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

+ CRL.A. 386/2005

ISMAIL SHEIKH

..... Appellant

Through: Mr. Deepak Anand, Standing
Counsel (DHCLSC)

versus

STATE

..... Respondent

Through: Ms. Aasha Tiwari, APP for
State with SI Himanshu Balyan,
PS Subhash Place.

+ CRL.A. 789/2005

SAIDUL

..... Appellant

Through: Mr. Rajiv Bajaj, Adv.
(DHCLSC)

versus

STATE

..... Respondent

Through: Ms. Aasha Tiwari, APP for
State with SI Himanshu Balyan,
PS Subhash Place.

+ CRL.A. 1006/2006

MOHD. DULAL

.... Appellant

Through: Mr. Sumeet Verma, Adv.

versus

STATE OF NCT DELHI

..... Respondent

Through: Ms. Aasha Tiwari, APP for
State with SI Himanshu Balyan,
PS Subhash Place.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

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14.06.2018

1. Vide the impugned the judgment dated 22.01.2005 of the then learned ASJ, Delhi in relation to FIR No.854/2002, PS Saraswati Vihar in State Case No.37/2004 in which there were seven persons arrayed as accused i.e. Alamgir, Ismail Sheikh, Abul Aakan, Saidul, Md. Dulal, Aslam, Abul @ Kabir, vide the said impugned judgment, the accused persons Ismail Sheikh, the appellant of CrI.A.386/2005, Md. Dulal, appellant of CrI. A.1006/2006 and Saidul, appellant of CrI.A.789/2005 presently under consideration before this Court were held guilty for the commission of offences punishable under Sections 395/397 Indian Penal Code, 1860 and all the four accused persons i.e. Alamgir, Abul Aakan, Aslam, Abul @ Kabir were granted benefit of doubt and acquitted. Submissions in relation to Ismail Sheikh were made by learned counsel on 13.06.2018 and have been reiterated today

also by the learned counsel on his behalf submitting to the effect that the charges qua the commission of offences punishable under Sections 395/397 Indian Penal Code, 1860 against Ismail Sheikh, s/o Afsar Ali have not been established even remotely and that the said appellant is entitled to be acquitted.

2. In terms of proceedings dated 04.06.2018, the nominal roll of the appellant was called for which indicates that he has already completed his sentence imposed vide impugned judgment dated 22.01.2005 whereby the said appellant along with two other appellants i.e. Md. Dulal and Saidul was sentenced to Rigorous Imprisonment for seven years and to pay a fine of Rs.500/- each and in default of the payment of the said fine, to undergo Rigorous Imprisonment for a further period of three months with the benefit of Section 428 Cr.PC, 1973 having been given to the convicts. The nominal roll as observed hereinabove dated 11.06.2018 received from the Superintendent Jail, Central Jail No.8/9, Tihar, Delhi indicates that the said appellant Ismail Sheikh, s/o Afsar Ali has already completed his sentence on 14.12.2002 but continued to be detained as an under trial in FIR No.294/2002, PS Link Road and after completion of sentence in all cases, was transferred to District Jail, Ghaziabad, U.P. on 27.03.2010. On behalf of the appellant of Crl.A.1006/2006 i.e. Md. Dulal it has been submitted by the learned counsel present that the convictions of the said appellant cannot be sustained in as much the evidence on the record is wholly infirm and that there is only a solitary evidence of PW-8 Praful Khosla in relation to identification of the said accused

