

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

RESERVED ON : 20th JANUARY, 2014

DECIDED ON : 31st JANUARY, 2014

+ CRL.A. 1283/2011

SHEKHAR @ CHHOTU Appellant

Through : Mr.S.B.Dandapani, Advocate.

VERSUS

THE STATE (NCT OF DELHI) Respondent

Through : Mr.M.N.Dudeja, APP.

AND

+ CRL.A. 1056/2011

HARI OM Appellant

Through : Mr.Bhupesh Narula, Advocate.

VERSUS

STATE (GNCT OF DELHI) Respondent

Through : Mr.M.N.Dudeja, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Shekhar @ Chhotu (A-1) and Hari Om (A-2) question the legality and correctness of a judgment dated 13.12.2010 in Sessions Case No. 80/10 arising out of FIR No. 45/10 PS Gandhi Nagar by which they

were held guilty for committing offences punishable under Sections 452/394/398/34 IPC. A-1 was also held guilty under Section 25 Arms Act. By orders on sentence dated 15.12.2010, A-1 was awarded RI for three years with fine ₹ 200/- under Section 452 IPC; RI for five years with fine ₹ 500/- under Section 394 IPC; RI for seven years with fine ₹ 500/- under Section 398 IPC and RI for one year with fine ₹ 200/- under Section 25 Arms Act. A-2 was awarded similar prison terms under Sections 452/394/398 IPC. The substantive sentences were to operate concurrently.

2. Allegations against the appellants were that on 21.02.2010 at about 08.30 P.M. at Swastik Hosiery, 9/6563, Nehru Gali, Gandhi Nagar, they in furtherance of common intention with their associates (not arrested) committed house trespass and attempted to commit robbery. In the process, they caused injuries to Darshan Jain by a 'deadly' weapon. Both the appellants were apprehended at the spot. Daily Diary (DD) No. 31A was recorded at 2044 hours at PS Gandhi Nagar about the apprehension of two assailants having knives. Daily Diary (DD) No. 32A was recorded at 2048 hours on getting information that the owner of the shop was assaulted with a knife by some assailants. The investigation was assigned to ASI Zile Singh who with Const. Jaswant went to the spot. Bhushan Jain produced both the assailants to him. Darshan Jain had

already been taken to SDN Hospital by PCR. The Investigating Officer lodged First Information Report after recording Darshan Jain's statement (Ex.PW-1/A). During investigation, statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against both the appellants; they were duly charged and brought to trial. The prosecution examined seven witnesses to substantiate the charges. In 313 statements, the accused persons pleaded false implication and claimed that on that day they had gone to purchase pants. A-2 had consumed liquor and was under its influence. They, however, did not examine any witness in defence. The trial resulted in their conviction as aforesaid.

3. I have heard the learned counsel for the parties and have examined the record. The incident took place at around 08.30 P.M. Darshan Jain who was injured in the occurrence was taken to SDN Hospital, Shahdara by PCR. MLC (Ex.PW-2/A) records the arrival time of the patient at 10.05 P.M. DD Nos. 31A and 32A were recorded soon after the incident at 2044 hours and 2048 hours, respectively. The Investigating Officer after recording statement of the victim lodged First Information Report without wasting time at 11.45 P.M. by making endorsement (Ex.PW-6/B). In the complaint, the victim gave vivid

description of the incident and narrated as to how and under what circumstances, four intruders had entered inside his factory and one of them was armed with a knife. He was directed to handover the cash at the point of knife. When he declined to do so, he was injured by a knife. The assailant who was armed with a knife was caught hold by him. His associate in an attempt to get him release, hit him on his head with a brick. His neighbor Bhushan Jain succeeded to apprehend the said assailant. Two of their associates escaped from the spot. Since the FIR was lodged without any delay, the complainant had no time to concoct a false story. He had no ulterior motive to fake an incident of robbery. While appearing as PW-1, he identified A-1 and A-2 to be among the four assailants who had committed trespass in his factory at about 08.30 P.M. when he was making accounts for payment to the workers. He attributed specific role to A-1 who had a knife and directed him to handover whatever money he had. On his declining to part with the money, A-1 again said 'paise deta hai ki nahi' and attacked him with a dagger. He hit him on the palm of his right hand. On his raising alarm, Bhushan Jain arrived there. A-2 asked him to release A-1 and on his refusal, he hit him with a brick on his head. He was also caught hold by Bhushan Jain. The assailants were given beatings by the public. In the cross-examination, he admitted that there

