

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on :February 06, 2017

+ CrI. A. No. 572/2001
SATENDER

..... Appellant

Through: Mr. N.L. Singh, Advocate

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 appeal has been filed by the appellant being aggrieved by the judgment of conviction dated 11.07.2001 passed by the learned Additional Sessions Judge, Delhi convicting the appellant for the offence punishable under Section 393/452/34 of Indian Penal Code (hereinafter referred to as I.P.C.), and order on sentence dated 19.07.2001, whereby the appellant has been sentenced to undergo rigorous imprisonment for a period of two years and fine of Rs.500/- for the offence under Sections 393/34 of IPC and in default of payment to further undergo rigorous imprisonment for two months. He was also sentenced to undergo rigorous imprisonment for a period of two years and fine of Rs.500/- for the offence under Section 452/34 of

IPC and in default of payment to further undergo rigorous imprisonment for two months. In addition, the appellant has also been sentenced for rigorous imprisonment for one year with fine of Rs.500/- for having possessed live cartridges ammunition under Section 25 of the Arms Act and in default of fine he was ordered to undergo RI for two months. All the sentences awarded to the appellant were ordered to run concurrently.

2. The present case was registered on the complaint of one Smt. Usha who had alleged in her complaint that she had been receiving a telephonic call for the last 3-4 days prior to the lodging of her complaint from a person stating that he was calling from courier and a dak was to be delivered at her residence and asked for the location of the house. According to the complainant, on 4.3.2000 while her husband was at her residence a telephone message was received from the courier and her husband told the said person about the location of House No.74, Type III, Lal Quarter, Timarpur. It is further stated that on 6.3.2000 at about 12.30 noon, a telephone call was received by her and she was told that caller is coming within half an hour. It was further alleged at about 1.30 PM a call bell of the house was knocked and when she peeped from the eye hole she saw one person pushing the bell. Upon inquiry, she was told that he had come from the courier. She opened the door and saw Razak standing outside her house and carrying one white color envelope, which he handed over to the complainant. For signing the receipt, she came inside the house for fetching a pen. Thereafter, another boy Satender, appellant herein,

came inside the room and bolted the door, gagged her mouth and pointed a country made pistol, threatened her and asked where the jewellery was lying. She somehow got herself released from him, cried for help but the said accused persons left the house. In the meanwhile, her neighbours Arvind Dwivedi and Balwinder Singh apprehended the appellant – Satender and got recovered one country made pistol with two live cartridges. Thereafter, the accused Razak Ahmad was also apprehended with one prohibitory knife.

3. After completion of investigation, the challan was filed in court and charges under Section 393/398/452/34 of IPC were framed against the appellant vide order dated 05.09.2000, to which the appellant pleaded not guilty and claimed trial. In addition the appellant was also charged with the offence under Section 25 read with section 27 of the Arms Act, 1959 on 11.01.2001.

4. To bring home the guilt of the appellant, the prosecution examined as many as 12 witnesses. They are, Usha Saini (PW-1); Devender (PW-2); K.C. Gupta (PW-3); Constable Surinder Kumar, (PW-4); Joginder Ahlawat (PW-5); Arvind Diwedi (PW-6); Constable Pradeep Kumar (PW-7); Balvinder (PW-8), Head Constable Rampal (PW-9), Sub-Inspector Hans Raj (PW-10), Head Constable Aman Kumar (WP-11) and M.S. Upadhaya, DCP North (PW-12).

5. Thereafter, entire incriminating material on record was put to the appellant, and his statement under Section 313 of Cr.P.C. was recorded. He did not lead any evidence in his defence.

6. After considering the facts, evidence led and the material on record, the learned Additional Sessions Judge held the appellant guilty for an offence punishable under Section 393/452/34 of IPC read with Section 25 of the Arms Act for having possession of two live cartridges and vide aforesaid judgment and order on sentence the appellant was sentenced, as indicated above.

