

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

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Reserved on: 31st January, 2011

Decided on: 29th April, 2011

+ Crl. Appeal No. 205/2010 & Crl. M.B. No.266/2010

DILSHAD

..... Appellant

Through: Mr. S.Q.Kazim, Mr. Alim Miraj and
Mr. H. Usmani, Advocates

versus

STATE

..... Respondent

Through: Mr. Pawan Bahl, APP along with SI
Om Prakash.

AND

+ Crl. Appeal No. 108/2010 & Crl. M.B. NO.140/2010

MUSTAKEEN

..... Appellant

Through: Mr. S.Q.Kazim, Mr. Alim Miraj and
Mr. H. Usmani, Advocates

versus

STATE

..... Respondent

Through: Mr. Pawan Bahl, APP along with SI
Om Prakash.

AND

+ Crl. Appeal No. 640/2010

KISHORE KUMAR @ PANDIT

..... Appellant

Through: Sumeet Verma, Advocate

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Pawan Bahl, APP along with SI
Om Prakash.

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. The prosecution case in brief is that on 1st May, 2006 an information was received vide DD No. 8A Ex.P1 on which SI Om Prakash PW13, Head Constable Babu Lal and Constable Sher Singh reached at the spot i.e. House No. K-13/C, Khirki Extension, Malviya Nagar, New Delhi and met Mohd. Mursaleen, the Complainant in the case and Head Constable Surender Singh PW8 who had apprehended Mustakeen along with knife in his possession and found Mohd. Mursaleen injured. Mohd. Mursaleen was sent to AIIMS and was examined vide MLC Ex.PW13/A. He was certified fit for statement by the doctor. The statement of the Complainant was recorded vide Ex. PW1/A in which it was alleged that on 1st May, 2006 at about 10:50 A.M., two persons entered inside the gate of his house which was already open. Immediately on entering they showed country-made pistols to the ladies and

the children and said in case they made noise, they will shoot them. On seeing that, as he stood up, three more persons came inside from the gate at the back side and out of them one person who had a country-made pistol went towards the women and took the ladies and children inside whereas the other two had knives in their hand and cornered the Complainant and abused him and threatened that if he makes noise, they will shoot him. Thereafter, they tied his mouth with the dupatta of his daughter and threatened that if he did not take out the entire money and jewellery of the house, he would be finished. While they were tying the dupatta on his mouth and hand, the Complainant showed courage and gave a fist blow on which one of them inflicted a knife injury which he caught hold of by the left hand resulting in a injury on the index finger of his left hand. He and his family shouted and as the gate was open, people got collected. Four of the accused persons ran away showing the country-made pistols however the person whose knife was caught by the Complainant. The Complainant caught his feet and did not leave him and the people gave fist and leg blows to him. In the meantime, the beat Constable who had passed through this place a short while ago, returned back and apprehended this person. His name came to be known as Mustakeen. The Complainant stated that he could identify the four persons who ran away

and action be taken against all the five who attempted to loot him and his family by showing country-made pistols and knives.

2. The Appellant Mustakeen was apprehended on the spot, however the co-accused could not be arrested. When on 15th May, 2006 the Appellants Dilshad and Kishore were arrested in FIR 538/2006 under Sections 186/353/307/411/34 IPC and Sections 25/27 Arms Act, they made disclosure about the commission of offence in the present case and also led to the arrest of one Ehsaan. The Appellants Dilshad and Kishore were produced for T.I.P. however, they refused to get the T.I.P. conducted. Dr. Malik @ Shokeen, co-accused was not identified by the Complainant and thus he was discharged. The other two accused Zahir and Yasim could not be traced and thus they were declared proclaimed offenders. On filing of the charge-sheet, the Appellants were initially charged for offences under Section 394/398 IPC and Sections 25/54/59 Arms Act and subsequently for offences punishable under Sections 395/397/398 IPC and Sections 25/54/59 Arms Act. After recording the prosecution evidence, statements of the accused under Section 313 Cr.P.C. and the defence witnesses, the Appellants were convicted for offences punishable under Section 395 read with Section 398 IPC and awarded a sentence of imprisonment for a period of seven years and a fine of ₹5,000/- each in default of payment of fine to undergo further simple imprisonment for

a period of six months. Appellant Mustakeen was also convicted for offences punishable under Sections 25/54/59 Arms Act and awarded Rigorous Imprisonment for a period of one year and a fine of ₹1,000/- and in default of payment of fine to further simple imprisonment for a period of one month. The judgment dated 20th November, 2009 and order dated 26th November, 2009 in Sessions Case No. 10/2008 are impugned in these appeals.

