

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

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Reserved on: 19th July, 2018

Decided on: 5th September, 2018

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CRL.A. 497/2016

JAVED @ CHIKNA

..... Appellant

Represented by: Mr.Rajiv Mohan, Mr.Abhimanyu
Kampani, Mr.M.A.Karthik and
Mr.Akshay Kumar, Advocates

versus

STATE

..... Respondent

Represented by: Mr.Ashok Kumar Garg, APP with SI
Kamaljeet Singh, PS Kashmere Gate

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CRL.A. 541/2016

AYYUB

..... Appellant

Represented by: Mr.Saurabh Kansal, Ms.Pallavi
S.Kansal and Mr.Deepak Pandey,
Advocates

versus

STATE

..... Respondent

Represented by: Mr.Ashok Kumar Garg, APP with SI
Kamaljeet Singh, PS Kashmere Gate

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CRL.A. 653/2016

SAMSUDDIN @ RAJU

..... Appellant

Represented by: Mr.Saurabh Kansal, Ms.Pallavi
S.Kansal and Mr.Deepak Pandey,
Advocates

versus

STATE

..... Respondent

Represented by: Mr.Ashok Kumar Garg, APP with SI
Kamaljeet Singh, PS Kashmere Gate

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CRL.A. 785/2016

MOHD. WAHID

..... Appellant

Represented by: Mr.Saurabh Kansal, Ms.Pallavi
S.Kansal and Mr.Deepak Pandey,
Advocates

versus

STATE

..... Respondent

Represented by: Ms.Meenakshi Dahiya, APP with SI
Kamaljeet Singh, PS Kashmere Gate

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these appeals, appellants Javed @ Chikna, Ayyub, Samsuddin @ Raju and Mohd. Wahid challenge the impugned judgment dated 28th April, 2016 convicting them for the offence punishable under Section 402 IPC and Javed @ Chikna, Ayyub and Mohd. Wahid also being convicted for the offence punishable under Section 25 Arms Act in FIR No. 69/2011 registered at PS Kashmere Gate and the order on sentence of dated 4th May, 2016 directing the appellants to undergo rigorous imprisonment for a period of four years and to pay a fine of ₹5,000/- each and in default thereof to undergo simple imprisonment for a period of two months for the offence punishable under Section 402 IPC and Javed @ Chikna, Ayyub and Mohd. Wahid were further directed to undergo rigorous imprisonment for a period

of one year and to pay a fine of ₹1,000/- each and in default whereof to undergo simple imprisonment for a period of fifteen days for the offence punishable under Section 25 Arms Act.

2. Assailing the conviction, Learned Counsel for Javed @ Chikna submits that there is difference between preparation and planning. The case of the prosecution is assembling for planning to commit offence and not for the purpose as required under Section 402 IPC. Though Javed @ Chikna is involved in 30 cases, however, none of the cases against him relate to dacoity and other co-accused are not Javed's associates. Since Javed has been acquitted for the offence punishable under Section 399 IPC, thus, preparation is disproved. On same facts, conviction cannot be sustained for offence punishable under Section 402 IPC. There is only one witness ASI Mahender Singh (PW-5) who overheard five persons. ASI Mahender Singh, in fact, laid the trap, seized and sealed the weapons i.e. conducted the entire investigation. Further, ASI Mahender Singh heard the alleged conversation from behind the statue which was very big, thus it was not possible to hear the conversation as alleged. Reliance is placed upon the decision of Supreme Court reported as (2008) 11 SCC 153 State of Uttar Pradesh v. Punni and Others.

3. Learned Counsel for Ayyub and Mohd. Wahid submits that appellants cannot be convicted solely on the basis of alleged conversation heard by one witness. Furthermore, the Learned Trial Court categorically held that '*there was no specific evidence to prove that accused persons were making preparation for dacoity*' and hence acquitted them for offence punishable under Section 399 IPC however, held them guilty under Section 402 IPC. It is urged that the appellants cannot be held liable for the offence punishable

under Section 402 IPC since there was no overt act on the part of the appellants. There are material inconsistencies in the testimonies of the witnesses and non-examination of material witness creates sufficient doubt on the prosecution version.

4. Learned Counsel for Samsuddin @ Raju submits that there was no recovery from the appellant hence he is liable to be acquitted.

5. Per contra, Learned APP for the State submits that even though the appellants have been acquitted for preparation to commit dacoity however the prosecution led evidence beyond reasonable doubt to prove that appellants assembled for the purpose of committing dacoity and appellants Javed, Ayyub and Mohd. Wahid were in possession of arms.