7. The grounds taken in support of the appeal are that there are material contradictions in the testimony of witnesses, i.e. the complainant-Smt. Usha Saini (PW-1) and husband of the complainant-Mr. Devender (PW-2) who was introduced as an eye witness such as; the main prosecution witness, i.e. the complainant Smt. Usha Saini (PW-1) has not identified the appellant before the court and she was a hostile witness of the prosecution; in the statement, Smt. Usha Saini stated that during the course of alleged incident, she gave teeth bite to one of the accused persons on his hand, but the prosecution has failed to prove any mark of teeth on the person of any accused; there is material contradiction in the statement of PW-1 who in her examination-in-chief has deposed that the police had informed her on the next date of incident that the other person has been arrested, however, as per prosecution case, the other person was apprehended on the same day; the complainant has failed to identify the pistol as well as cartridges recovered from the appellant; other witnesses Balvinder and Arvind Dwivedi have given their contradictory versions, as PW-1 Usha Saini stated in her cross-examination that she had not seen the alleged pistol in the 'Dub' but the witness Arvind had

deposed that the pistol was recovered and was shown to PW-1; the eye-witness (PW-6) in his cross-examination, had not identified the appellant who was present in court, as the same person who was apprehended with pistol; in the deposition of material witness i.e. investigating officer of the case (PW-10), who had deposed in his evidence that the weapon i.e. pistol which was allegedly recovered from the appellant was in working order, however, as per report of CFSL, the said recovered article was a 'desi katta' and not a pistol and was not in working order.

8. Per contra, learned Additional Public Prosecutor for the State has submitted that the appellant was apprehended with the pistol and two live cartridges. There is enough evidence and material on record to convict the appellant and therefore, the judgment and order on sentence as passed by learned Additional Sessions Judge do not suffer from any irregularity or illegalities and is passed with a reasoned order, therefore, the same is not liable to be interfered with.

9. 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.

10. Since the present case has been lodged on the statement of the complainant – Usha Saini (PW-1), let her deposition be scrutinized. PW-1 Usha Saini, had deposed in her statement that at about 1.30 PM on 6.3.2000 door bell of her house rang and she asked who was there. Thereafter, she saw a person from the eye hole who told her that he

had come from courier service. She opened the door and took the envelope which was addressed to Mr. Saini. The person opened a copy and while she was looking at the copy she told that number of her house was not mentioned in the copy. Thereafter, someone came from behind who was not seen by her and gagged her mouth. She tried to free herself and gave him a bite on his hand. She struggled to free herself. She fell down while trying to free herself and raised an alarm. It is further deposed that white wash work was going on in Flat No.78 and on hearing her noise, a lady labourer came outside that flat and the person who had come pretending to be from courier service and the other person ran away, leaving her. It is further deposed that the person who had gagged her mouth had not uttered anything and she had not seen any weapon in his hand. She further deposed that she ran down to the ground and told the people that two persons had entered her house, on which people chased those two persons and one person could be apprehended. When that person was brought to her, she confirmed that the person apprehended was one of those who had entered her house and thereafter that person was beaten up by the public. She further deposed that a pistol was recovered from that person. Police was informed and the person was arrested. Next day, police had informed her that the other person was also arrested but he was not shown to her. However, in court, she could not identify any of the accused persons, if they were the same persons who had entered her house and from one of whom the pistol was recovered. She further deposed that she did not know about the names of the person who was apprehended by public. Her statement was recorded by

police on the day of incident, when one person was apprehended and arrested by police. Police had prepared sketch of the pistol, which was signed by her. Pistol was sealed in pullanda which also bears her signatures. Personal search memo of the person arrested was also signed by her. She further deposed that the police had obtained her signatures on the personal search memo of the other person next day, but that person was not shown to her. She further deposed that two cartridges were recovered from the person who was apprehended by public and from whom the pistol was recovered but she could not identify the pistol and cartridges recovered. However, when the sealed parcel with seal of FSL was opened the pistol was taken out, she deposed that she cannot say if Ex.P-2 is the same pistol or not which was recovered from that person. She further deposed that she cannot say if cartridges Ex.P-3 and P-4 are the same or not, which were recovered from that person.

