

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

Judgment reserved on: January 04, 2011
Judgment delivered on: January 07, 2011

+ **CRIMINAL APPEAL No.454/2008**

MOHD. USMAN @ SONU

....APPELLANT

Through: Mr. Vikas Padora, Advocate with Ms. Rita Hingmang, Advocate.

Versus

STATE (NCT) OF DELHI

.....RESPONDENT

Through: Ms. Fizani Husain, APP.

WITH

CRIMINAL APPEAL NO.524/2008

MOHD. IMRAN

....APPELLANT

Through: Ms. Rakhi Dubey, Advocate.

Versus

STATE (N.C.T.) OF DELHI

.....RESPONDENT

Through: Ms. Fizani Husain, 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. Above referred appeals are directed against the impugned judgment dated 4th April 2007 in Sessions Case No.5/2006 FIR

No.361/2001 under Sections 392/394/397/34 IPC P.S. Bhajan Pura and the consequent order on sentence dated 10th April 2007 whereby the appellants Mohd. Usman and Mohd. Imran have been convicted for the offences under Sections 394 and 397 IPC read with Section 34 IPC and respectively sentenced to undergo RI for a period of 10 years and also to pay a fine of ₹20,000/- each and in default of payment of fine, to respectively undergo SI for a further period of one year.

2. Briefly stated, facts relevant for these appeals are that on 18th October 2001 at about 9.30 p.m., Head Constable Ramesh Chand (PW-2), while on motorcycle patrol along with Constable Narender Kumar came across the injured Satish Kumar (PW-4) surrounded by a group of people on a 66 feet wide road in front Gali No.14, Adarsh Mohalla, Maujpur, Delhi. Head Constable Ramesh Chand (PW2) stopped his motor cycle and on enquiry, injured Satish Kumar (PW4) told him that while he was coming back on his motor cycle DL-5S-N4590 make Yamaha, he was waylaid by four boys near Gali No. 14, Adarsh Mohalla, Maujpur Turning and two boys out of them took out knives and asked him to hand over his motor cycle. When he resisted their attempt, those boys inflicted knife wounds on his person i.e. abdomen and back. One of those boys snatched a gold chain from his neck and thereafter, said four boys left the spot along with the motor cycle and the chain. The injured also stated that those boys were aged 20-22 years. Head Constable Ramesh Chand thereafter took the injured to GTB Hospital in a TSR and conveyed the information about the incident to the police

station on wireless. On the basis of said information, DD No. 22A dated 18.10.2001 was recorded at P.S. Bhajan Pura at 9.47 p.m. and it was marked to SI Arjun Singh (PW7) for verification.

3. On the receipt of the copy of DD report, SI Arjun Singh reached GTB Hospital along with Constable Rajesh. By that time, injured Satish Kumar had been administered anaesthesia, as such, his statement could not be recorded. SI Arjun Singh recorded the statement of Head Constable Ramesh Chand Ex.PW2/A and sent it to the police station after appending his endorsement Ex.PW7/B on the same. On the basis of said *rukka*, formal FIR was registered. At GTB Hospital, Constable Devender handed over a sealed packet of clothes of injured to SI Arjun Singh, which was taken into possession vide memo Ex.PW3/A.

4. On 19th October, 2001, SI Arjun Singh visited the place of occurrence and prepared the rough site plan Ex.PW7/C. He also recorded the statement of the injured as well as of the witnesses. Investigation remained with SI Arjun Singh till 29th October, 2001 when it was taken over by Inspector Rohtash, PW13.

5. It is further the case of prosecution that on 26th October, 2001, appellant Mohd. Usman @ Sonu was arrested in an Arms Act case, being case FIR No. 392/2001 under Section 27 of the Arms Act, by the officials of P.S. Seelam Pur. When interrogated in that case, Mohd. Usman made a disclosure statement Ex.PW13/J regarding his involvement in this case along with his co-accused Shahnawaj, Faizan

and Mohd. Imran (appellant). This information was conveyed to P.S. Bhajan Pura and the Investigating Officer Inspector Rohtash, on 29th October, 2001 moved an application seeking permission to formally arrest the appellant in this case. Pursuant to said application, appellant Mohd. Usman was formally arrested in this case and on interrogation, he made a disclosure statement. The disclosure statement however, did not lead to any recovery.

