

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

Crl. Appeal No. 757/2007

Date of reserve: 20.11.2009

Date of decision: 05.12.2009

GHANSHYAM @ BABLU

...APPELLANT

*Through: Mr. Sumeet Verma, Amicus
Curiae*

Versus

STATE

...RESPONDENT

Through: Mr. Naveen Sharma, APP

With

Crl. Appeal No. 489/2007

AVDHESH @ AKHLESH SINGH

...APPELLANT

Through: Ms. Rakhi Dubey, Amicus Curiae

Versus

STATE

...RESPONDENT

Through: Mr. Naveen Sharma, APP

With

Crl. Appeal No. 570/2007

RAJU @ KATUWA

...APPELLANT

Through: Ms. Anita Abraham, Amicus Curiae

Versus

STATE

...RESPONDENT

Through: Mr. Naveen Sharma, APP

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

1. This common judgment shall dispose of the aforesaid three appeals filed against the judgment delivered by the Additional Sessions Judge, dated 10.04.2007 in Sessions Case No. 89/06 arising out of the FIR bearing No. 560/2003 of P.S. Ashok Vihar whereby, the Additional Sessions Judge has convicted all the appellants under Section 395/ 397 IPC vide order dated 10.04.2007 and has been pleased to sentence all of them to undergo RI for 07 years with fine of Rs.2000/- each and in default of payment of fine, further undergo additional RI for 02 months each vide order dated 10.04.2007.

2. In nutshell the case of the appellant is that the prosecution has not been able to prove its case beyond reasonable doubt. The evidence led by them suffers from number of infirmities and is not trustworthy. The judgment is also not legally sustainable for the reason that the reliance placed upon testimony of PW-1 and PW-7 regarding identification of the appellants is not reliable inasmuch as, all the appellants were shown by the Police to the witnesses before sending them to participate in test identification parade. This is fortified from the fact that none of the appellants were arrested at the spot. It has come in the evidence of the witnesses, that despite arrest of the appellant Ghanshyam @ Bablu and Raju @ Katuwa on 01.04.2004, they were produced for TIP only after a week or so in unmuffled face. Their photographs were also shown to the witnesses which washes away the evidentiary value of their identification in TIP proceedings . Refusal by one of the appellant to participate in TIP in the circumstances as disclosed is not fatal and cannot be used against him. As regard to the recovery of the briefcase at the instance of appellant Avdhesh @ Akhlesh Singh it has been submitted that the said recovery also cannot be used against appellant inasmuch as even though briefcase is mentioned as part of the robbed articles, there is nothing which may identify the briefcase so as to make it distinct. Regarding the contents of the briefcase it is submitted firstly that there is nothing mentioned about the contents of the briefcase in the list and secondly no public witness has been associated with the recovery. The

preparation of the list of articles after the arrest of Avdesh and non recovery thereof on the first day of his remand also cast serious doubt on the said recovery. It is also submitted by the appellants that in the facts of this case, no case under Section 395 IPC was made out as only three persons have been arrested whereas Section 395 IPC requires involvement of at least five persons. As regard to minimum punishment awarded under Section 397 IPC it has been submitted no weapon was recovered at the instance of the appellants and further evidence of the labourers who were present at the spot at the time of the incident as deposed by PW-7 Anjum Arora has not been led to support the case of the prosecution, in fact none of them even examined. It is also stated that the appellants are already in jail for a period of almost 6 years and therefore, even otherwise they are entitled to be released.

3. On the other hand, learned APP has stated that prosecution has proved its case beyond reasonable doubt in as much as all the three appellants have been identified by PW-1 Raghuvansh Arora and PW-7 Anjum Arora who is also the complainant. PW-7 has also identified the briefcase Ex. P-1 recovered at the instance of the appellant Avdesh @ Akhlesh Singh, which was one of the article mentioned in the list submitted by the complainant taken away by the accused persons. The said briefcase also contained visiting cards etc. which relates the said briefcase to the complainant. It is also submitted, that Raju @ Katuwa was identified by both the witnesses even during the course of the TIP proceedings while in respect of all of those refuse to participate in the TIP adverse inference has rightly been drawn. It is also submitted that it is the case of the complainant that five persons have come in their factory for the robbery/ dacoity who all were having desi katta and knife and therefore, the conviction of the appellants was correctly done by the trial Judge under Section 395 IPC. Since deadly weapon was used their sentence under Section 397 IPC is fully justified.

