

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

+ **Crl. Appeal No. 925/2010 & Crl.M.B. 1093/2010**

% **Decided on: 2nd August, 2011**

ASHISH KUMAR @ LAMBU Appellant
Through: Ms. Rakhi Dubey, Adv.

versus

STATE Respondent
Through: Mr. Manoj Ohri, 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. (Oral)

1. By the present appeal the Appellant lays a challenge to the judgment dated 10th March, 2010 convicting the Appellant and the co-accused for the offences punishable under Sections 394/398/34 IPC and Section 27 Arms Act and order on sentence dated 15th March, 2010 directing him to undergo

Rigorous imprisonment for 7 years and fine of Rs. 5,000/- for offences punishable under Section 394/398/34 IPC in default of payment of fine to further undergo Simple Imprisonment for 4 month and 3 years Rigorous Imprisonment and fine of Rs. 2000/- for offences punishable under Section 27 Arms Act.

2. Briefly the prosecution case is that on 9th July, 2002 Pawan Kumar & Vipin were coming from the factory situated at B-459, Majlis Park, Adarsh Nagar. When they reached at B-Block, Jahangir Puri, Ashish @ Lamboo and Ranjit came before them from front side and demanded phone from Pawan Kumar. When he resisted to handover the mobile phone to them, they tried to snatch mobile phone from Pawan Kumar. Pawan was dragged near Shauchalaya situated in a gali. He even tried to run away but Appellant Ashish @ Lamboo threatened him saying “Ruk ja nahin to goli maar doonga”. Ashish @ Lamboo fired a shot at Pawan Kumar. Co-accused Ranjit took out a kukri (knife) and apprehended Pawan Kumar. Pawan Kumar (victim) received bullet injuries on the right side of the stomach and fell down. S.I. Attar Singh (PW15) along with Ct. Baljeet Singh (PW8) and Ct. Suresh (PW7A) were investigation another case and at about 9.15 PM when they reached at BC Market, Jahangir Puri, they heard a noise coming

from the side of Sulabh Shauchalaya. They saw that two boys, Ashish and Ranjit were snatching something from Pawan Kumar. One of the boys that is Ashish @ Lamboo was having a desi katta and Ranjit a kukri. The Police Officials moved towards them. Ashish fired a shot at Pawan Kumar who received bullet injuries. Ashish @ Lamboo was apprehended at the spot along with desi katta whereas co-accused Ranjit managed to escape from the spot. Pawan Kumar was removed to BJRM Hospital. Statement of Ct. Baljeet was recorded on the basis of which FIR No. 437/02 under Section 307/394/397/34 IPC and under Section 25/27 Arms Act was registered. Accused Ashish @ Lamboo was interrogated and arrested. As per the medical opinion, the nature of injuries on the person of victim Pawan Kumar was grievous. Co-accused Ranjit was arrested by Operation Cell, North vide FIR No. 81/2002 under Section 25 Arms Act registered at P.S. Saraswati Vihar, wherein he made a disclosure statement about his involvement in the present case. The TIP proceeding of accused Ranjit were got conducted in Tihar Jail where he was identified by Ct. Baljeet. One kukri was recovered at the instance of Appellant who had led the Police party to Ramlila ground, B-Block Kushal Road Jahangir Puri. Same was seized and sent to CFSL. After completion of investigation charge-sheet was filed against the accused

persons. After recording the prosecution evidence and statement of accused persons the learned Trial Court convicted the Appellant and co-accused Ranjit and sentenced them as abovementioned.

3. Learned counsel for the Appellant contends that the judgment convicting the Appellant and orders on sentence is not sustainable in the eyes of law as there are glaring contradictions, discrepancies in testimony of the witnesses. The prosecution has concocted the entire story as the Police officials were present at the spot and did not prevent the crime committed. The earth control, blood stained clothes of injured and the blood stained clothes of Vipin who allegedly took the injured on his shoulder to hospital were not seized. The area despite being a crowded market place no public witness has been examined by the prosecution. There are contradictions in the version given by the three Police officers and the facts as stated by PW2 Pawan Kumar, the injured witness. It is contended that the accused/Appellant Ashish Kumar in his statement under Section 313 Cr.P.C. has stated that he has been falsely implicated in the present case and that at the time of commission of offence he was a juvenile. This plea of the Appellant has not been considered by the Learned Trial Court and states that the benefit of juvenility has been denied to him. Learned counsel contends that

the Appellant be granted the benefit under Section 7A of the Juvenile Justice (Care and Protection of Children) Act and be released on probation being a juvenile on the date of incident.

