

HIGH COURT OF DELHI : NEW DELHI

Judgment Reserved on: April 24, 2009
Judgment Pronounced on : May 08, 2009

+ Criminal Appeal No. 834 of 2006

% Lakhan Singh ... Appellant
Through: Mr. A.S. Khushwah, Advocate.

versus

The State of NCT of Delhi. ...
Respondent
Through: Mr. Amit Sharma, Additional
Public Prosecutor for State

Crl. Appeal No. 835 of 2006

% Surender Kumar @ Lamboo ... Appellant
Through: Mr. A.S. Khushwah, Advocate.

versus

The State of NCT of Delhi ... 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. Above titled two appeals are being disposed of by this common order in view of the fact that they arise out

of a common impugned judgment vide which both the appellants have been found guilty of committing armed robbery.

2. On 14th May, 2004, at about 8:30 p.m., Raj Bahadur Singh (PW-1), a Welder in a gas plant, was coming back from Guna to Delhi, and while he reached Zakhira Bridge at platform No. 3 to proceed towards Daya Basti Railway Colony, three-four boys sitting underneath the stairs of the bridge, surrounded him. One boy took out his purse containing Rupees six hundred and another boy took off his wrist watch (make Titan) and when he protested, another boy gave him a knife blow on his hand while the fourth one, hit on his chest with his knife and when Raj Bahadur raised an alarm, some persons came from platform No.2 and on seeing them, all those four boys fled away from the spot. On the statement (Ex. PW1/A) of Raj Bahadur- complainant, FIR No. 30 of 2004, under Sections 392/394/34 of the IPC was registered regarding this incident. On 19th May, 2004, accused Manoj and Anwar @ Raju, were arrested in this case as complainant (PW-1) stated that they were the assailants who along with their companions, had robbed him on the point of knife. Accused- Anwar @ Raju, led the police party to the house

of their two companions i.e. the appellants /accused herein- Lakhan Singh and Surender Kumar @ Lamboo, who made their respective disclosure statements and pursuant thereto, recoveries were made and after completion of investigation, charge sheet under Sections 392/394/397/398/34 of the IPC and 25/27 of Arms Act, against accused Lakhan Singh, Surender Kumar @ Lamboo and Anwar @ Raju, was filed in the court. By order of 28th September, 2004 accused Anwar @ Raju was directed to be produced before Juvenile Justice Board for trial where co-accused Manoj was facing trial and case of appellants/accused- Lakhan Singh and Surender Kumar @ Lamboo, was tried by the court of Sessions.

3. Appellants/accused preferred to face trial for the charged offences under Section 392/394/34 of the IPC. In addition, appellant Lakhan was charged for committing offences under Section 25 and 27 of the Arms act. Accused Manoj and Anwar @ Raju, co-accused of the appellants, were proceeded against before the Juvenile Justice Board as they were juveniles.

4. The evidence adduced by the prosecution is of nine witnesses and it consists of the testimony of Sh. Raj Bahadur (PW-1) i.e. the Complainant, Head Constable

Shiv Kumar (PW-2) had recorded the FIR of this case, Doctor Rohit Kumar (PW-7) and Doctor Sharad (PW-8) have proved MLC (EX. PW7/A) and opined the injuries to be of simple nature. Sub-Inspector Mahipal Singh (PW-9) is the Investigating Officer of this case.

5. Upon closing of prosecution evidence, appellants/accused in their statements under Section 313 of the Cr.P.C., alleged false implication in this case and solitary defence witness - Mukesh deposed that appellant- Lakhan was taken away from his house by police on 18th May, 2004, in the morning.

6. After completion of trial, both the appellants/accused stood convicted and sentenced by the trial court in the manner as noted below:-

RI for seven years each for committing offences under Section 392/394/34 of the IPC with fine of Rupees one thousand each, and in default of payment of fine, to undergo SI for three months each. Besides this, appellants/ accused- Lakhan has also been ordered to undergo SI for one year for committing offence under Section 25 Arms Act with fine of Rupees one thousand, and in default thereof, to undergo SI for three months.

7. Submission made by both the sides have been considered and the record of this case has been perused.

8. The primary submission made on behalf of both the Appellants/accused is regarding their identity. It has been vehemently argued on behalf of both the appellants/accused that absence of Test Identification Parade raises a reasonable doubt about the identity of both the appellants/accused and the benefit of the same has been illegally denied by the trial court to the appellants/accused and the same deserves to be given to them. Ultimate submission made on behalf of the appellants/accused is that at the time of this incident, appellants/accused were aged 20-21 years and therefore, the benefit of probation was required to be given to them. To seek the benefit of probation, reliance has been placed by learned counsel for the appellants upon a decision of the Apex Court reported in **AIR 1963 SC 1088**. In the last, it has been submitted on behalf of both the appellants/accused that appellant-Lakhan Singh has remained behind bars for more than three and half years and appellant – Surender is in custody for the last more than three years and therefore, their substantive sentence deserves to be reduced to the period already undergone

by them. Nothing else is urged on behalf of the appellants/accused.

