

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

+       **CRL. APPEAL No. 240/2001**

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Reserved on: 29<sup>th</sup> October, 2010

Decided on: 4<sup>th</sup> January, 2011

SUBASH PRASAD YADAV  
S/O SH. LANGI PRASAD YADAV,  
R/O VPO LAI LAKH,  
PS SWAO DISTT. BHAGALPUR,  
BIHAR,

..... Appellant

Through:   Mr. S.K. Duggal, Advocate along with  
the Appellant.

versus

STATE OF NCT OF DELHI

..... Respondent

Through:   Mr. Manoj Ohri, APP with SI Haroon  
Ahmad, PS Ashok Nagar, Delhi.

**Coram:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

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|---------------------------------------------------------------------------------|---------------|
| 1. Whether the Reporters of local papers may<br>be allowed to see the judgment? | Not necessary |
| 2. To be referred to Reporter or not?                                           | Yes           |
| 3. Whether the judgment should be reported<br>in the Digest?                    | Yes           |

**MUKTA GUPTA, J.**

1.           By the present Appeal a challenge is laid to the judgment of conviction for offences under Section 392, Section 392 read with Section 397

IPC and Section 27 of the Arms Act and the sentence of Rigorous Imprisonment for a period of three years with a fine of ₹1,000/- and in default of payment of fine to further undergo Rigorous Imprisonment for a period of three months; seven years with a fine of ₹2,000/- and in default of payment of fine to further undergo Rigorous Imprisonment for a period of six months; and two years with a fine of ₹500/- and in default of payment of fine to undergo Rigorous Imprisonment for a period of fifteen days respectively.

2. Briefly the case of the prosecution is that on 18<sup>th</sup> August, 1994 one Ram Karan was carrying a bag containing ₹2,54,000/- out of his factory premises which were given to him by his employer Atul Jain. The Appellant pointed a pistol at Ram Karan and his co-accused (whose name was later on disclosed to be Virender Mandal) snatched the bag and ran away. However, PW1 Krishnanad Jha, PW 2 Ram Karan and PW 3 Atul Jain the employer who immediately came out thereafter, overpowered the Appellant at some distance and from his possession a country made pistol loaded with live cartridge was recovered. When PW2 was being robbed by the Appellant and his accomplice at the point of pistol, accused Anil Mandal remained a silent spectator. The Appellant was handed over to the police along with a country made pistol loaded with one live cartridge. The Appellant disclosed the names of his accomplices as Virender Mandal and Anil Mandal. Accused Anil

Mandal was subsequently arrested. Both the Appellant and Anil Mandal were charged for offences punishable under Sec.392/34 IPC, whereas the Appellant was also charged for offences punishable under Sec. 397 IPC and 27 Arms Act. As accused Virender Mandal absconded he was declared a proclaimed offender and proceedings were recorded under Sec. 299 CrPC as against him. After trial, Anil Mandal was acquitted by the learned Trial Court giving him the benefit of doubt, whereas the Appellant was convicted and sentenced as above.

3. Learned counsel for the Appellant contends that though the prosecution claims to have examined three eye witnesses, that is, PW1 Krishnand Jha, PW2 Ram Karan and PW3 Atul Jain, however, there are material contradictions in the testimony of these witnesses. According to PW2 Ram Karan seizure of the pistol was from the Appellant, however, he was not present there. Even PW3 Atul Jain says that no proceedings were conducted on the spot. The eye witnesses have neither identified the Appellant nor the pistol nor the cartridge. There is discrepancy even on the place from where the money has been recovered. Moreover, incriminating evidence has not been put to the Appellant under Section 313 Cr.P.C. and thus, the same cannot be used for convicting the Appellant. According to the learned counsel even believing the testimony of the witnesses, only an offence

punishable under Section 25 of the Arms Act can be said to have been committed. The Appellant has faced a protracted trial of 16 years and has been in custody for nearly three years four months and should be let out for a sentence of imprisonment for the period already undergone or on probation.

4. Learned APP for the State on the other hand refers to the testimony of the eye witnesses and contends that there is no discrepancy in the testimony of these witnesses. The Appellant was apprehended on the spot immediately after the incident and on the police being called he was handed over to the police. Even if PW2 Ram Karan has stated that the Appellant had not fired the pistol, however, it has been deposed by both PW1 and PW2 that the Appellant had put the pistol on the neck of PW2 Ram Karan and this act of the Appellant fulfills the requirement of offence punishable under Section 397 IPC. Reliance is placed on *Phool Kumar vs. Delhi Administration, 1975 (1) SCC 797* and *Ashfaq vs. State, AIR 2004 SC 1253*. Relying on *Khuji @ Surender Tiwari vs. State of M.P., 1991 (3) SCC 627* it is contended that even if the witness has turned hostile his entire testimony does not get effaced and his statement in examination in chief can be relied upon.

