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

+ **CRL. A. No. 1589/2011**

Reserved on 21st January, 2015

Decided on 30th January, 2015

SAMEER HUSSAIN Appellant

Through: Ms. Rakhi Dubey, Adv.

Versus

STATE Respondent

Through: Mr. Amit Ahlawat, APP along with
SI Vinay Kumar, P.S. Neb Sarai.

AND

CRL. A. 22/2012

GOPAL Appellant

Through: Mr. D.K. Pandey, Adv.

Versus

STATE Respondent

Through: Mr. Amit Ahlawat, APP along with
SI Vinay Kumar, P.S. Neb Sarai.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. Both the above-mentioned appeals arise from the same incident, FIR and judgment, hence, are disposed of together.

2. Both the appellants have been convicted under Sections 393/34 of the Indian Penal Code, 1860 (IPC) and sentenced to undergo rigorous imprisonment for three years each with fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for six months. Appellant-Sameer Hussain has also been convicted under Section 398 IPC and sentenced to undergo rigorous imprisonment for seven years with fine of ₹10,000/- and in default of payment of fine to undergo simple imprisonment for one year. Sentences of appellant-Sameer Hussain have been directed to run concurrently. Aggrieved by their conviction as also the sentences handed down to them by the trial court, appellants have preferred these appeals.

3. Prosecution case, as unfolded, is that on 6th November, 2009 at about 02:30 pm, appellants along with one Raju (who could not be apprehended and was declared proclaimed offender) knocked the door of the house of complainant-Ms. Khashti Bisht and when complainant opened the door, they represented that they wanted to see the room which she was proposing to let out. Complainant took them to first floor and showed the room. After seeing the room, appellants along with their third accomplice went away. After about half an hour, appellants again returned and expressed their

desire to see the room again before finalising the deal. Complainant took them to first floor. Gopal asked for some drinking water which complainant brought and offered him. After drinking water, Gopal and Raju caught hold of complainant while Sameer Hussain pointed a country made pistol towards her and asked her to handover all the valuables to them. Complainant raised alarm at which she was dragged towards the toilet. In the meanwhile, on hearing the alarm raised by the complainant, her father Shri Bhopal Singh Negi arrived there and intervened as a result whereof a scuffle took place between the complainant's father and Sameer Hussain. During the scuffle Sameer Hussain fell down; while Gopal and Raju ran away. Police control room was informed by making a call at number 100. Police officials arrived at the spot and Sameer Hussain was handed over to them along with the loaded country made pistol. Two more live cartridges were recovered from the pocket of Sameer Hussain.

4. On the basis of information received in the police station Neb Sarai DD No. 26-A (Ex.PW4/B) was recorded and handed over to SI Karamvir Singh for investigation, who along with Ct. Rajaram reached the spot and arrested Sameer Hussain vide arrest memo Ex. PW1/D. He recorded the statement of complainant (Ex.PW1/A) wherein complainant narrated the

incident in the manner as has been described in the preceding paras hereinabove. Sketch (Ex.PW1/C) of country made pistol was prepared. Thereafter, weapon of offence was seized vide seizure memo Ex. PW1/B. SI Karamvir wrote rukka (Ex. PW5/A) and sent the same to police station per hand Const. Rajaram, pursuant whereof FIR (Ex.PW4/A) was registered. Sameer Hussain disclosed the names of his accomplices as Gopal and Raju.

5. Gopal surrendered in court and was arrested by ASI Babu Lal. His TIP was conducted wherein complainant identified him as one of the accomplices of Sameer Hussain. After completion of investigation, appellants were sent up to face trial by filing the charge-sheet in the court of Metropolitan Magistrate, Delhi who committed the case to Sessions Court since offence under Section 398 IPC is exclusively triable by the Sessions Court, after supplying the documents to the appellants in terms of Section 207 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

6. Charges under Sections 393/398/34 were framed against the appellants on 19th March, 2010 to which they pleaded not guilty and claimed trial. Separate charge under Section 25 of The Arms Act, 1959 (the Act, for short) was framed against Sameer Hussain on the same day to which also he pleaded not guilty and claimed trial.