4. To understand the controversy between the parties it would be appropriate to refer to the complaint filed by the complainant PW-7 Sh. Anjum Arora which is Ex PW-7/A

and which is also the basic of registration of the FIR.

5. In the said complaint the complainant has stated, that they have been running a factory for manufacturing plastic toys at shed no. 59, W.P.I. A.. On that day at about 7:40 p.m. when he along with his father was present at their factory along with their workers and were working in the factory, five persons armed with desi katta's and knife came to the 2nd Floor of the factory and threatened them to deliver the cash amount collected on that day, on which they responded that they do not have any cash amount. One of them opened the drawer of the table but nothing was found therein. Thereafter, one of them placed a katta on his head and another person placed katta on the head of his father and another person started threatening their laborers on the point of katta and fourth person snatched his citizen watch, one gold kada, one gold diamond ring, one gold chain and Rs.2500/- besides one lighter and his mobile phone Nokia No. 9810011067 and snatched from the person of his father one gold chain with locket and 4 gold rings besides Rs.3200/- and his mobile phone Motorla No. 9810029290 besides one black briefcase as lying on the table. One more boy was having katta and was standing at the stairs. All of them on hearing whistle left from the spot after giving them the threatening not to lodge complaint with the police.

6. The police registered the FIR bearing no. 560/2003 under Section 395 IPC at P.S. Ashok Vihar on 07.10.2003. The case was investigated by PW-10 SI Sanjay Goshwami. Initially accused Avdhesh @ Akhlesh Singh only was arrested on the same day and at his instance a briefcase Ex.P-1 was also recovered. Challan was filed after completing the investigation. It is thereafter, the other appellants were also arrested. The appellant denied the charges as framed against them under Section 392/ 395/ 397 IPC. In view of the aforesaid, prosecution examined 12 witnesses including PW-1 Raghuvansh Arora and PW-7 Anjum Arora, the complainant who was the eye witness of the incident. PW-2, PW-3, PW-4, PW-5, PW-6 and PW-8, PW-9 and PW-11 are formal witness and their deposition is informal in nature. PW-10 is IO of the case while PW-12 Ms. Archana

Sinha is concerned Metropolitan Magistrate who has conducted the TIP. After the evidence of the prosecution, appellants were examined under Section 313 Cr.P.C. At that time also they denied the allegations which were put to them and claimed to be innocent. They have not produced any defence witness.

7. All the submissions made before me in this appeal were also raised before the Addl. Sessions Judge during the course of trial. However, the learned Addl. Sessions Judge has simply brushed aside all the contentions raised on behalf of the appellant. Some of the observations made by the Trial Court in the course of its judgment and which are appropriate to understand the mind of the learned ASJ are reproduced hereunder. In para 11 of the judgment it has been stated by the learned ASJ that:

“I do not find any force in the submission of Ld. Amicus Curiae to the effect that depositing of PW-1 Raghuvansh Arora and PW-7 Anjum Arora cannot be treated as trustworthy and reliable. As from the deposition of PW-1 Raghuvansh Arora and PW-7 Anjum Arora, it is clearly reflected that they have specifically identified these three accused, namely, Raju, Ghanshyam and Avdhesh, who along with their two associates have committed robbery at their factory on the point of kattas and knife and narrated about their specific role also. Accused Avdhesh has been duly identified as the person, who placed katta on the head of PW-1 Raghuvansh Arora and forcibly took out ring and in that process also gave a fist blow on his head. Accused Raju has been duly identified as the person, who placed katta on the head of PW-7 Anjum Arora and the accused Ghanshyam has been identified as the person, who pointed out katta towards their labourers threatening them not to move. Furthermore, it is also reflected from the case record that the accused Avdhesh and Raju were duly identified by the witness in the TIP Proceedings, however, accused Ghanshyam refused to participate in the TIP proceedings. I do not see any reason to disbelieve the deposition of PW-1 Raghuvansh Arora and PW-7 Anjum Arora on the material aspect specifically when it is not even the stand of the accused that said PWs were having any motive to falsely implicate them in this case.”

8. Regarding Ghanshyam and Raju the Addl. Sessions Judge has refuted the submission made by the appellants that since there was no recovery at their instance and their identity was in dispute, in this regard, the Trial Court relying upon the judgment delivered in the case of 2002 (6) SCC 81 has stated as under:

“It is quality of evidence that matter and not the number of witnesses. Credible evidence of even a solitary witness can form basis of conviction. The contradictions, inconsistencies, exaggeration of embellishment are inevitable.”

