

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

% *Judgment reserved on :17.07.2014.*
Judgment delivered on : 22.07.2014.

+ CRL.A. 388/2006
HANIF

..... Appellant

Through Mr.Riaz Mohd, Adv.
versus

STATE

..... Respondent

Through Mr. Varun Goswami, APP

+ CRL.A. 540/2006
SANJAY KUMAR

..... Appellant

Through Mr.Mayank Goel, Adv.
versus

STATE

..... Respondent

Through Mr. Varun Goswami, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 There are two appellants before this Court i.e. Sanjay and Hanif. They are both aggrieved by the impugned judgment and order of sentence both dated 10.05.2006 wherein appellant Sanjay has been convicted under Sections 392/34 read with Section 397 of the IPC and Section 25 read with Section 27 of the Arms Act. He has been sentenced to undergo RI for a period of seven years and to pay a fine of Rs.5,000/-

and in default of payment of fine to undergo SI for two months for the offence under Section 397 of the IPC. For the offence under Section 25 of the Arms Act, he has been sentenced to undergo RI for a period of three years. For the offence under Section 27 of the Arms Act, he has been sentenced to undergo RI for a period of three years and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo SI for a period of one month. Appellant Hanif has been convicted under Section 392/34 of the IPC. He has been sentenced to undergo RI for a period of five years and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo SI for two months.

2 The version of the prosecution is that on 29.08.2000 at about 07:00 pm at the first floor of premises No. 152, Kucha Ghassi Ram, Fatehpuri, Delhi, both the accused persons along with their other accomplices had committed dacoity and had taken away Rs.20,000/- from the complainant Parkash Ram Bhai (PW-3) and Gulab Bhai (PW-6) by theft. This incident was witnessed by the brother of PW-3 Devender (PW-5) who was on the second floor and he had witnessed this incident through the CCTV. He had in fact raised the alarm. People had gathered there and two of the accused had been apprehended at the

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spot. They are the appellants before this Court. From appellant Sanjay, desi katta along with one live cartridge was recovered. The bag containing the stolen amount of Rs.20,000/- was recovered from the possession of Hanif.

3 On behalf of the appellants, arguments have been addressed in detail by Mr. Mayank Goel and Mr. Riaz Mohammad, Advocates. On behalf of appellant Sanjay, it has been pointed out that the testimony of PW-3, PW-5 and PW-6 are full of inherent contradictions and there are substantial improvements made by the aforementioned alleged eye-witnesses; wherein PW-3 has stated that the two boys had entered the first floor and three boys had entered later on. PW-5 had spoken only of two persons. He had allegedly witnessed this incident on CCTV. The CCTV footage had not been produced. The pistol and cartridge also could not be identified by PW-3. The contradictions and improvements pointed out by the learned counsel for appellant Sanjay have also been detailed in the written submissions filed by him. They are largely to the effect that PW-3 was tutored and in his version on oath in Court, there are improvements qua his version recorded by the Investigating Officer under Section 161 of the Cr.PC. This Court has noted these

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improvements which have been pointed out by the learned counsel for appellant Sanjay in detail in para 4.7. This embroidery which has been added to the version of PW-3 can in no manner be said to be improvements which go to the root of the case. It would not tarnish his otherwise credible testimony; on oath in Court, PW-3 has stated that on the packet of currency, there was a stamp of firm Bharat Kumar Praveen Kumar which did not find mention in his statement recorded under Section 161 of the Cr.PC. In his statement under Section 161 of the Cr.PC, he has stated that the revolver had been kept on his head whereas on oath in Court he has stated that the revolver was shown to him. At the cost of repetition, this version on oath in Court of PW-3 can in no manner be said to be improvements which could cast any suspicion on his honest narration.

4 On behalf of appellant Hanif, learned counsel has not assailed the conviction of the appellant; his submission is that he has been sentenced to undergo RI for a period of five years; he has already undergone incarceration of about 3 years and 6 months; he was 24 years of age on the date of the offence; the offence relates to the year 2000; more than one decade has passed; the appellant in this intervening period has got

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married and he also has a family to support and sending him back to the judicial custody would be a grave injustice.

