

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

% Date of Decision: 28.01.2014

+ CRL. A. No.1357 of 2010

SHAMSHAD @ BHURA & ANR. Appellants

Through: Mr. Ankur Sood, Adv.

versus

STATE (GOVT. OF NCT, DELHI) Respondent

Through: Mr. Feroz Khan Ghazi, APP.

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGEMENT

V.K.JAIN, J. (Oral)

Though Mr. Ankur Sood, Advocate appears only for the appellant Shamshad, since the other appellant is in custody and is not represented by a counsel, he is appointed as Amicus Curiae for him.

On 14.3.2008, SI Tulsi Ram of P.S. Sadar Bazaar was on patrol with other police officials around Bara Tooti Chowk. When they reached Gali Toliye Wali, Paan Mandi at about 8:05 p.m., two (2) boys carrying countrymade pistols in their hands were seen running. One of them was carrying a small black colour bag in his hand. Those boys were being chased by persons from public. On seeing the police officials, the boys carrying country-made pistols in their hands threatened to shoot them. However, they were apprehended by the police officials.

The complainant, Godar Mal, who was also chasing the aforesaid two boys complained to the above-referred police officials that when he

along with his son, Ratan Bhushan was going on foot towards Qutub Road Parking, carrying a bag containing bank slips, his medical papers, medicines and Rs.640/- in cash, etc., and had travelled for about 60-70 steps from his shop, two boys who were coming from opposite direction, put country-made pistols on his chest and threatened to kill him, in case the bag being carried by him was not handed over to them. Thereafter, one of the boys snatched his bag and then both of them ran towards Bartan Market. They turned towards Paan Mandi, where they were apprehended by the police officials. One country-made pistol each was seized from the possession of the appellants, who are stated to be the boys who were apprehended by the police officials. Five (5) live cartridges were found in the pistol seized from the appellant Shamshad whereas three (3) live cartridges were found from the pistol seized from the appellant, Nayeem.

2. The appellants were charged under Section 392 of IPC read with Section 397 thereof. Since they pleaded not guilty to the charge as many as sixteen (16) witnesses were examined by the prosecution in support of its case. No witness, however, was examined in defence.

3. The complainant came in the witness box as PW1 and stated that on 14.3.2008 at about 8:00 p.m he was going towards parking space where his car had been parked and had travelled for about 50-60 steps when both the appellant, who were present in the court at the time the witness was examined, put their pistols on his chest. The accused persons then snatched the bag which he was carrying and fled away. He shouted '*chor chor*' and along with public persons chased them. When the accused were trying to run towards Paan Mandi, the police officials who were coming from opposite side came face-to-face with the

accused persons and apprehended both of them who were taken to the nearby police post where pistols were recovered from them.

4. PW2, Ashwini stated that on 14.3.2008 at about 8:00 p.m. when he was returning from temple and passing through the area of Paan Mandi, he heard shouts of '*chor chor*' and saw the accused persons, present in the court, being chased by persons from public. He further stated that the police officials coming from the opposite side tried to apprehend the accused, both of whom were having pistols with them. On seeing the police officials the accused stated that the police officials should get out of their way. Despite that both of them were apprehended and taken to police station, where they were searched and five (5) cartridges were recovered from the pocket of one of them where two (2) cartridges were recovered from the pocket of the other.

5. PW9, Ratan Bhushan is the son of the complainant. He stated that about two and a half years before his deposition in the court, he along with his father, was going to Qutub Road Parking after closing their shop. When they reached near shop No.1288 some boys snatched the bag from the hand of his father. He chased them but fell down on the road. Thereafter he came back to his father and they went to the police station and lodged a complaint. He claimed that he had not seen the faces of the boys who had snatched the bag from the hand of his father and, therefore, cannot identify them. This witness was cross-examined by the learned Additional PP. However, nothing came out in his cross-examination which would establish that the appellants before this Court were the persons who had snatched the bag from his father.

6. PW3, Constable Sushil, stated that he was on patrol along with other police officials at Sadar Bazaar. At about 8:00 p.m., they heard

noise of '*chor chor*' and saw two boys running from Bartan Wali Gali towards Main Market, Sadar Bazaar. The boys were being chased by persons from public. He, with the help of Constable Rajesh and SI Tulsiram over-powered one boy, whose name came to be known as Nayeem Ahmed @ Kalwa whereas the other boy was also overpowered by ASI Rajeshwar with the help of Head Constable Krishna and Constable Ramesh, whose name later came to be known as Shamshad @ Bhura. The witness identified the appellants who were present in the court at that time. He further stated that the accused persons had country-made pistols in their hands when they were overpowered.

