

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

Date of Decision: 14th August, 2014

+ **CRL.A. 560/2013 & CrI. MB 1016/2014**

JOGINDER @ TIGER Appellant
Through: Mr. Mir Akhtar Hussain, Advocate.
versus

THE STATE(NCT OF DELHI) Respondent
Through: Mr. M.N. Dudeja, Additional
Public Prosecutor for the State.

%

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 25.02.2013 and order on sentence dated 28.02.2013 in Sessions Case no.30/10 arising out of FIR No.47/10 under Section 392/397/34 of Indian Penal Code and under Sections 25/54/59 of Arms Act of Police Station Ashok Vihar whereby the appellant was convicted for offence under Section 392 of Indian Penal Code and was sentenced to undergo rigorous imprisonment for a term of four (4) years and to pay a fine of Rs.5,000/-. In default of payment of fine, the appellant was go undergo simple imprisonment for a period of six months.

2. In a nutshell, the prosecution case is that on 26.02.2010, on receipt of DD No.24A, ASI Bhagat Singh along with Constable Nihal Singh reached at the spot at Ring Road, Shalimar Bagh red light, in front of “*All Heavens Restaurant*” and found one motorcycle bearing number DL4SBH-5187 make Pulsar and one *Hyundai i10* car bearing no.DL8CS 8112. Complainant Vijay Shankar also met the police and gave his statement to the police as to how he was robbed of the briefcase containing Rs.20,000/- belonging to his employer and his own money of Rs.9500/- approximately. This statement of the complainant resulted in registration of an FIR. Crime team was called at the spot. Spot was got photographed. The motorcycle and *Hyundai i10* car found at the spot were taken into possessions. It is further the case of the prosecution that on 10.05.2010, ASI Rakesh Kumar from Special Cell, North gave information vide DD No.40B that the accused/appellant Joginder @ Tiger, Manoj, Narender @ Lathia and Mohd. Shakil were arrested in case FIR No.25/10 under Section 25 of Arms Act and under Section 411 of IPC Police Station Special Cell and they had also given disclosure regarding case FIR No.47/2010. Thereafter all the accused were arrested on 20.05.2010 and all of them were identified by the complainant during test identification proceedings. After completion of

investigation, charge-sheet was submitted against them.

3. After compliance of Section 207 of Code of Criminal Procedure, the case was committed to the Court of Sessions and charge under Section 392/34 of Indian Penal Code was framed against all the accused and additional charge under Section 397 of IPC and 25/54/59 of Arms Act was framed against the accused Manoj, to which all the accused pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution examined 20 witnesses. All the accused denied the allegations made against them when all the incriminating was put to them while recording their statements under Section 313 Cr.PC. They examined four witnesses in support of their defence. Vide impugned judgment and order on sentence, the appellant was convicted and sentenced, as mentioned hereinabove.

5. Feeling aggrieved, the present appeal has been filed by the appellant.

6. At the outset, Mr. Mir Akhtar Hussain, learned counsel for the appellant submitted that he does not challenge the appeal on merit. However, he prayed for a lenient view on the ground that the appellant is the sole bread earner of the family. He has responsibility to maintain his four children besides his wife. Continuous incarceration has crippled the

socio-economic and educational life of the appellant's family. Due to non-payment of fees in Continent Public School, Naraina Vihar where two daughters of the appellant were studying, they were thrown out of the school and they were issued transfer certificates. He further submitted that out of the 48 months' sentence imposed upon the appellant; he has completed the sentence of 37 months and 20 days. The appellant is facing trial in only three (3) more cases which pertains to the year 2010 and even though the appellant was on bail in this case for a period of 18 months, he did not commit any offence which shows that the appellant has rehabilitated himself. He is suffering from multiple ailments and is under regular treatment at Central Jail Hospital and GB Pant Hospital. Fine imposed upon the appellant has already been deposited and as such it was submitted that the appellant be released on the period already undergone by him.

7. Learned Additional Public Prosecutor for the State, however, has opposed the submissions made by learned counsel for the appellant on the ground that undue sympathy is not warranted keeping in view the conduct of the appellant who is involved in many other criminal cases. Even as per the nominal roll and as per his own admission, he is facing trial in three (3)

other cases. The sentence prescribed under Section 392 of Indian Penal Code is ten years. The learned Trial Court has already taken a liberal view by awarding imprisonment of four (4) years, as such no further leniency is warranted. Besides that, on merit also, the appellant has rightly not challenged his conviction on merit as the prosecution had established its case beyond reasonable doubt. As such, the appeal is liable to be dismissed.