Md. Dulal and that the stated diamond ring taken out by the appellant Md. Dulal from Praful Khosla, PW-8 has not even been recovered. It has been submitted on behalf of the appellant that in any event, the charges against the said appellant qua the conviction under Section 397 Indian Penal Code, 1860 cannot stand in any manner inasmuch as there is no specification of the deadly weapon of offence allegedly utilised by the said appellant during the course of the dacoity. The nominal roll received from the Superintendent Jail, Central Jail No.8/9, Tihar, Delhi dated 06.06.2018 indicates that this appellant too has completed his sentence on the date 13.08.2009 of Rigorous Imprisonment of seven years with a fine imposed of Rs.500/- and in default of payment of the said fine, to three months of Rigorous Imprisonment with having earned a remission of one year, three months and seven days and continued to be detained as an under trial in view of his involvement in FIR 294/2002, PS Link Road, under Section 459 Indian Penal Code, 1860 and after completion of the sentences in all cases i.e. FIR No.319, PS Aman Vihar, FIR No.872/2002, PS Saraswati Vihar, FIR No.480/2002, PS Preet Vihar, FIR No.603, PS Preet Vihar, was transferred to teh District Jail, Ghaziabad, U.P. on 27.03.2010.

3. As regards the appellant Saidul @ Afzal, in view of the nominal roll that has been received for the date 06.06.2018 which indicated that the appellant was presently undergoing life sentence in relation to FIR No.849/2002, PS Saraswati Vihar, production warrants were issued for the production of the said appellant for the date 13.06.2018

and he was so produced and is present today as well. The appellant had submitted on 13.06.2018 and once again he reiterated that he does not seek to contest the appeal and had submitted on 13.06.2018 that he had deposited the fine of Rs.500/-, which was not so reflected in the nominal roll. The report has thus been called for from the Superintendent Jail, Delhi. As indicated vide the nominal roll that was received for the date 06.06.2018, the appellant Saidul @ Afzal has already undergone the period of sentence of seven years of Rigorous Imprisonment having earned one year, two months and sixteen days of remissions as on 22.09.2008. It has been reported vide the said nominal roll that the substantive sentence of this appellant has been completed on 22.09.2008 but that the fine sentence i.e. a fine of Rs.500/- and in the event of non-payment of fine, of three months of Rigorous Imprisonment was still pending. In view of the submissions that was made by the appellant that he had deposited the fine, the report was called for from the Superintendent Jail, Delhi, it is indicated that the appellant had made a request in the early morning of 14.06.2018 i.e. today with the report from the Superintendent Jail being of the date 14.06.2018 for the deposit of fine of Rs.500/- imposed in the instant case, the said amount had been deducted from his Prisoner's property account and the same would be deposited in the Government fund today itself. Thus the instant appellant has also undergone the entire sentence imposed vide the impugned order on sentence dated 22.01.2005 of seven years of Rigorous Imprisonment and a fine of Rs.500/-.

4. The facts as put forth in relation to FIR No.854/2002, PS Saraswati Vihar have been succinctly brought forth through the impugned judgment dated 22.01.2005 of the then learned ASJ which indicate to the effect that on the night intervening between 24/25.11.2002, the persons who had come were armed with deadly weapon like pistols and knives and they looted jewellery belonging to Shakuntla Khosla and her mother Smt. Saraswati Khosla and her son Praful Khosla and that her son Praful Khosla examined as PW-8, sustained injuries on his left arm in the incident and had been taken to the Jaipur Golden Hospital and was examined by Dr. Ashok Tandon, PW-11 vide MLC Ex.PW11/A. Information of the said incident is indicated to have been communicated to PS Saraswati Vihar whereafter the police arrived at the spot and Smt. Shkuntla Khosla made her statement as Ex.PW6/A to the Investigating Officer and the FIR was thus registered on the basis of the same on 25.11.2002 at 7:55am. It has been indicated further that one of the persons had left a muffler at the spot and so were one empty cartridge and some pellets, which were seized vide the seizure memo Ex.PW7/A and Ex.PW7/B and seven persons arrayed as accused in this case, are indicated to have been arrested on 08.12.2002 while they were sitting in Jheel Wala Park near Rashmi Apartments, Saraswati Vihar and on the interrogation, they made disclosures about their involvement in the instant case and were produced in Court and remanded in police custody and it was alleged that on 08.12.2002, the accused persons led the police to D-24, Shaheen Bagh, Okhla and produced a packet containing six gold bangles, which were taken into possession vide

memo Ex.PW1/E and the said bangles were later on identified by Smt. Shakuntla Khosla, examined as PW-6, in the TIP conducted by learned MM in the instant case.

