

* **HIGH COURT OF DELHI : NEW DELHI**

Date of hearing: April 23, 2009

Date of Order: May 06, 2009

+ **Crl. Appeal No. 821 of 2006**

% Alim @ Allo ... Appellant
Through: Mr. Vijay Singh Charak, Advocate

versus

The State (N.C.T. of Delhi) ... Respondent
Through: Mr. R.N. Vats, 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. This appeal is directed against the judgment and order dated 17th May, 2006 and 23rd May, 2006, of Additional Sessions Judge, Delhi in FIR No.148 of 2003 under Sections 394/397/34 of IPC, registered at Police Station New Usmanpur, Delhi, vide which appellant- Alim @ Allo has been convicted for commission of offences under Section 392/394 read with Section 397 of IPC and sentenced to rigorous imprisonment for a period of seven

years each with fine of Rs.5000/- in all, with default clause for committing aforesaid offences. All the substantive sentences have been ordered to run concurrently.

2. The facts on which the prosecution of the appellant was envisaged, are that on 15th June, 2003, on receipt of a call at the PCR regarding assault and robbing, DD No. 46-A was registered by Constable Ram Pal Singh (PW-12) and on receipt of the same, ASI Rakesh (PW-15) reached GTB Hospital and collected MLC of injured- Mohd. Islam (PW-2) and Sanjay (PW-1). Since both the injured, out of fear did not give any statement on that day and their statements could only be recorded after a few days. On the complaint made by both the injured (PW-1 and PW-2), ASI Rakesh (PW-15) reached at the spot and prepared the site plan (EX. 15/B). On coming to know that one of the co-accused of the appellant had been arrested in some other case, ASI Rakesh (PW-15) along with the complainant – Sanjay, reached Seelampur Police Station, Delhi, who identified co-accused Pradeep and Alim @ Allo. On the identification of both the accused by the complainant, they were arrested in this case. Disclosure statement (EX.PW-6/A) was made by accused Alleem @ Allo and one of the robbed articles was recovered from his possession. Other

two accused involved in this case, namely Sanju @ Sudhir and Sonu @ Sudhir, were also arrested and made their disclosure statements (EX. PW15/C and EX. 15/D). Upon completion of investigation, charge-sheet for the offences under Sections 394/397/34 of the Indian Penal Code against appellant/accused - Alim @ Allo and co-accused Sanju @ Sudhir and Sonu @ Sudheer, was filed in the court. Vide order of 26th August, 2003, Metropolitan Magistrate transferred the case of accused Sonu @ Sudheer to Juvenile Court, while case against appellant/accused Alim @ Allo and co-accused Sanjay @ Sudhir, was forwarded to the court of Sessions for trial.

3. The trial Court vide order of 10th December, 2003, framed charges under Sections 392/394/397/34 of the IPC, against both the accused. Present appeal has been preferred only by accused- Alim @ Allo, who had pleaded not guilty to the aforesaid charges, framed against him and claimed trial.

4. Prosecution adduced the evidence of fifteen witnesses. It primarily includes, the testimony of two injured Sanjay Pandey (PW-1) and Mohd. Islam (PW-2), Head Salluddin (PW-4) was a member of the investigating team, Constable Subhash (PW-6) deposes qua disclosure

statement (EX.PW-6/A) made by appellant/ accused- Alim @ Allo and was also a witness to the recovery of robbed I-card made from him, Sub- Inspector Manmohan Kumar (PW-8) and Sub- Inspector K.P. Shah (PW-9) have deposed regarding the disclosure statement of appellant/ accused in the instant case whereas Inspector Dharam Vir Joshi (PW-13) deposes qua disclosure statement of co-accused of the appellant. Doctor Prashant Kumar (PW-7) and Doctor Abhishek Yadav (PW-10) have proved the MLCs (Ex. PW7/A) and Ex. PW-10/A of injured- Mohd. Islam and Sanjay Pandey. ASI Rakesh (PW-15) is the Investigating Officer of this case.

5. The sum and substance of prosecution narration, as noticed by trial court, is as under:-

On 15th June, 2003, at about 10:30 p.m., complainant- Sanjay Pandey (PW-1), driver of TSR No. DL-1R-F-0682, first boarded two passengers from ISBT, Kashmiri Gate, and after some time three more passengers were boarded. While the TSR reached *Khajuri Khas*, he had to stop the TSR on the request of one of the passengers. In the meanwhile, one passenger gave knife blow on his cheek and kept it on his neck, and another passenger- Alim, snatched the cash and identity card from front pocket of his shirt. The other two passengers, stabbed the fifth passenger- Mohd. Islam (PW-2) and snatched Rupees five-six hundred and wrist watch from his person. After committing this robbery, all the four accused fled away from the spot, threatening them not to

inform the police. However, Sanjay Pandey (PW-1) later on gathered courage and made a call to the PCR. On receipt of call, police officials swung into action, carried out necessary investigation and filed a charge-sheet against the accused persons, which was the basis for prosecution of the appellant herein.