PW5, Head Constable R.K. Kaushik, has corroborated the deposition of PW3 with respect to seeing two boys running and being chased by persons from public. He also identified the appellants as the boys who were carrying country-made pistols in their hand and were apprehended. He stated that five (5) live cartridges were recovered from the search of the appellant-Shamshad.

PW12, Constable Rajesh Kumar, also corroborated the deposition of PW3 with respect to two boys being found running, carrying pistols in their hand and being apprehended by the police officials. He also identified both the accused persons in the Court. PW13, Head Constable Krishan Kumar, PW15, SI Tulsi Ram and PW16, SI Rajeshwar also corroborated the depositions of other police officials as regards the appellants being seen running and being chased by persons from public. They also stated that the appellants were carrying country-made pistols in their hands and were overpowered and arrested.

7. In their statements under Section 313 Cr.P.C., the appellants denied the allegations against them and stated that on the aforesaid date

they had gone to Karkardooma Court to attend court proceeding where they were apprehended by the officials of Special Cell and who implicated them in this case.

8. PW7, K.C. Varshney, Assistant Director, FSL, Rohini, has proved his reports Ex.PW7/A whereby he reported that one of the country-made pistols received by FSL on 14.3.2008 was found in working order and was test-fired successfully whereas the other country-made pistol at mark F2 required repair to bring it into working order. He also found that five (5) cartridges sent to him were live. One cartridge was test-fired with the country-made pistol mark F1. The cartridges marked A6 to A8 were also found to be live and could be fired through 12 bore firm arm.

9. The learned counsel for the appellants has pointed out that PW9, Ratan Bhushan who is the son of the complainant neither identified the appellants nor did he depose with respect to the robbers carrying guns and putting the same on the chest of his father. As noted earlier the complainant, Godar Mal, specifically stated that the accused persons who were present in the Court had put their pistols on his chest. A similar averment was made by him in the FIR Ex.PW6/A. It has come in the deposition of PW9 that his father was ahead of him at the time the robbery took place. Therefore, the possibility of PW9 not noticing the gun being put on the chest of his father while snatching the bag being carried by him cannot be altogether ruled out. In any case, even if the deposition of this witness is excluded from consideration, there is no good reason to disbelieve the deposition of the complainant, Godar Mal, with respect to the appellants putting pistols on his chest and then snatching the bag from his hand. As noted earlier, a number of police

officials found the appellants coming running with pistols in their hands and being chased by the members of the public. Their depositions have been corroborated by a public witness, PW2, Ashwani. The appellants were apprehended by the police officials and country-made pistols were seized from their possession. Live cartridges were found with the appellants. The deposition of the police officials, therefore, fully corroborates the deposition of the complainant, Godar Mal. In fact, but for use of the country-made pistols by putting them on his chest, the complainant might not have easily allowed the bag to be snatched from his hand, in a crowded place such as Sadar Bazaar at about 8:00 p.m. Therefore, I have no hesitation in holding that the appellants used a country-made pistol in committing robbery of a bag containing cash and documents from the possession of the complainant, Godar Mal, in furtherance of a common intention which they shared.

10. The learned counsel for the appellants has drawn my attention to some minor contradictions in the depositions of the prosecution witnesses. The Courts need to appreciate that normally the witnesses are not examined in the Court soon after the incident witnessed by them and, therefore, it may not always be possible for every person to correctly recall all the details of the incident witnessed. Of course, he is not likely to forget the main incident of this nature, experienced by him. Normally, discrepancy on the matters which are peripheral or rather trivial and do not form the core of the case do not affect the credibility of a witness and it is not proper to reject his testimony on account of such minor variations or infirmities in trivial details. The Courts need to recognize that not everyone has equal capacity of observation, retention and recollection, which varies from individual to individual and it is not

natural for the honest and otherwise reliable witnesses to differ on some minor details, which by themselves, do not constitute the main incident witnessed by them. As observed by the Hon'ble Supreme Court in Krishna Mochi vs. State, 2002 IV AD (SC) 45, normal discrepancies are those which are due to normal errors of observation, normal errors of memory due to passage of time due to mental disposition such as shock and horror and are always present, however, truthful witness may be. It is observed by Hon'ble Supreme Court in Leela Ram (Dead) through Duli Chand Vs. State of Haryana and Anr., AIR 1999 SC 3717 that the discrepancies unless they are vital in nature cannot by itself affect the credibility of a witness and unless contradictions are on material dimension they should not be used to Jettison the evidence in its entirety and trivial discrepancies ought not to obliterate otherwise acceptable testimony of a witness. It was observed in Dhanvir and Others vs. The State, 85(2000) DLT 711, that human memory is not mere a computer where memory can be fed or restored for all times to come and later on when retrieved it would be verbatim the same. A human being, when he describes some incident in natural course, some variation is bound to take place so long as the variations are not natural they ought to be ignored.

