

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

% *Date of Decision : August 02,2017*

+ **CRL.A. 638/2005**

GURDAYAL @ SURAJ Appellant

Through: Mr.Nishant Sharma, Advocate
with Appellant in person.

versus

STATE Respondent

Through: Ms.Kusum Dhalla, APP for the
State

AND

+ **CRL.A. 148/2006**

GHANSHYAM GUPTA Appellant

Through: Mr.Sandeep Tyagi, Advocate
with Appellant in person

versus

THE STATE OF NCT OF DELHI Respondent

Through: Ms.Kusum Dhalla, APP for the
State

PRATIBHA RANI, J. (Oral)

1. These two appeals arise out of the common judgment dated 26th April, 2005 passed in Sessions Case No.63/2004 whereby out of the five accused persons sent for facing trial, accused Ashok Chauhan and Raju were acquitted and accused Gurdayal (appellant in Crl.A. No.638/2005), Ghanshyam Gupta (appellant in Crl.A.No.148/2006) and Nanhe were convicted.

2. Vide impugned judgment dated 23rd April, 2005 and order on sentence dated 26th April, 2005 while accused Nanhe was convicted for committing the offence punishable under Section 395 IPC and sentenced to undergo RI for three years with fine of ₹500/-, the two accused namely Gurdayal and Ghanshyam Gupta (appellants herein) were convicted for committing the offence punishable under Section 395/397 IPC and sentenced as under:-

- (i) U/S 395 IPC : to undergo RI for three years and fine of ₹500/- each and in default of payment of fine, to undergo RI for two months.
- (ii) U/S 397 IPC : to undergo RI for seven years and fine of ₹500/- each and in default of payment of fine, to undergo RI for two months.

3. Feeling aggrieved by their conviction under Section 395/397 IPC and sentence awarded thereunder, appellants Gurdayal and Ghanshyam Gupta have preferred these two appeals.

4. It is informed that accused/convict Nanhe has already been released after undergoing the sentence awarded to him under Section 395 IPC.

5. In brief, the prosecution case is that on 17th July, 2000 DD No.32 Ex.11/A was recorded at C-54/1, Wazirpur Industrial Area, Delhi at about 9:50 PM to the effect that some bad elements have entered the factory and have looted some goods. SI Yashpal Singh along with Const. Deep Chand reached the spot and on the ground floor, Shaym Kishore Sharma and Prakash Chand were untied and on

the first floor Babu Ram was untied as they all had been tied with the telephone wires. In the meantime Ajay Gupta, Manager of the said factory also reached there and after making inquiry from the chowkidar and the employees made statement Ex.PW3/A on the basis of which FIR No.417/2000 Ex.PW-9/A was registered under Section 395/397/412 IPC at PS Ashok Vihar.

6. After completion of the investigation chargesheet was filed against five accused namely (i) Nanhe Singh, (ii) Ashok Chauhan, (iii) Ghanshyam Gupta, (iv) Gurdayal @ Suraj & (v) Raju @ Karva. Since the appellants Gurdayal and Ghanshyam have been sentenced to undergo rigorous imprisonment for seven years under Section 397 IPC, they have challenged their conviction and sentence mainly on the following grounds:

(i) PW-4 Prakash who is stated to be an eye witness has not supported the case of prosecution rather he had deposed that the accused present before the Court were not present at the factory on the day of alleged incident.

(ii) Mere recovery of stolen articles cannot form basis to convict the appellants for the offence of robbery or dacoity and only three stolen silver coins were allegedly recovered from the possession of the appellant after a long gap of about two months. Hence no presumption of they being dishonestly receiving the property stolen in commission of dacoity could have been drawn.

(iii) The recovered three silver coins were not subjected to proper test identification during judicial proceedings before the learned Magistrate. No weapon was recovered from any of the appellants.

Hence, the very basis of convicting them for committing the dacoity by using deadly weapon is not proved.

(iv) No injury was suffered by any of the persons present in the factory. Hence, the necessary ingredients for convicting them under Section 397 IPC were not satisfied.

