

\$~R-47

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

%

Date of Decision : May 23, 2016

+

**CRL.A. 99/2015**

MUJAHIR @ MAJA

..... Appellant

Represented by: Ms.Suman Chauhan, Advocate

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP  
SI Jagdeep Malik, PS Geeta Colony

**CORAM:**

**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**

**PRADEEP NANDRAJOG, J. (Oral)**

CrI.M.B.No.865/2016

The above captioned application seeking suspension of sentence is listed for July 27, 2016. Since the appeal has reached for final hearing the application is dismissed as infructuous.

CrI.A.No.99/2015

1. Mujahir has been convicted for the offence punishable under Section 392/34 IPC as also under Section 394/34 IPC. But on the reasoning that since he has been convicted for the offence punishable under Section 394/34 IPC and the allegations overlapped the offence punishable under Section 307 IPC, the appellant is not being convicted for the offence punishable under Section 307 IPC; a reasoning which ex-facie is incorrect, because punishment for offence punishable under Section 394 IPC is for voluntarily

causing hurt while committing robbery and it does not overlap the offence of attempting to murder a human being.

2. Be that as it may, the State has not challenged the impugned decision dated October 10, 2014 and therefore I proceed to decide appellant's fate regarding his conviction for the offence punishable under Section 392/394/34 IPC for which he has been sentenced to undergo imprisonment for 7 years and pay fine in sum of ₹5,000/-, in default to undergo SI for 5 months.

3. Conviction of the appellant rests on the learned Trial Judge accepting the testimony of the victim Durga Rao PW-2 and appellant refusing to participate in the TIP proceedings held on February 22, 2011.

4. To set the setting of the scene, I transpose myself to January 01, 2011. Durga Rao, a sepoy in the Indian Army, got down at ISBT Kashmiri Gate at 7:45 PM and was accosted by a TSR Driver (the appellant) who asked him his destination. He said that he had to take a train from New Delhi railway station. The TSR driver took him along with his luggage to his TSR where, one person was already sitting on the rear seat. The TSR moved hardly 100 meters when two other persons signalled the driver to stop. The driver stopped and the two also boarded the TSR. As they proceeded further, and reached a lonely spot, two of the three persons in the rear seat flung a rope around his neck and tried to strangle him. The third took out a long screw driver and put it inside his mouth. The TSR driver kept driving. He was thrown out of the moving TSR. His bag, containing his Id-card, two ATM cards, clothes, a mobile phone of Nokia make and some articles which he had purchased from the departmental canteen were stolen.

5. A socially conscious human saw Durga Rao lying injured near Geeta

Colony Flyover and he informed HC Bhagwati Prasad PW-13, incharge of a PCR van : Romeo-15 stationed nearby. HC Bhagwati Prasad rushed to Geeta Colony Flyover and removed Durga Rao who in an injured condition to GTB Hospital where Ct.Virender Singh PW-5, posted on duty, informed PS Geeta Colony of said fact and HC Krishan Kumar PW-11 recorded DD No.35A, Ex.PW-11/A. Investigation was entrusted to SI Satpal PW-14 who, accompanied by Ct.Vinod reached GTB Hospital.

6. In the meanwhile, Durga Rao was given medical aid at the hospital by Dr.Pankaj Rakesh, a junior resident who authored the MLC Ex.PW-8/A, proved at the trial by Dr.Sanjeeta Behera PW-8, because Dr.Pankaj Rakesh had left the hospital and had worked with Dr.Sanjeeta Behera and was thus acquainted with his handwriting and his signatures. Dr.Pankaj Rakesh noted on the MLC that the injured had a lacerated wound on the forehead and a mark of hanging on the neck. Collecting Durga Rao's MLC Ex.PW-8/A, SI Satpal recorded Durga Rao's statement Ex.PW-2/A in which he disclosed the facts noted by me in paragraph 4 of the narrative above.

