

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

Judgment reserved on: April 06, 2010
Judgment delivered on: April 23, 2010

+ **CRIMINAL APPEAL NO.303/2000**

GUDDU **....APPELLANT**

Through: Mr. Sumeet Verma, Amicus Curiae/
Advocate

Versus

STATE **.....RESPONDENT**

Through: Mr. Pawan Sharma, Standing Counsel
with Ms. Laxmi Chauhan, Advocate

WITH

CRIMINAL APPEAL NO.55/2000

SANJU **....APPELLANT**

Through: Mr. Sumeet Verma, Amicus Curiae/
Advocate

Versus

STATE **.....RESPONDENT**

Through: Mr. Pawan Sharma, Standing Counsel
with Ms. Laxmi Chauhan, Advocate

WITH

CRIMINAL APPEAL NO.119/2000

TARA CHAND **....APPELLANT**

Through: Mr. Rajesh Mahajan, Advocate

Versus

STATE **.....RESPONDENT**

Through: Mr. Pawan Sharma, Standing Counsel
with Ms. Laxmi Chauhan, Advocate

AND

CRIMINAL APPEAL NO.498/2001

MUKESH

....APPELLANT

Through: Ms. Ritu Gauba, Amicus Curiae/Advocate

Versus

STATE

.....RESPONDENT

Through: Mr. Pawan Sharma, Standing Counsel
with Ms. Laxmi Chauhan, Advocate

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. Above appeals have been preferred against the impugned judgment dated 23.12.1999 in Sessions Case No.7/98, FIR No.240/98, P.S. Mangol Puri. In terms of the judgment, the appellants Sanju and Mukesh have been convicted under Sections 392 IPC read with Section 397 IPC. Appellant Tara Chand has been convicted under Section 392 IPC read with Section 397 IPC as also under Section 302 IPC read with Section 34 IPC. The appellant Guddu has been convicted under Section 392 IPC read with Section 397 IPC, Section 302 IPC read with Section 34 IPC and also under Section 25/27 of the Arms Act. The appellants were sentenced accordingly in terms of the order on sentence dated 04.01.2000.

2. Briefly stated, case of the prosecution is that in the morning of 13.03.1998 at 7:45 am on the receipt of information from PCR Constable Geeta No.3700/PCR, DD No.7A was recorded at P.S. Mangol Puri (Ex.PW13/A) that a dead body was found lying behind DESU Office, Railway Line, Mangol Puri. Copy of the DD report was sent to SI Sanjay Singh through Constable Mohd Illyas for necessary action. SI Sanjay Singh along with Constable Mohd Illyas reached at the spot where he found the dead body of a male person having stab injuries on the thighs. In the meanwhile, Inspector Rejeshwar Prasad, SHO P.S. Mangol Puri also reached at the spot. While the efforts were being made to identify the dead body, complainant Sirajuddin (PW20) reached at the spot and identified the dead body as that of Insaf Ali. Inspector Rajeshwar Prasad recorded the statement (Ex.PW20/A) of Sirajuddin wherein he stated that he was an employee of a company at K-61, Udyog Nagar, Peera Garhi, Nangloi. The deceased Insaf Ali was his co-employee. On 12.03.98 at about 7:00 am, they left the factory. When they crossed the railway line to go towards Mangol Puri Industrial area, two boys suddenly caught hold of him, one of them placed a knife on the left side of his waist and they removed Rs.1080/- from his back pocket. They also threatened him to go away. Their two other associates caught hold of Insaf Ali (deceased) and one of them inflicted knife blows on his respective feet ("*Dono Pairo Par*"). Insaf Ali raised an alarm *bachao bachao*. He (complainant Sirajuddin) because of fear ran away from the spot. The complainant claimed that

aforesaid boys were aged about 20 to 25 years and he would be able to identify them if shown to him. He further stated that when Insaf Ali did not come back during the night, he thought that the deceased might have gone to the house of his brother-in-law at Samaipur Badli. Thus, in the morning, he went to Samaipur Badli and from there he came to the spot in search of the deceased Insaf Ali where he was found dead. On the basis of said complaint, formal FIR was registered at P.S. Mangol Puri.

