

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL NO. 582/2009

% Judgment decided on: 13th January, 2011

SUKHDEV APPELLANT

Through: Mr. M.S. Yadav, Adv.
Versus

STATE (GOVT. OF NCT OF DELHI) RESPONDENT

Through: Mr. M.P. Singh, APP for the State.

AND

CRL. APPEAL NO. 586/2009

RAJ KUMAR @ CHUHIYA APPELLANT

Through: Mr. M.S. Yadav, Adv.
Versus

STATE (GOVT. OF NCT OF DELHI) RESPONDENT

Through: Mr. M.P. Singh, APP for the State.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | Yes |

A.K. PATHAK, J. (Oral)

1. Both the above noted appeals arise from the same incident, FIR and judgment of the Trial Court and are being disposed of together.

2. Appellant Raj Kumar has been convicted under Section 392 IPC read with Section 397 IPC and sentenced to undergo rigorous imprisonment for seven years with fine of Rs.5,000/-; in default of payment of fine to undergo simple imprisonment for one year under Section 397 IPC; sentenced to undergo rigorous imprisonment for three years with fine of Rs.5,000/-; in default of payment of fine to undergo simple imprisonment for six months under Section 392 IPC. Appellant Sukhdev has been convicted under Section 392 IPC and sentenced to undergo rigorous imprisonment for three years with fine of Rs.3,000/-; in default of payment of fine to undergo simple imprisonment for six months. Fine realized from appellant Raj Kumar was directed to be paid to complainant Jai Singh. Benefit of Section 428 Cr.P.C had also been granted to appellant Raj Kumar.

3. It is this judgment which is under challenge in the above appeals.

4. As per the prosecution Rajiv Kumar and Dinesh had also participated in the crime. Record shows that Rajiv Kumar died during the pendency of trial. As regards Dinesh, he has been acquitted by the Trial Court. Accordingly, no discussion is made regarding the role played by them.

5. Prosecution case as unfolded is that on 6th March, 2002 at about 7:45 pm appellants Raj Kumar @ Chuhiya along with Sukhdev, had intercepted complainant Jai Singh near Hyderpur Canal within

the jurisdiction of Police Station Shalimar Bagh and robbed his bicycle, currency notes worth Rs.1,000/- in the denomination of Rs.5 each and wrist watch, on the point of knife. Appellants were not known to the complainant. On 14th March, 2002 complainant Jai Singh saw Raj Kumar @ Chuhia strolling near the Hyderpur Canal. He informed this fact in the police station. ASI Ram Darsh and Const. Avadh Kishore accompanied Jai Singh to Hyderpur Canal and arrested Raj Kumar @ Chuhia along with robbed bicycle. Raj Kumar @ Chuhia was found in possession of a knife, therefore, a separate FIR 165/2002 under Section 25, Arms Act was registered against him. Raj Kumar @ Chuhia disclosed that Sukhdev, Dinesh Kumar and Rajiv Kumar were with him on the date of incident and all of them had robbed complainant.

6. Sukhdev surrendered in the court of Metropolitan Magistrate on 9th July, 2002. With the permission of court, he was arrested by SI Yashveer Singh. He was taken to police station where he made disclosure statement admitting his complicity in the crime. Application for holding his Test Identification Parade (TIP) was filed before the Metropolitan Magistrate which was allowed. TIP of Sukhdev was fixed for 17th July, 2002 at Central Jail, Tihar. On 17th July, 2002 his TIP was held in Central Jail, Tihar wherein complainant Jai Singh identified him correctly as the same person who had robbed him along with his accomplices. Police remand of Sukhdev was

obtained on 19th July, 2002. He again made a disclosure statement on 20th July, 2002 and pursuant thereof, got recovered "Titan" make wrist watch of complainant from his house, in presence of the complainant.

7. Charges under Sections 392/ 397/34 IPC were framed against the appellants on 10th March, 2003 to which they pleaded not guilty and claimed trial.

