

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Judgment delivered on : February 27, 2017

+ CRL.A. 712/2000
TEJ SINGH @ GOLDY Appellant
Through: Mr.O.P. Sharma, Mr.Mohit 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. By this appeal, the appellant seeks to challenge the judgment of conviction dated 20.09.2000 passed by the learned Additional Sessions Judge, Delhi whereby he has been convicted for the offence punishable under Section 397/34 of IPC and order on sentence dated 21.09.2000, whereby the appellant has been sentenced to undergo rigorous imprisonment for a period of seven years for the offence under Section 397/34 IPC.

2. The facts of the case, as enumerated from the judgment of the learned Additional Sessions Judge are that on 02.03.1997 at about 11.45 pm at Ring Road, Opposite ARSD College, complainant Ashwini Kumar was going in his maruti Zen Car No.DL2 CG 6259, white colour, to his house. He is alleged to have crossed the roundabout at Dhaula Kuan. In the meantime, one Maruti Car came in,

wherein three boys were allegedly sitting. The boys made a signal towards the complainant so as to convey that there was something wrong with his car. The complainant allegedly stopped his car opposite ARSD College and got down from it to check if there was any defect. When he was walking around the car to check it, all the boys who were sitting in the car and who had given the signal, came and parked their vehicle in front of his car. One of the boys came to him and showed a revolver to him. That boy thereafter sat in the Maruti Zen of the complainant and drove away the same. One of the boys who was sitting in another car came on to the driver's seat of that car and drove away. Complainant allegedly lodged a report with the police subsequently.

3. During the course of investigation, the car in this case was recovered by Police Station Nangloi in an absconded condition. Appellant – Tej Singh this case was arrested by the police in another case. Police applied for holding TIP of the appellant and during the identification proceedings, the complainant identified the appellant, however other accused could not be identified by the complainant and therefore the challan was filed by the police against the appellant alone.

4. Charges under Section 392/397/34 IPC in FIR No.172/1997 were framed against the appellant to which he pleaded not guilty and claimed trial.

5. In support of its case, prosecution examined 9 witnesses. They

are, Ashwini Kumar (PW-1), Head Constable Om Parkash (PW-2), Shri B.S. Diwakar (PW-3), Head Constable Satbir Chand (PW-4), Inspector Sudhir Kumar (PW-5), Sub-Inspector Bhagwan Singh (PW-6), Ms. Renu Bhatnagar, MM (PW-7), Inspector Sher Singh, Investigating officer (PW-8), and ASI Pratap Singh (PW-9).

6. After conclusion of prosecution evidence, all the incriminating evidence against the appellant was put to him. The appellant, in his statement recorded under Section 313 Cr.P.C., claimed innocence. In his defence, the appellant produced Vasudev as his defence witness (DW-1).

7. After considering the facts, evidence led and the material placed on record, the learned Additional Sessions Judge held the appellant guilty for an offence punishable under Section 397/34 of IPC and passed an order on sentence as indicated above. The appellant has filed the instant appeal challenging the aforesaid judgment on conviction as well as order on sentence. During pendency of the present appeal, the sentence imposed upon the appellant was suspended vide order dated 08.11.2001.

8. The conviction has been challenged mainly on the grounds that the appellant has not been named in the FIR and no role is assigned to the appellant in commission of the crime. It is further contended that, as per the prosecution case, the appellant was only an associate and did not take the Maruti Zen Car of complainant and it was not the appellant who showed a revolver to the complainant. The counsel for

the appellant vehemently argued that a person not being assigned any specific role, what to say either to point the revolver on the victim or to rob the Maruti Zen, cannot be held guilty for the offence punishable under Section 397 IPC only with the aid of 34 of IPC. Apart from the above, the appellant had drawn attention of the court towards the contradictions in statements of the complainant and the police witnesses. It is further contended that though the complainant stated that there were three boys, but no other accused was even challaned and the appellant was falsely involved by the police. Therefore, in the facts of the present case, the appellant be given benefit of doubt and the judgment and order on sentence passed by learned Additional Sessions Judge be set aside.

9. Per contra, learned Additional Public Prosecutor for the State has vehemently opposed the aforesaid contentions raised on behalf of the appellant and submitted that the judgment and order on sentence as passed by learned Additional Sessions Judge do not suffer from any irregularity or illegality and is passed with a reasoned order. It is further submitted that the complainant has identified the appellant as being a part of the commission of the offence punishable under Section 392/397/34 of IPC.

10. Arguments advanced by the learned counsel for the appellant as well as learned APP for the State were heard and the impugned judgment has been perused.

11. The prosecution rests only on the statement of the complainant

being the sole eye-witness to the incident. For careful scrutiny of the case in hand, let the statement of complainant – Ashwini Kumar made before the court be perused.

12. Complainant – Ashwini Kumar (PW-1) deposed in his statement that on 03.03.1997, he was coming in his car from Kirti Nagar to his house. After half a kilometer from the crossing of Dhaula Kuan on Ring Road in front of Air Head Quarters, Tej Singh (the appellant herein) and three other persons overtook him with their Maruti car. They made a signal indicating that there was some defect in his vehicle. He stopped his vehicle in order to locate the alleged defect. He further deposed that the appellant and other accomplices also backed their vehicle and stopped their vehicle near his zen. **One of them who was driving a car pointed out a revolver on him, while the appellant and other persons took the vehicle in which they had come and the person who had shown the revolver, drove away in the complainant's vehicle.** Thereafter, the complainant went to the Police Station Dhaula Kuan and lodged the report. He further deposed that after 15 to 20 days, he came to know that the police had traced his vehicle, which was given to him on superdari from Police Station R.K. Puram and after 20/25 days, the appellant – Tej Singh and one Anil Kumar were arrested by the police. TIP of those accused persons were conducted and complainant could identify only the appellant – Tej Singh. In this statement the complainant further deposed that there were four persons in the car. Two were on the front seats while the other two were sitting on the rear seat. The

identification signal regarding some defect in complainant's car was given by the driver of that car as well as one other person sitting on the rear seat of car.