5. It is indicated as per record that the prosecution examined 14 witnesses in support of its contention i.e. PW-6 Smt. Shakuntla Khosla, PW-7 Vipul Khosla, PW-8 Praful Khosla who deposed in relation to the occurrence and PW-1 Constable Vinod Kumar, PW-5 HC Rajbir Singh, PW-10 ASI Jai Singh who were present at the time of the arrest of the accused persons from Jheel Wala Park on 08.12.2002 and PW-1 Constable Vinod Kumar and PW-12 Inspector Suresh Kumar Banta were put forth as being witnesses of the recovery of stolen bangles from Shaheen Bagh. The learned trial Court vide the impugned judgment itself held the recovery of the stolen property put forth by the prosecution through investigation conducted to be wholly insufficient in the mode and manner that the same had been conducted observing to the effect that the evidence regarding arrest of the accused persons, disclosure allegedly made by them and the recovery of the stolen property was not very convincing inasmuch as the disclosure statement Ex.PW1/H to PW1/N were more or less verbatim reproduction of each other and that such identical versions of the incident could not have been given by seven different persons in the ordinary course and that Inspector SK Banta who was categorical in relation to recovery of stolen bangles, was unable to identify all the accused persons and could not remember whether the police had gone to Okhla for recovery in the morning or in the evening and was unable

to recollect whether the room from where the alleged recovery was made was found locked or open whereas another witness PW-1 Constable Vinod Kumar stated that the packet containing the bangles was recovered from a trunk which was locked but was unable to state as to who produced the key of the trunk. Apparently as observed vide the impugned judgment, the evidence led by the prosecution in relation to the alleged recovery of stolen property is insufficient in relation to the recovery of the stolen articles from the appellant herein. The testimonies however of the eye witnesses of the occurrence i.e. PW-6 Dr. Shakuntla Khosla, PW-7 Vipul Khosla and PW-8 Praful Khosla are cogent and consistent in relation to material particulars in relation to the incident that took place on 24.11.2002 at about 3:30 am at their residence at 490, Sainik Vihar, Delhi-34. The appellants Saidul and Ismail Sheikh were duly identified by PW-6 Dr. Shakuntla Khosla as being amongst those boys who surrounded her and her son Vipul Khosla in the lobby and stated that they were having knives and pistols and also stated that in the meantime, his son Praful and his wife Sonia came out of their bedroom into the lobby and that the boys who had surrounded them started threatening them to hand over whatever they had, else they would kill them and those boys removed the diamond ring of her son Praful and one of them removed eight gold bangles from her hand. She also testified to the effect that she had also seen that somebody had caused stab injuries on the left hand of her son Praful and he was bleeding and that they fired twice and thrice and they ran away. She categorically identified the accused i.e. convict/appellant Ismail Sheikh, appellant of CrI.A.386/2005 as being

the person who had removed gold bangles from her hands and also identified those gold bangles Ex.P1/1-5 as five of the eight bangles and Ex.P2 as one of two bangles which have been released to her on superdari. On being cross examined she has stated that the miscreants were armed with knives and pistols but she could not say who was armed with the knife and who was armed with the pistol and that there were five persons inside the house and that five persons had covered their faces with scarf and that “she was categorical about Ismail Sheikh” and **100%** sure about his identity but about the other boy she was not sure whether he was there or not and she has further stated that she was not sure in relation to the involvement of the appellant Saidul who has already stated on 13.06.2018 and reiterated today also that he does not seek to contest the appeal.