3. The Investigating Officer, Inspector Rajeshwar Prasad (PW28) inspected the spot and lifted blood-stained earth as well as control earth from two different places, which samples were seized vide seizure memo Ex.PW17/A. The Investigating Officer also conducted inquest proceedings and sent the dead body for post mortem through Constable Mohd Illyas and one other Constable. Dr. K.L. Sharma (PW26) conducted post mortem examination on the dead body of the deceased and found following injuries on the body:

ON EXTERNAL EXAMINATION:

Dried vegetations were found over the clothes and the body.

INJURIES :

1. Multiple abrasions over-lying bruise over above the outer part of right eyebrow 2 X 2 cm.
2. Bruise 2 X 2 cm over front of right elbow.
3. Bruise 2 X 2 cm over upper part of right eye.
- 4.(a) Perforated incised penetrating wound 5 X 1.5 cm. Blood was oozing vertical and the lower angle was acute upper rounded over inner back of lower part of right thigh (entry wound).

- (b) Incised wound margins everted 1 X 0.5 cm over lower inner middle part of right thigh. Blood was oozing from the wound. (Exit)
- 5. Incised punctured wound 3 X 1 cm over outer middle part of left thigh. Upper angle acute lower rounded. The wound was muscle deep only.

On Internal Examination:

Injury No. 4 after cutting skin fascia showed extensive haematoma of muscles. It further entered and severed profundafemoris artery. The head and brain were normal. neck tissues were also normal. The chest viscera were intact and normal. The abdominal viscera were pale and the stomach contained semi digested semi solid food. The urinary bladder and rectum were empty.

4. In the opinion of Dr. K.L. Sharma, the cause of death was due to haemorrhagic shock consequent to injury No.4 which was sufficient to cause death in the ordinary course of nature within half an hour. He also opined that injury nos. 4(a & b) and 5 were caused by a sharp/penetrating slender and flat weapon like dagger or knife or the blade of a big cutting scissor and injury nos. 1, 2 and 3 were caused by blows and kicks during scuffle. He fixed the time of death forty hours prior to the conducting of post mortem examination. He also preserved the blood-stained clothes as well as the blood sample of the deceased and handed them over to the police. On 02.06.98, the Investigating Officer submitted an application to Dr. K.L. Sharma with a request to examine the weapon of offence contained in a sealed packet and give opinion as to whether the injury nos. 4 to 5 found on the person of the deceased could have been caused by the said knife. After examination, Dr. K.L. Sharma opined that the aforesaid injuries could have been caused by the said knife Ex.P1.

5. On 25.03.98, SI Rishipal Singh (PW22) arrested appellant Tara Chand in case FIR No.67/98 of P.S. Sultan Puri. On interrogation in that case, appellant Tara Chand made a disclosure statement wherein he confessed about his involvement in this case also. He also disclosed the names of his associates, i.e., the appellants Guddu, Sanju and Mukesh as his accomplices.

6. On the night intervening 29.03.98 and 30.03.98 at around mid night, SI Rajesh Rathi arrested appellant Mukesh on the basis of secret information. On interrogation, appellant Mukesh made a disclosure statement about this case and said that after robbing the deceased of his money, they removed his shoes also which he had thrown in the fields near Sonapat. Pursuant to the said disclosure statement, appellant Mukesh is stated to have led the police party to the fields near Sonapat from where he got recovered the pair of shoes belonging to the deceased.

7. On 02.04.98 at around 11:30 pm, SI Rajesh Rathi apprehended appellant Sanju on the basis of secret information. At the time of his arrest, Sanju resisted the police party and even threatened them with a knife, for that a separate case FIR No.308/98 under Section 25/27 Arms Act was registered against him at P.S. Mangol Puri. On interrogation, he also made a disclosure statement and pursuant to that, he got recovered a sum of Rs.100/- stated to be the part of his share of the robbed money, which was seized by the police.

8. Appellant Guddu was arrested by the police in case FIR No.191/98 under Section 302 IPC pertaining to P.S. Sultan Puri. After the arrest of appellant Guddu, the Investigating Officer obtained his police custody remand. On interrogation, he made a disclosure statement that he could get recovered the knife used for stabbing the deceased from a park near Sarai Rohilla. Pursuant to the disclosure statement, appellant Guddu led the police party to the said park and from there, he got recovered the knife Ex.P1 claimed to be the weapon of offence, which knife was thereafter sent to Dr. K.L. Sharma for seeking his opinion whether the injuries found on the person of the deceased were possible with that knife.