(v) As per the prosecution case, out of twelve stolen silver coins only seven silver coins allegedly stolen were recovered from Raju @ Karva, Ashok Chauhan, Gurdayal and Nanhe and the balance coins have not been recovered nor it can be established as to what happened to those remaining silver coins.

(vi) As per prosecution ₹1200 cash was robbed from the safe but no recovery has been affected.

(vii) There are contradictions in the testimony of material prosecution witnesses which prove that the appellants have been falsely implicated in this case especially when PW-2 Shyam Kishore has not fully supported the case of the prosecution and PW-4 Prakash has not supported the prosecution case at all and has not identified any of the accused persons to be involved in the same occurrence.

7. On behalf of the State it has been submitted that from the testimony of PW-2 Shyam Kishore it was proved that appellants were armed with weapons at the time of commission of robbery. The robbed silver coins have been partially recovered and merely because they have not been identified by the complainant during test identification proceedings is no ground to disbelieve his testimony as these silver coins having image of Lakshmi ji and Ganesh ji on one

side and are purchased and gifted mostly at the time of Diwali festival and kept in the office with religious belief for prosperity.

8. Learned APP for the State submitted that since role of the two appellants has been clearly specified and they have been identified by PW-2 Shyam Kishore, their conviction and sentence may be maintained.

9. Learned Trial Judge has convicted the two appellants for committing offence punishable under Section 395/397 IPC for the following reasons:

(i) Recovery of three silver coins have been affected from the jhuggi/house of the accused persons and merely because public witnesses have not been joined is no ground to disbelieve the statement of the police officials.

(ii) PW-2 Shyam Kishore and PW-4 Prakash were present in the factory at the time of occurrence and both of them testified that 6-7 persons came to the factory on 17th July, 2000 at about 8.30 PM and some of them were armed with knife and pistol. They also threatened PW-2 Shyam Kishore and PW-4 Prakash with dire consequences if they would raise alarm and those persons tied them with the telephone wire.

(iii) PW-2 Shyam Kishore identified only three out of them and merely because he has been declared hostile is no ground to disbelieve his testimony in toto, as his statement to the extent it appears trustworthy can be relied upon.

(iv) PW-2 Shyam Kishore has identified Gurdayal @ Suraj, Ghanshyam and Nanhe and deposed their specific roles in the occurrence.

(v) The discrepancies pointed out by the learned defence counsel were considered insignificant.

10. Learned ASJ held that no TIP was necessary in the matter and dock identification was sufficient as the witness had the opportunity to notice the distinctive feature of the accused persons.

11. Since entire judgment convicting the appellants for the offence punishable under Sections 395/397 IPC is based on the testimony of PW-2 Shyam Kishore, it is necessary to extract his examination-in-chief which reads as under:

“I am working as a Chowkidar in the factory of Chander Prakash at C-54/1, Wazirpur Industrial Area. My duty hours are from 8:00 p.m. to 8.00 a.m. On 17-7-2000 I was working on my duty. I was alone at that time. I was on the ground floor, whereas two of my colleagues Prakash Chand and babu Ram were present on the second floor. At about 8:20 p.m. a maruti car came and stopped at the gate of the factory. About 6/7 persons came out of that car and out of these persons one person came to me. That person is accused (indicated towards accused Gurdial). Accused Gurdial enquired from me as to where Babu was. I asked as to what work he had with Babu. Then accused Gurdial claimed that he had to take some money from babu. I told accused Gurdial that Babu would come next day and then he should come and collect his money. Then accused Gurdial took out a revolver and placed at my chest and other persons who had accompanied Gurdial in the car surrounded me. When I tried to raise alarm I was over powered and forced to enter the hall of the factory. I again raised

alarm and on hearing my noises Parkash came down stairs. Then those persons took a telephone wire and tied my hand and hands of Parkash and thrown us in a room. One of those persons remained standing with me whereas other accused went up-stairs and over powered Babu Ram. The person who stayed with me continued threatening me not to raise alarm and other persons who had gone upstairs started damaging the articles and the noises were heard by me. When I tried to lift my face then the person who had remained with me took out a chhuri and asked me not to raise a voice or I would be killed. When all the persons left I raised alarm and one of the neighbours either informed police or owner of the factory. Accused (indicated towards Ghanshyam) present in Court is the same person who had stayed with me on my guard and had threatened me with chhuri. Accused (indicated towards Nanhe) was also accompanying Ghanshyam and Gurdial at the time of occurrence. Next day I came to know that silver coins idols and 1,000/-/1,200/- in cash were missing. I cannot say if other accused (Raju) was among the persons or not who had come to loot the factory. The other accused (Ashok) was not among the persons who had come.