6. It is also the case of the prosecution that appellant Mohd. Imran was arrested by the officials of P.S. Seelam Pur in an Arms Act case being FIR No. 434/2001 on 05th December, 2001. On interrogation in the aforesaid case of P.S. Seelam Pur, the appellant Imran made disclosure about his involvement along with the other three co-accused persons in the incident relating to this case. This information was also conveyed to P.S. Bhajan Pura and pursuant to the information, Inspector Rohtash formally arrested the appellant Mohd. Imran in this case and he also, on interrogation, made a disclosure statement related to the incident which is the subject matter of this case but the disclosure led to no recovery.

7. The Investigating Officer Inspector Rohtash applied for holding Test Identification Parade (TIP) to fix the identity of the appellants. Appellant Mohd. Usman joined the TIP and he was correctly identified by the victim Satish Kumar. Appellant Mohd. Imran however, declined

to participate in the TIP proceedings on the ground that he had been shown to the witnesses by the police.

8. On completion of the formalities of investigation, appellants were challaned along with their co-accused Shahnawaj @ Mohd. Shalu and Faizan (P.O.).

9. The learned Additional Sessions Judge charged the appellants for the offences punishable under Section 392 read with Section 397/34 IPC. The appellants pleaded not guilty to the charged and claimed to be tried.

10. In order to bring home the guilt of the appellants, prosecution has examined 13 witnesses in all. PW2 ASI Ramesh Chand is the complainant. He has testified that on 18.10.2001, while on motor cycle patrol along with Constable Narender Kumar near Gali No. 14, Adarsh Mohalla, Maujpur, he noticed a crowd of people surrounding the injured Satish Kumar (PW4), who was bleeding. On inquiry, injured told him that he was waylaid at the corner of Gali No. 14, Adarsh Mohalla by four young boys aged 20-22 years and they had taken away his motor cycle make – Yamaha and his gold chain after stabbing him on his abdomen and on his back. The witness claimed that he conveyed this information to senior officers on wireless and took the injured to GTB Hospital in a Three Wheeler Scooter. He stated that at the hospital, his statement Ex.PW2/A was recorded by the Investigating Officer.

11. PW4 Satish Kumar is the victim. He has stated that on 18th October, 2001, he was returning home on his motor cycle after meeting Shaukat Ali. At about 8.15 p.m., when he reached near Adarsh Mohalla, the appellants and two other accused persons stopped his motor cycle and started beating him. They tried to snatch his motor cycle as well as the gold chain which he was wearing at that time. When he resisted, two boys took out knives and stabbed him on his belly. He was also stabbed on his back. This witness identified the appellants Mohd. Usman and Mohd. Imran and stated that Mohd. Imran had given the knife blow to him.

12. PW13 Inspector Rohtash Kumar conducted further investigation of this case. He testified that on 29th October, 2001, he took over investigation of this case. On the same day, an information was received from P.S. Seelam Pur that the appellant Mohd. Usman was arrested by them in case FIR No. 392/2001, P.S. Seelam Pur and in that case, he has made disclosure about his involvement along with others in the present case. He applied for production warrants of Mohd. Usman in the court concerned and on 30th October, 2001, he formally arrested Mohd. Usman. He further stated that he interrogated appellant Mohd. Usman with the permission of the court and he made a disclosure statement Ex.PW13/C. The witness claimed that the appellant was kept in muffled face and that he applied for fixing a date for TIP. TIP was conducted on 06th November, 2001 wherein the appellant was correctly identified by the victim Satish Kumar. He has

proved the copy of the TIP proceedings Ex.PW13/D. Inspector Rohtash Kumar further stated that he also arrested the appellant Mohd. Imran and co-accused Shahnawaj. Both of them were produced in court in muffled face and a request for holding TIP to fix their identity was made. Appellant Mohd. Imran and co-accused Shahnawaj refused to participate in TIP. He has proved the copy of the TIP proceedings related to appellant Mohd. Imran as Ex.PW13/E. He has also stated that appellant Mohd. Imran made disclosure statement regarding his involvement in the incident in question and he has proved Ex.PW13/H. Witness further stated that he also seized photocopies of the disclosure statements made by the appellants Mohd. Usman and Mohd. Imran at the time of their interrogation in the other cases in which they were arrested, being Ex.PW13/J and Ex.PW13/K respectively.

