

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

% Judgment Reserved on: 24.09.2009
Judgment delivered on: 18.12.2009

Crl. Appeal 247/2009

SUNNY Appellant

Vs

STATE Respondent

AND

Crl. Appeal 248/2009

LAXMAN @ SONU Appellant

Vs

STATE Respondent

Advocates who appeared in this case:

For the Appellant : Mr. K B Andley, Sr Advocate with Mr M Shamikh, Advocate

For the Respondent : Mr Amit Sharma, Additional Public Prosecutor

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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

RAJIV SHAKDHER, J

1. By virtue of the impugned judgment, the appellants in the captioned appeals have been convicted for offences under Section 392/34 of the Indian Penal Code, 1860 (hereinafter referred to as the 'I.P.C'). Accordingly, the appellants have been sentenced to undergo rigorous imprisonment for a period of five years alongwith fine of

Rs 10,000/-. In default of payment of fine, the appellants were required to undergo a further rigorous imprisonment for a period of nine (9) months.

2. In the judgment, I shall be referring to the appellant in Crl. A.No. 247/2009 as 'Sunny' and similarly, the appellant in Crl. A.No. 248/2009 as 'Laxman' (hereinafter collectively referred to as the 'appellants').

3. The captioned appeals are directed against a common judgment dated 07.03.2009 and sentence dated 16.03.2009 passed by the learned Additional Sessions Judge: 01(E): Karkardooma Courts, Delhi. Briefly, the prosecution version is as follows:-

3.1 On 19.10.2004, between 11.00 am and 12 noon, one Mr Dinesh Tiwari (PW9) who is an employee of a concern by the name of Bhagwati Transport Company, having its registered office at South Ganesh Nagar, was riding pillion on a scooter which was driven by his colleague, one Sirajuddin. They were evidently carrying a sum of Rs 2,29,826/- in a black colour rexin bag. The money which the duo were carrying had been collected from a concern by the name of Sahu Agency, located at New Ashok Nagar, which was at the relevant time a distributor of mother dairy products.

3.2 On the way to their office at South Ganesh Nagar they passed Mayur Vihar. At the crossing of Kotla Road at 11.20 am the appellants stopped their scooter. No sooner did the scooter come to a halt, one of the appellants i.e., Laxman @ Sonu took out a knife and placed it on the chest of Dinesh Tiwari (PW9). The other appellant i.e., Sunny snatched the bag containing the money from Dinesh Tiwari (PW9). The appellants ran towards Sanjay Jheel with Dinesh Tiwari (PW9) and Sirajuddin in hot pursuit. Hearing the hue and cry raised by Dinesh Tiwari (PW9) and Sirajuddin, two or three police personnel and some members of public joined the chase. Finally, the appellants were caught 20-25 yards from the place where they had waylaid Dinesh Tiwari (PW9) and Sirajuddin. At the point in time when the appellants were apprehended, Constable Prem Singh (PW5), Constable Ravinder Bhati (PW7) and Constable Sripal (PW8) and one member of the public Latoor Singh (PW1) amongst others were present. An intimation

was sent to the nearest police station i.e., police station, Pandav Nagar, Delhi. The intimation was entered as DD No.11A. The said DD entry was handed over to ASI Dharambir (PW4) who alongwith Constable Gajender proceeded to the place where the appellants had been apprehended. In the meanwhile, Inspector V K Sharma (PW10) had also been directed by the SHO of police station Pandav Nagar to reach the spot where the appellants had been apprehended.

3.3 On reaching the spot, Inspector V K Sharma (PW10) discovered that Constable Gajender, ASI Dharambir (PW4), Constable Ravinder Bhati (PW7), Constable Prem Singh (PW5) and Constable Sripal (PW8), Latoor Singh (PW1), Dinesh Tiwari (PW9) and his associate Sirajuddin and a public witness were already present at the spot alongwith the appellants. The bag seized from the appellants was handed over to Inspector V K Sharma (PW10). On a count being taken, it was revealed that the bag contained a sum of Rs 2,29,826/-. Inspector V K Sharma (PW10) recorded the statement (Ex PW9/A) of Dinesh Tiwari (PW9) and proved his signatures, based on which a rukka was prepared by him, and handed over to Constable Ravinder Bhati (PW7) for onward transmission to the police station at Pandav Nagar. At about 2.15 pm, Head Constable Omvir Singh (PW6) received the rukka carried by Constable Ravinder Bhati (PW7). Based on which Head Constable Omvir Singh (PW6) registered a FIR bearing No. 549/04, under Sections 392/397/34 of the I.P.C.