11. PW-1 was cross-examined by the Additional Public Prosecutor, wherein she deposed that she cannot say if accused Abdul Razak is the same person who had come and who had told that he had come from courier service. Similarly, she was not sure if he was the same person or not who had handed over her envelope Ex.P-1. She further denied that she had identified the accused Abdul Razak before the police and had given his name in her statement Ex.PW-1/A. She admitted that she had gone inside the house to fetch a pen and then suddenly other person came and caught her. She further deposed that she cannot say with certainty if accused Satinder is the same person or not who had

suddenly caught her and gagged her mouth as she had seen the person only from behind. She further denied that the accused Satinder took out pistol, aimed and threatened her to disclose the whereabouts of jewellery and cash. She further stated that she had not stated so before the police. She admitted that Arvind and Balvinder were her neighbours who had helped in apprehending the intruder but she cannot say if she had identified accused Satinder when he was apprehended by the public. She further denied the recovery of button actuated knife recovered from the other accused in her presence. She further deposed in her cross-examination that she is not sure that the person was carrying the pistol in the dub of pant. She herself had not seen the pistol, but Arvind had told her that pistol was recovered and was shown to him.

12. Arvind Diwedi (PW-6) in his statement before the court deposed that on the day of incident he had come to visit his brother at Timarpur. During mid day he heard noises from the ground floor, he went downstairs. About 20/25 people were gathered there and one person was detained by these persons. On inquiry, he was told that a thief was caught and he also apprehended that person. However, in court, he deposed that he cannot identify the person from whom the pistol and live cartridges were recovered. He further deposed that no other person was arrested by police in his presence and no knife was recovered from any person. With regard to the accused – Satender, appellant herein, he had deposed that the person present in court is not the same person from whom the pistol and cartridges were recovered.

He also denied that the second accused was also apprehended at the spot and from him a button actuated knife was recovered. He further denied preparation of the sketch of pistol and his signatures thereon. When sealed pullanda with seal of court was opened, the witness deposed that he had seen the pistol but he is not sure but perhaps it was the same pistol which was recovered alongwith two cartridges from the person who was apprehended. Regarding cartridges Ex.P-3 and P-4, he deposed that he had no idea if these were the same which were recovered from the person apprehended.

13. Now let us examine the testimony of investigating officer (PW-10). This witness has deposed before the court that on the date of incident, he was posted at P.S. Timarpur. At about 1.20 PM, he was patrolling in the area with const. Pradeep Kumar. At about 2 PM, he reached Tikona Park near Multi Storied Lal Quarters. Accused Razak present in court whose name he came to know later on, came running from opposite direction being chased by some public persons. With the help of Const. Pradeep, he overpowered accused Razak and took him towards the quarters where 60/70 persons were gathered. The other accused Satender, whose name he came to know later on was found there apprehended by the public. Balvinder Singh and Arvind Diwedi were holding the accused Satinder. Arvind Diwedi produced one country made pistol and two live cartridges and told that the same were recovered from accused Satinder. He conducted personal search of accused Razak and from his possession a button actuated knife was recovered. The complainant Usha was also present at the spot. He

recorded her statement and made endorsement on the same. After the sketch of weapon was prepared, the same was sent to P.S., who has also identified the country made pistol and cartridges as the same which were recovered from the accused Satinder.

14. This court observes that the present case was registered on the statement of the complainant – Usha Saini (PW-1). As per the prosecution story, appellant was charged with offence under Section 393/398/452/34 of IPC read with Section 25/27 of Arms Act. However, the question arises as to whether the appellant can be convicted for the offences with which he is charged where the complainant herself had not identified the appellant in court. Not only this, she had also not identified the recovery of any pistol and two live cartridges from the appellant herein.

