

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

+ CRL.A. 119/2010 & Crl.M.(Bail) 1451/2010

% Reserved on: 20th September, 2011

Decided on: 13th October, 2011

DHARMBIR @ DHARMA Appellant
Through Mr. Vimal Puggal, Adv.

versus

STATE Respondent
Through Mr. Mukesh Gupta, APP for State.

AND

+ CRL.A. 145/2010

SHASHI Appellant
Through Mr. Vimal Puggal, Adv.

versus

STATE Respondent
Through Mr. Mukesh Gupta, APP for State.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. By these appeals the Appellants lay a challenge to the judgment of conviction and order on sentence dated 21st and 22nd December, 2009 respectively passed by the Learned Additional Sessions Judge.

2. Appellant Dharambir has been convicted and sentenced to Rigorous Imprisonment for 5 years and fine of Rs. 2,000/- for the offence punishable under Section 392 IPC in default of payment of fine to further undergo Rigorous Imprisonment for 1 year; Rigorous Imprisonment for 2 years and fine of Rs. 1,000/- for the offence punishable under Section 324 IPC in default of payment of fine to further undergo Rigorous Imprisonment for 6 months; Rigorous Imprisonment for 1 month and fine of Rs. 500/- for the offence punishable under Section 341 IPC and in default of payment of fine to further undergo Simple Imprisonment for 1 month.

3. Appellant Shashi has been convicted and sentenced to Rigorous Imprisonment for 7 years and fine of Rs. 5,000/- for the offences punishable under Section 392/397 IPC and in default of payment of fine to further undergo Rigorous Imprisonment for 1 year; Rigorous Imprisonment for 2 years and fine of Rs. 1,000/- for offence punishable under Section 324 IPC, in default of payment of fine to further undergo Rigorous Imprisonment for 6

months and Rigorous Imprisonment for 1 month and fine of Rs. 500/- for the offence punishable under Section 341 IPC, in default of payment of fine to further undergo Simple Imprisonment for 1 month.

4. Learned counsel for the Appellant contends that the alleged incident is of 11th May, 2007. After the incident DD No. 34A was received with regard to the quarrel at Dhaba. Allegedly there are two eye-witnesses of the incident. PW1 Mohd. Shajid is the maker of FIR who neither in his FIR nor in his statement before the Court has leveled any allegations qua robbery of ATM Card, Rs. 10,000/- and some documents. Even PW2 Abdul Wahid in the MLC has not alleged anything in regard to the robbery. Thus his statement under Section 161 Cr.P.C. and before the Court is a material improvement. In cross-examination the Appellants have effectively elicited that PW2 was inimical to the Appellant Shashi. Thus, the Appellants have been falsely implicated in view of the enmity. Further, it is not proved that which weapon was used by Appellant Shashi nor there was recovery of any weapon of offence. In the absence of any such statement or recovery, it cannot be proved that a deadly weapon was used. Therefore, the ingredients of Section 397 IPC are not fulfilled. As regards the identity, PW1 has turned hostile. He has not supported the prosecution case qua identity. He has stated that it was dark and he could not identify the assailants. Even PW2 has not been able to identify

the other two alleged accused and thus on un-corroborated testimony of PW2 the Appellants have been convicted. Further, no investigation has been carried out qua robbery of ATM Card, Rs. 10,000/- and the documents. The nature of injury on the person of injured in the MLC has been opined to be simple. No TIP of the Appellants conducted. In fact after the arrest the Appellants were shown to the complainant in the Police Station which was wholly unwarranted and illegal. In view of the material contradictions and improvements in the testimony of the witnesses on record the Appellants are entitled to be acquitted. In the absence of recovery of any deadly weapon and use thereof it is prayed that since no offence under Section 392/397 IPC is made out the Appellants be released on the period already undergone which is around 2 years in the case of Appellant Dharambir and 1 years in the case of Appellant Shashi.

5. Learned APP on the other hand contends that a perusal of the testimony of PW2 Abdul Wahid shows that the Appellant Shashi used a sharp weapon while committing robbery. This version of PW1 and PW2 is corroborated by the MLC, though PW1 has turned hostile as far as the identity is concerned. However, he has supported the entire prosecution case. As per the MLC the nature of injury was found to be simple caused by sharp object and thus, there

is no infirmity in the judgment convicting the Appellants for offences under Section 341/324 IPC.

6. I have heard learned counsel for the parties. PW1 Mohd. Sajjad has stated that he was working as a labourer and was living with his brother. His brother was running a 'dhabba' on which he used to work. On 11th May, 2007 at about 8.30-9.30 PM there was no electricity in the Gali. At that time, four people came at other 'dhaba' when he was standing there. One of those persons splashed water on his face and another started slapping him. PW2 Abdul Wahid intervened and tried to save him and a quarrel took place. Abdul Wahid sustained injuries on his left hand and he took him to the hospital with the help of the other people. PW2 Abdul Wahid has stated that he was doing the business of selling school bags etc. in Sadar Bazar and was having his godown in Amar Puri. On 11th May, 2007 while he was standing outside his godown he saw that four persons were beating one person Mohd. Sajjad. When he went to save him, all the four accused persons pounced on him and started beating him and one of the accused gave blow on his left thumb base with some sharp object. Accused Shashi was earlier known to him who gave blow on his left thumb with some sharp object. He further deposed that one of the accused took out Rs. 10,000/- from his pocket and his purse

containing ATM Card, some slips and some money and then escaped from the spot.

7. A perusal of testimony of PW1 and PW2 shows that the two were restrained and an assault was committed on them by the assailants on the fateful day. As regards the identity of the accused persons, PW1 is completely silent. PW2 has identified the Appellants. In his statement before the Police recorded immediately after the incident he had given the names of the Appellants. Enmity is a double edged weapon. If it can be used for falsely implicating, it is also the motive to commit crime. PW2 has stated that some sharp object weapon hit them. The MLC shows the injury on PW2 to be simple and sharp in nature. In view of the evidence on record, I am of the opinion that the prosecution has proved its case beyond reasonable doubt for offences punishable under Section 341/324/34 IPC against the two Appellants before this Court.

8. As regards offences punishable under Section 392/397 IPC, it may be noted that undoubtedly PW1 neither in the FIR nor in his statement before the Court has alleged robbery of the articles. The PW1 and PW2 were assaulted together. In the absence of corroboration of the testimony of PW2 of robbery from PW1 and from any other independent sources, I do not find it appropriate to simplicitor rely on the testimony of PW 2. Moreso, because

admittedly there is enmity between PW2 and Appellant Shashi. Thus, exaggeration to implicate Shashi in a more heinous offences cannot be ruled out. Further the prosecution has neither recovered the sharp weapon nor proved the same. Thus, there is no evidence on record to show that the weapon used for committing assault on the PW2 was a deadly weapon. In the absence of corroboration of testimony of PW2 and in the absence of proof of use of a deadly weapon, in my opinion the offences under Section 392/397 IPC have not been proved beyond reasonable doubt by the prosecution. The Appellants are thus liable to be acquitted for these offences.

9. In view of the aforementioned discussion, the conviction of the Appellants is converted to one for offences under Section 341/ 324/34 IPC. The sentence of Appellant Dharambir alias Dharma was never suspended and he has been in custody for nearly two years whereas Appellant Shashi has undergone a period of nearly 1 year including remissions.

10. In view of the facts and circumstances of the case, the sentence of the Appellants is modified to the period already undergone. Appeals and the application are accordingly disposed of.

(MUKTA GUPTA)
JUDGE

OCTOBER 13, 2011
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