

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

+ CRL. APPEAL 257/2010

% Decided on: 9th September, 2010

ASHRAF Appellant

Through: Mr. Rajinder Singh, Adv.
Versus

STATE Respondent

Through: Mr. M.P. Singh, APP for the
State.

AND

+ CRL. APPEAL 628/2009

ANWAR @ ANNU Appellant

Through: Mr. Suresh Sisodia, Adv.
Versus

STATE Respondent

Through: Mr. M.P. Singh, APP for the
State.

AND

+ CRL. APPEAL 174/2010

BUCHA @ NADEEM Appellant

Through: Ms. Anita Abraham, Adv.
Versus

STATE Respondent

Through: Mr. M.P. Singh, APP for the
State.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J. (ORAL)

1. All the above-mentioned appeals are being disposed of together as the same arise out of the same incident, FIR and judgment of the Trial Court.

2. Appellants have been convicted under Section 392/34 IPC; sentenced to undergo rigorous imprisonment for five years and fine of Rs.3,000/-; in default of payment of fine to undergo rigorous imprisonment for one year. Appellant Anwar @ Annu has also been convicted under Section 397 IPC and Section 25 of the Arms Act. He has been sentenced to undergo rigorous imprisonment for seven years for offence under Section 397 IPC; sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.1,500/-; in default of payment of fine to undergo rigorous imprisonment for six months for the offence under Section 25 of the Arms Act. Sentences of Anwar @ Annu have been directed to run concurrently. Benefit of Section 428 Cr.P.C. has also been given to the Appellants.

3. Prosecution story as unfolded is that on 12th December, 2008 Allu Ram along with his friend Vijay Kumar Pandey was returning home in a private bus. On the way, when the bus stopped at Keshaw Chowk red light near Shyam Lal College at about 8:30 pm, some boys boarded the bus from front gate as well as from rear gate. Out of them, four boys surrounded Allu Ram and one of the boys took out a dagger and put it on his chest. They forced him to de-board the bus at the red light near Metro Station. Thereafter, they took out ₹10,000/- and some papers from the pocket of Allu Ram forcibly. After committing robbery

they pushed Allu Ram and his friend Vijay Kumar Pandey and started running away. On seeing certain police officials coming towards their side, they raised alarm “pakro pakro” and chased those boys. Allu Ram and his friend caught hold of one boy whose name was later revealed as Anwar @ Annu; while two other boys were apprehended by the police officials and their names were disclosed as Ashraf and Bucha @ Nadeem. Accused Anwar @ Annu along with knife was handed over to the police officials. In fact, these police officials were SI Jagbir Singh Nagar (Investigating Officer), HC Satya Narayan, Const. Satyapal Singh and HC Amar Singh. They were on patrolling duty in that area.

4. Investigating Officer recorded the statement of Allu Ram and wrote a tehrir on the basis whereof, FIR No. 444/2008 under Sections 392/397/34 IPC and Section 25 of the Arms Act was registered at Police Station Welcome Colony. During the investigation, Investigating Officer prepared the site plan. Appellants Anwar @ Annu, Ashraf and Bucha @ Nadeem were arrested. Sketch of the dagger was prepared and the same was sealed and seized vide seizure memo marked as Ex.PW1/A. Entire proceedings were conducted at the spot. Later, Appellant Shakir @ Jagga was also arrested on 12th December, 2008 on the pointing of Allu Ram and from him ₹500/-, out of the robbed amount, along with photocopy of driving license of the complainant, were recovered and seized. After the investigation, Appellants were sent up to face trial by filing a charge-sheet in the court of learned Metropolitan Magistrate, who in turn committed the case to the Sessions Court since the offence under Section 397 IPC was exclusively triable by the Sessions Court.

5. Charge under Sections 392/34 IPC was framed against the Appellants. Charges under Section 397 IPC and Section 25 of the Arms Act were also framed against the Appellant Anwar @ Annu. Charges were framed on 24th February, 2009 by the Trial Court to which Appellants pleaded not guilty and claimed trial.

6. Prosecution examined seven witnesses in all to prove its case. PW7 SI Jagbir Singh Nagar is the Investigating Officer. He was heading the patrolling party comprising of PW1 Const. Styapal Singh, PW 2 HC Satya Narayan and PW4 HC Amar Singh. Complainant Allu Ram was examined as PW5 and his friend Vijay Kumar Pandey, who was cited as an eye witness to the incident, was examined as PW6. So far as PW2 Const. Satpal Singh is concerned, he is a formal witness being Duty Officer who had recorded the FIR. He has proved the FIR as Ex.PW2/A.

7. After prosecution closed evidence statements under Section 313 Cr.P.C. of the Appellants were recorded on 28th July, 2009 in which entire incriminating material which had come on record during the investigation was put to them. Their case was that of simple denial. They denied their complicity in the crime. They claimed themselves to be innocent. All the Appellants took a similar plea that they had been lifted from their house and falsely framed in this case. However, no evidence was led by them in their defence.