3.4 Investigations were carried out, after which, a challan was lodged in Court. Since the appellants pleaded that they were not guilty and claimed trial, the matter was put to trial. The trial culminated in the conviction of the appellants as noticed above by virtue of the impugned judgment. In the background of the aforesaid broad version of the prosecution, the learned counsel for the appellants assailed the judgment of the trial court on following grounds:-

- (i) the prosecution witness Latoor Singh (PW1) had referred to the fact that three persons were involved in snatching the bag from Dinesh Tiwari (PW9) and his associate Sirajuddin. The prosecution has failed to produce the third person;
- (ii) the prosecution witness Dinesh Tiwari (PW9) in his deposition before the Court has referred to the fact that the appellants had used a motor cycle on which they were riding, to stop them at the Kotla Road zebra crossing. The motor cycle, however, curiously was not seized or produced as a case property;
- (ii) Sirajuddin who was also an eye witness to the robbery, was not examined by the prosecution for reasons best known to them;
- (iv) even though it is the prosecution's case that a knife was recovered from Sunny no case was instituted against him under Section 25 of the Arms Act, 1959; whereas it was instituted against Laxman in similar circumstances;
- (v) the trial court in the impugned judgment has given a benefit of doubt to Laxman in respect of charge framed against him for offence under Section 397 of the I.P.C on the ground that:- PW9 in his examination-in-chief had failed to identify the knives recovered from the appellants as also on account of the fact that Sirajuddin had not been examined. On the basis of the same reasoning, that is, Sirajuddin was not examined, the trial Court should have acquitted the appellants in respect of the offence under Section 392 of the I.P.C.; as it was part of the same transaction.

4. Mr Amit Sharma, the learned Additional Public Prosecutor, primarily relied upon the judgment of the trial court in rebuttal to the submission advanced by the learned counsel for the appellants.

5. I have heard both, the learned counsel for the appellants as well as the learned APP. Having perused the evidence on record and considered the submissions made by the counsels, I am of the view that prosecution has been able to establish its case beyond a reasonable doubt. My reasons for coming to the said conclusion are as follows:

6. The prosecution in support of its case has examined ten witnesses. As against this, the defence has not led any evidence. The appellants routinely denied each and every incriminating evidence put to them by the trial court, while recording their statements under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to in short as the 'Cr.P.C'). The appellants, however, stated before the trial court that they had been picked up from their house and falsely implicated in the case. Therefore, in the context of the aforesaid submissions and the evidence placed on record, let me first briefly note the deposition of each of the prosecution witnesses with respect to the offence with which the appellants were charged.

6.1 Latoor Singh (PW1) who is a public witness briefly deposed as follows:- In October, 2004, around 10.00 or 11.00 am, when he was present in the house alongwith 4-5 workers from his factory he saw three persons running towards Sanjay Jheel, one of these three had a bag in his hand. The said three persons were pursued by two persons even while they raised an alarm that they had been robbed of their money. PW1 further deposed that he alongwith his workers gave chase to the three persons. On the way one of the three boys who held the bag threw it on the ground. Lastly, he said that the three robbers ran away and hence, they could not be apprehended. Consequently, PW1 picked up the bag and handed it over to S.I. Madan Meena in the presence of Inspector Zoon. He also deposed that the bag was black in colour and made of cloth. He went on to state that thereafter the money was counted and it was revealed that the bag carried a sum of Rs 2,29,000/-. The police, according to him, kept the bag and the money; and that he was called to the police station in the evening at 8.00 pm, where he was made to sign some papers. At the police station, PW1 was shown two persons who, the police informed him were the persons involved in the snatching of the bag. He deposed that since he had not seen the persons closely he could not identify them.

6.2 To be noted, Latoor Singh (PW1) was declared hostile and was cross-examined with the permission of the Court by the prosecutor. In his cross-examination by the

prosecutor, he denied the suggestions made to him that Sunny was apprehended by Constable Sripal (PW8) and Laxman was apprehended by Constable Prem Singh (PW5). He also denied the suggestion that a button actuated knife was recovered from the right side pocket of the trouser worn by Sunny. He also denied the fact that a black coloured bag was found in the hands of Sunny. He went on to deny that Dinesh Tiwari (PW9) had reached the spot and his statement was recorded in his presence and that thereafter a case was registered by Constable Ravinder Bhati (PW7). He, however, accepted his signatures on the recovery memo Ex PW1/A which he said he had signed at the instance of the police at the police station. He denied the suggestion that he retracted from his statement made to the police only to save the appellants. In brief, in his cross-examination by the defence, he stuck to his statement that the boys involved in the robbery were three in number.

