

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

Judgment reserved on: August 20, 2010
Judgment delivered on: August 26, 2010

+ **CRIMINAL APPEAL NO.783/2008**

ABDUL HAMID **....APPELLANT**

Through: Mr. S.S.Hora, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI) **.....RESPONDENT**

Through: Mr. Pawan Bahl, APP

WITH

CRIMINAL APPEAL NO. 1031/2008

SIRAJUDDIN **....APPELLANT**

Through: Mr. A.K.Srivastava, Advocate

Versus

STATE (NCT OF DELHI) **....RESPONDENT**

Through: Mr. Pawan Bahl, APP

WITH

CRIMINAL APPEAL NO. 424/2010 & CRL.M.B.NO.533/10

FURKAN ALI @ SAGIR **....APPELLANT**

Through: Ms. Nandita Rao, Advocate/Amicus

Versus

STATE (NCT) OF DELHI **.....RESPONDENT**

Through: Mr. Pawan Bahl, APP

CORAM:
HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

AJIT BHARIHOKE, J.

1. Appellants Abdul Hamid, Sirajuddin and Furkan Ali @ Sagir have preferred the above appeals against their conviction for the offences punishable under Sections 399/402 IPC and Section 25 of the Arms Act, in terms of the judgment of Additional Sessions Judge dated 26th August, 2008 as also the consequent order of sentence dated 30th August, 2008.

2. Briefly stated, case of the prosecution is that on 23rd September, 2002, ASI Mukut Lal (PW3) was on patrol duty in the area along with other police officials. While on patrol duty, at around 09:00 pm, he received a secret information that 5-6 boys, who had assembled near public toilets behind Red-Cross Hospital were planning and preparing to commit dacoity. On this, ASI Mukut Lal organized a raiding party and requested some passersby to join as witnesses, but none of them obliged. Thus, without wasting time, he directed Constable Rambir (PW9), who was in civil dress to go near those boys and try to overhear their conversation. Constable Rambir (PW9) was also directed that if he finds that those boys are planning and preparing to commit dacoity, he should give signal to the raiding party by placing his hand on his head. Constable Rambir (PW9) accompanied by the informer, thus

proceeded towards the spot and overheard the conversation between the appellants and their co-accused, which revealed that they were planning to commit dacoity in a blue line bus with a view to rob the passengers. On this, Constable Rambir (PW9) gave the pre-arranged signal to the raid party and the raid party immediately rushed to the spot and apprehended the appellants and their co-accused. On being searched, one country made pistol .315 Bore and two live cartridges were recovered from the possession of the accused Israr, one 'buttondar' knife each was recovered from the accused Shahid @ Babloo, Sirajuddin and Furkan Ali @ Sagir. ASI Mukut Lal prepared a 'rukka' (Ex.PW3/A), detailing the above facts and sent it to the police station through Constable Hem Prakash, on basis of which formal FIR under Sections 399/402 IPC and Section 25 of the Arms Act was registered against the appellants and their co-accused.

3. The investigation of the case was handed over to SI Raj Kumar, who reached at the spot. He prepared the rough site plan of the spot. He also prepared the rough sketches of the pistol as well as knives recovered from the possession of respective accused persons, sealed those weapons in separate 'pullandas' and took them into the possession vide seizure memos. He also arrested the appellants and their co-accused. After completion of formalities of investigation, SI Raj Kumar filed challan against the appellants and their co-accused.

4. In the first instance, the appellants were charged for the offences punishable under Sections 399/402 IPC. However, their co-accused Israr was charged for the aforesaid offences as well as offence under Section 25 of the Arms Act. Israr pleaded guilty. He was therefore convicted and sentenced vide order dated 24th May, 2003.

5. During the pendency of trial, an application was moved by the learned APP with the request for framing of charges under Section 25 of the Arms Act against the appellants Abdul Hamid, Sirajuddin, Furkan Ali as well as co-accused Babloo @ Shahid and they were charged accordingly. The appellants pleaded not guilty to the charge under Sections 399/402 IPC as well as the charge under Section 25 of the Arms Act and claimed to be tried.

6. In order to bring home the guilt of the appellants, prosecution has examined 15 witnesses in all. Case of the prosecution is essentially based upon the testimony of the police officials who were the members of the raid party.

7. PW3 ASI Mukut Lal was in-charge of the raid party. He has deposed that while on patrol duty near Apsara Border, at around 09:00 p.m., he received a secret information that on a platform (*'chabutra'*) behind the Red Cross Hospital near the toilets, 5-6 boys were planning to commit dacoity in some blue line bus. On this information, he organized a raiding party comprising of the police staff. He requested some public persons to join the raid proceedings but none agreed.