6. Prosecution case springs out from the secret information received on 18th April, 2011 at about 5:50 P.M. that one person by the name of Javed @ Chikna would go to Maharaja Agrasen Park, Kashmere Gate along with 4-5 persons between 7:00-8:00 P.M. with intention to commit dacoity in the buses going to Shahadara from Mori Gate and they would be armed with weapons. Aforesaid information was recorded vide DD no. 18 (Ex.PW-5/A). Thereafter, ASI Mahender Singh along with HC Dinesh (PW-7), Ct. Gurcharan and informer went to PS Kashmere Gate. A raiding party was constituted consisting of ASI Mahender Singh, HC Dinesh, HC Ram Dayal (PW-6), HC Vijay, HC Upender (PW-4) and Ct. Gurucharan and they left at 6:30 P.M. vide DD No. 20 (Ex.PW-5/B) along with the informer and reached the park. At about 7:35 P.M., when ASI Mahender Singh, Ct. Gurucharan and the informer were sitting near the statue, they noticed six persons entering the park who also sat near the statue. The informer pointed out towards Javed @ Chikna who was instructing his companions that they

would commit dacoity in the bus going to Shahdara while boarding the bus from ISBT flyover and he would cover the driver at the point of katta whereas Wahid would cover the conductor with the katta and Ayyub, Pradeep, Mehmood and Raju Churiwala would rob the commuters at the point of knives. After which they would let off the bus at Shastri Nagar red light and again gather at Nigam Bodh Ghat to distribute the robbery amount. When they were in the process of leaving, ASI Mahender Singh told them that they had heard their plan and instructed them to surrender. Ct. Gurucharan gave signal by lighting the torch. All the six boys started running in different directions. However, four out of the six boys were overpowered by them.

7. On interrogation, they disclosed their names as Javed @ Chikna, Pradeep @ Kale, Wahid and Ayyub. On conducting search of Javed, one loaded country made katta was recovered from left dub of his pant and one live cartridge was recovered from the right pocket of his pant. After unloading the katta, a sketch was prepared vide Ex.PW-5/C. The katta and cartridges were seized vide memo Ex.PW-5/D. On searching Wahid, one loaded country made katta was recovered from left dub of his pant and one live cartridge was recovered from the right pocket of his pant. The sketch of the same was prepared vide Ex.PW-5/E and were seized vide seizure memo Ex.PW-5/F. Upon search of Pradeep @ Kale, one buttondar knife was recovered from right pocket of his pant. Its sketch was prepared vide Ex.PW-4/A and was seized vide seizure memo Ex.PW-4/B. On search of Ayyub, one buttondar knife was recovered from left dub of the pant and its sketch was prepared vide Ex.PW-5/G and was seized vide seizure memo Ex.PW-5/H. Consequently, FIR No. 69/2011 (Ex.PW-1/A) was lodged at

PS Kashmere Gate for the offences punishable under Sections 399/402 IPC and Section 25 Arms Act.

8. Investigation of the case was handed over to Insp. Ajay Negi (PW-11). He prepared the site plan (Ex.PW-5/K) at the instance of ASI Mahender Singh. Insp. Ajay Negi interrogated all the four accused persons and arrested Mohd. Wahid, Pradeep @ Kale, Javed @ Chikna and Ayyub vide arrest memos Ex.PW-7/B, Ex.PW-4/C, Ex.PW-11/A and Ex.PW-11/B respectively. Their personal search was conducted vide memos Ex.PW-7/C, Ex.PW-4/D, Ex.PW-11/C and Ex. PW-11/D respectively. Their disclosure statements were recorded vide Ex.PW-7/A, PW-11/E and PW-11/F respectively. All the four accused persons disclosed that two accused persons namely Javed @ Mehmood and Raju @ Churiwala @ Samsuddin had absconded.

9. In June, 2011, Insp. Ajay Negi came to know that one accused person namely Javed @ Mehmood was arrested in a case of PS Bhajan Pura. Thus, he moved an application for production of the accused on 8th June, 2011. ASI Vijender Singh (PW-8) interrogated Javed @ Mehmood and recorded his disclosure statement vide Ex.PW-8/A. Javed @ Mehmood was arrested vide arrest memo Ex.PW-8/B and his personal search was conducted vide memo Ex.PW-8/C. Raju @ Samsuddin moved an application to surrender before the concerned Court. On 5th October, 2011, Raju @ Samsuddin was arrested vide arrest memo Ex.PW-11/G and his personal search was conducted vide memo Ex.PW-11/H. His disclosure statement was recorded vide Ex.PW-11/J. After completion of investigation, charge sheet was filed.

10. All the appellants in their statements recorded under Section 313 Cr.P.C. stated that they were innocent and falsely implicated in the present

case. They were not arrested from the place and in the manner as deposed by the police officials. No weapon of offence was recovered from them and the same was planted upon them. They did not make any disclosure statement. Police officials obtained their signatures on blank papers and semi printed papers which were later converted into document.