7. Further investigation was taken over by Insp.R.N.Pathak PW-15 who, claims that Durgao Rao managed to recollect the name of the TSR in which he had travelled, but was not stated by him in his statement Ex.PW-2/A. It was DL 1RL 5136 and this led him to trace the owner thereof. Visit to the office of the Road Transport Authority at Burari revealed that the owner thereof was one Amit Sharma who had shifted from the address in the records of the RTO Burari, but the said records revealed that the TSR was got financed from Gaurav Auto Finance. Mr.Gaurav Sharma told him that the TSR was sold to somebody through Om Auto Dealers. One Naresh Chawla told him that the TSR was sold to one Smt.Sarla wife of Firoz

Aalam a resident of Nand Nagri. In this way SI R.N.Pathak reached Firoz Aalam who told him that the appellant and Azad used to ply his TSR; alternatively shifting during the day and the night and this led R.N.Pathak to trace the two. Whereas appellant was apprehended, Azad could not be and was declared a proclaim offender. Two other persons named by the appellant in his disclosure statement could also not be apprehended. The only person sent for trial was the appellant and relevant would it be to record that pursuant to the disclosure statement made by the appellant a screw driver Ex.P-2 and a mobile phone Ex.P-3 of Nokia make was recovered.

8. Concerning the mobile phone, Anil Gupta PW-7 has proved through the invoice of his sole proprietary firm : Gupta Electronics, that he sold Nokia 2626 MP mobile phone having IMEI No.359335023182618 to Durga Prasad Rao, which invoice was seized by the investigating officer. The invoice Ex.PW-2/C has been perused by me. It records, as noted above, Durga Rao having purchased the mobile on April 05, 2009.

9. Naresh Chawla PW-4 has proved that the TSR in question was purchased by him from Amit Sharma and Gaurav Auto Finance was a financier. He sold the same to Sarla. Gaurav PW-6 has corroborated Naresh Chawla. Firoz Aalam PW-12 the husband of Sarla has deposed that the TSR was being taken on hire by the appellant and Azad, and here I note that in his testimony he said that on the day of the incident the TSR was with Azad from 6:00 PM to 6:00 AM, which appears to be either a typing mistake or a slip of memory because in his statement under Section 161 Cr.P.C. Firoz Aalam said that Azad used to take the TSR from him at 8:00 PM and return the same in the morning at 6:00 AM. The relevance thereof would be that the time of the crime is 7:45 PM and assumes some critical importance

regarding custody of the TSR.

10. The minor hiccup, either the result of an incorrect recording of the time when Firoz Aalam deposed in Court or a memory loss by him, has to be kept in mind while discussing the incriminating evidence, and I lean in favour of the view that the hiccup is minor because the victim successfully identified the appellant as the TSR driver whom he had an occasion to see very properly because the appellant met him when he de-boarded the bus at ISBT Terminal. The two had a dialogue when appellant enquired where was he to go and Durga Rao said that he had to go to the Railway Station. The two walked together till the TSR. It is not a case where Durga Rao had a fleeting glimpse of the appellant. Further, the recovery of the mobile phone Ex.P-2 is clinching evidence regarding appellant's participation in the crime. It has an IMEI number which is the same as the one on the invoice Ex.PW-2/C i.e. No.359335023182618.

11. AS regards the appellant refusing TIP as deposed to by J.P.Nahar PW-3 learned MM Delhi, TIP Proceedings Ex.PW-3/B held on February 22, 2011, record that the appellant refused TIP on the plea that he was shown to Durga Rao. I note that during cross-examination Durga Rao admitted that the accused had been shown to him in the police station.

12. The recovery of the mobile phone from the appellant. The appellant being in custody of the TSR used for commission of the crime and the appellant being identified in the dock by Durga Rao are sufficient evidence to uphold the impugned judgment regarding the verdict of guilt as also the order on sentence which is 7 years RI. Indeed, during the robbery the victim was caused hurt. He was thrown out of the TSR and a screw driver was thrust in his mouth.

13. The appeal is dismissed.
14. TCR be returned.
15. Copy of this decision be sent to the Superintendent Central Jail Tihar for updation of his record.

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**MAY 23, 2016**  
*mamta*