6.3 Brij Mohan (PW2) who is the proprietor of Bhagwati Transport Company proved the fact that Dinesh Tiwari (PW9) and Sirajuddin had gone to collect money from the local distributors on his behalf. In his deposition, he stated that on the date of the incident Sirajuddin and Dinesh Tiwari (PW9) had collected a sum of Rs 2,29,826/- from his sub-agents at New Ashok Nagar. He further testified that Dinesh Tiwari (PW9) had informed him over the telephone as regards the loss of money, and thereafter within half an hour had telephoned him again, informing him, that the robbers had been apprehended, and the money had been recovered. PW2 also deposed that he had taken custody of the money on superdari. He proved the bond drawn up for the said purpose being Ex PW2/A, as also the photocopies of currency notes and change (Ex PW2/B). In his cross-examination he largely adhered to the deposition made in examination in chief before the Court. PW2, however, stated in his cross-examination that he saw the bag in the police station at which point in time it was not sealed.

6.4 Nootan Kumar (PW3) proved the fact that on 19.10.2004, Dinesh Tiwari (PW9) and Sirajuddin, who worked for Bhagwati Transport Company, had collected a sum of

Rs 2,29,826/- from him between 11.00 am and 12 noon. He also deposed that a receipt was issued for the said purpose by them.

6.5 ASI Dharambir (PW4) deposed that on 19.10.2004 on receiving intimation vide DD No 11A he alongwith Constable Gajender reached the spot in front of ITI Khichripur, Delhi. At that place he found the appellants in the custody of Constable Prem Singh (PW5), Constable Ravinder (PW7) and Constable Sripal (PW8). He further deposed that they were joined by Inspector V K Sharma (PW10), whereupon he identified the appellants who were present in Court as the persons who were apprehended by the afore-mentioned police officials. He also made a reference to the presence of the public witness Latoor Singh (PW1). He further deposed that the money contained in the bag was counted by Inspector V K Sharma (PW10); whereupon it was revealed that the total money contained in the bag was a sum of RS 2,29,826/-. PW4 further deposed that the button actuated knives were recovered from the possession of both, Laxman, as well as Sunny. He testified that currency notes were sealed with the seal VXKS affixed on the bag in which they were found, and that both were taken possession of vide memo Ex PW1/A. Thereafter, as per the testimony of PW4, the appellants were arrested, and the case property was deposited in the Malkhana. He proved his signatures on the possession memo Ex PW1/A at point B. In his cross-examination he accepted the fact that the currency notes and the knives were not recovered in his presence. He further deposed that the cloth and the sealing material were with the investigating officer. PW4 also stated that the statement of Latoor Singh (PW1) was recorded at that very spot.

6.6 Constable Prem Singh (PW5), Constable Ravinder (PW7) and Constable Sripal (PW8) proved the fact that they were involved in apprehending the appellants. Prem Singh (PW5), particularly adverted to the fact that a black coloured rexin bag containing a sum of Rs 2,29,826/- was recovered from Sunny. He also testified that Latoor Singh (PW1) was also involved in the chase. He identified in court the bag (Ex P1) in which

the currency notes were kept, and the knives [Ex P2 and Ex P3] which were recovered from Laxman and Sunny, respectively. It is important to note, however, that in his cross-examination, Prem Singh (PW5) flatly denied the suggestion made to him that the appellants were in possession of a motor cycle. PW5 was consistent in his deposition in Court, that apart from the appellants there was no other person involved. The testimony of Constable Ravinder Bhati (PW7) and Constable Sripal (PW8) was on similar lines. Head Constable Omvir Singh (PW6) is a formal witness who proved the registration of the FIR (Ex PW6/A).

6.7 Dinesh Tiwari (PW9), who is the star witness of the prosecution on whose testimony the prosecution case is largely pivoted, reiterated in Court what he had stated to the police in the first instance. In nutshell, PW9 stated that on 19.10.2004 while, he alongwith his associate Sirajuddin were proceeding to their office at South Ganesh Nagar, on a scooter on which he was riding pillion, they were waylaid at about 11.00 am, near ITI Khichripur by two persons, who were on a motor cycle. He testified that the two persons crashed their motor cycle into the scooter, on which he was riding with his associate. Resultantly, they fell down. Immediately, the bag containing the currency notes was snatched from him at the point of knife. The duo ran towards Sanjay Jheel. On an alarm being raised, they were chased by the members of the public, and some police officials who stood nearby. After some distance, the duo i.e., the appellants were apprehended, and the bag containing the money was recovered from them. The appellants were taken to the police station. The bag and the money were sealed in a cloth parcel. In Court, he identified the appellants as well as the bag containing the currency notes. He was, however, unable to identify the knives. In his cross-examination, he largely adhered to what has been stated by him in his examination-in-chief. PW9, however, deposed that he was unable to record either the registration number of the motor cycle or the colour of the motor cycle which the appellants had used to waylay him and his associate.

