

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

Reserved on: 17th February 2010
Pronounced on: 22nd February 2010

+ **Crl. A. 420/2004**

MOHD. ASLAM Appellant
! Through: Mr. Raj Singh, Adv.

versus

\$ STATE Respondent
^ Through: Mr. Jaideep Malik, APP.

And

Crl. A. 50/2005

MOHD. ANWAR Appellant
! Through: Mr. Raj Singh, Adv.

versus

\$ STATE Respondent
^ Through: Mr. Jaideep Malik, APP.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the 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 the Digest? Yes

: V.K. JAIN, J.

1. By this common judgment, I shall dispose of both the appeals referred above.

2. The appeals are directed against the judgment dated 27th April 2004 and Order on Sentence dated 29th April 2004 whereby, the appellants were convicted under Section 392/34 as well as 397/34 of IPC and were sentenced to undergo R.I. for 5 years each and to pay fine of Rs.5,000/- each or to undergo S.I. for 6 months each in default under Section 392/34 of IPC and were further sentenced to undergo R.I. for 7 years each under Section 397/34 of IPC. They were also sentenced to undergo R.I. for 2 years each under Section 25 of Arms Act. The sentences were directed to run concurrently.

3. On 18th May 2009, complainant Tabban Khan lodged a complaint with SHO Police Station Welcome Colony, Delhi. He alleged that in the night of 17th May 2001, when he was returning home on foot, he parked his motorcycle on G.T. Road between 11.30 PM to 12 Mid Night and was easing himself with his face towards a fish pond, three persons caught his neck from behind and started beating him. One of the boys took out a long knife, whereas the other one asked him to give a knife blow in

his stomach. Those boys then asked him to take out whatever he had with him. The complainant took out about Rs.30-35,000/-, which he was carrying with him and handed it over to those boys. After taking money from him, one of the boys asked the other one to kill him by giving knife blow in his stomach. Realizing that those persons were going to kill him, the complainant grappled with him. On hearing the voice coming from somebody, those persons left him and ran towards a godown. The complainant returned home and came to the Police Station on 18th May 2001 when written report was lodged by him. He also claimed that two boys were aged about 18-20 years, whereas the third one was aged about 12-13 years.

4. The complainant came in the witness box as PW-1 and stated that in the night of 17th, he was returning home on his motorcycle. When he was easing himself after stopping his motorcycle, all the three accused persons present in the Court caught hold of him by his collar. The accused Akram was having a knife with him and one of the accused was having a revolver. The accused persons started beating him and he was robbed of Rs.30-35,000/- by them. One of them said that he should be killed, otherwise he would go to the Police Station. He

thereupon grappled with them. On hearing of noise, the accused persons ran away from there. He went to his house from there and later lodged a complaint with the police.

5. PW-4 Const. Vinod Kumar has stated that on 20th May 2001 when he along with Const. Prakash was checking the buses at G.T. Road and they got a bus stopped. The accused persons got down from the bus and started moving. They were chased and apprehended. One buttondar knife was recovered from the search of accused Anwar. Another knife was recovered by Const. Prakash from the accused Mohd. Aslam. PW-7 Const. Prakash Chand has corroborated the testimony of PW-4 Const. Vinod Kumar and has stated that on search of the accused Mohd. Aslam and Akram, one knife, each was recovered from their possession. PW-10 Sh. M.R. Sethi, Metropolitan Magistrate has deposed that on 21st May 2001 all the three accused persons were produced before him in muffled face and all of them refused to join TIP, despite informing them that their refusal can be read against them during trial. The statement of accused Mohd. Anwar is Ex.PW-10/B, whereas that of accused Mohd. Aslam is Ex.PW-10/C.

6. In their statements under Section 313 of Cr.P.C., both the appellants denied the allegations against them. The appellant Mohd. Aslam stated that on 15th May 2001, he had a quarrel with complainant Tabban when he demanded Rs.500/-, which Tabban had taken from him and which he had assured to pay him later. He further stated that on 19th May 2001, he was called by the son of the complainant who took him outside his house where he was beaten by 2-3 persons. His brother informed the police, which took both the appellants to Police Station where SI Surjeet Singh demanded Rs.25,000/- from him. When he refused, he was implicated in this case.