9. During investigation, the Investigating Officer moved applications for conducting Test Identification Parade for fixing the identity of the appellants as the culprits who had robbed PW20 Sirajuddin and the deceased Insaf Ali. All the appellants declined to participate in the Test Identification Parade on the respective dates fixed by Shri Bharat Parashar, M.M. On 25.04.98, at the instance of the police, complainant Sirajuddin visited Tis Hazari Courts where the appellants were to be produced for the extension of their remand and he identified all the four accused persons outside the court room.

10. The Investigating Officer also sent the clothes of the deceased and his blood sample preserved at the time of the post mortem as also the knife Ex.P1 recovered at the instance of the appellant to CFSL for

examination. He collected the report of CFSL, completed other formalities of investigation and on completion of investigation, filed challan against the appellants.

11. The learned Additional Sessions Judge, on consideration of the charge sheet and the accompanying material, charged all the appellants under Section 302 IPC read with Section 34 IPC as also Section 392 IPC read with Section 397 IPC. Besides, a separate charge under Section 27 of the Arms Act was framed against the appellant Guddu. All the appellants pleaded not guilty to the charge and claimed to be tried.

12. In order to bring home the guilt of the appellants, prosecution has examined 27 witnesses, including the star witness, namely, the complainant Sirajuddin (PW20).

13. The appellants were examined under Section 313 Cr.P.C. to afford them an opportunity to explain incriminating circumstances appearing against them in evidence. They all denied the prosecution version and claimed that they have been falsely implicated to solve the blind case.

14. Appellant Sanju examined DW1 Balbir Singh in his defence who stated that on the occasion of Holi about a year before his statement dated 28.05.99, appellant Sanju visited their village Palla, District Bullandshahar three days prior to Holi and he left the village ten days after Holi. He also examined DW2 Rajender of Village Palla, District

Bullandshahar who also deposed on the lines similar to that of DW1 Balbir Singh. The appellant Mukesh examined DW Sham Lal in his defence who stated in the court that on the day of Holi i.e. 12.03.98, the appellant Mukesh remained with him from morning till evening and he had even taken dinner at his residence at around 7:00 or 7:30 pm. He further stated on 28.03.98, two/three persons in civil dress visited his residence and inquired about the appellant Mukesh and thereafter took him along at around 9:00 or 9:30 pm.

15. Case of the prosecution rests mainly on the eye witness account of the occurrence given by the solitary witness i.e. the complainant Sirajuddin (PW20). He testified in the court that on 12.03.98 at around 7:00 pm, while he and the deceased were returning home after duty and going towards Mangolpuri, four persons waylaid them. Accused Sanju caught hold of him and accused Mukesh snatched Rs.1080/- from him on the point of knife. Appellant Tara Chand and Guddu caught hold of the deceased Insaf Ali and appellant Guddu stabbed the deceased Insaf Ali on both his feet while Tara Chand was holding him. He further stated that when the accused persons again pounced upon him, he ran away due to fear and on reaching home, he informed the neighbours about the incident but no neighbour was ready to accompany him to the spot of occurrence. He also deposed that Insaf Ali did not return in the night. On the next morning, he went to village Badli to inform relatives of Insaf Ali. Thereafter, he along with Raju Ali and others came to the spot of incident and found the dead body of

Insaf Ali lying there. Police reached at the spot and recorded his statement Ex.PW20/A.

16. PW25 SI Randhir Singh, who conducted part investigation of the case, is another important witness. He testified that after the formal arrest of the appellant Guddu on 24.04.98, he was interrogated at the police station and he made a disclosure statement Ex.PW8/A confessing his complicity in the offence in question and he also made a disclosure that he could get the weapon of offence i.e. the knife Ex.P1 recovered and pursuant to the disclosure statement, he led the police party to a park at Sarai Rohilla from where he got recovered the knife Ex.P1 lying in the grass from underneath a bench near a tree in Darbar Khan Park. He deposed that he prepared the sketch of the knife Ex.PW15/B, converted it into a sealed packet with the seal of 'RS' and sealed it vide seizure memo Ex.PW15/C and the seal after use was handed over to Raju Ali (PW24). Raju Ali (PW24), SI Rajesh Rathi (PW27) and Constable Sunil Kasana (PW15) are the witnesses of the seizure memo of the knife and they, in their testimony have corroborated the version of SI Randhir Singh (PW25).

