

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

Judgment delivered on: 26th November, 2015

+ **CRL.A. 603/2002 & CrI. M.A. No.4072/2005**

SURESH KUMAR Appellant
Represented by: Mr.Manish Kumar Khanna,
Advocate with Appellant in person.

Versus

STATE N.C.T. OF DELHI Respondent
Represented by: Mr.Amit Chadha, Additional
Public Prosecutor for the State.

AND

+ **CRL.A. 625/2002**

HARISH KUMAR Appellant
Represented by: Mr.Rajeev Sharma, Advocate.

Versus

STATE N.C.T. OF DELHI Respondent
Represented by: Mr.Amit Chadha, Additional
Public Prosecutor for the State.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

CRL.A. 603/2002 & CRL.A. 625/2002

1. These appeals are directed against the judgment of conviction and order of sentence dated 01.06.2002 and 07.06.2002 respectively passed by the then learned Additional Sessions Judge, New Delhi, in Sessions Case

No. 41/99, by which both the appellants, i.e., Suresh and Harish Kumar, were held guilty and convicted under Sections 395 and 397 read with Section 120-B of the Indian Penal Code, 1860 ('IPC') and sentenced to undergo rigorous imprisonment for seven years and fine of Rs.5,000/- each under Section 398 IPC, in default of payment of fine, they shall further undergo rigorous imprisonment for six months.

2. Since, both these appeals have arisen out of the same judgment, therefore, both appeals were heard together and are being disposed of by a common judgment.

3. Brief facts for the disposal of the present appeals are that on the statement Ex. PW2/A of Nisha Gupta (PW2), Investigating Officer/SI Subhash Malik (PW19) made an endorsement Ex.PW19/A, upon which FIR No. 686/1998 (Ex.PW1/A) was registered on 04.08.1998. The case of the prosecution was that at about 12.15 PM on 04.08.1998, five-six miscreants duly armed with pistols and knives entered in the residential house bearing No.63-64, Hari Nagar Ashram, New Delhi. They enquired from Indu Gupta (PW3) as to whether some tenant was living upstairs and entered in the house by forcibly pushing the door. The complainant (PW2), Indu Gupta (PW3) and their mother-in-law Urmila Gupta (PW5) were covered by those boys with arms. The ornaments which the said women wearing on their person at that time were snatched by the miscreants and they compelled the women to give key of the almirah. Three of the boys covered the women and the remaining three ransacked the house. Two of the boys took Indu Gupta and Urmila Gupta to the adjoining room where their hands and legs were tied. Remaining four took Nisha Gupta at the point of the knife and pistol on the first floor

house where she used to live with her family and forced her to give the key and then the first floor was also ransacked and all the valuables were taken away. While the first floor house was being ransacked, one of the boy holding pistol went upstairs at the second floor. Threats were being given that they would be killed if tried to be smart. They then robbed Nisha Gupta of her ornaments weighing 25 tolas and cash of Rs.25,000/-. In the meantime, noises started coming from the second floor where one of the boy had gone. As a consequence, other persons also ran outside. Meanwhile, the complainant bolted the room from inside and opened the window which was facing the gali and started crying for help. The crowd which gathered there took out her from the window of the house. One of the boys, who had gone upstairs at the second floor with the country made pistol, had been caught by the public and was beaten up. Later it was found that his name was Dinesh, co-accused. The accused had robbed Rupees Two Lakhs and substantial quantity of jewellery from the ground floor, i.e., from the house of Indu Gupta. Police also arrived and caught co-accused Dinesh. During the investigation, other accused were also apprehended. Recovery of some jewellery and money was effected from the appellants. After the trial, the appellants have been convicted and sentenced as aforesaid.

4. Learned counsel appearing on behalf of the appellants submitted that the learned Trial Court has wrongly convicted the appellants as there is no cogent material on record to justify the same. The appellants were not previously known to the complainant and other witnesses, who allegedly seen the commission of the offence, as none of the witnesses, i.e., PW2, PW3, PW5 and PW17 had given the description of the accused

persons in the FIR or in their earlier statements, which only mentioned that accused persons were young boys of 20-25 years. No clue regarding their height, built, complexion etc. were given by any of the witnesses. Therefore, the prosecution ought to have proved the identity of the appellants beyond reasonable doubt. Moreover, the appellants have refused to participate in the TIP on the ground that they had been shown to the witnesses and their photographs have been taken by the police during the investigation.

5. Learned counsel further submitted that as per the prosecution case, appellants were arrested in the intervening night of 9th/10th August, 1998 and thereafter, they were taken to the house of the complainant where the alleged incident took place and remained there for about an hour. Therefore, the finding of the learned Trial Court that identification of the appellants was proved beyond reasonable doubt is not sustainable.

6. Learned counsel submitted that the learned Trial Court had misdirected itself in convicting the appellants under Section 397 IPC and passing the order on sentence for offence punishable under Section 398 IPC.