7. The appellant Mohd. Anwar stated that he was lifted from his house by the police and was taken to Police Station where he was falsely implicated in this case.

8. As far as the involvement of the appellant Mohd. Aslam in the robbery is concerned, admittedly he has not been named in the FIR, though the complainant has admitted in his cross-examination that Mohd. Aslam was a friend of his children and was known to him. The complainant, therefore, could not have missed to give his name in the FIR, particularly when the FIR was lodged by him on next day in the evening. The complainant

did not even say that one of the boys involved in the robbery was a friend of his children or was known to him. There is absolutely no explanation from the complainant as to why he did not name Mohd. Aslam in the FIR though he was previously known to him, he being the friend of his children. The alleged involvement of the appellant Mohd. Aslam in the robbery has, therefore, become seriously doubtful and he is entitled to benefit of doubt on this ground alone. He accordingly is acquitted of commission of robbery.

9. However, I see no reason to disbelieve the testimony of the complainant as regards the appellant Mohd. Anwar. In his statement under Section 313 of Cr.P.C. Mohd. Anwar has not claimed any animosity between him and the complainant. He does not claim even to be known to the complainant. Therefore, there could have been no reason for the complainant to falsely claim that he was one of the persons involved in the robbery.

10. It was pointed out by the learned counsel for the appellants that there was delay in lodging FIR though, the Police Station was at a distance of only about 20 yards from the place where the robbery is alleged to have been taken place. It is true that there is delay of about 17-18 hours in reporting the matter to the

police, since according to the Investigating Officer, the complaint was received by him at about 5/6 PM on 18th May 2001. As regards delay in reporting the matter to the police, the Hon'ble Supreme Court noted in '**Ravinder Kumar vs. State of Punjab**', 2001 VII AD (SC) 2009, that the law has not fixed any time limit for lodging FIR and delayed FIR is not illegal. Though prompt lodging of FIR is ideal, that by itself does not guarantee the genuineness of the version given in it. Whenever there is delay in lodging FIR, the Court ought to look for reasons, if any. But, delay by itself cannot be the sole ground to doubt and discard the entire case of the prosecution though it does put the Court, on guard, to look for explanation, if any.

11. The incident of robbery took place on around midnight at a secluded spot. The complainant was all alone when he was beaten, threatened and robbed of all that he was carrying with him. Since the complainant must be quite scared and terrorized, on account of incident that had taken place with him, it was not unnatural on his part as to seek the comfort and security of his home, instead of rushing to the Police Station to report the incident that took place with him. Obviously the complainant was bothered more about his security than about reporting the

matter to the police, he being all alone at that time and his having gone through a traumatic and terrifying experience at the hands of the robbers. The complainant had nothing to gain by concocting a false story of robbery and going to the police, particularly when he had no axe to grind by doing so, and he did not name any particular person in the FIR lodged by him. The purpose of insisting upon prompt lodging of FIR is to guard against a coloured or doctored version of the incident being given and innocent person being implicated after cool and careful planning and pre-meditation. When no one is identified in the FIR and the complainant had nothing to gain by making false allegations of robbery with him, the delay in lodging FIR, particularly when it happens to be only of a few hours will not by itself be a ground for rejecting the case of the prosecution if it otherwise stands proved beyond reasonable doubt.

12. It was pointed out by the learned counsel for the appellants that as admitted by the complainant, one person could not go on motorcycle from the side of the park near which this incident took place. I am unable to appreciate how the passage on the side of the park being narrow is relevant in the facts of the present case. The complainant was driving on main G.T. Road.

He had parked his vehicle and was easing himself on the side of the main road. Therefore, the width of the passage on the side of the temple appears to be irrelevant. This is not the case of the appellants either in the cross-examination of the complainant or in their statement under Section 313 of Cr.P.C. that it was not possible for the complainant to reach the house via G.T. Road. The complainant, when he came in the witness box, was not asked as to which route he had taken for going to his house from G.T. Road. Had the complainant been cross-examined on this aspect, he would have been able to explain how he would have reached his house from G.T. Road. Therefore, nothing really turns on the passage adjoining the temple being narrow.