11. In addition to the above, Wahid also stated that he was lifted from Apsara border, UP where he was working as a mechanic of tyre puncture and he was taken to PS Kashmere Gate where the case property was planted upon him and he had been falsely implicated in the present case. Ayyub also took the plea that he was lifted from the area of Welcome. Samsuddin @ Raju stated that the police officials were visiting his residence, due to this reason, he surrendered himself before the concerned Court. Javed @ Chikna stated that he was lifted from a milk diary situated in the area of Bhajanpura, he was taken to PS Kashmere Gate where the case property was planted upon him and he was falsely implicated in the present case.

12. S.P. Singh (DW-1), Deputy Director, Horticulture, Civil Lines Zone, Delhi stated that on 2nd November, 2015, their office had received a RTI application moved by Javed. Application was proved vide Ex.DW-1/A and the reply was proved vide Ex.DW-1/B. During his cross-examination, he stated that the area of the park mentioned at serial no. 7 of the reply Ex.DW-1/B was about 3 acres.

13. Ali Hasan (DW-2), Chowkidar, Maharaja Agrasen Park, ISBT, Kashmere Gate, Delhi stated that on 18th April, 2011, he was on duty in the park from 5:00 P.M. to 1:00 A.M.. During his presence, no incident took place in the park. He identified the photographs Ex.PW-11/DX and Ex.PW-11/DX1 and stated that the photographs were of the said park.

14. Supreme Court in the decision reported as (2004) 4 SCC 379 Aman Kumar v. State of Haryana while holding that attempt and intention are both important ingredients for commission of a crime and preparation for an offence differs widely from attempt, held as under

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case.

There is a greater degree of determination in attempt as compared with preparation.

15. Apex Court in the decision reported as (2015) 5 SCC 762 Jasbir Singh v. State of Haryana has observed as under:

12. Strangely, even after observing as above, the High Court has believed the prosecution story in respect of the offences punishable under Sections 399 and 402 IPC, and one in respect of the offence punishable under Section 25 of the Arms Act. The High Court has erred in law in not taking note of the following facts apparent from the evidence on record:

- i. In a daylight incident of 1.20 p.m. within the limits of City Police Station, Karnal, there is no public or any other independent witness of the arrest of the appellant along with other accused from the place of incident nor that of the alleged recovery of firearm which is said to have been made from the two of them. (It is not a case where arrest or recovery has been made in the presence of any gazetted officer.)*
- ii. The complainant (PW 6) has himself investigated the crime, as such, the credibility of the investigation is also doubtful in the present case, particularly, for the reason that except the police constables, who are subordinate to him, there is no other witness to the incident.*
- iii. It is not natural that the six accused, four of whom were armed with deadly weapons, neither offered any resistance nor caused any injury to any of the police personnel before they were apprehended by the police.*
- iv. It is strange that all the accused were wearing blue shirts, as if there was a uniform provided to them.*
- v. It is hard to believe that the appellant and three others did not try to run away as at the time of the noon they must have easily noticed from a considerable distance that some policemen were coming towards them. (It is not the case of the prosecution that police personnel were not in uniform.)*

16. Supreme Court in the decision reported as (1979) 3 SCC 430 Chaturi Yadav. State of Bihar while holding that the mere presence of 8 persons in school premises at 1:00 AM with arms was not enough evidence to convict them under Section 399 or Section 402 IPC observed as under:

4. The courts below have drawn the inference that the appellants were guilty under both the offence merely from the fact that they had assembled at a lonely place at 1 a.m. and could give no explanation for their presence at that odd hour of the night. Mr. Misra appearing for the appellant submitted that taking the prosecution case at its face value, there is no evidence to show that the appellants had assembled for the purpose of committing a dacoity or they had made any preparation for committing the same. We are of the opinion that the contention raised by the learned counsel for the appellants is well founded and must prevail. The evidence led by the prosecution merely shows that eight persons were found in the school premises. Some of them were armed with guns, some had cartridges and others ran away. The mere fact that these persons were found at 1 a.m. does not, by itself, prove that the appellants had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself, has in its judgment, observed that the school was quite close to the market, hence it is difficult to believe that the appellants would assemble at such a conspicuous place with the intention of committing a dacoity and would take such a grave risk. It is true that some of the appellants who were caught hold of by the Head Constable are alleged to have made the statement before him that they were going to commit a dacoity but this statement being dearly inadmissible has to be excluded from consideration. In this view of the matter, there is no legal evidence to support the charge under Sections 399 and 402 against the appellants. The possibility that the appellants may have collected for the purpose of murdering somebody or committing some other offence cannot be safely

eliminated. In these circumstances, therefore, we are unable to sustain the judgment of the High Court.