7. Learned counsel also submitted that no specific role is assigned to the appellants in committing the alleged dacoity by PW2/ Complainant Nisha Gupta, PW3 Indu Gupta, PW5 Urmila Gupta and PW17 Dr.R.S.Rathi, i.e., the witnesses of the incident of dacoity. Neither any independent witness was joined at the time of occurrence though it has come in the evidence of PW2 that crowd gathered in the gali outside the house in question nor at the time of effecting the alleged recovery from

the house of appellant Harish.

8. To strengthen his submissions, learned counsel for the appellants has relied upon the judgments of this Court in '**Pramod Kumar Vs. State of NCT of Delhi**' 2012 (3) JCC 2040, Criminal Appeal No.396/2012, titled as '**Sandeep @ Sanjeev Vs. State**', decided on 28.11.2013 and '**Mohd. Rafiq Vs. State (Govt. of NCT) Delhi**' 162 (2009) DLT 551.

9. Also relied upon the cases of **Mukhtiar Singh @ Mukha Vs. State of Haryana, 1995 (2) C.C. Cases 337 (HC)**, **Balwant Singh Vs. The State of Punjab, 1997 (2) C.C. Cases 9 (HC)** and **Khushal Singh & Ors. Vs. The State of Punjab, 1997 (2) C.C. Cases 34 (HC)**.

10. Further relied upon the case of **Ashfaq Vs. State (Govt. of NCT of Delhi)**, AIR 2004 SC 1253, wherein the Apex Court observed as under:-

"9. The further plea that one accused alone, was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under Section 397 IPC with the assistance of Section 34 IPC overlooks the other vital facts on record found by the Courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, does not create any new substantive offence as such but merely serves as complementary to Section 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of

grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to the conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, dehors any reference to Section 34 IPC.

10. So far as the other charges are concerned, though an attempt has been made to challenge those findings, we are of the view that the concurrent findings, as rightly contended for the respondent, are not only well merited but are found sufficiently based on and supported by overwhelming materials on record and no patent illegality or infirmity as to warrant our interference have been shown to vitiate in any manner those concurrent findings recorded by the Courts below in this case. The conviction under Section 397 IPC made read with Section 34 IPC alone is consequently altered and sustained under Section 397 IPC itself and the sentence imposed by the Courts below or, this count would stand.”

11. Alternatively, the learned counsel for the appellants submitted that the appellants have already faced the agony and trauma of criminal proceedings, trial and ignominy and humiliation of the conviction for more than eighteen years. They were young boys of 24-26 years at the time of occurrence, i.e., in the year 1998 and remained in jail for more than six years out of the total sentence of seven years. Thereafter, no case ever recorded against them. Therefore, looking to the totality of the facts and circumstances of the case, ends of justice would meet if a

lenient view is taken and the sentence of imprisonment is reduced to the period which the appellants had already undergone.

12. On the other hand, learned Additional Public Prosecutor appearing on behalf of the State while rebutting the submissions made by learned counsel for the appellants, submitted that there is no infirmity or ambiguity in the aforementioned judgment and order on sentence passed by the learned Trial Court as the prosecution has successfully proved its case against the appellants. Therefore, the appellants do not deserve any leniency.

13. I have heard the learned counsel for the parties.

14. From the evidence on record, admittedly on all material points Nisha Gupta (PW2), Indu Gupta (PW3) and Urmila Gupta (PW5) testified about the incident while corroborating each other and proved the prosecution case of dacoity committed by the appellants and other accused persons at their house. They had testified that there were six dacoits who had entered in the room. Moreover, the dacoity was committed in daylight at noon time and one of the dacoit, namely, Dinesh was caught red-handed at the spot with part of looted amount, i.e., Rs.2100/- and pistol. Almost the entire looted property was recovered except part of the cash amount and some items. Both these witnesses were cross-examined by the learned counsel for the appellants but nothing could be elicited from their cross-examination which may adversely affect their credibility or minimize the value of their evidence. Consequently, I am satisfied that the appellants were rightly held guilty of the offence of robbery and no ground has been made out for discarding the evidence led

against them by the prosecution during the trial.

15. The next contention raised before me by the learned counsel for the appellants is that the conviction of the appellants under Section 398 IPC was wrong and bad in law.

16. The above contention is based on the ground that Section 398 IPC is applicable to cases of attempt to commit robbery or dacoity and cannot be made applicable to a case like the present one in which robbery or dacoity has been actually committed or completed. In my opinion, the above contention is not devoid of force. Section 398 IPC opens with the words "If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon,.....". These words clearly indicate that Section 398 IPC merely relates to cases where the offender, having armed himself with a deadly weapon, attempts to commit robbery or dacoity.

17. Sections 397 and 398 IPC are not substantive Sections but prescribe a minimum sentence for the offence of robbery or dacoity or attempt to commit robbery or dacoity once aggravating circumstances stated in the said Sections are satisfied. Section 397 IPC applies when offence of dacoity/robbery has actually been committed. Section 398 IPC, on the other hand, has no application when robbery or dacoity has been completed, but applies to case of attempt to commit robbery or dacoity. Therefore, Section 398 IPC has certainly no application to the case as the dacoity was committed, not merely attempted. Accordingly, the offence for which the appellants ought to have been convicted is under Section 397 IPC.

18. Now, the question remains to be considered before this Court is whether the prescribed minimum sentence can be reduced.