8. Prosecution examined 14 witnesses in all to prove its story. Complainant has been examined as PW5. Investigating Officer has been examined as PW14. All other witnesses are formal in nature, having been joined with the investigation by the Investigating Officer at one or the other stage. PW1 HC Suraj Bhan, who had recorded the FIR, has proved the same as Ex. PW1/A. PW2 Const. Ranbir Singh had taken the complainant Jai Singh to Babu Jagjivan Ram Hospital and has deposed in this regard. PW8 SI Yashveer Singh had arrested Sukhdev on 9th July, 2002. He had recorded his disclosure statement. PW3 Const. Chanderpall was with PW8 SI Yashveer Singh at the time of arrest of Sukhdev and has deposed in this regard. PW4 Const. Manohar Lal had simply handed over carbon copy of FIR to the Investigating Officer after its registration. PW10 ASI Ram Darsh had arrested Raj Kumar @ Chuhia on the pointing of complainant Jai Singh on 14th March, 2002. He has deposed in this regard. PW7 Const. Avadh Kishore was with PW10 ASI Ram Adarsh at the time of

arrest of appellant Raj Kumar @ Chuhia. He has deposed in this regard. PW6 HC Sajjan Singh is another formal witness who had conducted the investigation in respect of FIR 165/2002 under Section 25 of the Arms Act. PW11 Ms. Seema Maini, Administrative Civil Judge, had conducted the TIP of Sukhdev in the Central Jail, Tihar on 17th July, 2002. She has proved the TIP proceeding Ex.PW11/D.

9. PW5 Jai Singh is the only material witness in this case to prove that he had been robbed by the appellant on 6th March, 2002 near Hyderpur Canal by the appellants of his bicycle, currency notes worth Rs.1,000/- and wrist watch on the point of knife. Learned Trial Court has found the testimony of PW5 trustworthy, reliable and sufficient enough to conclude that it is the appellants who had robbed the complainant on the fateful day and at that time appellant Raj Kumar @ Chuhia was armed with a deadly weapon which he used in commission of robbery.

10. I have carefully marshaled the testimony of PW5 Jai Singh and am of the view that Trial Court has erred in convicting the appellant Sukhdev for the offence under Section 392 IPC. Admittedly, Sukhdev was not known to the complainant/victim prior to the incident. He was stranger to him. He was arrested after four months of the incident. He was put to TIP wherein he has been identified by the complainant but, in my view, this identification loses its value since Sukhdev had been shown to this witness immediately after his arrest

in the police station which fact has been admitted by the complainant in his cross-examination. PW5 in his cross-examination dated 22nd January, 2004 has categorically admitted that police had called him in the police station to identify accused Sukhdev after his arrest. The purpose of TIP is to check the memory of the witness as also to see that investigation had been going in right direction. Since Sukhdev had been shown to PW5 Jai Singh in the police station immediately after his arrest, his identification before the Metropolitan Magistrate by this witness during the TIP and subsequently in the Court is invalid and inconsequential.

11. In **Ganpat Singh and Anr v. State of Rajasthan (1997)11SCC 565**, Supreme Court has held that where the accused were shown to the sole eyewitness in the police station who later identified them in the Test Identification Parade, the evidence of such person in the Court after one year was not reliable and could not be the basis for conviction. The Apex Court in **State of Andhra Pradesh Vs. Sayyaad Siraj Mohammed and Ors. (2009) 13 SCC 417**, while acquitting the accused, observed that witness (PW 1) was taken to Central Jail where the accused persons were shown to him before the Test Identification Parade, therefore, there was really no purpose in holding test identification parade. Similar view is taken by a Division Bench of this Court in Crl. L.P. No. 400/2010 titled **The Govt. of NCT of Dehi vs. Sh. Rama Shankar Pandey & Anr. MANU/DE/3285/2010**,

wherein it has been held that though the evidence of Test Identification Parade only has corroborative value as substantive piece of evidence is the identification in the Court, however, where suspect is already shown to the witnesses before the Test Identification Parade, his identification in the Court becomes valueless and the accused cannot be convicted on the basis of such identification.