17. On consideration of evidence, learned Additional Sessions Judge found all the appellants guilty of robbing on the point of knife and convicted them on the charge under Section 392 IPC read with Section 397 IPC. Besides, he found the appellant Guddu and Tara Chand guilty of committing murder of the deceased Insaf Ali in furtherance of their

common intention and convicted both of them under Sections 302 IPC read with Section 34 IPC. He also found the appellant Guddu guilty of offence punishable under Section 25/27 Arms Act and convicted him accordingly. Appellants Mukesh and Sanju were acquitted of charge under Section 302/34 IPC. The State has not preferred any appeal against their acquittal.

18. Learned Sh. Rajesh Mahajan, Advocate for the appellant Tara Chand, learned Sh. Sumeet Verma, advocate/amicus curiae for the appellants Guddu and Sanju and learned Ms. Ritu Gauba, advocate/amicus curiae for the appellant Mukesh have argued on almost similar lines so far as the merits of the case are concerned.

19. Learned counsels for the appellants submitted that from the record, it is obvious that the prosecution case rests mainly on sole testimony of PW20 Sirajuddin, whose presence at the spot of occurrence is highly doubtful and who is not a reliable witness because of various reasons.

20. The first criticism to the testimony of PW20 Sirajuddin is that his conduct during the occurrence as well as post occurrence in not making any effort to save the deceased and in not reporting the matter to the police for almost 15 hours is highly unnatural. Elaborating on the arguments, learned counsels submitted that had the version of PW20 Sirajuddin been true, under the natural course of circumstances, he was expected to report the matter to the police with a view to

initiate action against the appellants and to seek their help in ensuring medical treatment for his friend Insaf Ali (deceased). Learned counsels submitted that the doubt against the presence of PW20 Sirajuddin at the time of occurrence is further compounded by the fact that his version is not corroborated, rather contradicted by the medical evidence i.e. the post-mortem report Ex.PW26/A. Learned counsels submitted that as per the version of PW20 Sirajuddin, appellant Guddu had stabbed the deceased with a knife on both his feet, whereas the post-mortem report tells a different story, wherein it is mentioned that there were three incised wounds on the person of the deceased, two on the right thigh and one on the left thigh and no injury was found on the feet of the deceased. Learned counsels also drew our attention to the fact that as per the complainant, he sustained minor injury on his abdomen and he was also sent for medical examination, which version is not supported by any medical evidence as no MLC of the witness is placed on record. From the above, learned counsels have urged us to infer that PW20 is not a truthful witness and he perhaps has been introduced by the police to solve a blind case.

21. We do not find merit in this contention. It is well settled law that conviction of an accused can be recorded on the strength of the testimony of a sole eye witness provided his version is found to be reliable and consistent with the prosecution case. This is not a case in which investigation was long pending since the registration of the case, which might have prompted the police to introduce fake witness. In

the instant case, the incident took place in the evening of 12.03.98 around 7:30 pm. The complaint Ex.PW20/A of Sirajuddin (PW20) was recorded by the police in the next morning i.e. 13.03.98 at the spot where the dead body was found. In the said complaint, PW20 Sirajuddin narrated the incident and claimed that he was with the deceased at the time of occurrence and he was also robbed on the point of knife. This indicates that statement of PW20 Sirajuddin detailing the facts of occurrence was recorded by the police almost contemporaneously on reaching the spot where the dead body was found. Therefore, any possibility of Sirajuddin being a witness falsely introduced by the police to solve a blind case is ruled out. As regards the delay in reporting the matter to the police, Sirajuddin (PW20) explained that on being robbed on the point of the knife and seeing his friend Insaf Ali (deceased) being stabbed by the robbers, he ran away from the spot for fear of his life and safety. On reaching home, he narrated the incident to the neighbours but no one was ready to accompany him to the spot of occurrence, as such, due to fear, he did not go anywhere during night and stayed at home. We find nothing unnatural in this conduct of the witness to suspect his version or doubt his presence at the spot of occurrence. As regards the variance pointed out by learned counsels for the appellants in the ocular version of PW20 and the post mortem report Ex.PW26/A pertaining to the site of knife injuries, the aforesaid contradiction is not so material to doubt the truthfulness of the otherwise reliable testimony of the complainant

