

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on : May 04, 2017

+ CRL.A. No.562/2000 & CrI.M.A. No.1235/2001

MOHD. KHALID

..... Appellant

Through: Mr.Harsh Prabhakar, Mr.Anirudh
Tanwar, and Mr.Harjeet Singh
Sachdeva, Advocates.

versus

STATE

..... Respondent

Through: Mr.Panna Lal Sharma, Additional
Public Prosecutor for the State with
Sub-Inspector Vineet, PS Anand
Vihar.

+ CRL.A. 594/2000

SITA RAM

..... Appellant

Through: Mr.Aditya Vikram, Mr.Harjeet Singh
Sachdeva, Advocates.

versus

STATE

..... Respondent

Through: Mr.Panna Lal Sharma, Additional
Public Prosecutor for the State with
Sub-Inspector A. Kumar, Police
Station Vivek Vihar.

+ CRL.A. 511/2001

NISHAD

..... Appellant

Through: Mr.Saurabh Kansal, Ms.Pallavi S.
Kansal, Advocates.

versus

STATE

..... Respondent

Through: Mr.Panna Lal Sharma, Additional
Public Prosecutor for the State with
Sub-Inspector A. Kumar, Police
Station Vivek Vihar.

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S.TEJI, J.

1. By these three separate appeals filed under Section 374 of Cr. P.C., the appellants seek to challenge the common judgment and order on sentence dated 26.08.2000 passed in Session Case No.284/1996, by the learned Additional Sessions Judge, Delhi in Sessions, whereby the learned Additional Sessions Judge had convicted the appellants for the offence punishable under Section 398 of IPC read with Section 25 of the Arms Act and they have been sentenced to undergo rigorous imprisonment for seven years and fine of Rs.10,000/- each for the offence under Section 398 of IPC; and in default of payment of fine they were ordered to undergo further simple imprisonment for a period of two months. In addition, the appellants have been sentenced to undergo rigorous imprisonment for one year each and fine of Rs.1,000/- each for the offence under Section 25 of Arms Act.

2. Since the trial of all the applicants was commonly conducted and all the appellants have been acquitted by the common impugned judgment and have been awarded sentence by the common order on sentence, therefore, with the consent of the counsel appearing on behalf of all the appellants, arguments in all the appeals have been heard together and all the appeals are being disposed of by this common order.

3. The present case had been registered on the statement of Kamlesh Garg, who made her statement before Inspector Baljit Singh on the date of incident stating that she lived in the first floor with her family. Her husband has a Bura shop in Anaz Mandi, and had left for the same, her two children had left for school and she was in the house alongwith a domestic help, Gore Lal. One Narender Kumar was her tenant on the ground floor. On the day of incident, family of her tenant Narender Kumar had gone out and her ground floor portion was locked. At about 12.45 PM door bell rang and Gore Lal opened the door. The appellant Nishad who had worked in the house as carpenter for 4/5 days, entered the room alongwith four associates. One of the intruders caught hold of Gore Lal. Nishad closed the doors of both the gates of the first floor house. All the five offenders took out knives and demanded cash and valuables. She gave ear tops and Nishad pulled gold chain from her neck and snatched four gold bangles from her wrists. The appellants demanded more money and jewellery but she tried to put them off, whereupon she was slapped. Appellant – Nishad told other cohorts that she had been operated upon and her stomach would be split open if, she does not give more cash and jewellery. She further stated that her mouth was gagged with a piece of sari. The appellants opened the almirah lying in the room and collected silver coins, silver jewellery including pajab and angoothi, etc. and Idols of Laxmi and Ganesh of silver which were gold plated. The appellants also took Rs.3,28,000/- kept in almirah in different packets. The appellants also took a watch HMT mark with black dial from the fridge. They put some of the articles in a black colored

suitcase on which sticker of her husband's name was pasted. While leaving they imprisoned the servant in a box of the double bed and threatened her with her life if she raised noise. Thereafter, they went away. After recording the statement of Kamlesh Garg, Inspector Baljit Singh prepared a rukka and sent the same for registration of a case under Section 395 of IPC. Investigation commenced, crime team and dog squad were called, statement of witnesses were recorded, site plan was prepared on the pointing out of Kamlesh Garg. Three accused persons were arrested on 17.08.1995 by different police parties, two of the police stations Vivek Vihar and one of Police Station Anand Vihar under the Arms Act.