(At this stage ld.Addl.P.P. wants to cross-examine the witness as he is suppressing the truth and concealing the material facts. Heard. Allowed.).

xxxxxxxxxx by Addl.P.P.

It is incorrect that I had come to Court on 23-11-00. It is incorrect that on that day I had identified two accused (Ashok and Raju) were among the persons who had come to the factory and I had not stated so before the police. (Statement mark PW2/A is read over to the witness who denied having made the same)."

12. During his cross-examination PW-2 Shyam Kishore has been confronted with his statement under Section 161 Cr.P.C. Ex.PW2/A to

highlight the improvements made by him in deposition before the Court. He had also been confronted with Statement Ex.DW2/DA wherein it was not stated that accused Gurdayal @ Suraj took out a revolver and placed on his chest. In his statement Ex.PW2/A it was also not stated that one of the persons stayed with him and others went upstairs and that person continued threatening him not to raise alarm or that when PW-2 Shyam Kishore tried to lift his face he took out a chhuri and again threatened that he would be killed. All these improvements in the statement of PW-2 who has partially supported the case of the prosecution, could not have been made basis of convicting appellants Gurdayal @ Suraj and Ghanshya for using deadly weapon at the time of commission of dacoity.

13. Out of the five accused persons sent to face trial, two persons namely Ashok Chauhan and Raju have been acquitted by the learned ASJ. As per TIP proceedings Ex.PW3/B, test identification parade of all the case property was conducted during which PW-3 Ajay Kumar Gupta identified to be stolen silver coins recovered in this case. It is necessary to mention here that as per report Ex.13/F when the chance prints were lifted, left index finger impression of the accused Raju mark S1 matched with the chance print mark Q4 but he has been acquitted by the learned ASJ observing that the chance print Q4 was blurred and comparison of such chance print could not have been safe clue to establish identity. Accused Ashok Chauhan has also been acquitted as he was not identified by PW-2. Thus, only three accused persons were left who were identified by PW-2 Shyam Kishore,

though PW-4 Prakash specifically stated that none of the accused persons was present in the factory at the time of occurrence.

14. The question arising for consideration is whether without proving the involvement of five or more persons in the offence, the three accused persons could have been convicted under Section 395 IPC.

15. In the case **Ram Lakhan vs. State of U.P.** (AIR 1983 SC 352) an identical issue came up for consideration before the Apex Court and dealt with as under:

“In this appeal the appellant has been convicted under Section 395 and sentenced to 7 years rigorous imprisonment. In our opinion this appeal must succeed on a short point. It appears from the FIR that only 9 persons viz. 1.Ramroop Kurmi, 2.Ramdhoop Kurmi, 3.Rambodh Kurmi, 4.Ram Noker Kurmi, 5.Sampuran Kurmi, 6.Rambachan Kurmi 7.Ram Lakhan Kurmi, 8.Ram Ujagir Kurmi and 9.Ram Pyare kurmi have participated in the dacoity which is alleged to have been committed in the course of which ornaments, grains and other property were looted away. The trial Court had acquitted 5 persons and convicted 4. But on appeal the High Court acquitted the remaining three persons and convicted Ram Lakhan the present appellant. The position now is that out of 9 persons named in the FIR who are alleged to have participated in the dacoity Ram Lakhan is alone left. Before an offence under Section 395 can be made out there must be an assembly of 5 or more persons. On the findings of the courts below it is manifest that only one person is now left. In these circumstances therefore the appellant cannot be convicted for an offence under Section 395. The High Court has not found that Ram Lakhan was guilty of any overt act so as to bring his case within any other minor offence. For these reasons therefore the conviction and sentence imposed on the appellant are set aside and he is acquitted of offence charged

under Section 395. The appeal is accordingly allowed. The accused is on bail. His bail bonds are cancelled.