Sirajuddin (PW20). We cannot ignore the fact that the witness belongs to the illiterate and poor strata of society. It is not uncommon in illiterate and poor people to use the language loosely. Therefore, just because instead of thighs the witness has described the site of injuries as feet of the deceased, his version cannot be suspected. This contradiction can easily be attributed to loose use of language by the witness. On careful reading of the testimony of PW20 in the background of other evidence, we find his version natural and consistent with the prosecution story. PW20 Sirajuddin has been cross-examined at length by counsels for the appellants, but nothing material so as to discredit his testimony could be elicited in his cross-examination. Thus, we do not find any reason to doubt the truthfulness of the version of the complainant.

22. Another criticism to the testimony of Sirajjudin (PW20) is in relation to the identification of the appellants. Learned counsels for the appellants have submitted that neither of the appellants was arrested at the spot. It was also dark at the time of occurrence, therefore, in all probabilities, witness Sirajjudin (PW20) could not have got sufficient opportunity to see the faces of the accused persons. As such, his identification of the appellants in the court almost one year after the occurrence cannot be taken as reliable evidence.

23. We are not convinced with the above contention. On perusal of record, it transpires that during investigation, on the arrest of the

respective accused persons, the Investigating Officer moved applications Exhibits PW19/B, PW19/E, PW19/J and PW19/H in the court of Metropolitan Magistrate for holding Test Identification Parade to verify the identity of the appellants as the persons involved in this case. On these applications, we find that the learned M.M. has recorded that respective appellants were produced in his court in muffled face. This implies that the Investigating Officer had taken care to advise the appellants to keep their faces covered till the identification parade was held. From the evidence of Shri Bharat Parashar, M.M. (PW19), it is evident that learned M.M. scheduled holding of TIP in respect of appellants Sanju, Guddu as well as Tara Chand and Mukesh at Central Jail, Tihar on 17.04.98, 24.04.98 and 02.04.98 respectively. All the appellants refused to participate in the Test Identification Parade despite of the warning that their refusal to participate might be taken as a circumstance against them during trial. The explanation given by the appellant Sanju was that the police had taken his photograph, appellant Guddu claimed that he was shown to some persons while in the Tis Hazari lockup and appellants Tara Chand and Mukesh claimed that they were shown to the witness by the police at the police station. We are not convinced with the aforesaid explanations, particularly when as per the record, precautions were taken and the appellants were produced in the court in muffled faces when the applications for fixing of TIP were moved. Once the appellants had declined to participate in the Test Identification Parade,

now they cannot take shelter of the plea that dock identification of theirs by the complainant after a lapse of one year during trial is doubtful. Otherwise also, the Investigating Officer, SI Randhir Singh (PW25) as well as PW20 Sirajuddin have stated that subsequent to the refusal of the appellants to participate in the Test Identification Parade, PW20 Sirajuddin was called to Tis Hazari Courts on 25.04.98 when he identified the appellants as the persons involved in the crime outside the court room when the appellants were to be produced for extension of their judicial custody remand. This means that the first identification of the appellants after the occurrence was done by the complainant Sirajuddin within a period of less than two months since the incident, which is not such a long period in which the complainant possibly could have forgotten the faces of the persons who robbed him and also stabbed his friend Insaf Ali (deceased).

24. The next submission of the appellants is that admittedly the incident took place on 12.03.98 at around 7:00/7:30 pm when it was slightly dark. Therefore, it is highly improbable that the witness Sirajuddin could have had a thorough look at the faces of the robbers, as such it is urged that identification of the appellants by PW20 Sirajuddin is highly doubtful. It is also submitted that the aforesaid doubt also gets compounded by the fact that PW Sirajuddin in his complaint Ex.PW20/A has not given any distinctive physical features of either of the appellants except that their age was between 20 to 25 years.

25. Admittedly, the incident took place on the day of Holi i.e. 12.03.98. Since it was the beginning of summer season, obviously the days were longer. Generally, in the month of March, the Sun sets quite late in the evening and there is sufficient light/visibility till around 7:30 pm or so. Therefore, we do not find it surprising that the complainant was able to see the faces of the appellants at the time of occurrence and identify them firstly on 25.04.98 outside the court room in Tis Hazari Courts and secondly in the court. Thus, we find no reason to suspect the correctness of the testimony of Sirajjudin (PW20) regarding the occurrence as well the identity of the appellants.