4. Recoveries from the accused persons were affected. Rs.2,50,000/- and gold jewellery in a steel deeba were recovered from accused Sita Ram and seized under Section 102 of the Code; Rs.10,035/- with silver coins, gold chain and tops were recovered from Mohd. Khalid and seized; Silver coins, jewellery, two gold karas were recovered from the accused Nishad and were seized. In addition **knives were also recovered from all the three accused persons** Other accused Murslin was juvenile who is facing trial in the Juvenile Court, Another accused Pappur @ Sahir could not be apprehended initially and was declared proclaimed offender, who later on was being tried in the Juvenile Court. All the accused persons refused to participate in test identification parade. The recovered property (except silver spoon) was correctly identified by Smt. Kamlesh Garg. The case property was given to Smt. Kamlesh Garg on superdari.

5. After completion of the investigation, the chargesheet under Section 395 of IPC were framed against all the three accused on 27.07.1996. Accused Nishad and Mohd. Khalid were also charged separately for the offence under Section 25 of the Arms Act. It was not felt necessary by the Trial Court to frame separate charge against accused Sita Ram but in view of the fact that joint trial was being held and the facts were well known to him. All the incriminating material was put before the accused persons to which they pleaded not guilty and claimed trial.

6. To prove the charges against the appellants, the prosecution examined 21 witnesses. The relevant witnesses are, HC Abhay Singh Yadav (PW-2); Smt. Kamlesh (PW-5), Constable Subhash Chand (PW-6); Constable Ram Diya (PW-7); Gore Lal (PW-10); Sub-Inspector Pyar Singh (PW-11), Head Constable Jakir Hussain (PW-12); Constable Jitender (PW-15); Constable Dinesh (PW-16); Rajeev Jain (PW-17); Head Constable Abay Singh (PW-19); Shri Devender Kumar Sikri (PW-20); Inspector Baljit Singh (PW-21).

7. After conclusion of prosecution evidence, all incriminating material was put before the appellants and their statements under Section 313 Cr.P.C. were recorded. Upon considering the facts, evidence led and the material on record, the learned Additional Sessions Judge held the appellants guilty for an offence punishable under Sections 398 of IPC and under Section 25 of the Arms Act, by an order dated 26.08.2000, and vide order on sentence on the even date, appellants were sentenced as indicated above. Hence, the

appellants have filed the instant appeals against the judgment and order on sentence passed by learned Additional Sessions Judge.

8. The appellant – Nishad has challenged the judgment of conviction and order on sentence, inter alia, contending that there are material contradictions in the statements of the prosecution witnesses which go to the root of the matter and create a substantial doubt in the truthfulness of the prosecution version and the Trial Court has overlooked many significant contradiction and irreconcilable inconsistencies and has termed them as insignificant ones. Apart from this, there is no independent corroboration and natural witnesses did not support the prosecution case. As per learned counsel for the appellant, relying on the testimony of complainant – Kamlesh Garg and eye-witness Gore Lal who was a domestic help, the learned Additional Sessions Judge has not considered the deliberate improvement in their testimonies and other independent witnesses present at the spot. Regarding not participating in Test Identification Parade, it is contended that the incident was of 17.08.1995 and the proceedings for conducting TIP were initiated after more than one month, coupled with the deposition of the complainant during her cross-examination that she was called in the police station to identify the accused persons, at the time of their arrest. It is further contended on behalf of appellant – Nishad that he had not made any disclosure statement containing his confessional statement about the crime. Learned counsel for the appellant further urged that the appellant – Nishad was not arrested at the spot and unless and until his identity as

a culprit was established beyond doubt, the prosecution could not be said to have proved its case.

9. Apart from the grounds raised on behalf of the appellant – Nishad, learned counsel for the appellant– Mohd. Khalid, has contended that the charge was framed under Section 395 of IPC but when the learned trial court had fixed the date of 26.08.2000 and he appeared before the court and as his counsel was not available at the time of call of the case, the learned trial court without asking any question from the appellant on the quantum of sentence, proceeded to hold the appellant guilty of the alleged offence under Section 398 of IPC and at the same time without giving any opportunity to make any submission on the point of quantum of sentence proceeded to pass the impugned order even without passing a formal order of amendment of charge. Learned counsel for the appellant – Mohd. Khalid further argued that the learned trial court had exceeded its jurisdiction while passing the sentence to undergo rigorous imprisonment for seven years and a fine of Rs.10,000/- for the offence under Section 398 of IPC, whereas the law does not provide any provision of imposing fine in the said offence. Further, no independent person was made a witness to the arrest and recovery from the appellant. Lastly, it was contended that there was no use of any weapon in the alleged incident and recovery is also doubtful therefore the offence under Section 398 is not attracted in the facts of the present case.