4. Per contra learned APP contends that there is no error in the impugned judgment convicting the Appellant as there is sufficient evidence placed on record to show that the Appellant along with co-accused Ranjit have committed the crime in furtherance of their common intention. Minor contradictions in regard to the number of persons at the spot do not dent the prosecution case. The co-convict of the Appellant has been apprehended on spot with the weapon of offence in his hand. The testimony of PW2, PW15, PW8 and PW7A is clear and cogent giving the sequence of events as they unfolded. Further non-joining of public witnesses does not go to the root of the prosecution version. The weapon of offence is linked to the crime committed as the MLC records the nature of injuries to be grievous in nature. Thus, the present appeal being devoid of merit is liable to be dismissed.

5. I have heard learned counsel for the parties and perused the record. PW2 Pawan Kumar is the injured witness who has stated that on 9th May, 2002 at about 9.15 PM he along with PW1 Vipin Kumar was coming from

his factory at B-459 Majilis Park, Adarsh Nagar. When he reached at B-Block gali Atharasau, Jahangir Puri, two persons came in front of them and demanded his mobile phone. When he refused to deliver the same, they started china-japti with him and he was dragged near Shauchalaya in the gali. He has further stated that when he tried to get rid of them and tried to run they stated to him “ruk ja nahin to goli mar doonga” but he did not stop. He has stated that the accused who was taller fired a shoot at him and second accused present in the Court took out a kukri (knife) and apprehended him. He identified Appellant Ashish Kumar present in Court to be the person who had fired a shot at him. This witness has clarified that the incident occurred on 9th July, 2002 due to mistake he deposed the date of incident as 9th May, 2002. He received bullet injury on the right side belly and consequently fell down. This witness has further stated that after some time three persons came there and he was removed to hospital by his friend and one of those persons.

6. This version of PW2 Pawan Kumar is corroborated by the testimony of PW7A, PW8 and PW15 who were present near the place of incident at the time of commission of crime. PW15 the Investigating Officer has deposed that on 9th July, 2002 he was posted at P.S. Jahangir Puri and he along with

PW7A Ct. Suresh and PW8 Ct. Baljeet was busy in the investigation of case FIR No. 422/2002 under Section 302 IPC of P.S. Jahangir Puri. At about 9.15 when they reached at BC Market Road there they heard noise of “chor chor do” from the side of Sulabh Sauchalaya. They saw that two boys were snatching something from another boy and that boy got himself released from the clutches of those two boys and ran towards BC Market. In the meantime, one boy had taken out a desi katta and another a kukri like knife. The boy threatened him to stop otherwise he would shoot and asked his associate to catch hold of him. When they moved towards those boys, on seeing them the boy carrying desi katta fired shot at the boy. Bullet hit on the right side of the stomach due to which he fell down. In the meantime one another person came there, whose name was revealed to be Vipin and the injured boy was victim Pawan. Victim was removed to hospital by his friend and PW7A while PW8 Ct. Baljeet overpowered the Appellant. Thus, the testimony of PW15 corroborates the version as narrated by PW2 Pawan Kumar PW8 and PW7A have also deposed on similar lines.

7. Learned counsel for Appellant states that PW1 Vipin who was present at the spot has not identified the accused persons thus his testimony is not reliable, I find no force in this contention as PW1 though has turned hostile

on the aspect of identification of accused persons, but has stated in his cross-examination that it is wrong to suggest that on the date of incident he was not accompanying Pawan Kumar and no such incident took place. This witness in his testimony has deposed the sequence of events as they unfolded. Hence the testimony of this witness only on account of non-identification of Appellant and co-convict cannot be thrown out. The contemporaneous documents that is the MLC of the injured also records that he was got admitted to BJRM Hospital by his friend Vipin. The injuries on the person of Pawan Kumar were opined to be grievous in nature and the MLC Ex.PW13/A records that the injured had received Bullet injuries. The contention of learned counsel that it was dark when the incident took place and thus the witnesses could not have identified the Appellant is liable to be dismissed as PW2, PW15 and PW8 were cross-examined at length but nothing material could be elicited from the same. Further PW16 Puneet Puri, SSO Ballistics FSL Rohini has stated in his testimony that the country made pistol Ex.PWF1 (Ex.P1) and Ex.P2, the cartridge was a fire arm within the ambit of Arms Act. He has also deposed that empty cartridge Ex.P2 was fired from the country made pistol Ex.P1. The weapon of offence was seized and sealed from the Appellant on the spot which fact has been

