

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

RESERVED ON : May 15, 2014

DECIDED ON : May 23, 2014

+ CRL.A. 362/2012

RIZWAN @ BHURA

..... Appellant

**Through : Mr.K.B.Andley, Sr.Advocate with
Mr.M.Shamikh, Advocate.**

VERSUS

STATE OF DELHI

..... Respondent

**Through : Mr.Lovkesh Sawhney, APP.
SI Raj Kumar, PS Kalyan Puri.**

**CORAM:
MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 25.02.2012 of learned Additional Sessions Judge-02 in Sessions Case No.28/08 arising out of FIR No.296/06 registered at police station Krishna Nagar by which the appellant was convicted under Section 392/397 IPC and 25 Arms Act. By an order dated 29.02.2012, he was awarded various prison terms with fine.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 03.11.2006 at about 11:45 AM, in front of Himgiri Automobile, Kanti Nagar, Road No.57, Delhi, the appellant and his associates Asif and Dhillu Phurkan (since acquitted) robbed complainant-Sanjay Mahajan of ₹30,000/- at pistol point. On raising alarm by the complainant, the appellant was apprehended at a short distance and the robbed articles were recovered from his possession. He was also found in possession of a country-made pistol with live cartridges. Statements of witnesses conversant with the facts were recorded. During investigation, Asif and Dhillu Phurkan were arrested and put to Test Identification Proceedings. After completion of investigation, a charge-sheet was submitted against the appellant and his associates; they were duly charged and brought to trial. The prosecution examined 11 witnesses to prove their guilt. In 313 statement, the accused persons denied their complicity in the crime and pleaded false implication. The trial resulted in the appellant's conviction as aforesaid. Asif and Dhillu Phurkan were acquitted of the charges. It is relevant to note that State did not challenge their acquittal.

3. Learned Sr.Counsel for the appellant urged that the trial court did not appreciate the evidence in its true and proper perspective and

ignored the vital discrepancies and improvements in the statements of the prosecution witnesses without valid reasons. The appellant and the complainant were not medically examined. The prosecution witnesses gave inconsistent version about the exact place of recovery of katta from appellant's possession. On the same set of evidence, co-accused Asif and Dhillu Phurkan were acquitted. Learned Additional Public Prosecutor urged that the conviction is based upon fair appraisal of evidence and no sound reasons exist to disbelieve the complainant.

4. The incident in which the complainant-Sanjay Mahajan was robbed of ₹30,000/- took place at around 11:45 AM on 03.11.2006. The complainant had come to Delhi in connection with his business and was also robbed of a blank cheque bearing signatures of his wife-Rajni Mahajan. The appellant-Rizwan @ Bhura was apprehended soon on the complainant's raising alarm when the TSR in which the assailants had fled after the crime was chased. The Investigating Officer lodged First Information Report in promptitude after recording complainant-Sanjay Mahajan's statement (Ex.PW-2/1) by sending rukka at 02:45 pm. In the complaint Sanjay Mahajan gave detailed account of the incident as to how and under what circumstances the three assailants in the TSR robbed him of ₹30,000/- and cheque of State Bank of India at pistol point. He further

disclosed about the apprehension of the appellant and recovery of the country-made pistol used to put him in fear. Since the FIR was lodged in promptitude without any delay, there was least possibility of the complainant to falsely implicate the appellant with whom he had no prior animosity. The appellant was not even resident of Delhi and had travelled from Himachal Pradesh in connection with his business. In his Court statement, he supported the prosecution in its entirety and proved the version given to the police at the earliest available opportunity without any major deviation. He identified Rizwan @ Bhura to be the assailant who was armed with a pistol and used it to rob him of ₹30,000/- and a cheque. In the cross-examination, the complainant was confronted with the statement (Ex.PW-2/1) where some of the facts mentioned in the examination-in-chief were omitted to be recorded. He further disclosed that after the incident, he had called the police at 100 and the PCR had arrived after 30/45 minutes. Rizwan @ Bhura was given beatings by the public. He, HC Sompal and 5/7 public persons had given chase to the TSR. Scanning the complainant's testimony as a whole, it reveals that despite in-depth cross-examination, no material discrepancies or contradictions could be extracted to shatter it. Of course, the complainant made some improvements in his deposition before the court and the facts

stated by him did not find mention in the statement (Ex.PW-2/1) However, these improvements are minor in nature and do not affect the basic structure of the prosecution case. So far as the identity of the appellant and the role attributed to him in the crime is concerned, he was certain that the appellant was the author of the crime. No ulterior motive was assigned to the complainant to falsely recognize and identify the appellant. The complainant had travelled on the day of his examination from Himachal and had produced a ticket (Ex.2/D1) in that regard. He was not going to be benefited by making false statement to implicate the appellant. Since the appellant was apprehended at a short distance after the incident, there was no necessity to put him to Test Identification Proceedings as the complainant identified him at the spot. The police also recovered TSR No. DL1RJ 1594 in which the assailants were travelling. This TSR (Ex.P-5) was released to PW-7 (Sunil Kumar Tyagi) on superdari. The appellant failed to explain as to how and under what circumstances, the TSR which was in their possession came to be seized by the police. PW-7 thus corroborates the version given by the complainant. Minor contradictions and discrepancies highlighted by the appellant's counsel do not affect the core of the prosecution case to discredit the cogent and unimpeachable testimony of the complainant.

Acquittal of co-accused Asif and Dhillu Phurkan for reasons detailed in the judgment does not result the appellant's acquittal when there are specific and cogent evidence to establish his involvement in the crime. It is always open to a court to differentiate the accused who had been acquitted from those who was/were convicted. Simply because the complainant and the appellant were not medically examined, it won't affect the prosecution case.

5. All the relevant submissions of the appellant have been dealt cogently by the prosecution in the impugned judgment and no deviation is called for. Minimum sentence prescribed under Section 397 IPC is seven years, which cannot be reduced or modified. The appellant has been sentenced to pay ₹5,000/- under Section 392 IPC; ₹10,000/- under Section 397 IPC and ₹1,000/- under Section 25 Arms Act. Section 397 IPC does not regulate imposition of fine. It only prescribes minimum sentence of imprisonment which cannot be less than seven years. Hence fine sentence imposed under Section 397 IPC is not permissible and is set aside. Default sentence for non-payment of fine under Sections 392 IPC and 25 Arms Act is reduced to SI for fifteen days and ten days respectively. Other terms of the sentence order are left undisturbed.

6. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith along with the copy of this order.

(S.P.GARG)
JUDGE

May 23, 2014
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