13. PW5 Dr. Banarasi, CMO, GTB Hospital examined the victim Satish Kumar on 18th October, 2001. He has proved the MLC of PW4 Satish Kumar Ex.PW5/B and stated that on examination of the injured, he found stab injury on the right hypochondrium 2 c.m./0.5 c.m. and stab wound at right lumbar region 2 c.m./0.5 c.m. and that he referred the victim to Senior Resident (Surgery).

14. Statements of the appellants Mohd. Usman as well as Mohd. Imran were recorded under Section 313 Cr.P.C., who, in their respective statements denied the prosecution story in totality. As regards the TIP, appellant Mohd. Usman admitted that he had

participated in the TIP and appellant Mohd. Imran stated that he had refused to participate in TIP as he had been shown to the witnesses.

15. Mohd. Usman has examined two witnesses in defence. Both of them have stated that about 8 or 9 months prior to recording of their statements, the police had visited the house of Mohd. Usman and taken him to the police station Bhajan Pura. Both of them declined having any knowledge about the facts of this case.

16. Learned Additional Sessions Judge, on consideration of record, found the prosecution evidence reliable and held the appellants Mohd. Usman as well as Mohd. Imran guilty of the offences punishable under Section 394/397 IPC read with Section 34 IPC and convicted and sentenced them accordingly.

17. Learned Shri Vikas Padora, advocate for the appellant Mohd. Usman and learned Ms. Rakhi Dubey, advocate appearing for the appellant Mohd. Imran have assailed the impugned judgment and consequent order on sentence on almost similar lines. They contended that the prosecution has miserably failed to prove the guilt of the appellants in this case. Expanding on the argument, learned counsels submitted that the trial court has wrongly relied upon the testimony of PW4 Satish Kumar (victim) ignoring the fact that his version is not corroborated by the statement of any other witness, nor is it corroborated by the evidence regarding recovery of the stolen goods or the weapon of offence from either of the appellants or at their instance.

18. I am not impressed with the above contention. There is no law which provides that in a case of theft or robbery, recovery of the weapon of offence or stolen goods is sine qua non for proving the guilt of the accused person. If, for any reason whatsoever, the accused, after committing the offence has been able to dispose of, destroy or conceal the stolen property or the weapon of offence, it cannot be taken as a reason to disbelieve the testimony of the victim if it is otherwise found reliable. No doubt, as per the version of Head Constable Ramesh Chand(PW2), he found injured Satish Kumar surrounded by a group of people but, this by itself, does not mean that the aforesaid public persons had actually witnessed the occurrence. A possibility cannot be ruled out that those public persons reached at the spot after the occurrence.

19. Section 134 of the Indian Evidence Act provides that “no particular number of witnesses shall be required for the proof of a fact”. From this, it is clear that finding of guilt of an accused can be based on the testimony of a single witness, if he/she is found to be reliable. It is the quality of evidence and not the quantity which is required to prove a fact. Plurality of evidence is only a rule of prudence but not a requirement of law. In a trial, evidence is required to be weighed and appreciated on the anvil of reliability of the witnesses.

20. PW4 Satish Kumar (victim) has categorically stated that he was waylaid on the night of 18.10.2001 near Gali No.14, Adarsh Mohalla, Mauzpur, Delhi on a 66 feet wide road by four persons, including the appellants and they robbed him of his Yamaha Motorcycle and gold chain. He also claimed that in the process, he was stabbed on his abdomen and the back. His aforesaid version finds corroboration from his MLC Ex.PW5/B wherein it is recorded that on 18.10.2001, PW Satish was brought to Guru Teg Bahadur Hospital at 9:55 pm with the alleged history of assault (stab) and on examination, he was found to have suffered two stab injuries, namely, (1) stab injury on the right hypochondrium 2 c.m./0.5 c.m. and (2) stab on right side lumbar region 2 c.m./0.5 c.m. At the bottom of the MLC, Dr. Krishna Prasad has endorsed that the injury suffered by the victim was of grievous nature and it is also recorded on the MLC that the injuries were caused by a sharp object. From this, it is evident that the aforesaid injuries could not have been self-inflicted. This circumstance itself is an assurance of the fact that the witness Satish Kumar (PW4) is telling the truth about his having been robbed by four persons. PW4 Satish Kumar has been cross-examined at length by the defence counsel, but there is nothing in his cross-examination to suspect the correctness of his version. Thus, I am of the view that undoubtedly PW4 Satish Kumar was robbed of his motorcycle and gold chain on 18.10.2001 and in the process, he was stabbed on his abdomen and his back.