9. It has been held by the Addl. Sessions Judge that testimony of PW1 Raghuvansh Arora and PW7 Anjum Arora concerning commission of dacoity corroborates each other's testimony. The recovery of stolen briefcase containing certain papers of the complainant at the instance of accused Avdhesh adds credence to their testimony. It is also stated that these witness had no enmity with the present appellants. Moreover, it has also been mentioned that the report filed by the prosecution goes to show that one worker, namely, Parsi S/O Kansi Ram, who was stated to be present at the spot, was examined by the I.O. and was cited as a witness but he could not be examined before this court as his present whereabouts could not be known and, therefore, the same cannot be treated as fatal for the case of the prosecution.

10. Learned counsel appearing for the appellants have seriously assailed the findings returned by the learned trial court for various reasons. One of the common arguments raised by all the three counsels is that in the present case, no offence is made under Section 395 IPC for the simple reason, that the said offence requires involvement of at least five persons for having participated jointly for committing offence in the present case. It has been further submitted that only three persons were arrested, no particular of the other two persons are available with the prosecution nor they have been arrested or brought before the court. It is, thus, submitted that he was under Section 395 IPC cannot be sustained. Reference has been made to a judgment of Hon'ble Supreme Court AIR 1983 S.C. 352. It has been submitted that neither in the FIR nor in the testimony of the witnesses PW-1 and PW-7 any thing has been brought to prove involvement of five persons in the alleged crime.

11. The second point raised by the appellant is that the identity of the appellants has not been established on record in accordance with law inasmuch as two of the accused persons, namely, Raju @ Katuwa and Ghanshyam @ Bablu were arrested in this case on 01.04.2004 i.e. almost after 6 months of the incident. The testimony of the witnesses also shows that the appellants including appellant Avdhesh has been shown to the witnesses

much earlier and holding their identification parade.

12. It would be appropriate to take note of deposition of PW1 and PW7 in this regard.

Regarding Avdhesh, Raghuvarsh Arora PW1 states as under:

“I was informed by the police after 2 - 2.5 months that I should go to identify the accused. Police have informed the name of the accused which I do not remember. Police have come to me during day time to inform the name of the accused.”

I was shown some photographs of the suspects by the crime team when they came on the second day of the incident. Apart from this another photograph bundle was also shown to me.

13. Same is the testimony of PW7 Anjum Arora who stated that:

On the next day I was taken to the Police Head Quarter where the police prepared portrait of some persons. Police also showed some dossiers of criminals.

On 08.01.04 one of the accused whose name was Avdesh was arrested. I was called by the police and I was taken outside the police station Ashok Vihar. There accused Avdhesh was present. On seeing him I identified him as one of the robbers.”

14. Regarding the case of Avdhesh the appellant's counsel has also submitted that even the recovery of briefcase is unsustainable for the reason that according to PW5 Constable Chander Hash Avdhesh was arrested on 23.12.2003 i.e. on the same day when he had taken the rukka. Thereafter, he has stated that in fact the said appellant was arrested on 08.10.2003. As per the Police Rules whenever a police official enters or departs, it is mandatory to make their entry in D.D. Register. However, that has not been done in this case by PW5. No copy of the DD entry regarding his coming to the Police Station either on 23.12.2003 or on 08.10.2003 has been placed on record. Thus, it has been rightly submitted that this is a serious lapse and confusion created by the said witness which creates doubt on his testimony. This testimony also makes the recovery of briefcase doubtful at his instance of Avdesh for the reason that if the appellant was arrested on the same day i.e. the date of the incident recovery of a briefcase at his instance should have been effected on the same day. Preparation of a list after 4 days would create a doubt. The appellant Avdhesh was given in Police remand for 5 days.

The appellant was taken to Bihar to recover the robbed articles. However, the local Police of Bihar gave a clean chit about his character on 06.01.2004. Thus, when the Police was unable to recover anything the counsel for the appellant has rightly submitted that a disclosure was obtained by the Police so as to involve him in this case and the recovery of briefcase at his instance was fabricated. This becomes more important because house of the appellant Akhlesh is simply at a distance of ½ Km from PP WPIA, Delhi. It is not understood if disclosure of the appellant was to be made voluntarily why the briefcase could not be recovered voluntarily on the first day of his arrest. In fact, the position becomes more clear if one go by the testimony of PW6 Avdhesh Singh who has stated that no recovery was effected from accused Ghanshyam and Avdhesh in this case after recording their disclosure statement. It is a matter of record that no public witness has joined the recovery proceedings. Both PW1 and PW7 have also stated that the briefcase which has been recovered is easily available in the market.