3. Learned counsel for the Appellant Mustakeen and Dilshad contends that in the statement of Mohd. Mursaleen vide Ex. PW1/A, the identity of the other four accused is not stated and hence no reliance can be placed on the version of PW1 Mohd. Mursaleen. Despite the fact that the Appellant Mustakeen was allegedly arrested on the spot and he made disclosure about the co-accused, however co-accused Dilshad and Kishore were not apprehended on his disclosure. Fifteen days later when they were arrested in another case, it is alleged that they themselves made the disclosure of having committed this offence. This version of the prosecution is highly improbable and not trustworthy. To prove the offence of dacoity, involvement of five persons is essential. The prosecution has not been able to arrest two persons. Besides the Appellants, two other persons who were not even connected with the alleged incident were arrested and one of them was discharged and the other acquitted by the trial court. There is contradiction in the testimony of

PW1 as to the role ascribed to the Appellants. Besides the family members, no public witness has been examined. The Appellants Dilshad and Kishore Kumar rightly refused to undergo the T.I.P. as they were shown to the witnesses. Thus, no adverse inference could be drawn against the Appellants Dilshad and Kishore Kumar for not joining the T.I.P. because the Complainant had already identified them in P.S. Hauz Khas. Though PW13 states that Constable Sher Singh took the Complainant to the AIIMS, however, the Complainant says that the PCR took him to the AIIMS. PW2 Zaitun Begam, wife of PW1 has not been medically examined. PW1 states that Aslam, a neighbour called the PCR whereas his daughter PW5 stated that she called the police. There is no evidence or sign of breaking open the door nor any article is lying helter skelter or any lock has been found to be broken.

4. As per the version of Complainant, the Appellant was apprehended on the spot and he was beaten by the public. Thus, there should have been injuries on the Appellant Mustakeen however, no such injury was found on the person of the Appellant Mustakeen. The alleged 'chura' has not been identified which was used for causing the injury. Despite fifty people from the neighbourhood having been collected, no independent witness was examined. As per the MLC of PW1 Ex. PW13/A there was no bleeding and in case he would have been hit by a knife then bleeding should have been

there. Even in the MLC, the history given is “Burglary” and not dacoity. As per the Complainant he always kept ₹20,000/- with him. However, there is no recovery of money. Reliance is placed on *Latel vs. State of Madhya Pradesh AIR 1994 SCC 763*, to contend that the accused is not required to prove his explanation beyond reasonable doubts and they are entitled to be acquitted even on the basis of preponderance of probabilities. Reliance is also placed on *Surinder vs State 2006(3) JCC 1657*.

5. As regards the Appellant Kishore Kumar @ Panditji, learned amicus curiae states that he was arrested after two weeks of the alleged incident and despite Mustakeen being in custody and having made the disclosure, he was not apprehended. No description of the Appellant has been given in the FIR and he has been named only in the testimony of PW1 in the court, hence the testimony of PW1 is not reliable. There are glaring illegalities in the impugned judgment. As per PW13, Investigating Officer, it is stated that two other persons could not be arrested, however, finding of the learned trial court is that it is proved that five persons entered the house for committing dacoity. The offence of attempt to dacoity is not punishable under Section 395 IPC as has been held by the learned trial court. The Appellants were simultaneously charged for offences punishable under Section 398/397 IPC which is impermissible. The Appellant Mustakeen has been acquitted for offence

under Section 397 IPC not because of technical reasons, but because the version of the Complainant was not believed as it was contradictory in nature. Since no recovery of any knife was made from the Appellant Kishore Kumar so the charge of armed with knife is not proved. It has not been proved that the Appellants either used or were armed with the weapon recovered and thus, the Appellants cannot be convicted for offence under Section 398 IPC. Reliance is placed on *Sunil @ Munna vs. State 2010 (1) JCC 388* and *Rakesh Kumar vs. State of NCT of Delhi 2005 (1) JCC 334*, to contend that in absence of recovery of the knife, allegedly used at the time of commission of dacoity, it cannot be presumed that the knife used was a deadly weapon. Even if the prosecution case is taken at the best, only a case under Section 395/511 IPC is made out and the Appellants have already undergone substantial sentences. The maximum sentence which can be awarded for an attempt is five years and the Appellants have already undergone more than five years imprisonment.

6. Learned APP for the State on the other hand contends that from the testimony of PW1, PW2 and PW5, the wife and daughter of PW1, it is proved that five persons entered into the house and they were armed with weapons, one with knife and the other with pistols. The other daughter of PW1, Ms. Nazia could not be examined as she had expired prior to her examination in the Court which fact is duly recorded by the learned trial court. Dilshad and

Kishore Kumar were arrested on 15th May, 2006 and they refused their TIP on 17th May, 2006. The Complainant identified the two Appellants in the police station only on 19th May, 2006 i.e. after their refusal of TIP. The testimony of PW1, PW2 and PW5, is corroborated by the testimony of PW8 Surender Singh who was the beat officer and who apprehended the Appellant Mustakeen while running. Appellant Kishore @ *Panditji* put 'katta' on PW1 and the accused who put Katta on PW2 could not be arrested. Appellant Mustakeen caught hold of PW1 and held knife on his head and threatened him not to make noise. Dilshad was having knife in his possession. Panditji and Mustakeen first entered the house and Panditji exhorted. It is the case of the defence that the Mustakeen was present near the spot though for collecting subscription of Tata Indicom. The contention that they have been falsely implicated because their relation with one Dr. Malik is not proved by the defence. PW12 has proved the recovery of firearms from Appellants Kishore @ Pandit and Dilshad. Thus no case for acquittal is made out.