26. It was further submitted on behalf of the appellants that as per the case of prosecution, the mystery of this case started unravelling with the arrest of appellant Tara Chand in some other case pertaining to P.S. Sultanpuri and the disclosure made by Tara Chand about this case during interrogation in that case pertaining to P.S. Sultanpuri. Learned counsels for the appellants submitted that with regard to the arrest of the appellant Tara Chand in P.S. Sultanpuri case, the prosecution has examined three witnesses, namely, Constable Sansveer (PW4), Head Constable Jeet Singh (PW6) and SI Rishipal (PW22). Learned counsels submitted that all three of them have given contradictory versions regarding the manner and place of arrest of appellant Tara Chand. They drew our attention to the testimony of Constable Sansveer (PW4) who stated that appellant Tara Chand was arrested from Muradabad and even in his cross-examination he

reiterated this fact by saying that he had gone to Muradabad along with SI Rishipal for arresting the appellant Tara Chand. Head Constable Jeet Singh (PW6), on the other hand, deposed that the appellant Tara Chand was arrested by them from Prem Nagar and he was categorical that they did not go to Muradabad to arrest the appellant Tara Chand. SI Rishipal (PW22) came out with an entirely different version. In his cross-examination on behalf of the appellant Tara Chand, PW22 SI Rishipal stated that the appellant Tara Chand was already in custody of P.S. Sultanpuri in case FIR No.191/98 when he was arrested in the case FIR No.67/98 of P.S. Sultanpuri. From the aforesaid contradictions, learned counsels for the appellants have urged us to infer that the story of arrest of appellant Tara Chand and his disclosure statement pertaining to this case which led to arrest of the other appellants is nothing but a fabrication done by the police to solve the blind case of robbery.

27. It is true that according to the prosecution, the beginning of unravelling mystery of this case started with the disclosure statement made by the appellant Tara Chand after his purported arrest by the officials of P.S. Sultanpuri on 25.03.98. It is also true that the statements of the above three witnesses of arrest of appellant Tara Chand are contradictory regarding the manner and place of arrest of the appellant. But this circumstance by no means can be taken as a circumstance to discard the testimony of the eye-witness Sirajuddin

(PW20) whose testimony is otherwise natural and reliable and who has withstood the test of cross-examination.

28. In view of the above discussion, we do not find any reason to doubt the version of Sirajuddin (PW20) and we find that the learned Trial Court has rightly relied upon his testimony to return the finding of guilt of the appellants.

29. Learned Sh. Sumeet Verma, amicus curiae for the appellant Sanju and learned Sh. Rajesh Mahajan, advocate for the appellant Tara Chand have submitted that even if the prosecution case is taken to be true, then also, the conviction of the aforesaid two appellants under Section 397 IPC is bad in law. In this regard, they submitted that under the scheme of Indian Penal Code, Section 397 IPC does not define a distinct offence but it is an aggravated form of the offence under Section 392 IPC, which provides for minimum seven years imprisonment in certain cases where the offender uses a deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person. Learned counsels submitted that none of those three ingredients are established in case of the appellants Sanju and Tara Chand, as such, they could not have been convicted under Section 392 IPC read with Section 397 IPC and the only offence, if at all, committed by them is the offence punishable under Section 392 IPC.

30. The similar question of law came up for consideration before the Supreme Court in the matter of **Ashfaq v. State (Govt. of NCT of Delhi)**, *AIR 2004 SC 1253* wherein while dealing with the question whether Section 397 IPC recognises constructive or vicarious liability engrafted in Section 34 IPC, the Hon'ble Supreme Court observed thus:

“9. The further plea that one accused alone was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under Section 397 IPC with the assistance of Section 34 IPC overlooks the other vital facts on record found by the courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, do not create any new substantive offence as such but merely serve as being complementary to Sections 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz. use of a deadly weapon or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to the conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, de hors any reference to Section 34 IPC”.