13. From the careful perusal of the record, it is an undisputed fact that the complainant was robbed by four persons and the appellant was one of the assailants and duly identified by the complainant during test identification parade. In such cases, the testimony of victim has a prime relevance as he is also the eye witness to the incident. From the aforesaid deposition of the complainant (PW-1), this court observes that the complainant did not identify any of the other accused persons during TIP, except the appellant herein. This court further observes that the appellant had neither shown the revolver to the complainant nor driven his car but the only role attributed to the appellant is of accompanying the accused persons.

14. This court further observes that the appellant has been charged with the offence punishable under Section 392/397/34 of IPC and since the accomplice of commission of offence could not be identified, therefore the challan was filed solely against the appellant. For better appreciation of the sections with which the appellant is charged, extracts of the same are reproduced herein:

392. Punishment for robbery.—Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

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.

34. Acts done by several persons in furtherance of common intention.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

15. Perusal of the impugned judgment reveals that the appellant has been convicted for the offence punishable under Section 397/34 of IPC and that too with the aid of Section 34 of IPC and since the appellant has been convicted in the graver offence, therefore no punishment is awarded to him under Section 392 of IPC. No doubt, the appellant was accompanying his accomplices for commission of robbery and in case, when an accused is to be held guilty for the offence of robbery, the court has to see the role of the accused at the time of commission of offence. From the facts of the case, this court observes that the appellant was present at the time and place of the incident alongwith other accused persons and the car of the victim was robbed on the pointing of a deadly weapon such as revolver, by one of the accused persons, which was, admittedly, not the appellant in the present case. For convicting an accused for an offence under Section 397 of IPC, the court has to see that at the time of committing robbery or dacoity, the accused had used any deadly weapon, or caused grievous hurt to any person, or attempted to cause death or grievous

hurt to any person. In the considered opinion of this court, Section 397 of IPC is attracted only for an individual act of using any deadly weapon or causing grievous hurt or attempting to cause death or grievous hurt at the time of commission of robbery or dacoity. In the present case, it is not established against the appellant that at the time of robbery, he was armed with any deadly weapon or caused any grievous hurt to anyone or attempted to cause death or grievous hurt to anyone. Therefore, the accused cannot be held guilty for an offence under Section 397 of IPC with the aid of Section 34 of IPC.

16. It is apparent from the record that charge under Section 392/397 read with section 34 of IPC was framed by the trial court against the appellant. The fact remains that the appellant was the only accused at the time of framing of charge and the other accused – Anil was discharged. So, there was no justification in framing the charge with the aid of section 34 of IPC as there was only one accused. Therefore, charge under Section 34 of IPC fails.

17. In view of the aforesaid discussion, this court differs from the opinion of the learned Additional Sessions Judge, with regard to the conviction of the appellant under Section 397 IPC, with the aid of section 34 of IPC, as section 397 of IPC specifically mentions that *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, he shall be punished for not less than seven years.* Admittedly, as per the prosecution case, the appellant had not shown any deadly weapon or caused any grievous

hurt or attempted to cause death or grievous hurt to the complainant, therefore, in the considered opinion of this court, the impugned judgment is liable to be modified to the extent that the appellant is convicted for the offence under Section 392 of IPC while acquitting him for the offence under Section 397 of IPC. Accordingly, it is ordered that the appellant is convicted for the offence under Section 392 of IPC.

18. Resultantly, the order on sentence thereby sentencing the appellant to undergo rigorous imprisonment for seven years for the offence under Section 397/34 of IPC is also set aside and is made liable to be sentenced for the offence under Section 392 of IPC. It is ordered accordingly.

19. On the quantum of sentence to be awarded to the appellant in the facts of the present case, this court observes that the appellant's sentence has now been modified from Section 397/34 of IPC to Section 392 of IPC, which does not prescribe any minimum sentence. Further, the sentence of the appellant was suspended on 08.11.2001 and from the nominal roll of the appellant – Tej Singh, placed on record, it is clear that he has already undergone sentence for a period of about two years, i.e., 1 year, 7 months and 27 days with remission of 3 months and 5 days. Keeping in view the peculiar facts of the case and the fact that the present case relates back to the year 1997 and that the appellant has faced the agony of trial for the last 20 years, this court is of the considered opinion that the interest of justice would be met if the sentence be awarded to the appellant for the offence under

Section 392 of IPC to the extent of period already undergone by him. It is ordered accordingly.

20. Resultantly, the impugned judgment dated 20.09.2000 is hereby modified to the extent that the appellant is held guilty for offence under Section 392 of IPC and the order on sentence dated 21.09.2000 is modified to the extent of the sentence already undergone by him.

21. Appellant is on bail. His bail bond and surety bonds are discharged. He is ordered to be set free from this case.

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

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

FEBRUARY 27, 2017
pkb

(P.S.TEJI)
JUDGE