5. Learned APP for the State has taken me through the statement of the Appellant recorded under Section 313 Cr.P.C. to show that all the incriminating circumstances have been put to the Appellant and contends that

in any case even if this Court comes to the conclusion that some portion has not been put then in view of the decisions of the Hon'ble Supreme Court the Appellant has not been able to show that any prejudice has been caused to him. Reliance is placed on *State vs. Dharampal, 2001 (10) SCC 372* and *State of Punjab vs. Swaran Singh, 2005 (6) SCC 10*.

6. I have heard learned counsel for the parties at length and gone through the record. PW2 Ram Karan has stated that as he came out, two young boys confronted him and when the Appellant placed a pistol on his neck, the other co-accused snatched the bag containing currency. He raised an alarm on hearing which Sh. K.C. Jain and his son Atul Jain PW3 came out. This statement of PW2 is corroborated by PW1 Krishnanand Jha who was also present there. PW1 in addition also stated that when he apprehended the accused, he fired which fact has not been stated by PW2. In so far as the offence of Section 397 IPC is concerned, the same was complete the moment the Appellant used pistol by putting the same on the neck of PW2 and the accused snatched the bag containing money from PW2, and to that extent there is no discrepancy in the testimony of the two witnesses. Though in the statement of PW1 and PW2, there are minor contradictions as regards the manner of apprehension and firing however on material aspects, the testimony of PW2 is supported by that of PW1. As held by the Hon'ble Supreme Court

in *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat* (1983) 3 SCC 217,

much importance cannot be attached to minor discrepancies for the reasons:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen:

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

7. In *Bakhshish Singh Dhaliwal vs. State of Punjab*, AIR 1967 SC

752 it was held:

“Under Section 342 Cr.P.C. (Now Section 313 Cr.P.C.) questions are put to an accused to enable him to explain any circumstances appearing in the evidence against him, and for that purpose, the accused is also to be questioned generally on the case, after the witnesses for the prosecution have been examined and before he is called on for his defence. These War Diaries were not circumstances appearing in evidence against the Appellant. They were, in fact, evidence of circumstances which were put to the accused when he was examined under s. 342, Cr. P.C. It was not at all necessary that

each separate piece of evidence in support of a circumstance should be put to the accused and he should be questioned in respect of it under that section”.

8. From the perusal of the statement of the Appellant under Section 313 Cr. P.C, the incriminating circumstance against the Appellant that he and his co-accused Virender Mandal accosted Ram Karan and the Appellant put the pistol on his neck and snatched the bag containing currency notes from the hand of Ram Karan has been put as question No.2. In further questions, the fact that the co-accused escaped with the looted bag containing currency notes and PW1 managed to apprehend the Appellant has been put to the Appellant.

9. The contention of the learned counsel for the Appellant that the Appellant has not been identified by Krishnanand Jha PW1 has also to be ignored because the Appellant has been identified by both PW2 and PW3. Though PW1 has not supported the prosecution case to the extent of the Appellant being apprehended on the pretext that he could not identify as it was dark but he has stated that he over-powered a person and apprehended him and the identity of the Appellant has been proved beyond reasonable doubt by testimony of PW2 and PW3 who have identified him in the court. Moreover, the fact that the Appellant was apprehended immediately after the incident from near the spot along with one country made pistol loaded with one live cartridge, has also been corroborated by the testimony of PW7

Inspector Arun Sharma, the Investigating Officer who arrested the Appellant along with a country made pistol loaded with a cartridge, on reaching the spot soon after the incident.

10. For the reasons aforesaid, I find no infirmity in the impugned order. The sentence provided for an offence punishable under Section 392 IPC read with Section 397 IPC is imprisonment which may extend to ten years, subject to a minimum of seven years. The Appellant has already been awarded the minimum sentence of Rigorous Imprisonment for seven years for offence punishable under Section 392 read with Section 397 IPC and a sentence of Rigorous Imprisonment for a period of two years, that is, less than the minimum prescribed for the offence punishable under Section 27 of the Arms Act. The sentence of the Appellant cannot be reduced than the statutory minimum. The appeal is accordingly dismissed. The bail bond and the surety bond stand cancelled. The Appellant be taken into custody to serve the remaining sentence.

**(MUKTA GUPTA)**  
**JUDGE**

**JANUARY 04, 2011**  
**vn**