6. The witness PW-7 Vipul Khosla in his testimony has testified to the effect that on 24.11.2002 when they retired to bed in the night around 3:30 am, they heard cries from the lobby and on hearing the cries, he and his mother Dr. Shakuntala PW-6 went out from bedroom to the lobby and he saw that his maternal grandmother Smt. Saraswati Sachdev had been caught hold off by two persons and three of four persons were standing in the lobby and when he came out of the room, one miscreant put a pistol on his head and the miscreants threatened that if they would raise alarm they would kill them and this witness further stated that in the meantime his brother Praful Khosla and his wife also came out to the lobby and that the miscreants removed the gold bangles from the hand of his mother Dr. Shakuntala Khosla and

removed the gold chain and gold bangles of his Nani, i.e. of Smt. Saraswati Sachdev and they also removed the diamond ring of his brother Praful (i.e. PW-8) and he further stated that meanwhile his nani somehow escaped and went to her room and bolted it from inside and that the miscreants became nervous and went to the room of his Nani and he, his mother and his sister-in-law went out to the door to the right side and that his brother went out through the drawing room on the left side and that one of the miscreants caused injury to his brother Praful with a knife and also fired at him and the miscreants got panicky and started running away. He further stated that they were five boys who were present at that time and he also testified to the effect that the miscreants had left an empty cartridge, pellets and a muffler at the spot which were seized by the police and the sketch of the empty cartridge was also prepared, which was signed by him. On being cross examined, this witness stated that he had identified the five persons, that he had identified i.e. Alamgir, Abdul Agnan, Dulal, Saidul and Aslam whom he pointed out and stated that there were two others whom he could not identify. He further stated that as far as he could remember only the accused Saidul covered his face with the red muffler and the other persons had not covered their faces and he further stated that the accused Saidul put the pistol on his head and he had covered only his face below the nose and he also stated that the accused Saidul had a pistol in his hand but he categorically denied that he had wrongly identified the accused persons.

7. PW-8 Sh. Praful Khosla testified in relation to the occurrence on the night intervening 24th/25th November, 2002 and stated inter alia to the fact that while he was sleeping in his bed room and that his wife opened the door of his room and saw that there were five or six persons in the lobby and one of them had caught hold of his brother Vipul i.e. PW-7 and after seeing this he had locked his room from inside and picked up his mobile phone to inform the police but in the meantime there were shouts from the lobby asking him to open the door of the bedroom or else they would kill them and he had opened the door towards the lobby, and he and his wife came out from the lobby and that one of the miscreants caught hold of him and put a pistol on his head and he was taken near the dining table and one boy who had covered his face with the muffler came to him and removed his diamond ring and tried to tie his hands but he could not properly tie his hand and he further stated that in the meantime his Nani escaped and ran towards her room and bolted the room and that all the miscreants ran towards the door of his nani and tried to break it open and that he had run out and the miscreants came behind him and one of them caused injuries on his hand with a knife. This witness further stated that he raised an alarm and his mother and brother also raised an alarm and the miscreants ran away and they were taken to Jaipur Golden Hospital. This witness has further categorically testified that the accused Saidul i.e. one of the boys, present before this Court who has stated that he does not seek to contest his appeal, had put the pistol on his head when he came out into the lobby.

8. This witness categorically pointed out to the accused Dulal i.e. the appellant in Crl.A. 1006/2006 presently under consideration. He also stated that two or three miscreants had pistols in their hands and the others had long knives. During cross examination he stated that the total number of miscreants was five to seven and he was not sure about the exact number and that as far as he can remember, the face of three persons was uncovered and the faces of the other persons might have been covered. He identified three appellants of the appeal presently under consideration i.e. Saidul, Mohd. Dulal, Ismail Sheikh as being the three persons involved there who had their faces without cover. He stated that these persons were not known by him before the date of the occurrence and he had seen them thereafter when he had come to the Court. He categorically denied that he had wrongly identified the accused person at the instance of the police.

