

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

Judgment Reserved on: May 19, 2016

% *Judgment Delivered on: May 25, 2016*

+ CRL.A. 624/2015

NAUSHAD @ SHAMIM

..... Appellant

Represented by: Mr. Jivesh Tiwari, Adv.

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP for State

+ CRL.A. 217/2016

RAHUL

..... Appellant

Represented by: Ms. Suman Chauhan, Adv.

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP for State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By a common impugned judgment dated January 12, 2015 Rahul has been convicted for offences punishable under Section 397 IPC and Sections 25 and 27 Arms Act whereas Naushad @ Shamim has been convicted for the offence punishable under Section 392 IPC. Vide the order on sentence dated January 17, 2015 Rahul has been awarded rigorous imprisonment for 7 years, the minimum sentence prescribed for the offence punishable under Section 397 IPC and a fine of ₹20,000/- in default whereof to undergo simple imprisonment for 6 months, rigorous imprisonment for 5 years for

the offence punishable under Section 27 Arms Act and a fine of ₹10,000/-, in default whereof to undergo simple imprisonment for 5 months, rigorous imprisonment for 3 years for the offence punishable under Section 25 Arms Act and a fine of ₹5,000/-, in default whereof to undergo simple imprisonment for 3 months. Naushad has been sentenced to rigorous imprisonment for 7 years for the offence punishable under Section 392 IPC and a fine of ₹20,000/- and in default whereof to undergo simple imprisonment for 6 months.

2. FIR No. 201/2010 was registered under Sections 392/411/34 IPC and 27 Arms Act on the complaint of Dushyant Singh PW-1 who stated that he had come for training in Delhi with his friend Tarun Kumar and while they were going back to Hapur, they reached at ISBT Kashmere Gate, from where they boarded a DTC bus for Harsh Vihar. Around 7.30 PM when the bus reached 66 feet road, two boys came near him and stood by his side. He and his friend were standing near the rear gate. When the bus stopped near Welcome Pulia, one boy whose name he came to know later on as Rahul put a knife on his stomach and the other boy whose name he came to know later on as Naushad @ Shamim took out his Nokia 2700 mobile phone with SIM No. 8126502309. His friend Tarun caught hold of Shamim @ Naushad and a person named Kamta Prasad who was working as Head Constable in Delhi Police caught hold of Rahul and knife was recovered from him. From the spot they went to police station and lodged the FIR. Thus apprehension of both Rahul and Naushad was at the spot. Pursuant to a charge sheet being filed, charge for offences punishable under Sections 392/411/34 IPC, 25 Arms Act was framed against both Rahul and Naushad vide order dated February 22, 2011. Dushyant Singh, the complainant and Tarun Kumar his

friend were examined as PW-1 and PW-2 by the Metropolitan Magistrate and in view of the statement of the two witnesses that one boy i.e. Rahul put knife on the body of Dushyant Singh, the learned Metropolitan Magistrate vide its order dated April 24, 2012 formed an opinion that prima facie case for offence punishable under Section 397 IPC was made out, which was triable by the Court of Sessions and hence acting under Section 323 Cr.PC the matter was committed to the Sessions Court.

3. Learned ASJ vide order dated August 17, 2012 framed charges for offences punishable under Sections 392/34 and 397/34 IPC against Rahul and Naushad besides Sections 25/27 Arms Act against Rahul and Section 411 IPC against Naushad.

4. Dushyant Singh and Tarun Kumar were re-examined before the learned ASJ as PW-1 and PW-4 respectively and HC Kamta Prasad, the other eye witness who apprehended Rahul as PW-3.

5. Learned counsels for the appellants challenging the conviction state that in their testimony before the learned ASJ both Dushyant Singh PW-1 and Tarun Kumar PW-4 did not support the prosecution case and failed to identify the appellants. Learned ASJ convicted the appellants on the basis of their testimony recorded before learned Metropolitan Magistrate contrary to the law for the reason Dushyant Singh and Tarun Kumar were not confronted with their previous statements made before learned Metropolitan Magistrate. Relying upon Section 145 of the Indian Evidence Act and the decision of the Supreme Court reported as AIR (38) 1951 SC 441 Tara Singh Vs. The State it is contended that the statement recorded by learned Metropolitan Magistrate could not be used as substantive evidence. It is further contended that the case property i.e. the knife recovered was not

shown to either Dushyant Singh or Tarun Kumar and thus not proved. Reliance is placed on the decision reported as 1988 All. L.J. 85 Yashpal Vs. State of UP. There is no evidence led by the prosecution to show that case property was seized, sealed and properly kept in Malkhana and there was no tempering with it. There is violation of Section 100 Cr.PC as no public witness was joined at the time of apprehension or seizure, not even the driver and conductor of the bus. The case is based solely on the testimony of police who have falsely implicated the appellants.