6. Once the prosecution evidence was completed, the material evidence was put to the appellant/accused in his statement under Section 313 of the Code of Criminal Procedure, 1973, wherein appellant denied the entire prosecution case projected against him and stated that he had been falsely implicated in this case and to prove his innocence, he led one witness in his defence, i.e. Smt. Anisa (DW-1), his mother, who deposed that her son was lifted from his *jhuggi*, by the police, in order to falsely implicate him in this case.

7. Oral submissions have been heard and the impugned judgment rendered by the trial court and the relevant evidence on record, have been perused.

8. On behalf of the Appellant, three-fold submissions have been made. First submission is that there is delay of fourteen days in lodging of the FIR in this case and this delay is fatal to the prosecution case. The second submission is that the refusal of the Appellant to

participate in Test Identification Parade was justified as the Appellant was already shown to the witnesses. The third submission is that there is no recovery from the Appellant to establish his involvement in the commission of this offence and in fact, the Appellant was lifted from his house and was falsely implicated in this case. Lastly, it is submitted that Appellant has already undergone sentence of four years and seven months and the sentence imposed upon the Appellant deserves to be reduced to the period already undergone by him, as the Appellant is not a previous convict and was aged about twenty two years only at the time of this incident and he is the only son of his mother and is the bread earner of the family. Nothing else is urged on behalf of the Appellant.

9. According to the learned Additional Public Prosecutor for the State, identification of the appellant/accused by the injured (PW-1) as well as by Complainant - Mohd. Islam (PW-2), as one of the assailants and the recovery of the identity card of injured (PW-1) at the instance of the Appellant is sufficient to justify the conviction and the sentence imposed upon the Appellant and the delay in lodging of the FIR in this case stands explained by the Complainant (PW-2) who has stated that this incident was

not reported to the police because of fear and upon learning from newspaper 'Punjab Kesari' of 29th June, 2003, that the culprit who used to rob passengers and drivers of TSRs in Delhi have been caught, this matter was reported to the police. Thus, it is submitted that the conviction and sentence imposed upon the Appellant is duly supported by the evidence on record and this appeal lacks merit.

10. Six years ago, in the late morning of mid-June, a three wheeler scooter rickshaw (hereinafter referred to as TSR) driven by Sanjay (PW-1) with passenger Mohd. Islam (PW-2) reached Khajuri Khas in the area of Police Station New Usmanpur, Delhi, and appellant with co-accused boarded it. Co-accused of appellant were armed with '*ustras*' and they injured TSR driver (PW-1) and passenger (PW-2) while they were robbed and, thereafter, fled away while extending threats.

11. The delay aspect needs to be dealt with first. Injured (PW-1) has been cross-examined on this aspect and he has stated that after this incident, he was threatened by the assailants not to report this matter to the police and for this reason, he did not lodge any complaint with the police and when he learnt from the newspaper that

culprits, who used to rob passengers and TSR drivers have been caught, he gathered courage to tell the true facts of this case to the police. Complainant (PW-2) in his evidence has stated that after this incident, the assailants had extended a threat not to lodge any complaint regarding this incident and there is no cross-examination by the defence on this aspect except that he had learnt from his relative that it had appeared in the newspaper that the assailants, who used to rob passengers and TSR drivers in Delhi, have been caught.

12. It is quite natural that the victims are quite reluctant to report such like incidents to the police and there is nothing unusual in Mohd. Islam (PW-2) reporting this matter to police only after coming to know that the assailants, who indulge in such like incidents, have been caught. The delay occasioned in reporting this incident to the police is not fatal to the prosecution case as there is no worthwhile examination of this aspect by the defence. Otherwise also, the aforesaid explanation put forth for the delay sounds to be quite plausible.

13. It would be factually incorrect to state that nothing has been recovered from at the instance of the appellant/accused. It stands established from the evidence

of injured (PW-1), i.e., Electoral Identity Card (Ex.P-1) of the victim/injured (PW-1) was got recovered by the Appellant from his house and the evidence of the aforesaid recovery remains unshaken in the cross-examination by the defence.