Since Constable Rambir (PW9) was in civil dress, he was directed to go along with the informer near said '*chabutra*' and hear the conversation of those boys. Constable Rambir (PW9) was directed to give signal to the raid party by raising his hand if the correctness of secret information was confirmed from the conversation of those boys. At about 09:40 p.m., Constable Rambir (PW9) gave the pre-arranged signal and on this, the raid party surrounded those boys and apprehended the appellants as well as their co-accused persons Israr and Babloo @ Shahid. He stated that on search of appellant Abdul Hamid, one '*katta*' with two live cartridges were recovered. Accused Babloo @ Shahid and Israr were also found in possession of '*buttondar*' knives and the appellants Sirajuddin and Furkan Ali, who were apprehended by Head Constable Rakesh with the help of Constable Sushant and Constable Amarpal were also found in possession of a '*buttondar*' knife each. He further deposed that Constable Rambir (PW9) told him that he over-heard appellant Abdul Hamid telling his co-accused persons that they would rob the passengers of blue line bus and for that purpose, Israr would point the knife on bus driver to force him to keep on driving the bus without stopping. Co-accused Shahid and appellant Furkan Ali would man the front and rear gates of the bus and the appellants Abdul Hamid and Sirajuddin would loot the cash and jewellery from the passengers on the point of knife and '*katta*' and after looting the passengers, they would force the driver to stop the bus at a deserted place and fled away. ASI Mukut Lal also stated that

he recorded all the facts in the '*rukka*' (Ex.PW3/A) and sent it to the police station for the registration of the case. He further deposed about the formalities of the investigation conducted by SI Raj Kumar at the spot.

8. PW5 Constable Jai Karan, PW6 Constable Surinder, PW7 Head Constable Raj Pal and PW9 Constable Rambir are the other members of the raiding party. They have also deposed to the similar effect. Constable Rambir (PW9) has also stated that he was asked to go along with the informer near the appellants and overhear their conversation and if their conversation confirmed the correctness of the secret information, he was required to give pre-arranged signal to raid party. He stated in his examination that on hearing the conversation of those boys, he gave the pre-arranged signal to the raid party and in the cross-examination, he clarified that he heard Abdul Hamid saying to his co-accused that they would ride a blue line bus. Israr will take care of the driver on the point of knife and tell him to continue driving the bus. Shahid @ Babloo will man the front gate and Furkan would man the rear gate of the bus and Sirajuddin and Abdul Hamid would snatch the valuables from the passengers.

9. The appellants, when examined under Section 313 Cr.P.C., denied the prosecution evidence in toto. They claimed that that they have been falsely implicated in this case. No witness in defence has been examined.

10. Learned Additional Sessions Judge relying upon the evidence of the police witnesses has found the appellants guilty of the offences punishable under Section 399/402 IPC as well as Section 25 of the Arms Act.

11. Learned Mr. S.S.Hora, Advocate appearing on behalf of appellant Abdul Hamid, learned Mr. A.K. Srivastava, Advocate appearing on behalf of appellant Sirajuddin and learned Ms. Nandita Rao, Amicus Curiae appearing on behalf of appellant Furkan Ali have argued on almost similar lines. Their main challenge to the impugned judgment is that the prosecution case is highly unreliable. It is argued that if the prosecution case is to be believed, the informer intimated ASI Mukut Lal (PW3) that 5-6 persons were planning to commit robbery in a blue line bus at about 9:00 pm on 23.09.2002 and Constable Rambir (PW9) who was sent by ASI Mukut Lal along with the informer to overhear the conversation of the appellants heard their conversation about planning and gave signal to the raiding party at about 9:40 pm. This implies that the appellants, who were armed as per the prosecution case with knives and a 'katta', kept on discussing their plan for almost 40 minutes to ensure the arrival of police and overhear their conversation. Learned counsels contended that this story is highly unnatural to be believed and leaves a scope for doubt. It is contended that aforesaid doubt against the prosecution story is further compounded by the fact that ASI Mukut Lal (PW3) who was in-charge of raiding party, did not bother to join any independent witnesses in the raid party despite of

the fact that the appellants are stated to have been apprehended from a place within about 600 mtrs from a residential locality and admittedly public persons were available near the spot. It is also argued that as per the story of the prosecution, the informer was sent along with Constable Rambir (PW9) to overhear the conversation of the appellants from which it can be safely inferred that ASI Mukut Lal was not concerned about hiding the identity of informer from the appellants and as such, non-production of informer, who could be termed as an independent witness, is also a reason to suspect the prosecution case. Thus, it is urged on behalf of the appellants that prosecution has failed to prove their guilt beyond reasonable doubt and they are entitled to at least the benefit of doubt.

12. On the other hand learned APP has argued in support of the impugned judgment. He has contended that from the testimony of PW9 Rambir it is established beyond doubt that the appellants and their co-accused, who were found in possession of '*buttondar*' knives and '*katta*' respectively, were discussing their plan to commit dacoity in a blue line bus. His version finds corroboration from the other witnesses of the raiding party and merely because there is a gap of 40 minutes between the secret information and overhearing of conversation of the appellants by Constable, the prosecution case cannot be thrown away. As regards non-joining of public witnesses, learned APP submitted that it has come in evidence in the testimony of ASI Mukut Lal (PW3) as well as other witnesses that after the receipt of

the secret information public witnesses were requested to join the raid party, but none of them agreed. Thus, it is established that the Investigating Officer did make an effort to join independent witnesses to the raid; as such, absence of public witnesses cannot be taken as a reason to disbelieve the version of police witnesses which is otherwise reliable.

