

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

Judgment Reserved on: 04th December, 2009
% *Judgment Delivered on: 10th December, 2009*

+ **CRL.A.18/2008**

SURESH Appellant
Through: Mr.Rajesh Mahajan, Adv.

versus

THE STATE (N.C.T. OF DELHI) Respondent
Through: Mr. Manoj Ohri, APP for State

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. Mohd. Shahbuddin PW-3 is the complainant. On 23.10.2005, at about 5 PM, while he was going to Laxmi Nagar on reaching near the Ganda Nala, Nangla Basti, Nehru Stadium, he was accosted by four boys; one of the said four boys slapped him; the second gave him a blow with a fist; the third showed him a knife and the fourth caught hold of him from behind. Mohd. Shahbuddin was robbed of about Rs.2000/- cash lying in his pocket; this amount was removed by the person who had showed the knife; the money was then handed over to his co-accomplices. On the basis

of the aforesaid allegations complaint Ex.PW-3/A was lodged. The rukka was dispatched at 7.30 PM i.e. within two hours of the incident.

2. The person who had brandished the knife was apprehended at the spot. Other persons had managed to flee. Appellant before this Court i.e. Suresh was the person who had been apprehended at the spot; he was the person who was having the knife. The knife was recovered from his person which was taken into possession vide recovery memo Ex.PW-3/C; sketch of the knife Ex.PW-3/B was prepared.

3. The star witness of the prosecution is the complainant Mohd.Shahbuddin who has been examined as PW-3. In his deposition on oath he has stated that when he was going towards Laxmi Nagar he was attacked by four persons; Suresh the appellant had showed him a knife; one of the accomplices had slapped him; other had given him a fist blow; another caught hold of him from behind; he was robbed of Rs.2000/- by the appellant who had taken out his money from his pant pocket and handed it over to his accomplice. This amount was subsequently recovered from the co-accused.

4. PW-3 is categorical in his deposition; he has stated that

“.....Accused Suresh fell down and he was apprehended by me with the help of some passersby.

Some public person made a telephone call to police. Police came to the spot and recorded my statement Ex.PW-3/A which bears my signatures at point A. On search of accused Suresh one knife was recovered from his possession.”

In his cross-examination he had stated that one of the four persons was having a knife which was shown to him. PW-3 was alone at that time; he was threatened by the knife by the assailant; at the time of incident he had seen all the assailants properly; the length of the knife was extending up to his wrist. He denied the suggestion that he had identified the co-accused at the instance of the Investigating Officer and they were not present at the spot.

5. This witness is clear, categorical and cogent. He has specifically attributed a role to each of the four accused persons. Appellant before this Court was the person who was holding the knife by virtue of which he had threatened the complainant and robbed him of his Rs.2000/-. Description of the knife had also been given by PW-3; the same was extending right up to his wrist; sketch of the knife Ex.PW-3/C shows that it is 32 cm in length having a handle of 17 cm and blade of 15 cm. This knife is a 'deadly weapon' within the meaning of Section 397 of the IPC; there is no dispute about this proposition. No argument has been addressed on this score.

6. Learned defence counsel has argued that version of PW-3 shows that the appellant had fallen down and he had been

apprehended him with the help of some passersby; police had been summoned; on the search of the appellant knife was recovered. This version of PW-3 as per learned defence counsel substantiates his submission that the knife had been recovered from the appellant after the police had reached the spot; this version is, however, not in consonance with the version as set up by the other witnesses of the prosecution namely PW-4 Ct.Rajender Singh, PW-5 ASI Ajay Tyagi and PW-6 H.C.Krishan. Attention has been drawn to their versions. PW-4 had deposed that PW-3 had handed over the knife which was reported to be recovered from accused Suresh. PW-5 had deposed that PW-3 had produced Suresh along with the knife and told him that Suresh had robbed him of Rs.2000/- at the point of knife. PW-6 has deposed that PW-3 had produced Suresh along with knife to the ASI and had stated that the accused had robbed him of Rs.2000/- at the point of knife. It is submitted that these versions of PW-4, PW-5 and PW-6 are at variance with the version of PW-3 and whereas PW-3 has stated that after the police had reached the spot, the accused had been apprehended and the knife had been recovered subsequently but this does not match the testimony of PW-4, PW-5 and PW-6 who have spoken otherwise. Their version being to the effect that the knife had already been recovered by the complainant when the police had reached the spot. This is a material discrepancy throwing shadows of doubt on the recovery of the so-called deadly

weapon, entitling the accused to a benefit of doubt qua the offence under Section 397 of the IPC. It is submitted that even assuming the version of PW-3 to be the gospel truth, at best, the offence, in view of the aforestated version, would be an offence under Section 392 of the IPC and the ingredients of Section 397 of the IPC are not made out.