7. Prosecution examined eight witnesses in all to prove its case. Complainant was examined as PW1. Eye witness Shri Bhopal Singh Negi was examined as PW2. They are the material witnesses to prove the incident of attempt to robbery. SI Karamvir (Investigating Officer) was examined as PW5. He is also a material witness to prove the arrest of appellant at the spot. Shri S.P.S. Laler, Metropolitan Magistrate, Delhi has been examined as PW7 and has proved the TIP proceedings of Gopal as Ex.PW7/C. Other witnesses are formal in nature. PW6 HC Hariom had recorded DD Entry No. 26-A Ex. PW4/B. PW4 HC Ravinder Singh had recorded the FIR on the basis of rukka sent by SI Karamvir Singh and has proved the copy thereof as Ex. PW4/A. PW3 Const. Datta Darare had taken the case property to FSL Rohini and has deposed in this regard. PW8 SI Babu Ram had arrested Gopal after he surrendered in court and has proved the arrest memo as Ex. PW8/A.

8. After prosecution closed its evidence, statements of appellants under Section 313 Cr.P.C. were recorded. Appellants denied their complicity in the crime and claimed themselves to be innocent. Gopal took a plea that he was employed as a packer with a courier company. He along with Sameer Hussain and Raju had gone to see the room and thereafter, he went to his

work place. He did not accompany Raju and Sameer Hussain again to the said premises. When he returned in the evening he was informed by his landlord that police had come with Sameer Hussain. Out of fear he went to his native place. He examined DW1 Bablu to support his plea that he was in his office from 03:00 pm of 6th November, 2009 till 9:00 pm of 8th November, 2009. DW1 also produced copy of attendance register which was exhibited as Ex. DW1/DA. Appellant Sameer Hussain set up a defence that on 6th November, 2009 at 02:00 pm he along with his friend Hari Kewal had gone to Hi-Tech Institute, Khanpur Extension, Main Road, New Delhi to enquire about the fee schedule as he intended to do a technical course from the said institute. When he came out of the institute he was apprehended by the police and implicated in this case. He claimed that he met Gopal for the first time in court. Sameer Hussain produced Hari Kewal in the witness box as DW2 in order to support his above version.

9. Trial court scrutinised the testimony of the witnesses at thread bare and found the statements of PW1 and PW2 trustworthy and reliable so as to conclude that appellants along with one Raju had gone to the house of complainant on 6th November, 2009 at about 02:30 pm and attempted to commit robbery and at that time Sameer Hussain was armed with a deadly

weapon, that is, a country made pistol (Ex. P-1). Accordingly, appellants have been convicted under Sections 393/34 IPC. Sameer Hussain has also been convicted under Section 398 IPC since he was armed with a deadly weapon while attempting to commit robbery. As regards charge under Section 25 of the Act is concerned, Sameer Hussain has been acquitted for want of sanction under Section 39 of the Arms Act. Trial court has noted that Section 39 of The Arms Act provides that no prosecution shall be instituted against any person in respect of any offence under Section 3 without the previous sanction of the District Magistrate. Since no previous sanction under Section 39 of the Act was taken, Sameer Hussain was entitled to acquittal of charge under Section 25 of the Act.

10. I have heard learned counsel for the appellants and have perused the trial court record carefully. Learned counsel for the appellants have vehemently contended that testimony of PW1 and PW2 suffer from material contradictions and is inconsistent with the prosecution case as set up in the charge-sheet. Trial court has erred in placing reliance on their statements. It is contended that in the DD Entry, it has been mentioned that three boys had entered in the house bearing no. A-29/2, Durga Vihar, Devli, New Delhi and were misbehaving. It is contended that this DD Entry was recorded pursuant