14. So far as the Test Identification Parade refusal by the Appellant is concerned, I find that it is very easy to allege that Test Identification Parade refusal is justified because accused has been shown to the witnesses but this plea has to be put to the witnesses to elicit an answer from them. After having gone through the evidence of the material witnesses, i.e., (PW-1) and (PW-2), I find that from their cross-examination by the defence, it cannot be made out that appellant/accused was shown to these witnesses prior to his Test Identification Parade refusal. Not only this, no such suggestion has been given to these material witnesses on behalf of the appellant/accused. In fact, appellant/accused was shown to Complainant (PW-2) in the Police Station, only after Test Identification Parade refusal by him.

15. The plea taken by the appellant/accused of his being lifted from his house and of his being falsely implicated in this case, is supported by his mother (DW-1) but this plea

is an afterthought because no such plea has been taken by the appellant/accused in his statement under section 313 of Cr. P.C. before the trial court, nor any such suggestion has been given to the material prosecution witnesses on behalf of the appellant/accused.

16. The conviction of the appellant/accused for the offences under section 392/394/34 of the Indian Penal Code is well borne out from the evidence on record and the impugned judgment convicting the Appellant for the aforesaid offences, does not suffer from any illegality or infirmity and is thus, hereby sustained.

17. As far as the offence under section 397 of Indian Penal Code is concerned, I find that in the FIR (Ex.PW-2/A), it is clearly stated that the assailant who was sitting on the right side of Complainant Mohd. Islam (PW-2) had brandished '*ustra*' and had exhorted him to take out whatever he had, otherwise he would be killed. Complainant (PW-2) in his evidence has clearly stated that appellant/accused was sitting in the TSR by his left side and the assailant, who was sitting on his right side, had inflicted '*ustra*' blow on the right side of his face. It is a matter of record that the accused who was sitting on the right side of the Complainant (PW-2) is Sanjay @ Sudhir

who is facing trial before the Juvenile Justice Board.

18. To fasten the liability for the offence under section 397 of Indian Penal Code, a direct role has to be attributed and an accused cannot be vicariously held liable for commission of an offence under section 397 of Indian Penal Code.

19. In the case of *Dilawar Singh Vs. State of Delhi*, reported in **AIR 2007 SC 3234**, the Apex Court has dealt with this aspect, in the following words:-

“Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397 IPC and 398 IPC.

20. After having scrutinized the evidence of Complainant (PW-2) as well as the injured (PW-1), I find that none of these material witnesses have stated in their evidence that appellant/accused was carrying any weapon or that he had shown any weapon to them to commit the offence of robbery or had inflicted an injury to any one of them.

21. In view of the aforesaid factual and legal position, it becomes crystal clear that vicarious liability for the

offence under section 397 of the Indian Penal Code cannot be fastened upon the appellant/accused and the trial court has erred in doing so. Therefore, the conviction of the appellant/accused for the offence under section 397 of the Indian Penal Code is rendered unsustainable and is accordingly set aside. However, his conviction for the offences under section 392/394/34 of Indian Penal Code is well merited and is upheld.

22. On the quantum of sentence, it becomes evident from the nominal roll of the Appellant that as on 19th August, 2008, he had already undergone sentence of three years, ten months and some days. Since the sentence imposed upon the Appellant has not been suspended during the pendency of this appeal, therefore, by now, appellant/accused has already undergone sentence of four years and seven months (with remissions). At the time of this incident, the appellant/accused was aged about 22 years and he has already faced the agony of trial and appeal proceedings in this case since June, 2003 and he is said to be a poor person and sole bread earner of his family and the only son of his mother, therefore, the substantive sentence imposed upon the Appellant for the offences under section

392/34 is reduced to rigorous imprisonment for four years and six months. However, the sentence of fine is maintained and in default of the payment of the fine, Appellant is directed to undergo simple imprisonment for one month. Likewise, the substantive sentence imposed upon the appellant/accused under section 394/34 of Indian Penal Code is also reduced to rigorous imprisonment for four years and six months and sentence of fine imposed upon him is maintained and in default thereof, the Appellant has to undergo simple imprisonment for one month. Both these sentences shall run concurrently.

23. This appeal stands partly allowed to the extent indicated above.

24. Appellant is in custody. He be apprised of this order through the concerned jail superintendant.

25. This Appeal stands disposed of with aforesaid direction.

Sunil Gaur, J.

May 06, 2009

Rs/pkb