

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 25th May, 2010

+ CRL.A.82/2010

MOHD DULAL @ FAZAL KARIM Appellant

! Through: Mr. Arvind Kr. Patel and Mr. Subodh
Kumar, Advocates

versus

\$ STATE Respondent

^ Through: Mr. Sanjay Lau, APP

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the Judgment?(No)
2. To be referred to the Reporter or not? (No)
3. Whether the judgment should be reported in the digest? (No)

JUDGMENT

P.K.BHASIN,J(Oral)

This appeal is directed against the judgment of conviction dated 25th May, 2009 and order on sentence dated 27th May, 2009 passed by the Additional Sessions Judge whereby the appellant-accused was convicted under Section 392 read with Section 397 of the Indian Penal Code(IPC) and sentenced to undergo rigorous imprisonment for a period of five years and to pay fine of Rs.5,000/- under Section 392 IPC and seven years rigorous imprisonment under Section 397 IPC.

2. The prosecution case is that on 2nd December 2006 the appellant along with two other persons, who could not be arrested by the police, robbed PW-3 Sunil Kumar of Rs.21,000/- and his wrist watch at the point of knife. After committing robbery all the three persons had managed to run away from the place of incident. On 25th November, 2006 the appellant-accused was arrested in case FIR No. 209/06 registered at Rajinder Nagar Police Station under Section 25 of the Arms Act and while in police custody in that case he made a disclosure statement admitting his involvement in the present incident also. At the time of recording of his disclosure statement he had also claimed that the wrist watch which he was wearing at that time was the robbed watch of PW-3 Sunil Kumar and he gave it to the Investigating Officer of that case under the Arms Act. Since the present incident of robbery had taken place within the jurisdiction of Karol Bagh Police Station necessary information was given about his arrest and the disclosure statement to the Karol Bagh police station. On receipt of that information one police official reached Rajinder Nagar police station and obtained a copy of the disclosure statement made by the appellant-accused. The appellant was then formally arrested in the present case. The Investigating Officer of the present case then got arranged test identification parade in respect of the wrist watch which the appellant was allegedly wearing at the time of his arrest as well as for his own identification by the complainant PW3-Sunil Kumar. In the test identification parades the complainant had

correctly identified the appellant to be one of the robbers who had robbed him as also his wrist watch (Ex. P-1).

3. On the completion of the usual investigation formalities the police filed a charge sheet in Court against the appellant and in due course the case came to be committed to sessions Court where he was charged under Section 392 read with Section 397 IPC. Since the appellant had pleaded not guilty to the charge the prosecution was called to adduce evidence in support of its case.

4. The prosecution mainly relied upon the evidence of the victim of robbery namely PW-3 Sunil Kumar and the evidence of recovery of complainant's watch from the appellant-accused. The learned trial Judge after examining the evidence led by the prosecution accepted the prosecution case and found the guilt of the appellant-accused to have been established beyond reasonable doubt and accordingly held him guilty for the commission of offence punishable under Section 392 read with Section 397 IPC and awarded him separate sentences of imprisonment, as have been noticed already, under Section 392 as well as under Section 397.

5. Feeling aggrieved, the convicted accused preferred the present appeal challenging his conviction and the sentences imposed on him by the trial

Court.

6. It was contended by the learned counsel for the appellant that the prosecution case cannot be said to have been established beyond reasonable doubt since the prosecution has not ruled out the possibility of appellant being shown to the complainant during the period of his custody from 25th November, 2006, when he was arrested in the case pertaining to Rajinder Nagar police station and 9th December, 2006 when he was asked to participate in the test identification parade and therefore, his identification by the complainant in the TIP test and then in the Court becomes meaningless. Another submission was that the evidence regarding recovery of wrist watch (Ex.P-1) was also of no use for the prosecution since the complainant did not even claim during his evidence that that watch belonged to him and the same was simply exhibited as an article produced from the police malkhana. It was also argued that the conviction of the appellant under Section 392 read with Section 397 IPC was in any case not correct since the prosecution had not produced the deadly weapon which the appellant was alleged to have used during the incident of robbery.

7. On the other hand, learned APP for the State supported the trial Court's judgment and submitted that there is no infirmity whatsoever either in the judgment of conviction and he has been rightly convicted under

Section 392 read with Section 397 IPC. However, he fairly conceded that separate sentences of imprisonment under Sections 392 and 397 IPC cannot be imposed since Section 397 IPC does not contemplate an independent offence but it only prescribes a harsh punishment if it shown that the accused had while committing robbery used some deadly weapon and since the appellant had used a knife while robbing PW-3 he has been rightly awarded the minimum sentence of imprisonment provided under Section 397 IPC.

8. After going through the statement of the victim of robbery PW-3 Sunil Kumar, I find myself in full agreement with the decision of the learned trial Court that his testimony establishes that the accused was involved in the incident of robbery. He had narrated the incident in the manner in which he had narrated in his first information report to the police, Ex.PW-3/A. Since I am in general agreement with the appreciation of the evidence of PW-2 done by the trial Court I am not narrating his testimony. The same remained totally unchallenged in cross-examination as far as his narration of the incident and the role of the appellant-accused is concerned. It was though suggested to him in the cross-examination that he had identified the accused at the instance of the police but merely on the basis of that bald suggestion to PW-3 the testimony of PW-3, which otherwise remained unchallenged, cannot be doubted. His evidence is duly corroborated also by the evidence of test identification parade in which PW-3 had identified the appellant as one

of the robbers.

9. As far as the evidence of recovery of wrist watch, Ex.P-1, is concerned, I am inclined to exclude that evidence since the complainant had not himself claimed when he had appeared in witness box that that watch belonged to him. However, even after excluding that evidence the evidence of PW3 Sunil Kumar itself is sufficient to maintain the conviction of the appellant but only under Section 392 IPC since the prosecution has not led any evidence to show that the appellant had used a deadly weapon in the incident of robbery. The weapon which appellant is alleged to have used in the incident had not been recovered during investigation and so Section 397 IPC would not get attracted. This conclusion is supported by two judgments of this Court in ***Crl. M.C. No. 2881/2007(Rakesh Kumar v. State, NCT of Delhi)*** decided on 18.03.2009 and ***Crl. Appeal No. 757/ 2007 (Ghanshyam @ Bablu v. State)*** decided on 05.12.2009. The conviction of the appellant under Section 392 IPC only is, therefore, to be confirmed.

10. Regarding the sentence awarded to the appellant for his conviction under Section 392 IPC counsel for the appellant had submitted that a lenient view may be taken considering the fact that the appellant has two minor children out of whom one was born only in May, 2009 and the other one is 5 years old and the appellant has to bring them up and in case he is sent to jail

for a long period it would be those two small children who will have to suffer for the sin committed by their father.

11. Considering all the facts and circumstances and the aforesaid submissions made on behalf of the appellant for taking a lenient view on the point of sentence, the sentence of imprisonment awarded to the appellant for his conviction under Section 392 IPC is reduced from 5 years to 4 years and the separate sentence awarded under Section 397 IPC stands set aside.

This appeal stands disposed of accordingly.

P.K. BHASIN,J

MAY 25, 2010 /vld