31. In the instant case, as per the evidence on record, neither the appellant Sanju nor the appellant Tara Chand used a deadly weapon. Therefore, in view of the above enunciated principle of law, they cannot be held guilty for the aggravated form under Section 392 IPC with the aid of Section 397 IPC. Thus, we find that they are guilty of the offence of robbery punishable under Section 392 IPC read with

Section 34 IPC, and the learned Trial Court fell in error in invoking Section 397 IPC against them.

32. Learned Shri Sumeet Verma, amicus curiae for the appellant Guddu has submitted that he has been wrongly convicted for the offence of murder punishable under Section 302 IPC. Learned amicus curiae contended that from the evidence of Dr. K.L. Sharma (PW26) and his autopsy report Ex.PW26/A, it is evident that the knife injuries were inflicted on the left as well as right thigh of the deceased which are non-vital parts of the body, which rules out any possibility of the intention to cause death of the deceased or to cause such injury which, in the ordinary course, would have resulted in death of the deceased. Thus, it is argued that the offence committed by the appellant does not amount to murder as defined under Section 300 IPC and amounts to causing grievous hurt punishable under Section 326 IPC or for the offence of culpable homicide not amounting to murder punishable under Section 304 IPC.

33. Learned Additional Sessions Judge has dealt with this argument in para 40 of the impugned judgment by, inter alia, observing thus:

“40. I do not subscribe to the contention of the Ld. Defence counsel for the accused persons that there was no intention of the accused persons to murder Insaaf Ali. The vital organs of the deceased were not injured. Perusal of the postmortem report reveals that injury no.4 on the person of the deceased was opined sufficient to cause death. Injuries were caused by accused Guddu repeatedly on the person of deceased Insaaf Ali with deadly weapon i.e. knife. Accused Tara Chand had caught hold Insaaf Ali at that time. The deceased was rendered incapable to defend himself from the fatal blows. There was no provocation by the deceased to compel the accused Guddu to stab him. The injuries were inflicted on both the thighs of the deceased. The impact of the injury to one thigh was such that it had entered &

severed profunda femoris artery. Knowledge can be imputed to the accused Guddu and Tara Chand to cause injuries sufficient to cause death in the ordinary course of nature. Simply because injured could have been saved if taken to hospital within half an hour is not sufficient to presume that the accused had not intended to cause his death or bodily injury sufficient to cause death in the ordinary course of nature. Explanation 1 to Section 299 IPC clearly states that where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented. Since, the occurrence had taken place at a secluded place and none had attended the deceased after the incident, the accused person Guddu and Tara Chand are to be held liable for his death.”

34. We do not find any infirmity in the above line of reasoning adopted by the learned trial Judge in holding the appellant Guddu guilty of culpable homicide amounting to murder punishable under Section 302 IPC. From the testimony of PW20 Sirajuddin, it is firmly established that the appellants waylaid the complainant Sirajuddin and the deceased Insaf Ali with the intention to rob them. Two of them namely Guddu and Mukesh were in possession of knife and they actually used the knife. From this, it can easily be inferred that there was intention on the part of Guddu to use the knife in order to give effect to the robbery. This of course, by itself would not imply that the appellant Guddu, while inflicting the knife blows on the thighs of the deceased intended to cause his death or intended to cause such injuries to the deceased which he knew was likely to cause death of the deceased. Whether Guddu nursed that intention while inflicting the knife injuries on the person of the deceased is a state of mind and it has to be inferred from the accompanying circumstances. On perusal of the post mortem report Ex.PW26/A and from the testimony of PW26

Dr. K.L. Sharma, it is apparent that a grave knife injury was inflicted on the right thigh of the deceased, which is detailed below:

- “4.(a) Perforated incised penetrating wound 5 X 1.5 cm. Blood was oozing vertical and the lower angle was acute upper rounded over inner back of lower part of right thigh (entry wound).
- (b) Incised wound margins everted 1 X 0.5 cm over lower inner middle part of right thigh. Blood was oozing from the wound. (Exit)”

On Internal Examination:

Injury No. 4 after cutting skin fascia showed extensive haematoma of muscles. It further entered and severed profunda femoris artery. The head and brain were normal. Neck tissues were also normal. The chest viscera were intact and normal. The abdominal viscera were pale and the stomach contained semi digested semi solid food. The urinary bladder and rectum were empty.”