15. As far as identification of accused Ghanshyam is concerned, it has come on record that his TIP was to be held on 13.04.2004. He was arrested on 28.03.2004 and was produced in the Court on 01.04.2004 with an unmuffled face. His photographs has been taken and shown to some persons. In any case from 01.04.2004 to 13.04.2004 the possibility of photographs of the appellants being shown to the witnesses cannot be ruled out. It is also not the case of the prosecution that he was brought in a muffled case when he was called for TIP. In these circumstances, no adverse inference can be drawn for the said appellant for having refused to participate in the TIP. Similarly, in the case of Raju @ Katuwa TIP took place on 07.04.2004 i.e. 7 days after the formal date of arrest. It has been submitted on behalf of the appellant that the appellant had been arrested on 28.03.2004 and was kept in illegal custody. The purpose of the said detention was to ensure that their identification by the witnesses is obtained prior to their appearance in the Court. It has been submitted that delay of 4 days in conducting the TIP is fatal to the case of the prosecution. Reference has been made to the judgment delivered by the Supreme

Court in the case of Bali Ahir V. State of Bihar, 1983 CriLJ 434 (SC). Moreover, reference has been placed on 3-Bench judgment, Muthuswami v. State of Madras, AIR 1954 SC 4. It has been stated that PW-1 has admitted that he has also shown the photographs of suspects by the crime team on the second day of the incidence. In this regard PW-1 also deposed 8-10 days prior to the identification of the appellant Raju @ Katuwa, the investigation officer also informed the complainant about the arrest of the appellant. Thus, carrying out proceedings of identification on the part of the prosecution. It has also been submitted, that nothing has been brought on record to show, the appellants were in possession of any deadly weapon a prerequisite invoking under Section 397 IPC no such weapon has been recovered.

16. It has been specifically argued that despite allegation of the complainant that the said appellant pointed out katta towards the labourer, threatening them not to move, none of the labourers have been examined nor their statements under Section 161 Cr.P.C. have been recorded. Coupled with this fact that there is no recovery effected from the said appellant and his arrest after six months in another case under the Arms Act just on the basis of the disclosure statement of one of the co-accused and has been falsely implicated in this case. The appellant refused TIP on 13.4.2004 on the plea that he was arrested on 29.3.2004 and was produced in the court on 01.04.2004 and his photographs had been taken and shown to the witness which has been blemished side and no importance has been given though this was a fact and delay which has been taken place from 01.04.2004 to 13.04.2004 in holding the TIP to give justification to the submission made by the appellant that it was a case of false implication. Regarding minimum sentence awarded to him under Section 397 IPC it has been submitted, that there being no recovery of weapon, therefore, offence under Section 397 IPC could not be made out reference has been made in judgment Rakesh Kumar Vs. State of NCT (2005 (1) JCC 334). Reference has also been made in another judgment Charan Singh Vs. State [1988 CrL. L. J. NOC 28 (Delhi)].

17. It is the common case of the appellants that they have already completed 06 years out of sentence awarded to them of 07 years. The case that the prosecution is not trustworthy no case is made out against all of them under Section 395 IPC and therefore the appellants who were not even arrested at the spot could not be held guilty as has been done by the Sessions merely recovery of briefcase is not unique and is easily available in the market.

18. Insofar as the plea taken by the appellant that offence under 395 IPC is not made out is not of much consequence because even if appellants are to be convicted under Section 392 IPC they can also be convicted with the help of Section 397 IPC because of using deadly weapon. However, in the present case what is more important is that for the reason stated above neither the identification of the appellants is trustworthy nor the recovery of the briefcase at the instance of Avdhesh is reliable. It is also a matter of record that no weapon of offence has been recovered from either of the appellants despite their having made an alleged disclosure statement. Even recovery of any robbed article has also not been made from the appellants except for the briefcase at the instance of Avdhesh Kumar which is easily available in the market and as such is unbelievable also for the reason that the said briefcase was not recovered on the date of his arrest but has been recovered after a week and in the meanwhile Police had obtained a list of robbed articles which includes the briefcase also. Even then the contents of the briefcase have not been included. The non-examination of the labour who were present at the spot is also fatal to the case of prosecution inasmuch as it is for the prosecution to prove their case. If any witness is not available and cannot be produced then the benefit has to be given to the appellants only and not to the prosecution.

