

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Judgment delivered on : July 18th, 2017

+ CRL.A. 348/2002
SURINDER KUMAR

..... Appellant

Through: Mr. Pradeep Kumar Arya, Mr. Raj
Kiran Sharma, Advocates

versus

STATE

..... Respondent

Through: Mr. Panna Lal Sharma, Additional
Public Prosecutor for the State

+ CRL.A. 371/2002
RUPINDER KUMAR

..... Appellant

Through: Mr. Pradeep Kumar Arya, Mr. Raj
Kiran Sharma, Advocates

versus

STATE

..... Respondent

Through: Mr. Panna Lal Sharma, Additional
Public Prosecutor for the State

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

JUDGMENT

P.S.TEJI, J.

1. The present appeals have been filed by the appellants being aggrieved by the common judgment of conviction dated 08.04.2002

passed by the learned Additional Sessions Judge, Delhi holding the appellants guilty for the offence punishable under Section 452/323/34 as well as under Section 394 of IPC of Indian Penal Code (hereinafter referred to as I.P.C.), and vide order on sentence dated 08.04.2002, they had been sentenced to undergo rigorous imprisonment for a period **of two years each** with fine of Rs.3,000/- each and in default of payment of fine, to undergo simple imprisonment for three months for the offence under **Section 452/34 of IPC**. They were further sentenced to undergo rigorous imprisonment for **one year each** for the offence under Section 323/34 of IPC and rigorous imprisonment for two years each with fine of Rs.3,000/-, in default to undergo simple imprisonment for three months each for the offence under **Section 394/511/34 of IPC**.

2. Since the trial of both the applicants was commonly conducted and both the appellants have been convicted by the common impugned judgment and have been awarded sentence by the common order on sentence, therefore, both these appeals are hereby disposed of by this common order.

3. The facts enumerated from the impugned judgment are that on 21.02.1999, Sub-Inspector Balram of Police Post Pushp Vihar was on patrol along with other police officials when he reached near Pushp Vihar Park, Sector 7, and found accused Lokender Kumar apprehended by Mahinder and Raju along with a country made pistol and three cartridges. Complainant Brij Bala was also present there. Investigating Officer recorded her statement and seized the country

made pistol and cartridge. Brij Bala stated before the police that she was resident in quarter No.1096 in Sector 7 of Pushp Vihar. At about 8.45 pm on that day, she was washing clothes in the bathroom while her daughter was sitting in the other room, playing with a child. One person entered her quarter and sat on the sofa. On inquiry, he told her that he had come to meet Sunil. She told him that she did not know him and no one named Sunil resided there. Thereupon that boy became nervous. She asked her daughter to turn him out and close the door. In the meantime, two other boys entered the room out of which one had covered his face with handkerchief and was carrying a country made pistol in his hand. Both of them grappled with her and put a country made pistol on her chest after pressing her mouth while the third person held her daughter. The boy who was carrying the country made pistol asked her where the money had been kept. Gathering courage she removed the country made pistol, held those boys at the internal door and asked her daughter to raise an alarm. Her daughter went to the balcony and raised an alarm. Thereafter, those boys rescued themselves and ran away. They jumped from the first floor. While running, the boy who was carrying country made pistol fired at the chowkidar Shiv Kumar, however he managed to save himself. The boy carrying country made pistol was chased by Mahinder and Raju and was apprehended near Park with country made pistol. He was beaten by the public, whereas his accomplices whose names came to be known as Dolly and Surinder managed to run away.

4. The accused Rupinder Kumar @ Dolly and Surinder Kumar were arrested on 02.11.1999 and they were duly identified by Smt. Brij Bala and her daughter Ritu during TIP. Investigation was conducted, and after completion of investigation, charge sheet under Section 452/323/394 of IPC read with Section 511 and 34 of IPC were framed against the appellants, to which they pleaded not guilty and claimed trial.

5. To prove its case, the prosecution had examined 17 witnesses, namely; Smt. Suman (PW-1); Rajesh Kumar (PW-2); Raju Singh (PW-3); Smt. Brij Bala (PW-4); Ritu (PW-5); Shailender Singh (PW-6); Shiv Kumar (PW-7); R.S. Ghuman (PW-8), Ghanshyam Gupta (PW-9); Head Constable Jai Pal (PW-10); Sub-Inspector Ved Singh (PW-11); Constable Naresh Kumar (PW-12); K.C. Varshney, Sr. SSO, FSL (PW-13); Smt. Gayatri Devi (PW-14); AI Prabhu Dayal (PW-15); Head Constable Sushil Kumar (PW-16); Sub-Inspector Balram (PW-17).

6. After conclusion of prosecution evidence, statements of the appellants under Section 313 Cr.P.C. were recorded in which they denied the entire case of prosecution and claimed innocence and brought forth one lead witness in their support. After conclusion of trial, the impugned judgment and order on sentence passed by the learned Additional Sessions Judge was passed holding the appellants guilty and sentencing them to as indicated above.