10. Learned counsel for the appellant – Sita Ram contended that vide order on sentence dated 26.08.2000, the appellant had been

awarded sentence without asking any question from the appellant on the quantum of sentence and without giving any opportunity to make any submission on the point of quantum of sentence and despite the charge framed under Section 395 of IPC, the appellant has been convicted under Section 398 of IPC and that too without passing any formal order on amendment of charge. Therefore, non-compliance of provisions of Section 216 of Cr. P.C. vitiates the whole proceedings of the case as well as the order of conviction. Learned counsel for the appellant – Sita Ram further argued that the learned trial court had exceeded its jurisdiction while passing the sentence to undergo rigorous imprisonment for seven years and a fine of Rs.10,000/- for the offence under Section 398 of IPC, whereas the law does not provide any provision of imposing fine in the said offence. Even no independent person was made a witness to the arrest and recovery from the appellant. It was also contended that there was no use of any weapon in the alleged incident and recovery is also doubtful therefore the offence under Section 398 is not attracted in the facts of the present case. Lastly, it is contended that the appellant – Sita Ram had remained behind bars for about 33 months and while considering the facts and circumstances of the case the sentence of the appellant – Sita Ram be reduced to the period already undergone by him.

11. The appellants have filed the instant appeals challenging the aforesaid judgment on conviction as well as order on sentence. During pendency of the present appeal, the sentence imposed upon the appellant – Mohd. Khalid was suspended on 31.10.2002; appellant -

Sita Ram was suspended vide order dated 03.02.2003; and appellant – Nishad was suspended on 17.07.2002.

12. Per contra, learned Additional Public Prosecutor for the State has vehemently opposed the aforesaid contentions raised on behalf of the appellants and submitted that the offence with which the appellants have been convicted are the crimes against society. In this case, five persons committed the dacoity duly armed with dangerous weapon like knives, out of which two have been tried before the Juvenile Justice Board. Apart from this, no material substance has been cited on behalf of the appellants which could show that the statement of the complainant – Kamlesh Garg was inherently improbable and no ground has been provided as to why so many police officials conspire to falsely implicate the appellants. Identification of appellant – Nishad, Mohd. Khalid and Sita Ram are held satisfactory by the learned Additional Sessions Judge. Prompt DD entry was made in respect of the registration of the case, arrest of the accused persons and the recoveries from accused Sita Ram in particular and other in general also. Regarding framing of charge against all the appellants, it is submitted that no doubt, the charge was initially framed under Section 395 of IPC but all the appellants were carrying knives and have common intention to commit robbery in the house of the complainant, therefore, there is no illegality or infirmity in the impugned judgment and order on sentence as passed by learned Additional Sessions Judge. Therefore, the appeals filed by the appellants are liable to be dismissed.

13. I have heard the submissions made on behalf of both the sides and also gone through the evidence as well as material placed on record.

14. Since the basis of registration of present case is the statement of the complainant – Kamlesh Garg (PW-5), let her statement be scrutinized for the better appreciation of the case. The impugned judgment records that when Inspector Baljit Singh, on receipt of information from Police Station Vivek Vihar on 17.08.1995 reached the place of incident, he found that the household goods were scattered in room. The complainant – Kamlesh Garg met him and stated that her husband has a bura shop in Anaz Mandi. When he left for the shop and her two children had also left for the school, she was in the house with a domestic help Gore Lal. She stated that at about 12.45 noon door bell rang, Gore Lal opened it. Appellant – Nishad entered the room with his other four associates. One of the intruders caught hold of Gore Lal. Appellant – Nishad closed the door of both the gates of the first floor house. All the five offenders took out knives and demanded cash and valuables. Nishad pulled gold chain from her neck and snatched four gold bangles from her wrists. When she tried to put them off, she was slapped. Her mouth was gagged with a piece of Sari. The appellants opened the almirah and collected silver coins, silver jewellery including pajab and angoothi etc. Idols of Laxmi and Ganesh of silver which were gold plated. They also took Rs.3,28,000/- kept in almirah. It is further stated that while leaving, they imprisoned the servant in the box of the double bed and threatened her that if she

raised noise, she would be killed.

15. So far as recovery is concerned, Rs.2,50,000/- and gold jewellery in a steel deeba were recovered from accused Sita Ram and seized under Section 102 of the Code; Rs.10,035/- with silver coins, gold chain and tops were recovered from Mohd. Khalid and seized; Silver coins, jewellery, two gold karas were recovered from the accused Nishad and were seized. In addition knives were also recovered from all the three accused persons. The complainant as well as Constable Ram Diya (PW-) have identified the entire case property in court.

16. Eye witness - Gore Lal (PW-8) deposed in his statement that he was domestic help to the complainant and was 12 years of age at the time of incident. This witness clarified that he was put in the box of double bed when the appellants prepared to leave. So far as the identification of the appellants are concerned, it has been established from the deposition of complainant Kamlesh Garg (PW-5) and Gore Lal (PW-8) on the date of incident.