9. As observed hereinabove, PW-11 Dr. Ashok Tandon, Jaipur Golden Hospital, Rohini had examined Praful Khosla on 25.11.2002 in relation to the injuries sustained by him of a lacerated wound with clear cut margin, spindle shaped 7x1 cm. on extensor surface of left forearm and it having been observed by him that the wrist with left little finger was diminished and there was active bleeding was observed and he opined that the injuries sustained by Praful Khosla were grievous in nature vide the MLC Ex. PW11/A prepared by him. The said MLC No. 5908 of the Jaipur Golden Hospital Ex. PW11/A is on the record and indicates that it has been opined thereon in relation to Praful Khosla that the injuries sustained by the said person were

opined to be grievous with lacerated wound as observed hereinabove with active bleeding.

10. The entire record thus consistently brings forth the factum of the incident having taken place as deposed by PW-6, PW-7 and PW-8 and there appears no reason whatsoever to disbelieve their testimonies as there is nothing on the record to indicate that they had any inimical terms with any of the appellants and or they had any reason to falsely implicate the appellants in the instant case. The incident of the commission of the offence and dacoity in terms of Section 391 Indian Penal Code, 1860 is wholly borne out through the testimonies of three witnesses which bring forth categorically that the more than five persons were involved at the time of the commission of the offence. Though a contention is sought to be raised by learned counsel for the appellant that there was no commission of any exhortation by the said appellant, and that the ingredients of the commission of dacoity or robbery or exhortation were not brought forth in any manner in as much as the only testimony against the said Ismail Sheikh was to the effect that as stated by PW-6 Dr. Shakuntala Khosla that the said appellant had removed the eight gold bangles from her hand and it has been submitted thus on behalf of the said appellant Ismail Sheikh that the removal of the gold bangles from the hand of Dr. Shakuntala Khosla and mere presence also allegedly of the appellant with the other co-accused would not suffice to bring forth the ingredients of the commission of offence punishable under Section 395 of the Indian Penal Code, 1860. The said contention is vehemently refuted on

behalf of the State submitting to the effect that the testimonies of the prosecution witnesses clearly bring forth that PW-6, PW-7 and PW-8 and also Smt. Saraswati Khosla, the mother of PW-6 and also Sonia, daughter-in-law of PW-6 were in a state of fear and terror created by the presence of the persons numbering more than five in their residence of whom they were stated to be seven persons and these persons were armed with knives and pistols.

11. The testimonies of these three material witnesses categorically bring forth the commission of the offence punishable under Section 395 of the Indian Penal Code, 1860 against all the three appellants i.e. Saidul, Mohd. Dulal, Ismail Sheikh in as much as the presence of Mohd. Dulal at the time of the commission of the offence is also brought forth categorically through the testimony of PW-8 who has testified in relation to his presence at the spot at the time when he, Mohd. Dulal removed the diamond ring from the hand of Praful Khosla and he tried to tie his hands. As the presence of Ismail Sheikh as already observed hereinabove has been also categorically testified by Dr. Shakuntala Khosla and PW-6 Dr. Shakuntala Khosla had pointed out to the accused Saidul as being amongst those boys who surrounded her and her son Praful Khosla in the lobby and had brought knives and pistols with them and likewise the witness PW-7 Vipul Khosla has categorically identified Saidul as being the person who had covered his face with a red muffler and was the person who put pistol on his head and had the pistol in his hand. The witness PW-8 Praful Khosla has also categorically identified the appellant Saidul

as being the boy who put the pistol on his head. He also testified to the fact that as far as he could remember the knife injury to him had also been caused to him by Saidul.

12. Though the charges were framed against the appellants and the other accused persons Alamgir, Abul Aakan and Aslam and Abul @ Kabir in relation to the alleged commission of the offence punishable under Section 412 of the Indian Penal Code, 1860; none of the accused including the appellant have been convicted in relation thereto.