7. Aggrieved by the impugned judgment and order on sentence passed by learned Additional Sessions Judge, the appellants have filed the instant appeals.

8. Learned counsel for the appellant – Surinder contended that none of the neighbors, i.e. Suman (PW-1), Rajesh Kumar (PW-2), Gayatri Devi (PW-14) have supported the case of the prosecution. Further, no description of the appellant is given by the complainant in her first information report and the subsequent TIP of the appellant after about 2 months from the date of alleged occurrence is of no value. Ms. Ritu (PW-5) has also committed mistake in identification of the appellant. It is further contended that the story of the prosecution about use of fire arm and then recovery of the same is not proved whatsoever. Even the ballistic expert has not supported the case of the prosecution as the used cartridges were not found to be fired from the alleged country made pistol and this falsify the claim of the prosecution about firing by the appellant on Shiv Kumar (PW-6). Counsel has also urged the various improvements made by PW-4, as PW-4 specifically stated that accused Surinder put the country made pistol on the chest whereas the case of the prosecution is that the accused Lokender put the country made pistol on chest of the complainant.

9. Learned counsel for the appellant – Rupinder Kumar had contended that the appellant was 17 and a half years of age at the time of commission of the alleged offence and the appellant was trustingly accompanied by the co-accused Lokender oblivious of the fact that he

was carrying any weapon or the dubious intention of the co-accused. The appellant neither threatened, hurt nor robbed the complainant. It is contended that the evidence of the prosecution clearly shows that the accused had no *mens rea* to commit any crime. He had no common intention to commit any illegal act and when the co-accused pulled out the weapon, the appellant was horrified and ran away.

10. On the other hand, learned APP for the State has argued that there is sufficient evidence on record in the form of testimony of the complainant Smt. Brij Bala (PW-4) who had identified the appellants during TIP and daughter of the complainant – Ritu (PW-5) has also corroborated the deposition of the complainant. It is further stated that the prosecution has established the identity of the appellants and their presence at the place of the incident. Therefore, the appellants have rightly been convicted for the offences with which they were charged and the impugned judgment and order suffers from no illegality or infirmity and does not call for any interference from this Hon'ble Court.

11. I have gone through the submissions made by both the sides, the depositions of the material witnesses and other material available on record. The case was registered against the three accused, however this court is concerned with the two appeals filed by the appellants as the third accused is not before this court. For the purpose of ascertaining the role of the appellants, the main witnesses are the complainant (victim) and her daughter, who were the eye witness to

the incident. Apart from them, Shiv Kumar is an independent witness who also got injured due to the fire arm.

12. Smt. Brij Bala (PW-4) is the complainant of the case, who deposed in her statement made before the court that on 21.09.1999 she along with her daughter and niece were in her quarters. She was washing clothes at about 9 PM. Her daughter was feeding her niece in the outer room. She further deposed that the accused Surinder entered her room and sat on the sofa. She asked the accused as to who he was to which he replied that he was a friend of Sunil. She told him that noone named Sunil was residing there. She asked her daughter to shun him out and close the door. Thereafter Surinder got up but in the meantime the accused Rupinder @ Dolly and Lokinder entered the room. Accused Lokinder had covered his face with handkerchief and was carrying a country made pistol. It was further deposed that the accused Surinder pressed her mouth and put the country made pistol on her chest. The accused persons asked for the money thereafter, when she asked her daughter to raise an alarm. It is deposed that when her daughter raised an alarm, the accused Lokinder removed the country made pistol from her chest and other accused started running away. All the three accused jumped from the first floor. She chased them. The accused Lokinder fired at the chowkidar who was coming with water. Accused Lokinder was chased by Mahinder and Raju and ultimately got apprehended near the Park with country made pistol. The other accused (appellant herein) managed to run away. She

further deposed that no attempt was made by the appellants to snatch the jewellery which she was wearing.

13. The other relevant witness is Ritu (PW-5), who is also an eye witness to the incident. She had deposed before the court that on the date of incident at about 8.45 pm, she was feeding her cousin in the outer room of quarter. Her mother was washing clothes in bathroom. She further deposed that the door was not locked as her tutor had just left after giving coaching to her. Accused Surinder entered the room and sat on the sofa with her. He told her that he had come to meet Sunil. She told her mother whereupon her mother told that no Sunil was residing there and asked her to turn him out of the room and close the door. The accused Surender got up as she got up to turn him out of the room. Thereafter accused Lokender and Dolly entered the room. It is further deposed that the accused Lokender was carrying a pistol in his hand. She deposed that the accused persons manhandled her as well as her mother. Her mother asked her to raise an alarm for which she ran to the balcony and raised an alarm. She deposed that the accused Lokender put the pistol on the chest of her mother and asked her mother to take out whatever had been kept in the house and asked where it had been kept. When she raised an alarm, the accused started running. Mahender and one more person chased the accused persons.

