

2. Briefly the prosecution case is that on 7th February, 1996, accused Swaran Singh accompanied by 3/4 associates came to the house of Ram Niwas at Sangam Vihar with an intention to commit dacoity. They were armed with weapons and the Appellant was having one country-made pistol. On reaching the house of Ram Niwas they knocked the door and when Ram Niwas opposed their entry in his house all the accused persons on the instructions of Appellant forcibly entered into the house of Ram Niwas. He raised an alarm and his friend Dharambir who was sitting inside the house came out and the Appellant fired a shot. Then the Appellant along with his associates tried to flee away but after chasing, the Appellant was caught by the Complainant and Dharambir with his pistol while the others managed to escape. Police arrived at the spot and from the Appellant one country-made pistol and five live cartridges were recovered. Also one empty cartridge was found in the barrel of the katta and all the articles were seized and sealed. Thereafter on 10th October, 1996 co-accused Kanwar Pal Singh was arrested in some other case and in his disclosure statement he disclosed about his involvement in the present offence. Investigation was conducted and a charge-sheet was filed. After recording the statement of witnesses and the accused under Section 313 Cr.P.C. the learned Trial Judge held as above.

3. Learned counsel for the Appellant contends that the Appellant is a handicapped person. There are many lacunas in the prosecution version and statements of the alleged eye-witnesses i.e. PW2 and PW3 are full of contradictions. There is no recovery of alleged robbed articles from the Appellant. The witnesses on the basis of whose testimony conviction has been based are interested witnesses and no public witness has been examined by the prosecution despite the fact that it is stated by the witnesses that on raising an alarm public got collected at the house of the Complainant. The co-accused, who were charged for the said offence, have been given the benefit of doubt and acquitted by the learned Trial Judge. However, the benefit of doubt has not been extended to the Appellant. The Appellant claims that he be acquitted on parity. It is further stated that no shell has been recovered, no finger prints or chance prints have been picked up from the place of occurrence. No photographs of the crime scene have been taken. Relying on *Chinnadurai v. State of Tamil Nadu, AIR 1996 SC 546*, it is contended that since no attempt of robbery has been proved, the Appellant cannot be convicted for an offence punishable under Section 398 IPC. The entire prosecution story is full of contradictions and improvements and hence the Appellant is entitled to be acquitted.

4. Per contra, learned APP for the State contends that the prosecution has established its case beyond reasonable doubt. The Appellant was apprehended at the spot with the katta and five live cartridges in the barrel and one empty cartridge case which was used at the time of commission of offence. The version of PW2 and PW3 who have deposed about the Appellant firing a gun shot is corroborated by his apprehension and recovery on the spot. The Appellant cannot claim parity with co-accused Kanwar Pal as no overt act is attributed to the co-accused by the witnesses. It is, thus, prayed that the appeal be dismissed being devoid of merit.

5. I have heard learned counsels for the parties. The moot question involved in the present case is whether the ingredients of Section 398 IPC are satisfied in the present case. PW 2 Dharambir in his testimony has stated that on 7th February, 1996 when he was present at the house of Ram Niwas, 2/3 persons came and knocked at the door of the house of Ram Niwas. On Ram Niwas opening the door, those persons shouted 'Loot Lo, Mar Do' and a scuffle ensued. He rushed where Ram Niwas was standing but he could not see the other persons while Ram Niwas caught hold of accused Swaran Singh, he fired a shot from the revolver and the neighbours gathered. The shot did not hit anyone. Somebody informed the police at 100 number and police came at the spot and accused was handed over to the police. PW 3 Ram

Niwas in his testimony has deposed that on 7th February, 1996, while he was present at his house, there was a knock at the door of his house. He opened the door and found 4/5 persons present there. Three of them came inside the room and one of them pointed out a katta on his chest on his right side. He raised alarm and Dharambir rushed to his help. He caught hold of the person who was having katta in his hand but that person fired a shot from the katta and the shot did not hit anyone. The persons who attacked ran away from the spot. He along with Dharambir chased those persons and after a distance of 10/15 steps, the Appellant was apprehended and katta was snatched from him. Appellant was given beating by the public and on getting the information, the police reached at the spot and arrested him with katta.

6. A perusal of the statement of PW 3 shows that he nowhere alleges that the Appellant and his co-accused attempted to commit robbery. Even PW2 has only stated that when the Appellant and the other accused entered, they shouted 'Loot Lo, Mar Do'. Thus, at best it can be said that Appellant came with the intention to commit robbery, however, that intention did not fructify into an attempt and it was at best the preparation. Further this statement of PW 2 is not corroborated by PW3. From his testimony, it is evident that the Appellant at best had the intention to kill Ram Niwas. Thus, the basic ingredient of Section 398 IPC that is an attempt to commit robbery is not

made out in the present case. Therefore, the conviction of the Appellant for offence under Section 398 IPC cannot be sustained. The Appellant has not been convicted for the offence punishable under Section 307 IPC. No appeal has been filed by the State on this count.

7. For the reasons mentioned above, the appeal is allowed. The Appellant is acquitted of the charge under Section 398 IPC. The Appellant is in custody. The Superintendent, Tihar Jail, is directed to release him forthwith, if not required in any other case.

(MUKTA GUPTA)
JUDGE

JULY 05, 2011
VKM