13. The appellant Mohd. Anwar has been identified by the complainant when he was examined during trial. Admittedly, he had refused to join Test Identification Parade when he appeared before PW-10 Sh. M.R. Sethi, Metropolitan Magistrate on 21st May 2001. In his statement before the Magistrate, the appellant did not give any reason for his refusal to join TIP. I, therefore, have no hesitation in holding that the appellant refused the TIP without any justification and without any reasonable ground. If the accused refuses to join Test Identification Parade, without

any justifiable cause, he does so at his own peril and the Court will, in such circumstances, be justified in drawing an inference that had the appellant participated in Test Identification Parade he would have been identified by the witnesses and that precisely was the reason why he refused to join the TIP. Similar view was taken by the Hon'ble Supreme Court in '**Suraj Pal vs. State of Haryana**' (1995) 2 SCC 64. The identification of the appellant in Court, coupled with his refusal to join TIP, without any reasonable ground, is sufficient to establish his identity.

14. There is no evidence of the appellant Mohd. Anwar being armed at the time of commission of robbery. Admittedly, it was Mohd. Akram, co-accused of the appellants who was carrying knife with him. Though the complainant, when he came in the witness box, stated that one of the boys was also carrying revolver with him, I find that no such averment was made by him in the FIR. Therefore, this part of the deposition of the complainant is obviously an improvement, for which there is no explanation from him. Hence, the deposition of the complainant to the effect that one of the robbers was having a revolver with him needs to be excluded from consideration. In any case, the complainant did not tell the Court as to whether it was the

appellant Mohd. Anwar or the appellant Mohd. Aslam, who according to him was carrying revolver with him. Admittedly, no revolver has been recovered from the possession of the appellant Mohd. Anwar. Only a knife is alleged to have been recovered from his possession when he was arrested on 20th May 2001 and this is not the case of the prosecution that the appellant Mohd. Anwar was armed with a knife when the robbery took place. Since, neither the appellant Mohd. Anwar was armed with a knife or any other deadly weapon at the time of commission of robbery nor any grievous hurt was caused to any person nor any attempt was made to cause death of or grievous hurt to any person, Section 397 of IPC does not apply against him. The injury caused to the complainant by beating him were simple and no grievous hurt, as defined in Section 321 of IPC, was caused to him.

15. It is by now settled proposition of law that Section 397 of IPC, which by itself does not create an offence and which only prescribes a minimum punishment, can be applied, while awarding sentence, only in respect of that person, who uses a deadly weapon at the time of commission of the offence or who causes grievous hurt or attempts to cause death of or grievous

hurt to any person. This very view was taken by the Hon'ble Supreme Court in '**Phool Kumar vs. Delhi Administration**' AIR 1975 SC 905 and in '**Ashfaq vs. State**' 2003 (10) 732. In Ashfaq's case (supra) the Hon'ble Supreme Court inter alia observed as under:

“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.”

The proposition of law, which one gathers from the decision in the case of Ashfaq (supra), is the same as was laid down in the case of Phool Kumar (supra) that Section 394 of IPC can be applied only in case of a person, who himself had used a deadly weapon at the time of commission of the robbery.

16. Since the appellant Mohd. Anwar was involved in commission of robbery and since hurt was caused to the complainant while committing robbery, Section 397 of IPC comes into play and accordingly he is liable to be convicted thereunder with the aid of Section 34 of Indian Penal Code.