5 Learned APP has refuted these submissions addressed on behalf of the appellants. It is stated that in no manner can it said that the conviction of appellant Sanjay under Section 397 of the IPC calls for an interference as all the ingredients of the aforementioned provision of law stand fulfilled. It is pointed out that it is an admitted position that desi katta has been recovered from the possession of appellant Sanjay and merely because the complainant could not identify this desi katta at the time when it was shown to him on oath in Court will not take away the fact that it was recovered from the appellant Sanjay who had been arrested from the spot. Attention has been drawn to the version of SI Dharampal (PW-14) who had arrested the appellants and who had also proved the factum of arrest of Sanjay from the spot along with desi katta. Reliance has been placed upon (2011) 10 SCC 158 Takdir Samsuddin Sheikh Vs. State of Gujarat & Anr. to support the submission that minor contradictions in the version of the witness which are trivial in nature are not fatal to the case of the prosecution. Further version being that even on the point of sentence where the offence has been

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proved, the minimum sentence cannot be interfered with as in this case Section 397 specifically postulates that the minimum sentence will be seven years RI. This is qua the role of Sanjay. Qua the role of Hanif, it has been pointed out that no leniency can be afforded to him also.

6 Arguments have been heard. Record has been perused.

7 Parkash Ram Bhai (PW-3) was the complainant. He has on oath deposed that on 29.08.2000, he had come from office along with cash of Rs.20,000/- and he had entered his house on the first floor of 152, Kuchha Ghasi Ram. This was in the evening at 06:00 pm. He put the cash in the Almirah. Both the wads of Rs.100/- denomination had a stamp of Bharat Kumar and Parveen Kumar. He thereafter went to the second floor to meet his brother Devender (PW-5). He came down to the first floor at 07:00 pm. He saw two boys coming on the first floor, one has a pistol and other was holding a bag; one of the two boys put a revolver to his head. Three more persons entered his house. His colleague Gulab Bhai (PW-6) who was also sitting in the room was lifted from his seat; one of those three boys put a pistol to his head. Cash of Rs.20,000/- was taken out from the Almirah where he put it.

Meanwhile Devender (PW-5) who was on the second floor and was

watching the CCTV pushed the alarm button. People gathered there. Accused Sanjay and Hanif were caught at the spot. Other three persons fled from the spot. Sanjay had one pistol with one live cartridge. Rs.20,000/- was also recovered from accused Hanif. Sketches of the desi katta and other documents were prepared.

8 In his cross-examination, he had stuck to his stand. He was confronted with the improvements which have been recorded in his statement recorded under Section 161 of the Cr.PC and as noted in the arguments of learned counsel for appellant Sanjay. These so called improvements can in no manner be said to be vital enough to effect the credibility of the witness.

9 The brother of the complainant, Devender, has been examined as PW-5. He admitted that the police remained at the spot for about two hours. He admitted that the CCTV was installed on the second floor in order that the happenings on the first floor could be viewed; this camera was installed in the room near the second floor; the same was not seized by the police; he denied the suggestion that there was no CCTV in the second floor.

10 Gulab Bhai, the colleague of PW-3 who was also present at the

spot and was the eye-witness was examined as PW-6. He was working with PW-3 in his shop. He has also reiterated the version of PW-3 on oath in Court. He has deposed that on the fateful day at about 07:00 PM, two persons entered the first floor; he was sitting on the gaddi; PW-3 was doing the dhoopbatti (prayer); one of the two boys put a revolver to the temple of PW-3. PW-5 was also threatened. Meanwhile, three more boys came inside the room. PW-5 had categorically stated that Sanjay was the person who had put the revolver to the temple of PW-3. He could not identify the other three persons who had entered the room.

11 PW-6 was also subjected to a lengthy cross-examination. He also stuck to his stand. He was not shaken in his cross-examination.

12 Devender PW-5 was the brother of PW-3 who was viewing the CCTV footage on the first floor. He has fully corroborated the version of PW-3 and PW-6. In his version on oath in Court, he stated that he was on the second floor at the time of the incident. He saw on CCTV two persons entering the first floor and he came down stairs. Hanif was apprehended and from the bag in his possession, Rs.20,000/- were recovered. Sanjay was having a pistol. He had on the CCTV seen both PW-3 and PW-5 being threatened by the aforementioned persons before the

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other three entered the room. He was also subjected to a lengthy cross-examination. He denied the suggestion that he had not seen anything on CCTV. Relevant would it be to point out that no suggestion has been given to this witness that there was in fact no CCTV installed on the second floor which was the suggestion given to PW-3.

13 These witnesses were the star witnesses of the prosecution. Nothing has been elicited either in their examination-in-chief or in their cross-examination which could create any suspicion on their version. There was also no reason for false implication of the accused. At the cost of repetition, it is noted that both the appellants were apprehended at the spot.