From the nature of said injuries, it is apparent that the appellant Guddu, with a view to give effect to the intention to rob the deceased, inflicted knife wound on the right thigh of the deceased with such a brute force that it caused a penetrated incised entry wound 5 cm x 1.5 cm deep which exited over the lower inner part of the right thigh with exit wound having margins everted 1 cm x 0.5 cm and the injury resulted in severing of profunda femoris artery. The nature of said injury gives a clear picture of the brute force with which the knife wound was inflicted and taking into account the force used by the appellant Guddu in causing said injury and also the fact that the occurrence took place at a secluded place, one can safely infer that the aforesaid injury was caused by the appellant with the intention of causing death with the knowledge that nature of injury was such which, in ordinary course, would result in death of deceased. Thus, we find

that the learned trial Judge has rightly convicted the appellant Guddu under Section 302 IPC.

35. Learned Shri Rajesh Mahajan, advocate has submitted that conviction of appellant Tara Chand under Section 302 IPC for murder of Insaf Ali with the aid of Section 34 IPC is bad in law because there is nothing on record to suggest that when the appellant Tara Chand caught hold of the deceased to rob him, he was aware of the intention of the appellant Guddu to brutally stab the deceased to cause his death or he shared any such intention with the appellant.

36. As per the case of prosecution, role played by the appellant in the occurrence is that he caught hold of the deceased Insaf Ali while his co-accused Guddu stabbed the deceased with a knife on his left as well as right thigh. Apart from this, there is no evidence of any pre-concert on the part of the appellant to cause death of the deceased or to cause him a vital/dangerous injury. Under these circumstances, we are of the view that when the appellant Guddu inflicted knife blows on the thighs of the deceased which are non-vital parts, appellant Tara Chand could have known about his intention to cause such injury to the deceased which in ordinary course would prove fatal. Thus, we find it difficult to infer from the facts of the case that Tara Chand shared a common intention with his co-accused Guddu to cause death of the deceased or to cause him such injury which, in ordinary course, would prove to be fatal. From the evidence on record, only inference which could be

drawn against the appellant Tara Chand is that he shared common intention with the appellant Guddu to cause grievous hurt to the deceased Insaf Ali, who had tried to resist the robbery and raise alarm. Thus, we are unable to sustain the conviction of the appellant Tara Chand for the offence of murder of Insaf Ali under Section 302 IPC with the aid of Section 34 IPC and we convert the aforesaid conviction into the conviction under Section 326 IPC read with Section 34 IPC.

37. In view of the discussion above, we do not find any merit in the appeal filed by the appellant Guddu being Crl.A. No.303/2000. It is accordingly dismissed.

38. Appeal of Sanju being Crl.A. No.55/2000 is partly accepted. His conviction under Section 392 IPC read with Section 397 IPC is set aside and is converted into conviction for the offence of robbery under Section 392 IPC. We have heard learned amicus curiae on the point of sentence and taking into consideration the facts and circumstances, while maintaining the fine imposed upon the appellant Sanju, he is sentenced to undergo RI for the period of five years. Appellant Sanju is absconding, therefore, the court concerned and the SHO concerned are directed to initiate proceedings for his arrest so that he can be sent to custody for undergoing remaining period of sentence.

39. The appeal of Tara Chand being Crl.A. No.119/2000 is partly accepted. His conviction for the offence under Section 302 IPC read Section 34 IPC is set aside and converted into conviction under Section

326 IPC read with Section 34 IPC and his conviction under Section 392 IPC read with Section 397 IPC is converted into the conviction under Section 392 IPC. We have heard his counsel on the point of sentence. Taking into consideration the submissions made by the learned counsel for the appellant and the overall circumstances of the case, while maintaining the fine imposed upon him by the learned Trial Court, we sentence the appellant, for the offence under Section 392 IPC, to undergo RI for the period of five years. For the offence under Section 326 IPC, the appellant Tara Chand is sentenced to RI for the period of seven years. Both the sentences awarded to appellant Tara Chand shall run concurrently.

40. In view of the testimony of PW20 Sirajuddin discussed above, we do not find any reason to interfere with the conviction of the appellant Mukesh under Section 392 IPC read with Section 397 IPC. We do not find any merit in his appeal. It is accordingly dismissed.

41. All the appeals are disposed of accordingly.

AJIT BHARIHOKE, J.

APRIL 23, 2010
pst

A.K. SIKRI, J.