17. As regards the alleged recovery of knives from the possession of the appellants at the time they were arrested on

20th May 2001, no arguments were submitted before me, assailing their conviction under Section 25 of Arms Act. Even otherwise, I see no reason to disbelieve the testimony of police officials PW-4 Const. Vinod Kumar and PW-7 Const. Prakash Chand as regards recovery of knives from the possession of the appellants. The appellants do not claim that there was any enmity or ill will between them and any of these witnesses. Therefore, there could have been no reason for them to depose falsely against the appellants and implicate them in a false case. Their testimony cannot be rejected merely because they happen to be police officers. As observed by the Hon'ble Supreme Court in '**Tahir vs. State**', (1996) 3 SCC 338, no infirmity attaches to the testimony of police officials merely because they belong to the police force. It was observed in '**Aner Raja Khima vs. The State of Saurashtra**', AIR 1956 SC 217 that the presumption that a person acts honestly and legally applies as much in favour of police officers as of others. It is not proper and permissible to doubt the evidence of police officers. Judicial approach must not be to distrust and suspect their evidence on oath without good and sufficient ground thereof. It is true that no public witness has been joined in the search of the appellants, but, that by itself is not a good ground to reject the testimony of police officials, if

it otherwise inspires confidence and stands unimpeached during their cross-examination. It has to be kept in mind that police officials had no prior information about the appellants traveling in the bus and having knives in their possession. They were checking the bus when the appellants presumably on account of their being armed with knives, tried to run away and were apprehended. It cannot be disputes that public persons must be around when the appellants were arrested but, the reluctance of the citizens to join such proceedings is well known and needs to be recognized. It cannot be disputed that the public does not want to get dragged in police and criminal case and wants to avoid them, because of long drawn trials and unnecessarily harassment. Similar view was taken in '**Manish vs. State**', 2000 VIII AD (SC) 29 and in '**A. Bhai vs. State of Gujrat**', AIR 1980 SC 696. We can't be oblivious to the reluctance of a common man to join such raiding parties organized by the police, lest they are compelled to attend Police Station and Courts umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit.

18. For the reasons given in the preceding paragraphs, the appellant Mohd. Anwar is convicted under Section 394 of IPC

read with Section 34 thereof. His conviction under Section 25 of Arms Act is also maintained. The appellant Mohd. Aslam is acquitted of the charge under Section 392/297 of IPC, but his conviction under Section 25 of Arms Act is maintained.

19. As regards sentence, it was contended by the learned counsel for the appellant Mohd. Anwar that he was about 15 years old at the time this incident took place and he is suffering from mental disorder and is being treated at Institute of Human Behaviour and Allied Science of Shahdara. An affidavit of the mother of the appellant Mohd. Anwar has also been filed along with a copy of OPD Card of Mohd. Anwar issued by Institute of Human Behaviour and Allied Science. It has been stated in the affidavit of the mother of the appellant that on many occasions he has to be chained and kept at home in order to ensure that he does not cause any damage to himself or to others.

20. I find that no plea was taken before the trial court, at any stage of the proceedings that the appellant Mohd. Anwar was 15 years old at the time of commission of the offence. Even in his statement recorded under Section 313 of Cr.P.C. on 3rd March 2004, he claimed to be 21 years old. The incident in question having taken place on 17th May 2001, the appellant Mohd.

Anwar would be more than 18 years old at that time even if one caused goes by the age given by him in his statement under Section 313 of Cr.P.C. No proof of the age of Mohd. Anwar such as his Birth Certificate or School Leaving Certificate has been produced to show that he was a juvenile at the time he committed this offence. It is, therefore, difficult to accept, at this stage, that he was 15 years old when he took part in the robbery or when he was found in possession of a knife.

21. Taking into consideration all the facts and circumstance of the case, the appellant Mohd. Anwar is sentenced to undergo R.I. for 2 years and is also sentenced to pay a fine of Rs.1,000/- or to undergo S.I. for one month in default under Section 394/34 of IPC. He is sentenced to undergo imprisonment for the period already spent by him in custody under Section 25 of Arms Act. The sentences of the appellant Mohd. Anwar will run concurrently. The appellant Mohd. Anwar is directed to surrender forthwith to undergo the remaining portion of the sentence awarded to him. The appellant Mohd. Aslam is sentenced to undergo R.I. for the period already spent by him in custody under Section 25 of Arms Act.

The trial court record be sent back immediately along with a copy of this judgment.

Crl.A. 420/2004 & 50/2005 stand disposed of.

(V.K. JAIN)
JUDGE

FEBRUARY 22, 2010

Ag