8. PW5 Allu Ram did not identify the Appellants as the same persons who had robbed him. Similar is the story of PW6. He also did not identify the Appellants as the same person who had robbed PW5 Allu Ram on the point of knife. Their deposition is also not in line with the prosecution case as set up in the charge-sheet. So far

as Investigating Officer PW7 and other police officials, who were accompanying him while patrolling, are concerned, they have corroborated each other with regard to the apprehension of Appellants from the spot. Trial Court was of the view that even the testimony of a hostile witness can be read against the accused to the extent it supports the prosecution version. As per PW5 and PW6, it was established that both of them were going in a bus and were robbed by certain persons at Welcome Colony Metro Station. As per PW6, one Anwar @ Annu was even apprehended by him and PW5 and then handed over to the police officials, who were on patrolling duty. Trial Court was of the view that since from their statement it was established that certain boys had robbed PW5 Allu Ram on the point of knife at Metro Station Welcome Colony, the deposition of the police officials, who had apprehended the Appellants, assumes importance and connect the Appellants with the crime inasmuch as, PW5 Allu Ram had admitted his signatures on his statement recorded under Section 154 Cr.P.C. by the Investigating Officer immediately after the incident, which fact supported the police witnesses. Thus, Trial Court was of the view that prosecution had succeeded in proving its case beyond shadow of reasonable doubt that it is the Appellants who had robbed PW5 Allu Ram on the point of knife. Recovery of knife from the Appellant Anwar @ Annu was also accepted on the basis of statements of police officials, i.e. PW1, PW3, PW4 and PW7.

9. I have heard the learned counsel for the Appellants, learned APP for the State and have perused the Trial Court Record more specifically, depositions of PW5 Allu Ram and PW6 Vijay Kumar Pandey. PW5 has failed to identify any of the Appellants in the

dock. He was declared hostile and cross-examined by the APP for the State at length but nothing could be elicited from him which could indicate complicity of the Appellants in the crime. Similar is the case with regard to testimony of PW6. He has also not identified any of the Appellants as the same persons who had robbed the complainant Allu Ram. Thus, in my view, identity of the Appellants could not be fixed and in absence thereof, there was no other material available before the Trial Court to arrive at a finding that too beyond the shadow of reasonable doubt that it is the Appellants who had robbed the Allu Ram on the fateful day.

10. That apart, there are material infirmities in the statements of PW5 and PW6 vis-à-vis prosecution case with regard to the manner in which incident took place as also the apprehension of the Appellants. In the FIR, PW5 had stated that some boys had surrounded him and made him to de-board the bus at Keshaw Chowk red light and thereafter, had robbed him. However, while deposing in the court he has stated that he was robbed inside the bus. When the bus stopped at the red light all four boys de-boarded and started running. Thereafter, on the advice of Vijay Kumar Pandey, he along with him went to the Police Station and lodged a report. After about one hour a call was received in the Police Station that the persons who had committed crime had been arrested. He signed 5/7 papers in the Police Station. His this version while in the witness box is materially at variance vis-à-vis the prosecution story. PW6 has come up with another version. According to him, PW5 Allu Ram was robbed inside the bus but those boys got down from the bus at the red light of Metro Station. He along with Allu Ram, also de-boarded the bus and gave a chase

and caught Anwar @ Annu and handed him over to the police official while other boys succeeded in escaping. Thereafter, all of them went to the Police Station. His this version is also not in consonance with the prosecution story. There is yet material discrepancy regarding the arrest of Appellants and other proceedings conducted by the Investigating Officer. According to police officials, it was done at the spot; whereas as per PW5, it was done in the Police Station. Be that as it may, identity of the Appellants cannot be fixed from the testimony of police officials, inasmuch as, Allu Ram was not robbed in the presence of the police officials and that is not the case of the prosecution. If that is so then on the basis of their testimony it, otherwise, cannot be concluded that it is the Appellants who had robbed the PW5 more so, when PW5 and PW6 have failed to identify them.

11. It is true that the evidence of a witness, declined hostile, is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. In other words, testimony of a hostile witness to the extent it supports the prosecution case, if found trustworthy, can be accepted and made base of conviction. However, that would depend upon the facts of each case and cannot be applied across the board in all cases. For example, in a case where witness supports the prosecution case in his examination-in-chief but makes contradictory statements in his cross-examination, the same can be taken as an attempt to wriggle out from the earlier statement, and in such an eventuality, the statement made in examination-in-chief on material point can be accepted. However, in case a witness is completely hostile with regard to identity of the accused even in his examination-in-chief

and nothing could be elicited from him to show the involvement of the accused in the offence in the cross-examination by the APP, such a testimony cannot be accepted and made the basis of the conviction.

12. For the foregoing reasons, I am of the view that the prosecution has failed to prove its case beyond shadow of reasonable doubt that the Appellants had robbed the complainant. Findings returned by the Trial Court in this regard are not in consonance with the evidence adduced on record. Appeals are, thus, allowed. Appellants are acquitted. They be released forthwith if not wanted in any other case.

13. Copy of this order be sent to the Superintendent Jail for compliance and also for serving on the Appellants.

A.K. PATHAK, J.

September 09, 2010

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