16. The decision of the Supreme Court in **Ram Lakhan** (Supra) has been reiterated in **Raj Kumar @ Raju vs. State of Uttaranchal** AIR 2008 SC 3248.

17. The appellant Ghanshyam @ Bablu has also been charged under Section 412 IPC for dishonestly receiving or retaining two silver coins belonging to complainant Ashok Kumar Gupta and Gurdayal @ Suraj has been charged for dishonestly receiving one silver coin belonging to Ashok Kumar Gupta, having reasons to believe the same to be stolen in the commission of dacoity.

18. In view of the decisions in **Ram Lakhan vs. State of U.P.** (Supra) and **Raj Kumar @ Raju vs. State of Uttaranchal** (supra), since necessary ingredient to base conviction for committing the offence punishable under Section 395/397 IPC has not been proved by the prosecution as only three accused persons have been held guilty and convicted, the appellants could not have been convicted for committing the dacoity. It is relevant to mention here that Ashok Kumar Gupta, the complainant in this case is not an eye witness. Two eye witnesses PW-2 Shyam Kishore and PW-4 Prakash who were present in the factory at that time have not been made complainant and whatever PW-3 Ashok Kumar Gupta stated in his complaint Ex.9/A is on the basis of information gathered by him from PW-2 and PW-4 who are the employees and present in the factory at that time.

19. It is also not clear from the FIR or DD No.32 Ex.11/A as to who informed the police. The endorsement on the rukka by the

Investigating Officer records that police people untied Shyam Kishore Sharma, Prakash Chand and Babu Ram who had been tied with the telephone wires so they could not have made any call to PCR.

20. PW-2 Shyam Kishore and PW-4 Prakash Chand did not state that they had made the telephone call. Even the number from which the call was received cannot be ascertained from the DD No.32 Ex.11/A or from the statement of the Investigating Officer. The appellants were arrested in FIR No.508, 509, 511 and 512 under Section 25 of the Arms Act, Police Station Ashok Vihar and on the basis of their disclosure statement this case was solved. On the basis of recovery of two silver coins from Ghanshyam @ Bablu and one silver coin from Gurdayal @ Suraj at the most the appellants could have been convicted under Section 411 IPC for receiving the stolen property.

21. It is also necessary to mention that PW-2 Shyam Kishore in his statement under Section 161 Cr.P.C. had not given any distinctive feature of any of the appellant so as to enable him to identify the appellants.

22. In view of the above discussion, the conviction of the appellants Gurdayal and Ghanshyam Gupta for committing the offence punishable under Sections 395/397 IPC cannot be sustained. Hence, the conviction of the appellants for committing the offence punishable under Section 395/397 IPC and sentence awarded thereunder are set aside.

23. For the recovery of stolen silver coins i.e. one silver coin from appellant Gurdayal @ Suraj and two silver coins from appellant

Ghanshyam, as the appellants have not been found guilty for committing dacoity, they cannot be convicted under Section 412 IPC. Thus, the appellants Gurdayal and Ghanshyam Gupta are convicted only for the offence punishable under Section 411 IPC and sentenced to undergo rigorous imprisonment for three years.

24. As per the nominal roll of the appellant Gurdayal @ Suraj, as on 22.03.2007 he has undergone three years, six months and one day in judicial custody and on 22.03.2007 he was released on bail.

25. Perusal of nominal roll of the appellant Ghanshyam reveals that he has completed the sentence of seven years on 28th July, 2008 awarded to him in this case and he was finally released from Jail on 08.12.2009 after disposal of other cases pending against him.

26. In view of the nominal roll of the appellant received from Jail, they have already undergone the sentence of three years awarded to them for committing the offence punishable under Section 411 IPC.

27. Bail bonds of the appellant Gurdayal stands discharged.

28. Both the appeals are allowed in above terms.

29. Copy of this order be sent to the concerned Jail Superintendent for information.

30. TCR be sent back alongwith copy of this order.

31. As prayed, copy of the order be also given dasti to learned counsel for the appellants under the signature of Court Master.

PRATIBHA RANI
(JUDGE)

AUGUST 02, 2017

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