to the information received from the complainant and there is no mention of robbery therein. Subsequently, incident of misbehaviour has been given colour of attempt of robbery. I do not find any force in this contention of learned counsel. Merely because details of incident have not been mentioned in the DD Entry, it would not make the statement of complainant, recorded by the Investigating Officer immediately on reaching the spot as also her deposition in court doubtful and suspicious. DD entry has been recorded on the basis of telephonic call made to Control Room wherein no details have been mentioned. As against this, statement Ex. PW1/A has been recorded in detail by the Investigating Officer, immediately after the incident. In her statement complainant has described the incident in detail and in the same manner as has been described by her while deposing in the court. Her statement in court is in line with what was stated by her in Ex. PW1/A. Her statement has also been corroborated by PW2 Bhopal Singh Negi, who was also present in the house at the time of incident. Appellants were stranger to PW1 and PW2, thus, there is no reason as to why they would have falsely implicated the appellants with whom they had no previous enmity. It is also highly improbable that appellants, who were strangers to the complainant, would have entered in the house that too with a

weapon only in order to molest the complainant. Accordingly, statement of PW1, as contained in the FIR and duly supported by her while deposing in court, has to be accepted, more so when it has been duly corroborated by the PW2. Trial court has rightly accepted their statements to conclude that Sameer Hussain armed with a country made pistol along with Gopal and other accomplice entered in the house of complainant in order to rob her.

11. I also do not find any force in the contention of learned counsel that Sameer Hussain has been falsely implicated by the Investigating Officer after picking him from Hi-Tech Institute. Appellant was apprehended at the spot by the PW2 and handed over to Investigating Officer. PW1 and PW2 have categorically deposed in this regard. PW5 SI Karamvir Singh had reached the spot immediately after the incident and arrested Sameer Hussain. Time of arrest has been mentioned as 05:00 PM. This supports the version of PW1 and PW2 that Sameer Hussain was apprehended by them and handed over to PW5 SI Karamvir Singh. Rukka (Ex. PW5/A) was sent by SI Karamvir Singh from the spot. In the rukka itself, PW5 has recorded that Sameer Hussain was handed over to him by PW1 and PW2. Reference of country made pistol and live cartridges has also been mentioned in the rukka. FIR (Ex. PW4/A) was registered at 05:35 pm pursuant to said rukka.

Accordingly, arrest of Sameer Hussain prior to registration of FIR also does not raise any suspicion. As against the statements of PW1, PW2 and PW5, trial court has rightly not accepted the statement of DW2.

12. I also do not find any force in the contention of learned counsel that Gopal was present at his work place from 03:00 pm of 6th November, 2009 till 09:00 pm of 8th November, 2009. DW1 has deposed to this effect but his statement cannot be accepted being inconsistent with the copy of attendance register (Ex. DW1/DA) produced by him, which otherwise, appears to be a manipulated document. Name of the appellant appears at last serial number and appears to have been interpolated. Though DW1 has deposed that Gopal remained in the office from 03:00 pm of 6th November, 2009 till 9:00 pm of 8th November, 2009, however, attendance register shows that Gopal was absent on 8th November, 2009. Gopal absconded after the incident and his this conduct also goes against him. He surrendered in court on 27th November, 2009 and was put to TIP wherein he has been correctly identified by the complainant. PW7-Shri S.P.S. Laler, Metropolitan Magistrate, Delhi has proved the TIP proceedings as Ex. PW7/C. Subsequently, Gopal has been identified by PW1 and PW2 in court as well. Thus, his identity is also established beyond shadow of any reasonable doubt.

13. Section 398 IPC envisages that if at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years. Sameer Hussain was armed with a country made pistol which fact is duly established from the statements of PW1 and PW2. PW1 and PW2 have also identified the country made pistol in court. There can be no doubt that the 'country made pistol' would fall within the ambit and scope of a 'deadly weapon'. Accordingly, Sameer Hussain has rightly been convicted under Section 398 IPC besides under Sections 393/34 IPC. Mere acquittal of Sameer Hussain under Sections 25/54/59 of the Act will not make any difference as regard to offence under Section 398 IPC is concerned. Appellant has been acquitted for the charge under Section 25 of the Act on technical grounds but that would not mean that factum of his being in possession of a country made pistol at the time of crime has also to be doubted.

14. For the foregoing reasons, both the appeals are dismissed.

A.K. PATHAK, J.

JANUARY 30, 2015/ga