6. Learned APP for the State on the other hand contends that though Dushyant Singh has not been confronted with the statement made before learned Metropolitan Magistrate, however Tarun Kumar PW-4 has been confronted with the statement made before the learned Metropolitan Magistrate i.e. Ex.PW-4/A which he admitted. Though Dushyant Singh has turned hostile when examined before the learned ASJ, however in cross-examination he admitted that the appellants were the robbers. Vide order dated August 04, 2011 learned Trial Court noted the threat extended to the witnesses by the appellant Naushad. Thus, when witnesses are examined after a long gap of time coupled with threat extended to them, there is every likelihood of their being won over. Reliance is placed on the decision of the Supreme Court reported as (2015) 3 SCC 220 Vinod Kumar Vs. State of Punjab.

7. As noted above, when examined before learned ASJ both Dushyant Singh PW-1 and Tarun Kumar PW-4 turned hostile and did not support the prosecution case. However Kamta Prasad who apprehended the appellants on the spot supports the prosecution case. The deposition of HC Kamta Prasad PW-3 along with his cross-examination is as under:-

“On 27/08/10, I was posted as HC at VRK ACP Office. On that day, after finishing my duty I was going to my house in a DTC bus route No.213. There was crowd in the bus and when bus reached at near Welcome pulia at about 7:30 p.m. one boy had put the knife on the stomach of a passenger and other boy was also standing near them removed mobile phone from the pocket of that passenger. One boy who was with that passenger on seeing the same raised alarm and on this I snatched the knife from the hand of that accused who had put on the stomach of the passenger for the purpose of robbery and with the help of both the passenger other boy who had removed the mobile phone was also apprehended by us. The other passenger who was the friend of complainant had recovered the knife from the possession of that accused. The name of the accused who had put the knife revealed as Rahul and the name of the other who boy had removed the mobile revealed as Shameem @ Naushad. The name of the complaint revealed as Dushyant and his friend was Tarun. Thereafter we took both the accused persons to PS Jafrabad and produced before DO. Thereafter, I left from the PS. Later on IO of this case met me and recorded my statement. I identify both the accused persons who are present in the court. I can also identify the case property if shown to me.

At this state, MHCM has produced one sealed parcel sealed with the seal of KP. The seal is broken and from the parcel one knife is taken out and shown to the witness to which witness has identified the knife which was used by accused Rahul and was recovered from his possession. The handle of the knife is made of aluminium and blade of the knife is rusted. Same is Ex.PW3/Art.1.

At this stage, complainant/superdar Dushyant has produced one mobile phone make NOKIA 2700 of black and grey colour. Same is shown to the witness and witness has identified the same to be the same which was recovered from the possession of accused Naushad @ Shameem. The same is Ex.PW1/Art.1.

Xxxx by Sh. Yamim Ali, Ld. Counsel for both the accused.

On that day I left the office at about 6:30-7:00 p.m. The distance in between my office and the place of occurrence is about 10 minutes walk. It is correct that I was going to Bhajanpura. It is wrong to suggest that there is direct conveyance of bus from my office to my residence. The distance in between seelampur and Bhajanpura is about four Kms. I used to return my home from my office by bus. It is correct that bus of route No.213 of DTC is not go to Bhajanpura. I took the bus at about 7:15 p.m. I boarded the bus from back gate. I did not take ticket to travel in the bus. I was standing in the bus as no seat was vacant.

I have not stated to the IO in my statement that I was sitting. Confronted with the statement Ex PW3/DA where it is recorded that I was going to my home while sitting in the bus of route No.213. It is wrong to suggest that I was not travelling in the bus and as such I was not having any ticket to travel in the same. First of all I saw that accused had put the knife on the stomach of complainant then I heard the noise of his friend. Tarun had raised the alarm prior to apprehension of accused persons. The other passengers who were travelling in the bus did not help us to apprehend the accused persons. I did not call the police over 100 number rather I got the bus stopped near the PS Jafrabad. The conductor and the driver of the bus did not accompany us to the PS. I did not ask any other passengers to accompany me to the PS or to the conductor as well as the Driver. I had handed over the knife and mobile phone to the DO alongwith both the accused persons. I do not remember the date on which my statement was recorded but it might be after one or two days. The date of incident is 27/08/10. It is wrong to suggest that I had not joined the investigation of this case or that nothing was happened in my presence or that I am deposing falsely about the incident or that the accused persons have been falsely implicated in this case or that I am deposing falsely. It is wrong to suggest that nothing was happened in my presence as such none of the documents bear my signatures. It is correct that site plan was not prepared in my presence.”