was no blood stains on the knife (Ex.P1). He denied the suggestion that the boys who had run away from the spot had caused injuries to him or that the appellants were falsely implicated when they were coming to their house. PW-5 (Bhushan Jain) corroborated PW-1 (Darshan Jain)'s statement on material facts. He also identified A-2 to be the assailant who was overpowered by him. He attributed definite role to A-1 who had the handle of dagger and A-2 who had a brick in his hand. In the cross-examination, he explained that the occurrence took place in one or two minutes. He denied the suggestion that the appellants were wrongly identified by him in the Court at the instance of the police.

4. On scrutinizing the testimonies of PW-1 and PW-5, it reveals that they have given consistent version regarding the incident and have proved the role played by each of the assailants in the occurrence without major variation. Despite cross-examination, no material discrepancies could be elicited or extracted to disbelieve or discard their statements. No ulterior motive was assigned to any of these public witnesses for falsely implicating the appellants with whom they had no prior acquaintance or animosity. The victim who had sustained injuries with a sharp weapon was not expected to let the real culprit go scot free and to falsely implicate and identify innocent ones. The appellants were arrested at the spot and

were given beatings by the public. They were taken for medical examination. They have not denied their presence at the spot. They did not adduce any evidence to prove that prior to arrival at the spot, they had purchased pants from a specific shop. No such shopkeeper was examined in defence. Nothing was revealed as to when and where A-2 had consumed liquor as alleged.

5. Minor contradictions and discrepancies highlighted by appellants' counsel do not affect the core of the prosecution case. The ocular testimony is in consonance with medical evidence. PW-2 (Dr.Gangotri Singh) medically examined Darshan Jain and prepared MLC (Ex.PW-2/A). Nature of injuries was opined as 'simple' caused by sharp weapon. In the cross-examination, she categorically stated that the patient had bruises on his head. She denied the suggestion that the said injury on the head was not possible with brick (Ex.P2). Injury on the palm was described as 'simple' caused by sharp edged weapon. Merely because blood was not found on the knife at the time of its production in the Court, cogent and credible statement of the victim cannot be discarded. The medical evidence is certain that the injuries were caused by a 'sharp' object. In 313 statements, the accused persons did not give plausible explanation to the incriminating circumstances proved against them. No

pant or cash was recovered during their search as depicted in their personal search memos. The findings are based upon fair appraisal of the evidence and require no interference.

6. A-2, admittedly, did not have any 'deadly' weapon at the time of occurrence. Only when he attempted to get release A-1 from the clutches of the victim, he hit him with a 'brick' on his head. Under these circumstances, the 'brick' cannot be considered as a 'deadly' weapon to attract section 398 IPC. Conviction under Section 398 IPC qua A-2 is set aside.

7. A-1 has been awarded minimum sentence prescribed under Section 398 IPC which cannot be altered or modified. A-2's nominal roll dated 03.01.2012 reveals that he has suffered custody in this case for one year, ten months and eleven days besides earning remission for four months and four days as on 03.01.2012. Nominal roll further reveals that he is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. He was enlarged on bail by an order dated 21.03.2013. Nothing has emerged if he misused the liberty or indulged in any such crime after his release. Considering these mitigating circumstances, the substantive sentence under Section 394 IPC qua A-2 is reduced from five years to four years.

8. In the light of above discussion, appeal filed by A-1 is dismissed. While maintaining A-2's conviction under Section 452/394 IPC, substantive sentence under Section 394 IPC will be RI for four years. Other terms and conditions in the sentence order shall remain unaltered.

9. A-1 and A-2 are directed to surrender before the Trial Court on 7th February, 2014 to serve the remaining period of sentence (if any).

10. Trial Court record be sent back immediately. A copy of the judgment be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

JANUARY 31, 2014/*tr*