13. I have carefully considered the rival contentions and perusal the material on record.

14. On perusal of the statement of PW3 ASI Mukut Lal and '*rukka*' Ex.PW3/A, which formed basis for registration of the case, it transpires that ASI Mukut Lal received secret information at 9:00 pm, that five or six boys were planning to rob a bus behind the Red Cross building near the toilets. It is also evident from the testimony of PW3 as well as facts narrated in the '*rukka*' Ex.PW3/A that Constable Rambir along with the informer was sent to said spot with the direction to overhear the conversation between those boys at 9:30 pm and Constable Rambir was also directed to give signal if those boys were found planning dacoity and the signal was given by Constable Rambir at 9:40 pm. If this version is to be believed, then as per the case of prosecution, the appellants and their co-accused continued to plan the dacoity at the spot behind the Red Cross building for almost 40 minutes. This story appears to be unnatural for the reason that as per the statement of the prosecution witnesses, all the appellants as well as their co-accused

persons were armed with '*buttondar*' knives and '*katta*' respectively and if they actually wanted to rob a bus, it is highly improbable that they would have waited there for more than half an hour for the arrival of the police and catch them red-handed. This circumstance raises a doubt against the correctness of prosecution version. Aforesaid doubt is further compounded by the fact that the prosecution case is based upon the testimony of police witnesses only. As per the site plan Ex.PW3/D, the place where the appellants were allegedly planning the robbery was near a residential colony. Therefore, it can be safely inferred that public witnesses were easily available to the Investigating Officer. The explanation given for non-joining of public witnesses by ASI Mukut Lal is that he requested some passersby but they did not agree. This explanation of the Investigating Officer is not convincing. If the Investigating Officer was actually serious about joining the independent witnesses, he was expected to go to the nearby residential houses or to the Red Cross building, Dilshad Garden to join some independent witness to the raid party instead of asking just the said passersby to join the raid. Further story of the Investigating Officer that he received secret information is also suspect for the reason that as per the Investigating Officer ASI Mukut Lal (PW3), informer was sent along with Constable Rambir (PW9) to overhear the conversation of the appellants and the co-accused. This story is not probable because such a course of action had a potential to reveal the identity of the informer to the appellants and put him at risk. If the

Investigating Officer ASI Mukut Lal was not so keen to keep identity of the informer under wraps, then there should have been no hesitation on the part of the prosecution to produce the informer as a witness to support the prosecution story.

15. The doubt against the prosecution case is further compounded by the fact that SI Raj Kumar, to whom the investigation of this case was entrusted after the registration of the case has stated that he left the Police Station for the spot at 10:30 pm and reached there within 20 minutes. He has also stated that he completed the formalities of investigation under the street light at the spot and the police party left the spot at 1:00 am. If this version is to be believed, then the Investigating Officer had reached the Police Station along with the knives and country made pistols as well as cartridges seized from the appellants and their co-accused at the Police Station on 24th September, 2002 after 1:00 am. The arrest memos of the appellants Abdul Hamid Ex.PW3/E, Sirajuddin Ex.PW12/F and Furkan Ali Ex.PW12/G indicate that they were arrested at the spot at 1:30 am on 24.09.2002. Thus, it is apparent that the Investigating Officer reached at the Police Station along with the appellants and the seized weapons on 24.09.2002 after 1:30 am. This is belied by the record of the Malkhana register Ex.PW10/A regarding deposit of the case property by SI Raj Kumar in the malkhana of Police Station. Perusal of the malkhana register entry No.3588, Ex-PW-10/A reveals that the case property pertaining to the instant case FIR No.349/02 dated 23.09.2002

under Section 399/402 IPC and Section 25 of the Arms Act was deposited in the malkhana by SI Raj Kumar on 23.09.2002. Even as per the ocular testimony of PW-10 H.C. Ravinder Kumar, who was moharrir malkhana P.S. Seema Puri, case property was deposited by the Investigating Officer at malkhana on 23.09.2002. It is beyond comprehension as to how the case property got to be deposited in the malkhana on 23.09.2002 when as per the testimony of the Investigating Officer, he reached at the Police Station along with the weapons recovered from the appellants on 24.09.2002 after 1:30 am. This contradiction in the prosecution story clinches the issue and raises a strong doubt against the correctness of the prosecution story and entitles the appellants to benefit of doubt.

16. The result of above discussion is that, I find myself unable to sustain the impugned judgment of learned Additional Sessions Judge. All the three appeals are, therefore, allowed and the appellants are acquitted of the charge under Sections 399/402 and Section 25 of the Arms Act, giving them benefit of doubt.

17. The appellants are in jail. They be released forthwith, if not required in any other case.

18. Appeals are disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

AUGUST 26, 2010

akb/pst