21. The question for determination is the identity of the persons who had robbed the victim Satish Kumar. PW4 Satish Kumar in his testimony has identified Mohd. Usman as well as Mohd. Imran as the persons who had robbed him of his motorcycle and gold chain along with other accomplices. He further stated that he identified Mohd. Usman in Test Identification Parade at Tihar Jail and according to him, Mohd Imran was the person who stabbed him with a knife.

22. Learned counsel for the appellant Mohd. Usman contended that solitary witness of occurrence PW4 Satish Kumar was examined by the prosecution on 15.04.2005 i.e. approximately three and a half years after the occurrence. In absence of any evidence of recovery of incriminating articles i.e. the weapon of offence or the stolen property from the possession of the appellant Mohd. Usman or at his behest, it is not safe to rely upon the dock identification of the appellant Mohd. Usman by PW4 Satish Kumar because, after a lapse of almost three and a half years, the witness, under the natural course of circumstances, is not expected to remember the faces of the robbers. Regarding the identification done in TIP, learned counsel submitted that aforesaid identification is also of no avail to the prosecution for the reason that Mohd. Usman was admittedly arrested by the officials of P.S. Sultan Puri in an Arms Act case on 26.10.2001 and he made a disclosure statement about the incident in question on the same day. Learned counsel submitted that despite that, he was formally arrested in this case on 30.10.2001 as is apparent from his arrest memo

Ex.PW13/A. Learned counsel argued that a possibility cannot be ruled out that during the intervening period of four days between his arrest in Seelampur case and the arrest in this case, the police might have shown the appellant Mohd. Usman to the witness Satish Kumar.

23. I am not impressed with the above argument, which appears to be an afterthought. On perusal of testimony of PW4 Satish Kumar it transpires that appellant Mohd. Usman did not suggest to this witness in his cross-examination that the appellant was shown to him (witness) by the police during the period intervening 26.10.2001 to 30.10.2001. Even in his statement under Section 313 Cr.P.C., Mohd. Usman, when confronted with the evidence that he was identified by PW4 Satish Kumar in the Test Identification Parade conducted on 06.11.2001 admitted this fact and did not come out with any explanation in his defence. Thus, I find no reason to disbelieve the testimony of PW4 as regards the identity of the appellant Mohd. Usman as one of the culprits who robbed him, particularly when he was able to identify the appellant in the TIP within a few days of the occurrence. Thus, I find no infirmity in the finding of learned trial Judge holding the appellant Mohd. Usman guilty of robbing PW Satish Kumar along with his associates.

24. Learned counsel for the appellant Mohd. Imran also contended that in absence of any recovery at the instance of the appellant Mohd. Imran, it is not safe to rely upon the dock identification of appellant

Mohd. Imran done by PW4 Satish Kumar in the court approximately three and a half years after the occurrence. Learned counsel contended that the learned trial Judge has committed a grave error in drawing adverse presumption against the appellant in his refusal to participate in TIP, ignoring the fact that the appellant had explained that he was not inclined to participate in TIP as he had been shown by the police to the witness.

25. It is true that as a general rule, dock identification of an accused, who was not previously known to the witness, without holding a previous identification Parade does not carry much weight. Substantive evidence in a criminal trial is the statement made by the witness in the court. However, as a rule of prudence, identification proceedings are held during investigation in order to fix the identity of the accused and provide corroboration to the testimony of a witness in the court as regards the identity of the accused. As per the case of prosecution, appellant Mohd. Imran was arrested in case FIR No.434/2001 under Arms Act by the officials of P.S. Seelam Pur and on interrogation, he made a disclosure statement Ex.PW13/K regarding the occurrence in question. This intimation was conveyed to P.S. Bhajan Pura and Inspector Rohtash, the Investigating Officer, formally arrested appellant Mohd. Imran. He was produced in the trial court in a muffled face with a request for holding Test Identification Parade. Exhibits PW 10/A to PW10/C is the record of TIP proceedings proved by the then ACMM, Shahdara, Delhi Shri Dilbag Singh. As per this record,