6.8 Inspector V K Sharma (PW10) proved the fact that on receipt of information of robbery, at police station, Pandav Nagar he was directed to proceed to the intimated spot. On reaching the said place, he was met by Constable Prem Singh (PW5), Constable Ravinder (PW7) and Constable Sripal (PW8). He further alluded to the fact that the appellants were found in the custody of the said police officials. He further deposed that Dinesh Tiwari (PW9) and Sirajuddin had also reached the said spot. He also adverted to the fact that on taking a count of the currency notes contained in the bag, which was recovered from the appellants, it was revealed that it contained a sum of Rs 2,29,826/-. PW10 further testified that he took possession of the bag; recorded the statement (Ex PW9/A) of Dinesh Tiwari, and also prepared a site plan at the spot (Ex PW10/B) and the rukka. He further stated that the rukka was despatched by him through Constable Ravinder Bhati (PW7) for registration of the case at police station, Pandav Nagar. In his cross-examination, he expressly denied the suggestion that the appellants were riding a motor cycle which was supposedly used to waylay Dinesh Tiwari (PW9) and his associate. PW10 had accepted the fact that the scooter driven by Dinesh Tiwari (PW9) and Sirajuddin was not seized by him. He also denied the suggestion that the bag which contained currency notes was handed over to him by Latoor Singh (PW1). He denied the version given by Latoor Singh (PW1) that the bag containing the currency notes was thrown at the spot by one of the robbers. He also denied the suggestion that the appellants were not apprehended from the spot but were taken into custody from their houses and falsely implicated in the case.

7. On an analysis of the testimony of the evidence placed before Court by the prosecution the following points clearly emerge. The factum of the robbery having been committed has been clearly proved by PW9. To that extent, the testimony of Latoor Singh (PW1) is in line with the testimony of Dinesh Tiwari (PW9). The only point of difference, which is relevant from the point of view of the appellants, is that, Latoor Singh (PW1) has stated firstly, that three persons were involved in the robbery; and

secondly, that the currency notes were found in a black coloured cloth bag. In contradistinction, Dinesh Tiwari (PW9) has adverted to the fact that only two persons were involved in the robbery and the currency notes were recovered from them which were found in a black coloured rexin bag. The factum of apprehension of the appellants has also been proved by Constable Prem Singh (PW5), Constable Ravinder Bhati (PW7) and Constable Sripal (PW8). Therefore, it is quite obvious that Latoor Singh (PW1) who turned hostile had introduced two foreign elements into the case i.e., involvement of a third person and the fact that the currency notes were found in black coloured cloth bag only to derail the case of the prosecution. The testimony of Dinesh Tiwari (PW9) when contrasted with that of Latoor Singh (PW1) on these two aspects seems natural and hence, can be relied upon. The testimony of Dinesh Tiwari (PW9) is also backed by the testimony of other police personnel i.e., Constable Prem Singh (PW5), Constable Ravinder Bhati (PW7) and Constable Sripal (PW8) who were involved in the chase and were responsible for finally apprehending the appellants. There is no good reason to disbelieve the testimony of Constable Prem Singh (PW5), Constable Ravinder Bhati (PW7) and Constable Sripal (PW8). The defence has not been able to set up a case of any ill-will and animosity of the said police personnel against the appellants.

8. In these circumstances, I am quite persuaded to discard that part of the testimony of Latoor Singh (PW1) wherein he has adverted to the fact that a third person is involved in the robbery, and that the black coloured cloth bag in which the currency notes were found was thrown on the ground by one of the robbers who escaped being apprehended.