14. Shiv Kumar (PW-7) is the chowkidar in the locality who had deposed before the court that on the date of incident at about 9 PM, he was coming to his house along with a gallon of water in his hand. He heard the alarm raised from the upper floor. Smt. Brijbala was residing

in the said quarter. Three persons came downstairs. Two of them ran away towards the park and one of them ran towards him. He chased him. It is further deposed that the person suddenly fired a shot at him, however he saved himself by ducking. That person was apprehended by Mahender and Raju at a short distance. He was beaten by the public. During his deposition, he identified all the accused persons. He identified the accused Lokender who had fired a shot at him and subsequently was apprehended. In his cross-examination, he deposed that the accused Lokender had muffled his face with a hanky and he had run towards him whereas the other two accused (i.e. appellants herein) were running towards Birla Park.

15. After careful scrutiny of the deposition of the relevant witnesses and the material placed on record, this court observes that the appellants have been sentenced for the offence under Section 452/394/34 of I.P.C. For better appreciation of the provisions of the offence, the same are reproduced herein below:

*452. House-trespass after preparation for hurt, assault or wrongful restraint.—Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to **seven years**, and shall also be liable to fine.*

*394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with 1[imprisonment for life], or with rigorous imprisonment for a term which may extend to **ten years**, and shall also be liable to fine.*

16. From the depositions of Smt. Brij Bala (PW-4) and Ritu (PW-5) this court observes that both the witnesses have corroborated with each other to the effect that the appellants – Surinder Kumar and Rupinder Kumar had entered into the home of the complainant. Therefore, the offence under Section 452 of I.P.C. is established. It is further established that both the appellants had entered the house of the complainant with an intention to commit robbery. The appellants have been duly identified by the complainant – Brij Bala as well as the eye-witness – Ritu. Therefore, in the totality of evidence and the facts and circumstances brought on record, the testimony of the prosecution witnesses to base the conviction of the appellants is sufficient to prove the guilt of the appellants beyond all reasonable doubts. Therefore, the impugned judgment of conviction passed by the learned Additional Sessions Judge does not suffer from any infirmity or illegality, therefore the same is upheld.

17. So far as order on sentence is concerned, this court observes that the appellants have been awarded the sentence to undergo rigorous imprisonment for a period of **two years each** with fine of Rs.3,000/- each and in default of payment of fine, to undergo simple imprisonment for three months for the offence under **Section 452/34 of I.P.C.**; and to undergo rigorous imprisonment for **one year each** for the offence under Section 323/34 of I.P.C.; and to undergo rigorous imprisonment for two years each with fine of Rs.3,000/-, in default to undergo simple imprisonment for three months each for the offence under **Section 394/511/34 of I.P.C.** This court **further observes that**

the appellants have been attributed the role of entering into the house of the complainant with intention to commit robbery, which the prosecution has successfully proved beyond all reasonable doubts. Learned counsel for the appellant – Rupinder Kumar had contended that the appellant was 17 and half years of age at the time of commission of the alleged offence and the appellant was trustingly accompanied with the co-accused Lokender oblivious of the fact that he was carrying any weapon or the dubious intention of the co-accused. The appellant neither threatened, hurt nor robbed the complainant. It is contended that the evidence of the prosecution clearly shows that the accused had no *mens rea* to commit any crime. He had no common intention to commit any illegal act and when the co-accused pulled out the weapon, the appellant was horrified and ran away. However, the learned counsel for the appellant – Surinder Kumar had highlighted various contradictions in the testimonies of the material witnesses as well as other documents, which cannot go to the root of the matter and the fact of entering into the premises of the complainant with the intention to commit robbery cannot be belied.

18. Considering all the relevant material against the accused/appellants and the submissions made on behalf of their counsel, and the fact that the incident in question relates back to the year 1999 and the appellants have faced the agony of trial for more than about 18 years and the fact that the appellant – Rupinder Kumar was 17 and a half years old at the time of the incident, and owing to the peculiar facts and circumstances of the case this court is of the

considered opinion that the interest of justice would be met if the order on sentence is modified to the extent that the substantive sentence imposed upon the appellants is reduced to the period already undergone by them with an enhancement of the fine to Rs.10,000/- each for the offence under Section 452 of I.P.C. and Rs.10,000/- each for the offence under Section 394 of I.P.C. It is ordered accordingly.

19. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged. Appellants are directed to deposit the enhanced amount of fine within a period of one month, failing which they will be required to undergo simple imprisonment for six months each.

20. Copy of this order be sent to the trial court for information and necessary steps.

21. With aforesaid directions, the present appeals filed by the appellants are disposed of thereby upholding the impugned judgment with modification of the order on sentence to the extent as indicated above.

(P.S.TEJI)
JUDGE

JULY 18, 2017
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