17. After going through the facts of the present case, this court has observed that the prosecution has been successful in proving the identification of the appellants at the time of commission of crime, recoveries have been effected from the appellants and proved by the prosecution.

18. After a cumulative reading of the evidence of the complainant (PW-5) and Gore Lal (PW-8), who have identified the appellants and

the recoveries of robbed articles and the buttondar/giraridar knives from the appellants, this court is of the considered opinion that the prosecution has successfully proved the charges beyond all reasonable doubts, against the appellants herein. Therefore, in the considered opinion of this court, the impugned judgment dated 26.08.2000, thereby convicting the appellants for the offence under Section 398 IPC read with section 25 of Arms Act does not suffer from any illegality or infirmity and the same is accordingly upheld.

19. Coming to the order on sentence, this court has perused the impugned order on sentence dated 26.08.2000 and observes that the appellants have been sentenced to undergo rigorous imprisonment for seven years and a fine of Rs.10,000/- for the offence under Section 398 of IPC despite they were charged under Section 395 of IPC. The contention on behalf of the appellants that *by convicting the appellants under Section 398 IPC and imposing fine of Rs.10,000/- the learned trial court had exceeded its jurisdiction as Section 398 does not provide for imposition of fine*, has no merit in it for the reason that in fact the trial was conducted for the commission of offence of robbery under Section 395 of IPC, which does not debar the court to impose fine alongwith the substantive sentence. It is only after considering the recoveries of buttondar/giraridar knives from the appellants, the learned Additional Sessions Judge has convicted the appellants for the offence under Section 398 of IPC read with section 25 of Arms Act.

20. For better appreciation of the conviction under Section 398 of IPC, Sections 395, 397 and 398 are reproduced hereunder:-

395. Punishment for dacoity.—Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

397. Robbery, or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, 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.

398. Attempt to commit robbery or dacoity when armed with deadly weapon.—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.”

21. In the light of the aforesaid description of the sections, while advertent back to the facts of the present case, it is apparent that the accused persons have committed dacoity having been possessed with deadly weapon, therefore, they are rightly sentenced for the offence punishable under Section 398 of IPC. In fact, for convicting the accused for the commission of offence of robbery or dacoity, the punishments awarded under Section 397 and 398 are the aggravated forms of Section 395 IPC.

22. In the considered opinion of this Court, if the robbery or dacoity is committed by a group of persons the offender shall certainly be liable to be punished only for the offence under Section 395 of IPC and when the robbery or dacoity is committed by a group and any

person *uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person*, then the offender shall be punished under Section 397 of IPC. Similarly, section 398 of IPC prescribes for award of sentence for a period not less than seven years, in case the offenders *at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon*. The embargo of Section 397 or 398 IPC for the award of sentence is not less than seven years. In a nutshell, Section 398 IPC does not prescribe the sentence separately but it enhances the sentence and fixes the minimum sentence of seven years for the persons possessing a deadly weapon during commission of robbery or dacoity and they are to be sentenced under the sections such as 398 IPC, which is nothing but an aiding section to the substantive offence putting the bar on the minimum sentence of not less than seven years.

23. In the facts of the present case, the appellants were carrying deadly weapons at the time of committing the robbery and dacoity and since section 398 IPC does not constitute an independent offence inasmuch as it is related to dacoity under Section 395 of IPC. Basically, the appellants are convicted for the commission of offence of dacoity (under Section 395 of IPC), which does not bar the court to impose fine coupled with the substantive sentence.

24. To clarify further, the impugned judgment and order of sentence is modified to the extent that the appellants are convicted and sentenced for the offence punishable under Section 395 read with Section 398 of IPC.

25. In view of the aforesaid discussion, finding no illegality or infirmity in the impugned judgment and order on sentence dated 26.08.2000, thereby sentencing the appellants to undergo rigorous imprisonment for seven years with fine of Rs.10,000/- each is modified to the extent that the appellants are held guilty and convicted for the offence punishable under Section 395 read with section 398 of IPC. However, sentence for the offence under Section 25 of Arms Act thereby sentencing the appellants to undergo rigorous imprisonment for one year and fine of Rs.1,000/- each and in default, to undergo simple imprisonment for 15 days each is upheld.

26. A cumulative consideration of the overall evidence on the facts of the present case, this court does not find any merit in the appeals filed by the appellants, therefore, the same are dismissed.

27. Appellants are on bail. Their bail bonds are cancelled and sureties are discharged. Appellants are directed to surrender before the trial court to serve out the remainder of their sentence.

28. A copy of this order be sent to the Trial Court for information and necessary steps.

29. With aforesaid directions, the present appeal is disposed of.

(P.S.TEJI)
JUDGE

MAY 04, 2017
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