9. The fact that Dinesh Tiwari (PW9) had referred to the appellants using a motor cycle to waylay him and his associate while they were riding the scooter on the way to the office is, in my view, not material for the reason that the core aspect of the case, which the prosecution has been able to prove, is that Dinesh Tiwari (PW9) and his associate were waylaid by the appellants after the scooter on which Dinesh Tiwari (PW9) and Sirajuddin were riding, was stopped and the bag containing the money was

snatched, and thereafter on being chased, the appellants were caught red handed with the bag containing the currency. These ingredients are sufficient to prove the charge against the appellants. The fact that a reference is made by Dinesh Tiwari (PW9) to a motor cycle being used by the appellants in committing the robbery will not, in my view, dilute core aspect of the case set up by the prosecution. It is to be noted that in the first statement (Ex PW9/A) of Dinesh Tiwari (PW9) recorded by the police there was no reference to the motor cycle. Dinesh Tiwari (PW9) in his testimony in court may have over stated his case or this may have been a case of inept or defective investigation but that by itself cannot enure to the benefit of the defence (See *Dhanaj Singh vs State of Punjab AIR 2004 SC 1920*, *Amar Singh vs Balwinder Singh & Ors. (2003) 2 SCC 518* and *Allarakha K. Mansuri vs State of Gujarat: AIR 2002 SC 1051*). This, in my view, will not inject a doubt in the case set up by the prosecution, so as to persuade me to completely reject the testimony of Dinesh Tiwari (PW9). This is more so when regard is had to the testimony of Brij Mohan (PW2) who deposed that on 19.10.2004 Dinesh Tiwari (PW9) and Sirajuddin had been assigned the task of collecting the money from Sahu Agency at New Ashok Nagar, and that within half an hour or so, he was informed that they had been robbed. The fact that the money had been handed over to Dinesh Tiwari (PW9) and his associate Sirajuddin on 19.10.2004 by the sub-agents of Sahu Agency is also proved by Nootan Kumar (PW3). In these circumstances, there is no reason to disbelieve Dinesh Tiwari's (PW9) testimony with regard to the robbery having been committed as also the factum of the chase and its culmination in the apprehension of the appellants.

9.1 As regards the submission of the learned counsel for the appellants that because Sirajuddin was not examined, doubt ought to be cast on the prosecution's case; I am of the view that even this submission is without merit. The reason being, no such suggestion was made by the defence to the prosecution's witness, in particular, the investigating officer Inspector V K Sharma (PW10). It is well settled that it is not

necessary for the prosecution to examine each and every witness if it is of the view that the witnesses produced by them, alongwith other evidence which is placed on record would be sufficient for establishing their case in Court against the accused. [See **Amar Singh vs Balwinder Singh (2003) 2 SCC 518 at page 531-533, paragraph 16-18 and Bhima @ Kale vs State Crl A. No. 238/2000 dated 05.11.2009**].

9.2 The other submission of the learned counsel for the appellants that no case was instituted against Sunny under Section 25 of the Arms Act, 1959 and hence, the trial court ought to have concluded that the entire case was fabricated is, in my view, once again untenable. In so far as Laxman is concerned, as observed by the trial court, he had already been acquitted vide judgment dated 31.10.2007 on the basis of being extended the benefit of a technicality. It is quite possible that the prosecution realizing that the same technical issues may come in their way vis-à-vis Sunny; may have decided not to initiate prosecution against Sunny under Section 25 of the Arms Act, 1959. From this, it cannot possibly be concluded that the entire case of the prosecution with regard to the incident was false and fabricated.

9.3 The last submission of the learned counsel for the appellants that since the appellants had been acquitted of the charge under Section 397 of the I.P.C on the ground that Sirajuddin was not examined is on a closer reading of the observation made in paragraph 45 of impugned judgment, only an ancillary reason. The main reason for acquitting Laxman of the charge under Section 397 is that Dinesh Tiwari (PW9) was unable to identify the knives allegedly recovered from the appellants. In so far as Sunny is concerned, he was acquitted of the charge under Section 397 of the I.P.C. on the ground that the charge had been inadvertently framed against him as Dinesh Tiwari (PW9) in his statement Ex PW9/A had stated that Laxman had used the knife to threaten him. The only role which Dinesh Tiwari (PW9) attributed to Sunny was that he had snatched the bag containing the money. In the opinion of the trial court, charge against Sunny under Section 397 of the I.P.C. could have been framed only if Sunny had used

the knife to threaten Dinesh Tiwari (PW9). Therefore, in my opinion, the submission is without merit as the fact that Sirajuddin was not examined by the prosecution was really not material, or relevant for the trial court to come to a conclusion that no charge against the appellants could be made out under Section 397 of the I.P.C. In view of the discussion above, I am of the opinion, as observed above, the prosecution has been able to make out a case against the appellants beyond a reasonable doubt. Accordingly, the trial court judgment is sustained. The appeal is dismissed. The appellants shall be taken into custody forthwith.

RAJIV SHAKDHER, J

DECEMBER 18, 2009
mb