

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

RESERVED ON : February 04, 2014

DECIDED ON : February 17, 2014

+ CRL.A. 1579/2011

SANWAR @ RAZZAK Appellant

Through : Mr.Sanjay Kumar, Advocate.

VERSUS

STATE Respondent

Through : Mr.Lovkesh Sawhney, APP.

SI Jaibir, PS Alipur.

CORAM:

MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. This appeal has been preferred by Sanwar @ Razzak to challenge the legality of a judgment dated 15.11.2011 in Sessions Case No. 60/08 arising out of FIR No. 72/08 registered at Police Station Alipur by which he and his associates were held perpetrators of the crime under Section 395/398 IPC. The appellant was also convicted under Section 27 Arms Act. By an order dated 19.11.2011, he was awarded RI for eight years with fine ₹ 2,000/- under Section 395/398 IPC and RI for three years under Section 27 Arms Act. Both the sentences were to run concurrently.

2. The prosecution case in brief as projected in the charge-sheet

was that on the night intervening 03/04.04.2008, Sanjeev Kumar (PW-1)

security guard was deputed outside the godown of East India Transport Company located at the Theke Wali gali, Alipur, Delhi and was on duty from 08.00 p.m. to 08.00 a.m. (next morning). At around 02.15 a.m., when he was taking round of the godown, he saw two tempos parked near the shutter. When he put on the torch, he saw four individuals trying to open it. On being challenged, three more individuals got down from the tempos; they were armed with swords, iron rod and knives and threatened him to run away. He raised alarm 'daku-daku' and ran away towards the back side. However, two of the assailants caught hold of him after chase and attacked him. Other miscreants also attacked him with a knife, which struck him on his left thigh and blood started oozing out. In the meanwhile, two police/beat officers arrived there on a motorcycle. On seeing them, the assailants fled the spot and ran towards G.T.Karnal Road. At Singhu Border, those tempos were stopped after chase and four accused persons after alighting from the tempo started running away; they were overpowered and apprehended. The appellant (Sanwar @ Razzak) was one of them and was caught with a knife along with Amzad Khan, Sheikh Sharaft and Imran @ Rikki. Two tempos bearing registration No.HR55-D-0508 & UP14-AE-9143 were seized. The investigating officer lodged First Information Report after recording statement of the

complainant-Sanjeev Kumar. During investigation, statements of the witnesses conversant with the facts were recorded and a charge-sheet was submitted under Section 395/397/398 IPC read with Section 25/27 Arms Act. Subsequently, Sikandar @ Raja and Jan Mohd.@ Bholu were also arrested and supplementary charge-sheet was filed against them. All of them were duly charged and brought to trial for committing offences under Sections 395/397/398 IPC. The prosecution examined seventeen witnesses to substantiate their charges. In 313 statements, the accused persons pleaded false implication. After considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted Amzad Khan, Imran @ Rikki, Sheikh Sharafat and Sanwar @ Razzak (the appellant) and acquitted Sikandar @ Raja and Jaan Mohd. of all the charges. It is pertinent to note that the State did not challenge their acquittal.

3. Conviction of the appellant is based upon the sole testimony of the complainant-Sanjeev Kumar (PW-1) who identified him in the court as one of the assailants having a knife at the spot. When he challenged the assailants, he was inflicted injury by the appellant by a knife on the thigh. He further deposed that after chase on motorcycle, the accused amongst others was apprehended at Singhu Border and his

statement (Ex.PW-1/A) was recorded. Knife recovered from the appellant was seized. Similar is the testimony of the police witnesses. The complainant who had no prior animosity with the appellant had no ulterior motive to falsely identify and implicate him. The complainant had no reasons to let the real culprit go scot free. The victim had sustained injuries and was taken to Satyavadi Raja Harish Chander hospital, Narela. MLC (Ex.PW11/A) was prepared and injuries were opined 'simple caused by sharp weapon.' PW-3 (Dr.Ved Pal) Indrawati Poly clinic, Khasra No.1734, Alipur, Delhi, examined the patient at first instance at around 06.40 p.m. brought by Const.Bhopal Singh with the alleged history of 'a sharp injury by knife on the knee joint and left thigh'. After providing first aid, he referred the patient to a government hospital. The history of the said patient recorded in Ex.PW3/A was in his writing. PW-11 (Dr.Rajesh Kumar) medically examined the complainant-Sanjeev Kumar and prepared MLC (Ex.PW-11/A). The testimony of the injured witness cannot be discarded without cogent reasons. Recovery of tempos from the possession of the assailants further connects him with the crime. The accused did not give specific explanation for his presence at odd hours with tempos at the spot.

4. The prosecution was able to establish that the appellant and his associates arrived at the spot in tempos while armed with various weapons. When they were found endeavouring to break into the godown, Complainant-Sanjeev Kumar (PW-1) challenged and prevented them from doing so. On that, the complainant was assaulted and injured. Even if the prosecution case is taken on its face value, ingredients of 395/397/398 for which the appellant and his associates were charged, are not attracted or proved. In the cross-examination, the complainant admitted that no 'theft' had taken place and nothing was taken away by the culprits. He also admitted that no cutting material like hammer or any other thing which could cut the shutter was found or recovered. He volunteered to add that the assailants were found present near the shutter and were trying to open it. The locks were not broken and were intact. He further admitted that there were no marks of hammer on the shutter. Apparently, it was a mere preparation or at the most an attempt to commit house-breaking with an intention to commit theft in which they did not succeed. They did not command the complainant to hand over any valuable property at the point of knife or any other deadly weapon. They simply caused injuries when he dared to challenge them to foil their plan. Needless to say, violence or hurt was entirely unconnected with the offence of theft. Where no force or

show of force is found to have been used in the committing of the theft, the offence of robbery/decoity cannot be said to have been committed. In the present case, the prosecution was unable to establish commission of theft or robbery as no movable property was taken out of the possession of the complainant. No property was delivered to the assailants by the complainant under fear of instant hurt etc. If no property is carried off, there is no decoity. The essentials of the offence of decoity are that the theft should be perpetrated by means of either of actual violence or of threatened violence which are lacking in the instant case.

5. The conviction of the appellant under Section 395/398 IPC is not permissible; cannot be sustained and is set aside. Nominal roll dated 31.01.2014 reveals that the appellant has undergone five years, eight months and twenty days incarceration besides earning remission for nine months and twenty two days. Since the appellant has already undergone substantial period of substantive sentence for the offences for which he was not legally required to be charged, no further sentence is required to be awarded to the appellant for the offences under Section 379 read with Section 511 IPC and Section 324 IPC proved against him.

6. Appeal is disposed with the direction to set the appellant-Sanwar @ Razzak at liberty forthwith, if not required to be detained in any other case.

7. Trial Court record along with a copy of this order be sent back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation.

(S.P.GARG)
JUDGE

February 17, 2014
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