There is no contradiction in the depositions of PW1, PW2 and the police officials with respect to core part of the case of the prosecution. All of them corroborated each other in saying that the appellants were the persons who were running with fire arms in their hands and were overpowered by the police officials. All of them also say that fire arms were recovered from both of them. One may say that fire arms were recovered at the police post and the other may say that the same were

recovered in the police station but that would be absolutely inconsequential contradiction. Considering the time lag between the incident and the date on which the witnesses were examined in the Court.

11. The plea taken by the appellants in their statements under Section 313 is that they were picked up from Karkardooma Courts and were falsely implicated in this case. No such suggestion, however, was given to the Investigating Officer in their cross-examination. Therefore, the plea taken by the appellants in this regard appears to be an afterthought only. In any case there could be no reason of the Investigating Officer to pick up the appellants from Karkardooma Court and implicate them in a case of armed robbery.

During the course of arguments, I specifically asked the learned counsel for the appellants as to whether any complaint was made to senior police officers alleging therein that they had been picked up from Karkardooma Court and implicated in this case. He fairly concedes that there is no material on record which would show making of any such complaint.

12. The learned counsel for the appellants relies upon the judgement of the Supreme Court in Ajit Singh Vs. State of Haryana (1996) 3 SCC 335. In the aforesaid case, the case of the prosecution was that when PW7, Suresh being accompanied by his brother PW8 Subhash was going on a scooter to Village Gadwal from Gonana, both the said accused suddenly appeared armed with pistol and they made an attempt to stop the scooter, but his brother PW7, did not allow them to do so. The accused thereafter caught hold of the scooter by its handle and pointed the pistol on the back of Suresh, urging him to hand over

whatever valuable was in his possession and thereupon he handed over purse containing cash as well as his wrist watch to the accused. However, in that case the accused were not apprehended on the spot and the case of the prosecution was that they were arrested on 16.5.1990, i.e., more than one (1) month after the incident of robbery and the stolen wrist watches were recovered at their instance. It was argued on behalf of the appellant-Ajit Singh, that he could not be convicted under Section 397 if he had not used a weapon. It was also pointed out by the learned counsel that the co-accused, who was not armed, had also been convicted under Section 397 of IPC, which indicated total non-application of mind. It was also submitted that the prosecution evidence indicated that the pistol was not used for committing robbery but when a milk can was thrown by PW7 on the accused, he had opened fire from his country-made pistol, presumably by way of self-defence and, therefore, conviction under Section 397 of IPC was not justified. A number of other submissions were made on behalf of the appellant before the Hon'ble Supreme Court. The Apex Court in the facts & circumstances of the case held that the appellant should not be convicted under Section 397 and 394 of IPC but should have been convicted under Section 392 thereof. However, the facts of the present case are entirely different. It has come in the deposition of the complainant that pistols were put on his chest at the time bag was snatched. Therefore, it cannot be said that the pistols were used in self-defence of the appellants. Moreover, the appellants were apprehended on the spot while carrying country-made pistols in their respective hands and being chased. Therefore, the facts of this case are altogether different.

13. The appellants have been convicted under Sections 392/397 of IPC as well as under Sections 25 & 27 of the Arms Act. They have been sentenced to undergo RI for seven (7) years each and to pay fine of Rs.1,000/- each or to undergo SI for one (1) month in default under Section 392 of IPC read with Section 397 thereof. Since the substantive sentence awarded to the appellants is the minimum prescribed for the offence, there is no scope for its reduction. It is, however, directed that in case of default of payment of fine, they shall undergo SI for fifteen (15) days each. The appellants have also been sentenced to undergo RI for two (2) years each and to pay fine of Rs.1,000/- each or to undergo SI for one (1) month each under Section 25 of the Arms Act. They have further been sentenced to undergo RI for three (3) years each and to pay fine of Rs.1,000/- each or to undergo SI for one (1) month each under Section 27 of the Arms Act.

In the facts & circumstances, there is no ground for reducing the substantive sentence awarded to the appellants. It is, however, directed that in default of payment of fine imposed under Sections 25 & 27 of the Arms Act, the appellants shall undergo SI for fifteen (15) days on both counts. The appellants are granted four (4) weeks to deposit the fine.

The appeal stands disposed of.

The LCR be sent back along with a copy of this order.

JANUARY 28, 2014
b'nesh

V.K. JAIN, J.