13. The charges of the commission of the offences punishable under Section 395/397 Indian Penal Code, 1860 are thus wholly brought forth against the appellant Saidul who has already submitted that he does not seek to contest the appeal in relation to his conviction, he having already undergone the sentence imposed vide the impugned order on sentence dated 22.01.2005 having also thus now today got the deposit of the fine of Rs. 500/- as deducted from his Prisoner's Property Account. Nothing more survives in the appeal in relation to Saidul and the same is dismissed.

14. As regards the appellant Mohd. Dulal as already observed hereinabove the commission of the offence punishable under Section 395 of the Indian Penal Code, 1860 is wholly brought forth against him. However, in view of the verdict of the Hon'ble Supreme Court in Dilawar Singh Vs. State of Delhi AIR 2007 SCC 323 which categorically points out that in terms of Section 397 Indian Penal Code, 1860 the word 'offender' refers only to the culprit who actually

used the deadly weapon, and that only one has used the deadly weapon, others cannot be awarded the minimum punishment and it only envisages the individual liability and not any constructive liability and [Section 397](#) IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision, but other accused cannot be vicariously liable under that Section for acts of the co-accused.

15. Though, undoubtedly, in terms of the said verdict and in terms of Section 397 of Indian Penal Code, 1860 the presence of any injury per se is not essential and the use of weapon by an offender for creating terror in the mind of victim is sufficient with it also not being required to be shown whether the weapon was actually used for cutting, stabbing or shooting, as the case may be as laid down by the Hon'ble Supreme Court in *Ashfaq v. State* (Govt. of NCT of Delhi) AIR 2004 SC 1253, nevertheless as laid down by the Hon'ble Supreme Court in the Dilawar Singh Vs. State Of Delhi (supra) there cannot be constructive liability qua the sentence/conviction to be imposed under Section 397 of the Indian Penal Code, 1860. The testimonies thus on the record do not substantially bring forth the allegations against Md. Dulal qua the offence punishable under Section 397 Indian Penal Code, 1860 in relation to the specific deadly weapon utilized by him. The conviction of Md. Dulal under Section 397 Indian Penal Code, 1860, 1860 is thus set aside.

16. As observed herein, the appellant Ismail Sheikh has also been held to have been present in the commission of the dacoity at the time

of the occurrence and the charges against him and the conviction under Section 395 of the Indian Penal Code, 1860 in the instant case is upheld. However, as regards the commission of the offence punishable under Section 397 of the Indian Penal Code, 1860, the testimonies of the prosecution witnesses as in the case of Mohd. Dulal do not specify the specific deadly weapon in possession of the appellant Ismail Sheikh at the time of commission of the dacoity to bring him within the ambit of culpability under Section 397 of the Indian Penal Code, 1860 in view of the verdict of the Hon'ble Supreme Court in Dilawar Singh Vs. State Of Delhi (Supra). The conviction of the appellant Ismail Sheikh in relation to the commission of the offences punishable under Section 397 of the Indian Penal Code, 1860 in relation to FIR No.854/2002, PS Saraswati Vihar is thus set aside.

17. As per the nominal roll received, the appellant Ismail Sheikh has already undergone the entire period of sentence. Nothing more survives in the instant appeal. The impugned judgment and impugned order on sentence are modified thus to the extent qua the conviction of this appellant Ismail Sheikh having been upheld too qua the commission of the offence punishable under Section 395 of Indian Penal Code, 1860 alone. To similar effect is the conclusion arrived at in Crl.A. 1006/2006 qua the appellant Md. Dulal and the conviction and sentence in the instant case are thus modified to the extent that the appellant Mohd. Dulal, S/o Shri Abdul Latif is held to have been rightly convicted qua the commission of offence punishable under Section 395 of the Indian Penal Code, 1860. The conviction against

him under Section 397 of the Indian Penal Code, 1860 is set aside. This appellant too has however, already completed his sentence on 13.08.2009 and nothing more survives in the instant appeal thus as well.

18. Copy of this order be sent to the Superintendent, Central Jail, Tihar Delhi.

ANU MALHOTRA, J

JUNE 14, 2018

vm/p

