the IPC. A sentence of RI of three years and a fine of rupees one thousand has been awarded to the appellant for the offence u/s 452 of the IPC and for the offence u/s 27 of the Arms Act, appellant has been directed to

undergo RI for two years and a fine of rupees five hundred. The above-said sentences awarded by the trial court also contained a default clause in respect of fine imposed and substantive sentences have been ordered to run concurrently.

6. In this appeal, both the sides have been heard and the evidence on record has been scrutinized.

7. It is evident from the testimony of complainant Rajesh Malhotra (PW-2) that while the appellant/accused had entered his house, his co-accused stood outside on the motorcycle and inside the house, appellant/accused had put the pistol on the complainant (PW-2) and had asked the complainant and other family members present there, not to raise alarm and to hand over the keys of the house and to give the jewellery and cash which is there in the house as the appellant and his co-accused had come for committing *dacoity*. Since appellant/accused was heavily under the influence of liquor, therefore, he could not fire from his country made pistol and was apprehended at the spot.

8. Aforesaid evidence is assailed on behalf of the appellant by contending that the domestic servant was also in the house but he has not been got examined. Learned counsel for the appellant contended that it is highly improbable that the appellant/accused being apprehended by the complainant inspite of the fact that he was armed with a country made

pistol and was also having a kitchen knife with him and the version of the appellant of complainant calling him at Gymkhana Club and of getting him arrested from there on account of money dispute is probable one.

9. After having carefully gone through the evidence on record, I find that although appellant/accused was armed with a country made pistol and a kitchen knife was in his pocket but he could be apprehended at the spot by the complainant because he was under the influence of liquor. There is nothing improbable about it as I find from the MLC of the appellant that there was smell of alcohol. The story of the appellant of complainant falsely implicating him on account of some money dues remains in the air only as there is nothing on record to probablise it. Infact, there is evidence of complainant (PW-2) regarding the club starting functioning in September, 2002 i.e. after a year or so of this incident.

10. Non-examination of the servant or the parents of the complainant (PW-2) is not of any consequence as I find that the evidence of the complainant (PW-2) is trustworthy and it receives ample corroboration from the evidence of his wife Roma Malhotra (PW-5). Since the parents and servant of the complainant (PW-2) have not been cited as a witness, therefore, the best person to explain about it, is the Investigating Officer (PW-17). However, it appears from the

evidence of the Investigating Officer (PW-17) that it has not been elicited from him as to why the parents and the servant of the complainant have not been cited as witnesses in this case. In any case, the evidence of the complainant (PW-2) and his wife (PW-5) is sufficient to establish the prosecution case against the appellant/accused. As per FSL report Ex.PW17/A, the recovered country made pistol was found to be in working order and it has been opined that the recovered live cartridge could be fired through it. Therefore, it is sheer chance that the appellant/accused could not fired from his country made pistol as he was heavily under the influence of liquor at the time of this incident.

11. I am of the considered opinion that the conviction of the appellant by the trial court for the aforesaid offences is very well justified, in the face of the evidence on record. As regards the quantum of sentence is concerned, I find that the offence under Section 398 of the IPC provides for a minimum sentence of seven years and the trial court has already awarded the minimum sentence, as provided for this offence. Thus, there is no scope for any interference on the sentence aspect also.

12. During the course of the arguments, learned counsel for the appellant had pointed out that the appellant has virtually undergone the substantive sentence as awarded to him by the trial court but he cannot be released from jail because he is

also undergoing sentence awarded to him in another case by a court in the State of Haryana. Learned counsel for the appellant had made a prayer to invoke Section 427 of the Code of Criminal Procedure, so that the sentence awarded in this case and another case by a Court in the State of Haryana runs concurrently. Since the details of the sentence awarded by another court in the State of Haryana are not on record, so the aforesaid prayer made cannot be acceded to and it would be appropriate if the provision under Section 427 of the Cr.PC is invoked by the appellant by filing a separate petition with complete particulars.

13. For the aforesaid reasons, impugned judgment and order is upheld and this appeal stands dismissed accordingly.

14. Appellant is in custody. Criminal Miscellaneous No. 13083 of 2006, filed by the appellant through Jail, has now become infructuous and is disposed of accordingly. He be informed of this order through the concerned Jail Superintendent.

15. With the aforesaid directions, this appeal and pending application(s) stands disposed of.

SUNIL GAUR, J

January 19, 2009

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