19. Insofar as their conviction under Section 397 IPC is concerned, in the absence of any recovery of the deadly weapon at the instance of the appellants, punishment for 7 years cannot be sustained. Reference can be made to the judgment delivered by this Court in the case of Rakesh Kumar Vs. The State of NCT of Delhi. Some observation

made in that case are reproduced hereunder:

2. Mr. Sumeet Verma learned Amicus Curiae representing the appellant has pressed only one submission in support of the appeal though the grounds of appeal challenged the conviction on several grounds. The ground now being pressed is that at best the case than can be said to have been made out against the appellant under Section 392 IPC, but not under Section 397 IPC. The basis of this contention is that according to the prosecution case, the appellant had used a deadly weapon, i.e. a knife while committing robbery along with his accomplices, but the prosecution has not been able to establish that the knife used by the appellant was in fact a deadly weapon within the meaning of the term appearing under Section 397 IPC. In support of his contention, he has placed reliance on a decision of this Court in the case of Charan Singh v. The State 1988 Cr.L.J. NOC 28 (Delhi) wherein the Court considering a similar situation held that in the absence of recovery of knife, which was allegedly used at the time of commission of the robbery/dacoity, it cannot be presumed that the knife so used was a deadly weapon. The Court observed as under in this regard:-

“At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under S.397 the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make knife deadly is its design or the method of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved by the prosecution that the knife used by the accused was a deadly weapon. In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of S.397. The accused could be convicted under S.392.”

3. On the other hand, Mr. Sunil K. Kapoor appearing for the State has submitted that the Trial Court returned a positive finding about the appellant having used a deadly weapon at the time of commission of the robbery and, therefore, a case under Section 397 is squarely made out. Mr. Kapoor has vehemently urged that in view of the statement of PW-3, learned Court was fully justified in recording conviction against the appellant under Section 397 IPC.

4. This Court having considered the facts and circumstances of the case, and the material brought on record and the submissions made on behalf of the parties is of the view that since in the present case, prosecution has not been able to establish the dimensions of the knife and to recover and produce the same at the time of trial, it will not be appropriate to raise a presumption that the knife so used by the appellant was in fact a deadly weapon within the meaning of the term. There are knives of hundreds of type available in different length and width. It is true that PW3 in his examination stated that it was a butcher's knife which was used by the appellant. But in the cross-examination, he could not give the exact description or the length of the said knife. He has only stated that the length of the knife was more than 6". The prosecution in this case has not tried to find out and record the length or the description of the knife whether it was a spring operated knife (batandar) or a large knife which can be considered to be a deadly weapon within the meaning of the term used under Section 397 IPC. The Court is, therefore, of the considered opinion that even though the sentence of the appellant for the offences under Section 392 IPC is based on the material brought on

record, the conviction of the appellant for the offences under Section 397 IPC cannot be upheld and the appellant is entitled to benefit of doubt on that count.

5. In the result, the appeal is partly allowed. While maintaining the conviction of the appellant for the offences under Section 392 IPC, the conviction of the appellant under Section 397 IPC is hereby set aside. The appellant was awarded 7 years rigorous imprisonment for the offence under Section 397, out of which, he has already undergone a sentence of almost 6 years and 8 months and, therefore, this Court is of the opinion that ends of justice will adequately be met if the sentence of the appellant is restricted to the period already undergone by him and that would be considered to be a sentence awarded to him under Section 392 IPC.

20. Much emphasis has been laid by the Id. App that all the three appellants were identified by PW-1 and PW-7 who had no enmity with them. However, it is not the case of the prosecution that they knew the appellants prior to the date of incident. As such on account of highly suspicious way of holding their Test Identification Parade, their deposition of identification of the appellants becomes doubtful. Taking all these facts into consideration, I am of the considered view that the conviction of the appellants cannot be sustained in this case as the prosecution has failed to prove its case beyond reasonable doubt. Accordingly, all the three appeals are allowed. A copy of this order be sent to the Jail superintendent who would release the appellants forthwith if not wanted in any other case. A copy of the order be also sent to the trial court along with the trial court record, if any.

21. The fee of all the amicus curiae is fixed at Rs. 4000/- each.

MOOL CHAND GARG, J.

DECEMBER 05, 2009
ag/bm