appellant Mohd. Imran was produced in the court in muffled face and he refused to participate in TIP on the ground that he had been shown to the witnesses by the police. Learned Additional Sessions Judge has drawn an adverse presumption against appellant Mohd. Imran on account of his refusal to participate in the TIP and accepted the evidence of PW4 relating to the dock identification of the appellant in the court. The explanation given by the appellant Mohd. Imran for refusal to participate in TIP is unacceptable. On perusal of testimony of PW4 Satish Kumar, it transpires that no suggestion in this regard was given to the witness in his cross-examination. Had the explanation of appellant Mohd. Imran for refusal to participate in TIP been true, he would have suggested this to the witness to bring out true facts on record. Otherwise also, PW4 Satish Kumar has identified Mohd. Imran as one of the culprits and categorically stated that it was Mohd. Imran who had stabbed him. There is no reason to suspect the correctness of aforesaid version, particularly when injured Satish Kumar had no motive to falsely implicate the appellant. Thus, in my considered view, the trial court has rightly held that Mohd. Imran was also party to the crime and convicted him.

26. Learned counsel for the appellant Mohd. Usman, in the alternative, has argued that even if Mohd. Usman is held to be party to the crime, his conviction under Section 397 IPC is unwarranted for the reason that there is no evidence against him that he was carrying or used a deadly weapon.

27. Section 397 IPC comes into play only if the offender, while committing robbery or dacoity (a) uses a deadly weapon or (b) causes grievous hurt to any person or (c) attempts to cause death or grievous hurt to any person. This is an individual offence for which vicarious liability with the aid of Section 34 IPC cannot be foisted on the co-accused. PW4 Satish Kumar, the sole eye witness in this case, in his testimony has not attributed any of the above three roles to the appellant Mohd Usman. Therefore, in my considered view, his conviction under Section 397 IPC is unwarranted and is liable to be set aside.

28. Learned counsel for the appellant Mohd. Usman has also pressed for reduction of the sentence awarded to the appellant Mohd. Usman from 10 years RI to the period already undergone by him in custody. He submits that at the time of commission of offence, Mohd. Usman was a young boy without any criminal record against him. He realises his mistake and deserves at least one chance to correct himself and become a useful member of the society.

29. Taking into account the aforesaid factors and the nature of the offence committed by the appellant Mohd. Usman, I feel that rigorous imprisonment of 10 years awarded to him for the offence under Section 394 IPC is too harsh. Therefore, while maintaining the sentence of fine, the sentence of imprisonment awarded to the appellant is reduced from 10 years to 07 years RI.

30. Learned counsel for the appellant Mohd. Imran has also pressed for reduction of sentence awarded to him. She contended that at the time of commission of offence, appellant was a young boy of 22 years and he is the sole earner of his family comprising of his wife, aged parents and three unmarried sisters. Learned counsel submitted that the appellant Mohd. Imran deserves a chance to mend his ways and prove himself to become useful member of the society.

31. Taking into account aforesaid factors and the nature of the offence committed by the appellant Mohd. Imran, I feel that rigorous imprisonment of 10 years awarded to him for the offences under Section 394 as well as Section 397 IPC is too harsh. Therefore, I modify the sentence awarded to the appellant and while maintaining the sentence of fine, sentence awarded to the appellant Mohd. Imran for the offences punishable under Sections 397 and 394 IPC is reduced from 10 years RI to 07 years RI respectively. Both the sentences shall run concurrently.

32. The result of above discussion is that Crl.A. No.454/2008 of Mohd. Usman is partially accepted. His conviction and sentence for the offence under Section 397 IPC is set aside and for the offence under Section 394 IPC, the sentence of imprisonment is reduced from 10 years RI to 07 years RI.

33. The Crl.A. No.524/2008 of Mohd. Imran is also partially accepted and while maintaining the conviction of the appellant for the offences

under Sections 394 and 397 IPC, the sentence awarded to the appellant under Sections 394 and 397 IPC is reduced from 10 years RI to 07 years RI respectively for each of the offence, with both sentences to run concurrently.

34. Appeals are disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

JANUARY 07, 2011
ks/pst