14 SI Dharampal (PW-14) had arrested the accused. He was at the relevant time posted at PS Lahori Gate. He was along with SI Shailender and constable Ramesh on patrolling duty; at about 07:05 pm they received an information that a dacoity had taken place at Kuchha Ghasi Ram. SHO of PS Lahori Gate was informed. PW-14 reached the spot. He saw that shutter of the shop was bolted from outside. On opening the shutter, PW-14 overpowered Sanjay who was holding a katta in his hand. Accused Hanif who had a thaila containing robbed amount of
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Rs.20,000/- was also overpowered by ASI Rajeshwar. Accused persons were arrested and the aforementioned property i.e. desi katta and the bag containing the money were taken into possession.

15 The role attributed to Sanjay is clear and categorical. Evidence led by the prosecution clearly deciphers that it was Sanjay who had put desi katta on the temple of PW-3. This has been reiterated by both the eye-witnesses i.e. PW-3 and PW-6 as also by PW-5 who had viewed this incident on CCTV. The fact that Sanjay was apprehended at the spot is further corroborated by the version of PW-14. The documentary evidence to this effect which is the arrest memo and the seizure of the desi katta (Ex.PW-3/B) and the preparation of its sketch (Ex.PW-3/A) have also been proved.

16 Ingredients of offence under Section 397 of the IPC which necessarily entail the use of a deadly weapon at the time of committing dacoity or robbery stood established. Admittedly there were five persons at the time of committing crime. As noted supra, out of five persons, two are the appellants before this Court. The other co-accused namely Ashok has been awarded sentence already undergone by him by the trial Court.

The other co-accused Satbir also stands acquitted. Accused Ishwar has

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expired during the trial. There is no quarrel to this proposition that the weapon of offence which was recovered from the appellant and which was a desi katta is a deadly weapon within the meaning of Section 397 of the IPC. No such argument has also been advanced before this Court.

17 Thus the ingredients of offence which is the use of deadly weapon coupled with the attempt to cause a grievous hurt upon the victim stood established. It is not necessary that the weapon should actually be used. The offender being armed with a deadly weapon and which was capable of creating terror in the mind of the victim would establish the ingredients of the aforementioned offence. This has been held by the Apex Court in AIR 2004 SC 1253 Ashfaq Vs. State.

18 Relevant extract of the said judgment reads herein as under:-

“Thus, what is essential to satisfy the word "Uses" for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.”

19 The submission of the learned counsel for the appellant that Section 397 of the IPC can be diluted to Section 392 holds no water.

The use of deadly weapon by Sanjay stood established by oral and documentary evidence i.e. by the versions of PW-3, PW-5 and PW-6 coupled with the recovery of weapon after the arrest of Sanjay from the spot and the documents to this effect i.e. arrest memo, sketch of desi katta (Ex.PW-3/A) and its seizure memo (Ex.PW-3/B).

20 The offence under Section 397 of the IPC imposes a minimum sentence of seven years RI. Learned counsel for the appellant Sanjay fairly concedes that there is no judgment to his knowledge where less than the minimum sentence has been awarded for a conviction under Section 397. The nominal roll of the appellant Sanjay reflects that as on date, he has suffered incarceration of about 3 years and 9 months. The appellant has a family to support; this circumstance has been taken into account but this Court is left with no option but to send him back to custody while upholding the conviction of the appellant as there was a minimum sentence engrafted by the legislature for a conviction under Section 397 of the IPC.

21 The appeal of Sanjay is dismissed. He is on bail. He be taken into custody to serve the remaining sentence.

22 Appellant Hanif has a different role. As noted supra, he has been

convicted for the offence under Section 392/34 of the IPC. He has been sentenced to undergo RI for a period of five years. On merits, learned counsel for the appellant has not challenged his conviction. He has prayed for leniency in the sentence. As on the date, when he had been granted bail, he has suffered incarceration of about 3 years and 6 months. He was present at the time of hearing. He had been queried by this Court. He was 25 years of age on the date of the offence. He has since got married. He has a family and three children all of whom are minor. He is in his early thirties.

23 Keeping in view the period of incarceration already suffered by the appellant Hanif, this Court in its discretion thinks it fit to release him on the period already undergone by him. The period of sentence already undergone by him would be the sentence imposed upon him. His bail bond stands canceled. Surety discharged.

24 Appeal of Hanif is also disposed of in the above terms.

INDERMEET KAUR, J

JULY 22, 2014

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