8. Even in the absence of the testimony of Dushyant Singh and Tarun

Kumar supporting the prosecution case, from the statement of Kamta Prasad, who was present at the spot, apprehended the appellants at the spot, took them to the police station and got lodged the FIR along with Dushyant Singh and Tarun Kumar, the prosecution has proved beyond reasonable doubt the offences punishable under Sections 397 IPC, 25 and 27 Arms Act committed by Rahul and offence punishable under Section 392 IPC committed by Naushad.

9. Dushyant Singh has not been confronted with his statement recorded before learned Metropolitan Magistrate and thus it cannot be read as substantive evidence as has been erroneously done by learned Trial Court.

10. Moreover Tarun Kumar PW-4 even when examined before the learned ASJ stated that he and his friend were standing in the bus and suddenly Dushyant not finding his phone asked him whether he had taken mobile which he refused. In the meantime, 4-5 boys started running towards the gate in the bus but amongst them 2-3 were apprehended by the public and they were taken to the police station. The mobile phone of his friend was recovered from one of the accused persons. He identified his signatures on Ex.PW1/J i.e. sketch memo of knife/churi, PW-1/I i.e. seizure memo of knife/churi, Ex.PW-1/B i.e. seizure memo of mobile phone besides disclosure statement, arrest memo and personal search memo. Thus, this portion of Tarun's testimony lends corroboration to that of Kamta Prasad. He however failed to identify the appellants as the accused persons.

11. Tarun Kumar was confronted with his statement PW-4/A however he denied that the same was true and correct statement. Thus I need not go further into the question whether this confrontation was proper or not. Though not relevant in view of Tarun Kumar not admitting the correctness

of his previous statement Ex.PW4/A, however it would be relevant to note that when the prosecution wishes to use the previous testimony of the witness to the contrary as substantive evidence then it must confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only the previous statement can be brought in as substantive evidence as held in Tara Singh (supra). Confrontation has to be to the specific portions of the previous statement however in the present case the stage of confronting with the parts of previous statement had not arrived for the reason Tarun Kumar declined to accept the correctness of the previous statement Ex.PW4/A in its entirety.

12. As regards the identification of the weapon of offence, no doubt any recovery at the instance of the accused is required to be connected with the offence committed. In the present case, no injury was caused and the knife was shown to the witness to threaten him which fact has been deposed by Kamta Prasad PW-3. Kamta Prasad has identified the knife produced in the Court to be the same which was shown to Dushyant Singh and which was recovered from Rahul when he was apprehended. Further both Dushyant Singh and Tarun Kumar identified their signatures on seizure memos of mobile phone and knife besides disclosure statement, search memos and arrest memos though they did not identify the accused persons the reason for which was obvious. Thus, the weapon of offence seized is connected with the offences committed.

13. Dushyant Singh was first examined before the learned Metropolitan Magistrate on March 16, 2011 and on August 04, 2011 when he was recalled for examination-in-chief and cross-examination. On August 04, 2011, the examination-in-chief and cross-examination had to be deferred for the

reason Naushad threatened Dushyant Singh stating “Bahar Ladke Khade Hai gawahi thik se diyo”. After Dushyant Singh and Tarun Kumar were examined by learned Metropolitan Magistrate, the matter was committed to learned ASJ and testimony of Dushyant Singh before learned ASJ was recorded on October 30, 2012 and February 16, 2013 and that of Tarun Kumar on March 25, 2013. Merely because Kamta Prasad was a police officer, his testimony witnessing the incident, apprehending Rahul and Naushad along with mobile phone and their arrest cannot be rejected which is also supported by both Dushyant Singh and Tarun Kumar in so far as they admitted lodging of complaint on which FIR was registered, seizure memos, arrest memos and disclosure statements.

14. In view of the aforesaid discussion, the appeals are dismissed.

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 25, 2016
‘v mittal’