8. Learned counsel for the appellant has not challenged the conviction of the appellant under Section 392 of the Indian Penal Code and rightly so in view of the voluminous evidence coming on record. PW4 – Vijay Shankar is the complainant who has testified that on 26.02.2010 his owner Purshottam sent him to Sadar Bazar at Metal Alloys for collection of money. Thereafter, he was sent to Katra Neel, Khari Baoli to collect the money from where he collected Rs.20,000/- and put them in a briefcase along with his personal money amounting to Rs.9500 – 9600/-. He boarded a private bus from Fatehpuri. At about 3.10 pm, he got down from the bus at “*All Heavens*” red light. A motorcycle on which two boys were sitting came from behind and started abusing him. The boy who was riding the bike, told the pillion rider to snatch his briefcase. The pillion rider then tried to snatch the bag from him. In the meanwhile, on another motorcycle,

two boys came and the boy who was sitting on the pillion seat of the said motorcycle showed him a pistol and frightened him. The boy who was sitting on the pillion seat of the first motorcycle snatched the briefcase from him and thereafter, the motorcyclists drove away the motorcycle. The second motorcycle on which the pillion rider had shown him the pistol, however, stopped. Both the motorcycle riders got down and tried to start the motorcycle and also showed the pistol to the public to keep them away. After starting the motorcycle while they were trying to run away, an *i10* car came in front of the motorcycle. The pillion rider fired from his pistol which hit the rear glass of the car and entered inside. Thereafter, the motorcycle fell down and both the motorcycle riders fled away from the spot leaving behind the motorcycle. He further deposed that he identified all the four accused during test identification proceedings. He also identified all the four accused by deposing that accused Narender was the person who was driving the motorcycle and the appellant Joginder was the person who was sitting on the pillion seat of the motorcycle driven by the accused Narender and had snatched the briefcase from him. Accused Mohd. Shakeel was driving the second motorcycle and accused Manoj, who was sitting on the pillion seat, had shown him the pistol and fired the

bullet which hit *i10* car.

9. The testimony of this witness finds corroboration from PW2 – Priya Ranjan, who deposed that on 26.02.2010 at about 2.45 pm, he got his *i10* car bearing number DL8C 8112 serviced from Hyundai Service Station near “*All Heavens*” at Ring Road and after service of the car when he reached Ring Road, a black colour Pulsar motorcycle hit the right side of his car and thereafter both the motorcyclists fell down. He heard a loud noise. He became perplexed. The boys who had fallen down immediately fled away from the spot after leaving their motorcycle. Public gathered at the spot. Someone from the public informed him that there was a hole on the rear glass of his car and suspected that someone had fired bullet on the car. On opening the gate of the car, he noticed a hole on the back side of the head rest of the driver seat. He gave a call at 100 number and police reached the spot. The car was taken to *Hyundai* Service Station and on search of the car, a lead piece was recovered after cutting the cover of the driver seat.

10. PW3 – Gaurav Singh Thakur is the owner of motorcycle bearing registration number DL6SV 7401 and deposed that on 25.08.2009, he had gone to Balaji Hospital, Paschim Vihar as his mother was under treatment

there. He parked his motorcycle outside Emergency Ward at around 9.30/10 pm. After two hours when he came out, he found that his motorcycle was missing. He identified his motorcycle in Police Station Ashok Vihar in the month of March, 2010, after it was recovered by the police.

11. PW9 Ms. Vandana, Metropolitan Magistrate proved the test identification proceedings Ex.PW9/A to Ex.PW9/F whereby all the accused were duly identified by the complainant Vijay Shankar.

12. The police officials have proved the proceedings conducted at the spot and thereafter on receipt of information from PW18 – SI Rakesh Kumar regarding arrest of accused persons by Special Cell and their making disclosure statements pertaining to present case. They were arrested. All the witnesses were subjected to lengthy cross examination by learned defence counsel. However, nothing material could be elicited to discredit their testimony. Moreover, none of the accused have alleged any enmity, ill-will or grudge either against the complainant or the police officials for which reason they would falsely implicate them in this case. Under the circumstances, the appellant was rightly convicted by the learned Additional Sessions Judge for offence under Section 392/34 of Indian

Penal Code. There is no infirmity in the impugned order dated 25.02.2013, which calls for any interference.