9. Learned Additional Public Prosecutor for the State submits that the question of holding of Test Identification Parade does not arise because both these appellants/accused were arrested at the instance of their co-accused and were there and then identified by the complainant (PW-1) as the assailants and the conviction and the sentence imposed upon the appellants/accused is fully supported by the evidence on record and there is no merit in these appeals.

10. It has been pointed out by learned Additional Public Prosecutor for the State that so far as the prayer for grant of probation made on behalf of both the appellants/accused is concerned, the same stands already declined by this court vide order of 4th October, 2006 passed on the applications of the appellants/accused made by them in this behalf.

11. After having heard both the sides and upon perusal of record this case, I find that it is a matter of record that applications of both the appellants for grant of benefit of probation already stand declined vide order of 4th October,

2006. Therefore, the prayer of the appellants/accused now renewed at the final hearing cannot be considered.

12. So far as the identity of the appellants/accused is concerned, it is clear from the evidence of complainant (PW-1) that both these appellants/accused have been duly identified by him in his evidence before the court and nothing worthwhile has come out in the cross-examination of the complainant to discredit his version regarding the identity of these appellants/accused. It is evident from the evidence of the Investigating Officer (PW-9) that at the first instance, two co-accused of the appellants were arrested and at their instance, the present appellants/accused were arrested and the complainant (PW-1) was accompanying the raiding party and upon the arrest of the appellants/accused, complainant (PW-1) had there and then identified the appellants as the assailants. In these circumstances, there was no requirement of subjecting appellants to the Test Identification Parade.

13. Upon careful analysis of the entire evidence on record, I find that the conviction of both the Appellants/accused for the offence under section 394/34 of the Indian Penal Code is fully justified and is hereby upheld. However, as regards the conviction of both these

appellants/accused for the offence under section 397/34 of Indian Penal Code is concerned, I find that the conviction of appellant-Lakhan Singh for commission of offence under section 397 of Indian Penal Code is well merited as it stands proved from evidence on record that he had given a knife injury on the chest of the complainant (PW-1) and the same stands corroborated from MLC (EX. PW7/A) of the complainant. The role attributed to appellant – Surender Kumar by the complainant (PW-1) is of catching hold of the complainant and of robbing the Complainant of his purse. There is no evidence on record to suggest that appellant – Surender Kumar was having any weapon with him at the time of commission of this offence.

14. Appellant- Lakhan alone was charged for commission of offence under Section 397 of the IPC and therefore, trial court has gravely erred in convicting appellant-Surender Kumar by invoking Section 34 of the Indian Penal Code, for the offence under Section 397 of Indian Penal Code. 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. It is so said in view of the dictum of the Apex

Court in the case of *Dilawar Singh Vs. State of Delhi*, **AIR 2007 SC 3234**, which is as under:-

“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.”

15. In view of the aforesaid, the conviction of the appellant-Surender Kumar for the offence under section 397 of Indian Penal Code with the aid of section 34 of Indian Penal Code cannot be sustained and is accordingly set aside.

16. On the quantum of sentence, it is found that the sentence imposed upon the appellant-Lakhan Singh is the minimum as provided under section 397 of Indian Penal Code and therefore, there is no scope for any interference by this court in respect of the sentence imposed upon this appellant.

17. So far as appellant-Surender Kumar @ Lamboo s/o Banwari Lal is concerned, it is found that for the offence under section 394/34 of Indian Penal Code, he has been sentenced to undergo rigorous imprisonment for seven years with fine. Considering the fact that the appellant-

Surender Kumar was aged about 21 years on the day of this incident and as per his nominal roll, he has already undergone sentence of three years and two months, therefore, ends of justice would be met if the substantive sentence of this appellant is reduced to the period already undergone by him. It is ordered accordingly. However, the sentence of fine is maintained.

18. Appeal of appellant- Lakhan Singh lacks merit and is hereby dismissed and appeal of appellant-Surender Kumar is partly allowed to the extent indicated above.

19. Appellants- Lakhan Singh and Surender Kumar are in custody. They be apprised of this order through the concerned Jail Superintendant.

20. With aforesaid directions, these appeals are disposed of.

Sunil Gaur, J.

May 08, 2009

rs/pkb