12. The other incriminating circumstance which was set up by the prosecution against Sukhdev was recovery of wrist watch of PW5 from his house pursuant to his disclosure statement. As per the prosecution, Sukhdev got the wrist watch recovered from his house, in presence of complainant. However, testimony of complainant regarding recovery of watch is discrepant, inasmuch as inconsistent answers have been given by this witness. In his examination-in-chief complainant has stated that his watch was brought along with Sukhdev, when he was apprehended, and he had not gone to Sukhdev's house. As against this, he stated in his cross examination that he had accompanied the police at the time of recovery of watch from Sukhdev's house and had signed the recovery memo. In view of these conflicting statements, recovery of wrist watch pursuant to the disclosure statement of Sukhdev becomes suspicious. Accordingly, in my view, Sukhdev is entitled to an acquittal.

13. As regards Raj Kumar @ Chuhia is concerned, he has been duly identified by PW5 Jai Singh in the court as the same person who had

robbed him of his bicycle while his accomplices had snatched from him currency notes and wrist watch. PW5 has correctly identified Raj Kumar @ Chuhia in the court, inasmuch as, this appellant was arrested on being pointed out by PW5 Jai Singh. It is not the case that he was already arrested by the police in Arms Act case and was subsequently identified by the complainant Jai Singh. It has been categorically deposed by the complainant that after about 10 days of incident while he was going to his sister's house at Ambedkar Nagar he saw Raj Kumar @ Chuhia near Hyderpur Canal. He went to the police station Shalimar Bagh and intimated this fact to police officials who accompanied him to the Hyderpur Canal and apprehended Raj Kumar @ Chuhia on his pointing. His this version has remained unshattered in his cross-examination. His this version is also in line with the prosecution story as set up in the charge-sheet. There is no reason to disbelieve PW5 Jai Singh on this count, inasmuch as, no previous enmity had been there between the complainant and Raj Kumar @ Chuhia. There is no reason as to why PW5 Jai Singh would have falsely implicated Raj Kumar @ Chuhia. In my view, Trial Court has rightly convicted Raj Kumar @ Chuhia under Section 392 IPC. However, as regards his conviction under Section 397 IPC is concerned, in my view Raj Kumar @ Chuhia is entitled to benefit of doubt. In his examination-in-chief PW5 has deposed that when he reached Hyderpur Canal on 6th March, 2002, he had parked his bicycle to urinate. In the meanwhile, Raj Kumar @ Chuhia along with

his accomplices came there. He robbed his bicycle and ran away. Thereafter, complainant was beaten by other persons accompanying Raj Kumar @ Chuhia, who had even caused injuries on his person by knives. PW5 Jai Singh has not stated that Raj Kumar @ Chuhia had snatched his bicycle on the point of knife and thereafter, ran away with the same. Subsequent recovery of knife at the time of his arrest would be inconsequential, as complainant has not deposed that the knife recovered from Raj Kumar @ Chuhia was the same which he had used at the time of incident. No evidence has come on record to show that on the date of incident Raj Kumar @ Chuhia was armed with a deadly weapon, which he had used in commission of robbery. Section 397 IPC provides that at the time of committing robbery or dacoity, if the offender uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. In the facts of this case prosecution has failed to prove that Raj Kumar @ Chuhia had used the deadly weapon while committing robbery, thus he is entitled to be acquitted of the charge under Section 397 IPC.

14. For the foregoing reasons, conviction of Raj Kumar @ Chuhia under Section 392 IPC is upheld. However, he is acquitted of charge under Section 397 IPC. Sentence awarded by the Trial Court to him under Section 392 IPC is maintained as it is. Sukhdev is acquitted of

the charge under Section 392 IPC. Personal bond and surety bond of Sukhdev is discharged.

15. Both the above appeals are disposed of in the above terms.

16. Copy of this order be sent to Superintendent Jail for serving it on the appellant Raj Kumar @ Chuhia as also for compliance.

A.K. PATHAK, J.

JANUARY 13, 2011
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