7. I have heard the learned counsel for the parties and perused the record. There are three eye- witnesses to the alleged incident PW1, Mohd. Mursalim, PW2, Zaitun Begum his wife and PW5 Nazra his daughter. The offence has taken place inside the house and thus no neighbor could have witnessed it. The contention of the learned counsel for the Appellants that the maid has not

been examined as a witness is meritless. As per the cross examination of PW1 when the maid knocked the door, one of the accused opened it and wanted to pull her inside but she resisted and raised noise. Thus, she was a witness only to the fact that one person tried to pull her inside. PW1 has stated that two persons came to his house and after few minutes three other persons entered his house. Appellant Kishore put pistol on his head and the person who put Katta on his wife's head was not present in the Court. He could not identify the person holding katta out of the three persons who took children inside. One of the three was Mustakeen with knife. Mustakeen and Dilshad caught hold of him. He has further stated that Kishore @ Pandit exhorted and hit him with a knife. He caught hold of the knife and sustained minor injury on the middle finger of his left hand. After this, he alongwith the accused Kishore fell down. He has further deposed that Accused Dilshad was having a knife in his possession. When his hands were being tied by the five persons, he resisted and while he was raising noise and trying to grab the accused person and the knife which was in the hands of the accused Dilshad, he sustained injuries in his finger due to the grappling of the accused Mustakeen and others. Thus, it is not clear as to which of the accused person inflicted knife injuries upon PW1. PW2 gave the version of the incident that when the accused persons were tying the hands of her husband, he gave a blow to them

and the knife injuries were caused to him. Moreover, PW1 has admitted in his cross examination that accused persons took him to the inner side and tied his hand etc. at his back, therefore he could not see as to which accused did what. PW 5 has stated that one of the three accused who took her father, mother and sisters inside the room in the house, gave a fist blow on the upper right chest of her mother, however this testimony has been contradicted by PW 2 who has stated that she was not given any beatings by the accused persons. An offence punishable under Section 398 IPC postulates only individual acts of the accused, thereby negating the use of principles of constructive vicarious liability engrafted in Section 34 IPC as held by their Lordships in *Ashfaq v State JT 2004 (5) SC 484*. Hence, in absence of any cogent evidence as to which of the Appellants was carrying which weapon, benefit of doubt has to be given to the Appellants and their conviction under Section 398 IPC is unjustified and unwarranted.

8. The contention of the Learned APP for the State that PW 12 has proved the recovery of firearms from the Appellants Kishore @ Pandit and Dilshad is meritless as the recovery which is stated in the testimony of PW12 is of two country made pistols, two live cartridges and two fired cartridges in the incident that happened on 14th May 2006 wherein the above- named Appellants were involved in a cross-firing. This recovery of the firearms is not

linked to this case as no witness has identified that the Appellants Kishore @ Pandit and Dilshad were carrying these kattas.

9. I find no merit in the contention that Appellants Dilshad and Kishore @ Panditji were shown to the witnesses in the police station and thus they were justified in refusing TIP. PW1 was shown the two Appellants only on 19th May, 2006 after they refused TIP on the 17th May, 2006.

10. The testimony of the prosecution witnesses as to the fact that five persons entered the house to commit dacoity on the date of the incident out of whom three are the Appellants herein is consistent, convincing and reliable. The testimony of these witnesses is corroborated by the MLC of PW1 i.e. Ex.PW13/A. The Hon'ble Supreme Court in *Saktu and Anr vs. State of U.P.* AIR 1973 SC 352, held that where there is a clear evidence of involvement of five or more persons in commission of dacoity, then merely because less than five are convicted would not be a ground to hold that offence of dacoity is not made out. It has also been proved beyond reasonable doubt that the Appellants along with two others in furtherance of their common intention attempted to commit dacoity on 1st May, 2006 at about 10.50 A.M. at the residence of PW1 and PW2. In the present case, the completed offence of dacoity is not made out as the accused persons were not able to commit theft or extortion of any movable or valuable security. Thus,

the offence punishable under Section 395/511 IPC is proved beyond reasonable doubt against the Appellants. The conviction of Appellant Mustakeen is also upheld for offence under Sections 25 Arms Act as he was apprehended on the spot with a knife in his possession.

11. All the Appellants have been in custody for nearly five years and two months. Their sentence is modified to the period of imprisonment already undergone. The Appellants are presently in judicial custody. Superintendent, Tihar Jail is directed to release the Appellants forthwith, if not required in any other case.

(MUKTA GUPTA)
JUDGE

APRIL 29, 2011
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