deposed by PW15 and PW8. There is no evidence placed on record to show that there was any sort of tampering done with the case property. PW7, the MHCM has deposed that the case property was intact and sealed. PW16 has stated that when the case property was received at FSL the seals were intact. Thus, there was no tampering with the case property.

8. The prosecution has established its case beyond reasonable doubt against the Appellant. The evidence against him is clear and cogent. Thus, I find no illegality in the impugned judgment passed by the learned Trial Court convicting the Appellant.

9. As regards the contention of learned counsel for the Appellant that the Appellant was minor at the time of commission of crime, this Court vide order dated 30th November, 2010 had directed the Superintendent to get the Appellant examined by a Board of Doctors at a Govt. Hospital for determination of his bone age, tooth age and submit a report in this regard. The ossification test of the Appellant was conducted on 7th January, 2011. The report was submitted in this regard wherein it was opined that the age of Appellant was greater than 20 years. On 14th March, 2011 learned APP sought some time to verify the age of the Appellant from school records etc. A status report has been filed in this regard by SHO, P.S. Jahangir Puri

wherein it is stated that an enquiry in regard to the age of Appellant was conducted at his village Hari Har Patti, P.S. Pipra Bazar Distt. Supole, Bihar and it is revealed that he took admission in Middle School, Pipra Bazar, Supole Bihar on 15th January, 1991. The Principal of the school has given in writing that the Appellant Ashish Kumar took admission on 15th January, 1991 vide S.No. 187 and his date of birth in the school record is mentioned as 15th January, 1998, but his parents did not submit any documentary proof in support of his date of birth.

10. Thus, in view of the status report filed and the ossification test it is clear that the Appellant was a juvenile at the time of commission of crime. Though the date of birth in the school record is based on no other document submitted by the parents of Appellant, but the ossification test conducted on 7th January, 2011 opines the age of Appellant to be greater than 20 years as on that date, which means that on the date of incident i.e. 9th July, 2002, he was around 11 years. In the OPD card of the ossification report, the age of Appellant is mentioned as 23 years which would again mean that he was around 14 years at the time of offence even if his age is taken to be 23 years as on 7th January, 2011. Hence, the Appellant being a juvenile at the time of commission of crime is entitled to get the benefit under Juvenile Justice Act.

11. Hon'ble Supreme Court in *Hari Ram Vs. State of Rajasthan (2009) 13 SCC 211* has held that a juvenile, who had not completed 18 years on the date of commission of the offence is entitled to benefit of the Juvenile Justice (Care & Protection of Children) Act, 2000.

12. The issue thus arises as to how the benefit of juvenility can be extended to the Appellant in a case where the offences charged have been proved beyond reasonable doubt by the Prosecution. The Hon'ble Supreme Court in *Bhoop Ram vs. State of U.P., AIR 1986 SC 1329* held:

“7. On a consideration of the matter, we are of the opinion that the appellant could not have completed 16 years of age on 3-10-1975 when the occurrence took place and as such he ought to have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act 1951 and dealt with under Section 29 of the Act. We are persuaded to take this view because of three factors. The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on 30-4-1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in schools for benefits to the children in their future years. The second factor is that the Sessions

Judge has failed to bear in mind that even the Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the Trial would lend credence to the appellant's case that he was less than 10 years of age on 3-10-1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date of the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts.

8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in *Jayendra v. State of U.P.* 1982 Cri.LJ 1000 that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed.

13. In view of the fact that the Appellant was a juvenile at the time of the commission of offence and the said benefit has to be extended to him, while maintaining the conviction of the Appellant, the order on sentence is set aside. The appeal and the application are disposed of accordingly. The Appellant is in custody. The Superintendent, Tihar Jail is directed to release the Appellant forthwith, if not required in another case.

(MUKTA GUPTA)
JUDGE

AUGUST 02, 2011
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