7. These arguments have been rebutted by learned counsel for the State. Attention has been drawn to the first statement of the complainant Ex.PW-3/A which had formed the basis of the rukka. Attention has also been drawn to the seizure memo Ex.PW-3/C of the knife. It is submitted that the case of the prosecution all along has been that the accused had been apprehended by PW-3 and the knife already stood recovered from his possession which he had then handed over to the police personnel when they had come to the spot.

8. Record has been perused. It is the version of PW-3 which has to be scrutinized and examined by this Court to determine the question as to whether the appellant is guilty of an offence punishable under Section 392 of the IPC or an offence under Section 397 of the IPC.

9. Under Section 397 of the IPC the prosecution must establish:-

(i) The commission of robbery and dacoity;

(ii) That the accused used the deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt;

(iii) The above acts were done during the commission of robbery or dacoity

10. In this case ingredients nos. (i) & (iii) stand established. The Court has to examine as to whether ingredient no.(ii) i.e. the use of the deadly weapon by the appellant stands established or not. Testimony of PW-3 has to be read in its entirety and as a whole; a stray sentence picked up from here and there cannot and does not become the test to determine the gist of what is sought to be stated by the said witness.

11. Witnesses, as Bentham said, are the eyes and ears of justice. They are the importance and primacy of the quality of the trial process. The evidence has to be tested for its inherent consistency and the inherent probability of the story, consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts to the 'credit' of the witnesses; their performance in the witness box; their power of observation etc. In appreciating the evidence of a witness, the approach of the court must be to see whether the evidence of a witness as a whole is reliable and has a ring of truth.

12. PW-3 on oath has narrated the incident in the same manner in which it has been depicted in his first complaint Ex.Pw-3/A. He is categorical that the present appellant was the person who had

showed him a knife and robbed him of his Rs.2000/- which he had handed over to some other associate. Thereafter appellant had fled away from the spot. He was chased by PW-3 and with the help of the passersby he was apprehended. Telephone call was made to the police. From the search of the appellant a knife was recovered. Merely because the complainant in his deposition on oath has preceded his version by first stating that his statement Ex.PW-3/A was recorded bearing his signatures at point A and thereafter in the next line he has stated that a knife was recovered from the search of Suresh would not dispel the version of the prosecution which is that the accused had already been apprehended by the appellant, the weapon i.e. the knife had been taken from him pursuant to which the police had reached the spot. This is clear from the reading of the testimony of PW-3; at the cost of repetition one sentence picked up from one stray corner is not enough to deduce what the witness is trying to convey. This is further clarified in the cross-examination of PW-3 wherein he has stated that

“.....I was threatened with the knife by the assailants at the time of incident. I remained present at the spot till 1 pm. Police had reached at the spot after about half an hour of the incident.”

13. Version of PW-3 is wholly consistent and corroborative of the versions of PW-4, PW-5 and PW-6. The case of the prosecution as set up by the prosecution is that PW-3 was the person who had apprehended the appellant with the help of some passersby; the

knife had been taken from him; police had thereafter reached the spot. There is no inconsistency. This arguments is of no help to the appellant. Ingredient no. (ii) of Section 397 of the IPC also stands established.

14. In the alternate, learned defence counsel has argued that the appellant should be granted benefit of probation. Appellant has suffered a long and protracted trial and the incident being of the year 2005; out of the seven years of imprisonment which had been awarded to him; the nominal roll of the appellant shows that the appellant has already undergone a sentence of almost five years. Reliance has been placed upon a judgment of the Supreme Court reported in Masarullah vs. State of Tamil Nadu 1983 SC (Cri) 84 wherein in a case under Section 397 of the IPC keeping in view the factual position therein the appellant had been released on probation.

15. For an offence punishable under Section 397 of the IPC, there is a minimum punishment prescribed which is imprisonment of not less than seven years as also fine. In Masarullah's case (supra), the Supreme Court had granted the benefit of probation to the appellant who was less than 21 years of age as on the date of the offence. The report of the Probation Officer had been called and keeping in view the circumstances as had been detailed in the report of the Probation Officer coupled with the fact that the appellant being less than 21 years of age on the date of offence, he

had been granted benefit of probation. These factual circumstances are not applicable to the facts in hand.

16. Appellant was admittedly around 29 years of age as on the date of the offence; as on date he would be about 34 years. No ground is made out for the grant of the benefit of probation to the appellant. There is minimum punishment which has been prescribed by the legislature; this court is not inclined to modify the sentence. The appellant stands convicted under Section 397 of the IPC. Appeal is without any merit; it is dismissed.

(INDERMEET KAUR)
JUDGE

10th December, 2009
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