19. In imposing a punishment, the concern of the Court is with the nature of the act viewed as a crime or breach of the law. Admittedly, the long delay before the courts in taking a final decision with regard to the guilt or otherwise of the accused is one of the mitigating factors for the superior courts to take into consideration while taking a decision on the quantum of sentence.

20. In the case of ***B.G. Goswami Vs. Delhi Administration, [1974] 1 SCR 222***, the Supreme Court held as under:-

“10..... Now the question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question. In modern civilised societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentence both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal. In the present case, after weighing the considerations already noticed by

us and the fact that to send the appellant back to jail now after seven years of the agony and harassment of these proceedings when he is also going to lose his job and has to earn a living for himself and for his family members and for those dependent on him, we feel that it would meet the ends of justice if we reduce the sentence of imprisonment to that already undergone but increase the sentence of fine from Rs. 200.00 to Rs. 400.00 . Period of imprisonment in case of default will remain the same."

21. In the case of ***Ashok Kumar Vs. State (Delhi Administration)***, (1980) 2 SCC 282, the commission of offence of theft was in 1971 and the Judgment was delivered in 1980. The conviction was under Section 411 of IPC. Having regard to the purpose of punishment and “the long protracted litigation”, the Supreme Court reduced the sentence to the period already undergone by the convict.

22. In the case of ***Sharvan Kumar Vs. State of Uttar Pradesh*** (1985) 3 SCC 658, the commission of offence was in 1968 and the judgment was delivered in 1985. The conviction was under Sections 467 and 471 of IPC. In that case also, the long delay in the litigation process was one of the factors taken into consideration by the Supreme Court in reducing the sentence to the period already undergone.

23. In the case of ***Ajab and Others Vs. State of Maharashtra***, 1989 Supp (1) SCC 601 also, the Supreme Court had an occasion to examine the similar situation. The offence was committed in 1972 and the judgment was delivered in 1989. The conviction was under Section 224 read with Section 395 of IPC. In that case also “passage of time was reckoned as a factor for reducing the sentence to the period already undergone”. The Supreme Court in this case, while reducing the

substantive sentence, increased the fine holding that the same would meet the ends of justice.

24. In the case of ***Sarup Chand Vs. State of Punjab, (1987) 2 SCC 486***, appellant was convicted by the learned Trial Court under Section 161, Indian Penal Code and under Sections 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947, and conviction was upheld by the High Court. While maintaining the conviction, the Supreme Court had reduced the sentence to the period already undergone on the ground that six years have passed from the date of the incident and this is the first time the appellant had committed an offence.

25. It is not out of place to mention here that in the case of ***Gulab @ Bablu Vs. The State (NCT of Delhi), 2012 (3) JCC 2213***, this Court while setting aside the conviction under Section 397 IPC held as under:

“7. A perusal of the aforesaid provision makes it clear that if an offender at the time of committing robbery or dacoity, uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. This provision prescribes minimum sentence which shall be handed down to such an offender. In this case neither the victim has sustained grievous hurt nor there is any evidence that attempt was made to cause death or grievous hurt to the victim nor is there any evidence to show that the knife used at the time of committing robbery was a 'deadly weapon'. Simple injuries have been sustained by the victim on his thigh.”

26. So far as the case in hand is concerned, the appellants had filed the aforementioned appeals before this Court in the year 2002. The sentence of appellants Suresh Kumar and Harish Kumar was suspended on

23.03.2004 and 20.04.2004 respectively. As per the nominal rolls dated 02.01.2004 and 02.05.2005 of appellant Suresh Kumar and Harish Kumar respectively, they were arrested in this case on 10.08.1998 and have already undergone more than six years imprisonment including the period of remission earned out of total sentence of seven years. They are not involved in any other criminal case. The nominal rolls reflect that jail conduct of the appellants is satisfactory. Appellants faced trauma of criminal proceedings for more than eighteen years.

27. Coming to the quantum of sentence, admittedly, dacoity has been proved but it was not proved that appellants had used any deadly weapon. It is noticed that the prosecution has not brought on record the previous conviction of the appellants in similar or any other offence. Therefore, it can safely be assumed that this was the first offence of the appellants. No injuries were admittedly caused to any of the persons while committing dacoity.

28. It was contended that the appellants are about 50 years of age, having marriageable children. They remained in judicial custody for more than six years. They are not the habitual offenders. The occurrence is alleged to have taken place on 04.08.1998, i.e., about 18 years ago from today.

29. Taking into consideration the law discussed above, and the facts and circumstances of the case, I feel persuaded to reduce the sentence of seven years' rigorous imprisonment awarded to the appellants. Accordingly, the substantive sentence of imprisonment awarded vide order on sentence dated 07.06.2002 is modified and the appellants are set

free on the sentence for the period already undergone by them.

30. Accordingly, the appeals are partially allowed.

31. The Registry of this Court is directed to send a copy of this order to the concerned Jail Superintendent for information.

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With the dismissal of the appeal itself, the present application has become *infructuous*. The same is dismissed accordingly.

**SURESH KAIT
(JUDGE)**

NOVEMBER 26, 2015

Sb/jg