15. Report of FSL is also placed on trial court record, perusal of which shows that one country made pistol .315” bore marked Ex.’F1’ along with two 8 mm/ .315” cartridges marked exhibits ‘A1’ and ‘A2’ were sent to the FSL. It is specifically reported in the result of examination of the exhibits that the firearm country made pistol .315” bore exhibit ‘F1’ is designed to be a standard 8 mm/ .315” cartridge. It is not in working order in its present condition and require repair of the fire-mechanism to bring into the working order. Test-fire could not be conducted.

16. This court further observes that the prosecution story is that two persons entered in the house out of which, one had gagged the mouth

of the complainant. Both the accused persons were arrested on the same date and recoveries were also affected from them. Statement of complainant as well as persons apprehending the appellant – Satender with alleged recovery of pistol and live cartridges, were recorded on the same day. Thereafter all the papers were sent to Police Station for registration of FIR. However, perusal of the FIR shows that there is no mention of the names of the accused persons. This court is unable to understand, when the accused persons were apprehended from the spot and all the statements were recorded then what prevented the prosecution to write the names of the accused in the FIR.

17. Apart from the above, this court observes that, Smt. Usha Saini (complainant herein) had deposed in her statement before court that during the course of alleged incident, she gave teeth bite to one of the accused persons on his hand, but there is no document or investigation with this regard and the prosecution has failed to prove any mark of teeth on the person of any accused.

18. It is pertinent to note here that the eye-witness - Arvind Diwedi (PW-6) has also not supported the case of prosecution as in court, he deposed that he cannot identify the person from whom the pistol and live cartridges were recovered. With regard to the specific query, he deposed that the person present in court is not the same person from whom the pistol and cartridges were recovered. Not only this, he further denied preparation of the sketch of pistol and his signatures thereon. When sealed pullanda with seal of court was opened in court, this witness deposed that he had seen the pistol but he was not sure

that it was the same pistol which was recovered alongwith two cartridges from the person who was apprehended. Regarding cartridges Ex.P-3 and P-4, he specifically deposed that he had no idea if these were the same which were recovered from the person apprehended.

19. In the facts of the present case, where the complainant herself has not identified the appellant – Satender and the recoveries affected from him, and the fact that the recovered pistol was not found to be in working condition by the FSL report, and the fact that the other witness Arvind Diwedi has also not identified the accused persons in court, in the considered opinion of this court, it cannot be held that the prosecution has been able to prove the charges against the appellant herein beyond all reasonable doubts.

20. Likewise in proving the guilt of the appellant for the offence under Section 25 of the Arms Act, this court finds that there is no identification of the recovered pistol by the complainant. In this regard the complainant (PW-1) and the public witness – Arvind Diwedi (PW-6) who were alleged to be the witness of recovery of weapon have not deposed in their testimony to the fact that they were witness to the same. The complainant has not supported the case of prosecution to the fact that the appellant was one of the robbers what to say use of any weapon by him. Even the other public witness Arvind Diwedi (PW-6) has not supported the case of prosecution that any recovery of weapon was made from the appellant.

21. A cumulative effect of the evidence of the complainant (PW-1), Arvind Diwedi (PW-6), who have neither identified the appellant – Satender nor supported the recovery of pistol and live cartridges from the appellant, and the FSL report to the effect that the pistol recovered was not in working order, this court is of the considered opinion that the prosecution has not successfully proved the charges beyond all reasonable doubts, against the appellant herein.

22. In the light of the facts of the present case and the deposition of the material witnesses, i.e. the complainant (PW-1), Arvind Diwedi (PW-6), and the FSL report, the appeal filed by the appellant succeeds and the impugned judgment of conviction dated 11.07.2001 and order on sentence dated 19.07.2001 are set aside. The appellant is acquitted of the charges while extending benefit of doubt.

23. Appellant – Satender is on bail. His bail bonds and sureties are discharged.

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

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

(P.S.TEJI)
JUDGE

FEBRUARY 06, 2017
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