13. Coming to the quantum of sentence, the basic submission of learned Counsel for the appellant is that the appellant has remained in jail for a period of 37 months and 20 days out of 48 months' sentence imposed upon him. Due to continuous incarceration, socio-economic and educational life of the appellant's family has been crippled. His two daughters were thrown out of the school because of non-payment of fees. As per the status report submitted by the State, the appellant is having his own house at F-587, J.J. Colony, Inderpuri and the appellant is having rental income of Rs.4,000/- per month from this house. The elder son of the petitioner is teaching dance to the children on a salary of Rs.2500/- per month. It is further reported that the appellant is a history-sheeter and a desperate robber/snatcher of Police Station Inderpuri. He has previous involvements in 16 cases, list of which is attached with the status report which reflects that he has been convicted in four cases. As per the list, he is facing trial in five cases. Even as per the nominal roll, three cases are pending against him, details of which are as under:

- (i) FIR No.193/09 under Section 395/468/471/120 IPC Police Station G.B. Road.

- (ii) FIR No.70/10 under Section 356/379/411/392/34 IPC Police Station S. Rohilla.
- (iii) FIR No.25/10 under Section 25/54/59 Arms Act Police Station Special Cell.

14. The learned Additional Public Prosecutor for the State also opposes any leniency on the ground that the maximum sentence prescribed under Section 392 of Indian Penal Code is ten years and the learned Trial Court has already taken a lenient view by awarding imprisonment of four years.

15. In *Sevaka Perumal and another v. State of Tamil Nadu* [(1991) 3 SCC 471], after referring to the decision in *Mahesh v. State of M.P* (1987) 3 SCC 80, the Court observed that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. The Court further observed that if the courts do not protect the injured, the injured would then resort to private vengeance and, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

16. In *Shyam Narain v. State (NCT of Delhi)* [(2013) 7 SCC 77], it has been ruled that primarily it is to be borne in mind that sentencing for any

offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes, for it serves as a deterrent. The Court observed, true it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It has been further opined that while carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

17. Recently, the matter came up for consideration before the Hon'ble Supreme Court in ***Sumer Singh v Surajbhan Singh and others***, 2014 (6) Scale 187 wherein it was observed as under:

"29. It is seemly to state here that though the question of sentence is a matter of discretion, yet the said discretion cannot be used by a court of

law in a fanciful and whimsical manner. Very strong reasons on consideration of the relevant factors have to form the fulcrum for lenient use of the said discretion. It is because the ringing of poignant and inimitable expression, in a way, the warning of Benjamin N. Cardozo in The Nature of the Judicial Process: -

“The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ~the primordial necessity of order in social life.”

30. In this regard, we may usefully quote a passage from Ramji Dayawala & Sons (P.) Ltd. v. Invest Import, AIR 1981 SC 2085: -

“....when it is said that a matter is within the discretion of the court it is to be exercised according to well established judicial principles, according to reason and fair play, and not according to whim and caprice. Discretionary”, said Lord Mansfield in R. v. Wilkes, ((1770) 98 ER 327), when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular” (see Craies on Statute Law, 6th Edn., p. 273).”

31. In M/s. Aero Traders Pvt. Ltd. v. Rvinder Kumar Suri, AIR 2005 SC 15, the Court observed: -

“According to Black’s Law Dictionary “Judicial discretion” means the exercise of judgment by a judge or Court based on what is fair under the circumstances and guided by the rules and principles of law; a Court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right. The word “discretion” connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. (See 27 Corpus Juris Secundum page 289). When it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice and not according to private opinion; according to law and not humour. It only gives

certain latitude or liberty accorded by statute or rules, to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him."

Thus, the judges are to constantly remind themselves that the use of discretion has to be guided by law, and what is fair under the obtaining circumstances."

18. Adverting to the case in hand, keeping in view the antecedents of the appellant which reflects that he was convicted in at least four cases, out of which one was for the same offence i.e. under Section 392/397/34 of Indian Penal Code, he is also facing trial in several other cases coupled with the fact that although the sentence prescribed under Section 392 of Indian Penal Code is ten years, the learned Trial Court has already taken a liberal view by awarding imprisonment for four years only, no further leniency is warranted in the facts and circumstances of the case. Under the circumstances, there is no merit in the appeal and the same is accordingly dismissed.

19. The appeal as well as the application stands disposed of. The appellant be informed accordingly through Superintendent Jail. Trial Court record be sent back along with a copy of this judgment.

(SUNITA GUPTA)
JUDGE

AUGUST 14, 2014

rd