17. High Court of Bombay in the decision reported as (2007) SCC OnLineBom 513 Satish Vitobha Diwate v. State of Maharashtra while holding that the mere fact that the accused could not give plausible explanation as to why they had assembled was not enough evidence to hold them guilty for dacoity, observed as under:

9. Learned Additional Public Prosecutor for the State contended that the possession of these things would show that they were about to commit dacoity. On the other hand, learned Counsel for the appellant contended that this would not show that they intended to commit dacoity only and the possibility their committing any other offence cannot be ruled out. He submitted that there is no evidence that they had hatched any plan or conspiracy to commit dacoity. The evidence of P.I. Mr. Prashant (P.W. 4), who had lodged the F.I.R. (Exh. 29) needs to be looked into. He states that while he was on patrolling duty along with other policemen, around 2.00 a.m. he found near shop of one Ajmire 5 to 6 people in suspicious circumstances. He states that they tried to run away but five of them were caught on the spot and one of them escaped. It is in his evidence further that he questioned them but they could not give satisfactory answers. He also states that, therefore, he suspected that they had assembled to commit dacoity. (If Marathi deposition is seen, this statement that he suspected that they had assembled to commit dacoity is missing). Suspicion, however, strong cannot take place of proof. Mere fact that the accused were unable to give plausible explanation one could not jump to a conclusion that they had assembled to commit dacoity. There ought to be an evidence that these persons had, in fact, conceived a design to commit dacoity. The possibility of their having come together to commit some other offence has to be ruled out. Here in this case there is no evidence at all that they had designed to

commit a dacoity. The evidence shows that the Police Officer jumped to a conclusion that they had assembled to commit dacoity, simply because they were unable to give satisfactory explanation. In a case reported in 1979 DGLS 197 (soft) : A.I.R. 1979 S.C. 1412 : 1979 (3) S.C.C. 430 (Chaturi Yadav v. State of Bihar)¹, Their Lordships have held as follows-

“The Courts below have drawn the inference that the appellants were guilty under both the offences merely from the fact that they had assembled at a lonely place at 1 A.M. and could give no explanation for their presence at that odd hour of the night. Mr. Misra appearing for the appellant submitted that taking the persecution case at its face value, there is no evidence to show that the appellants had assembled for the purpose of committing a dacoity or they had made any preparation for committing the same. We are of the opinion that the contention raised by the learned Counsel for the appellants is well founded and must prevail. The evidence led by the prosecution merely shows that eight persons were found in the school with guns, some had cartridges and others ran away. The mere fact that these persons were found at 1 A.M. does not, by itself, prove that the appellant had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself has, in its judgment, observed that the school was quite close to the market, hence it is difficult to believe that the appellants would assembled at such a conspicuous place with the intention of committing a dacoity and would take such a grave risk. It is true that some of the appellants who were caught hold of, by the Head Constable are alleged to have made the statement before him that they were going to commit a dacoity but this statement being clearly inadmissible has to be excluded from consideration. In this view of the matter, there is no legal evidence to support the charge under sections 399 and 402 against the appellants. The possibility that the appellants may

have collected for the purpose of murdering somebody or committing some other offence cannot be safely eliminated. In these circumstances, therefore, we are unable to sustain the judgment of the High Court.

18. High Court of Delhi in the decision reported as (1999) SCC OnLine Del 1049 Des Raj v. State while holding that the mere presence of some people even with arms is not enough to hold that the accused had assembled there to commit dacoity, observed as under:

20. The prosecution has to establish that the accused persons had assembled there for committing dacoity or assembled for the purpose of making preparation to commit dacoity. Mere presence of some persons even with arms cannot legitimately lead to the definite conclusion that they had assembled there to commit dacoity. Convicting the accused on such presumption is against the settled principles of criminal jurisprudence.

19. Appellants have been convicted for offence punishable under Section 402 IPC and appellants Javed, Ayyub and Mohd. Wahid for offence punishable under section 25 Arms Act. Section 402 IPC reads as under:

“402. Assembling for purpose of committing dacoity.—Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.”

20. In contradistinction to Section 399 IPC which punishes the offence of preparation to commit dacoity, Section 402 punishes for assembling for the purpose of committing dacoity. It is thus evident that for the prosecution to prove an offence under Section 402 IPC it has to prove that the accused

assembled at the place with the intention and for the purpose of committing dacoity. The stage for Section 402 IPC is between a preparation and intention i.e. less than preparation and more than intention. Though intention can be gathered from the fact that accused assembled with the weapon however, the same is not sufficient to convict accused for offence punishable under Section 402 IPC for the reason they could have even assembled for committing any other offence i.e. murder etc. for which mere assembling is not sufficient.

21. The prosecution, to press the ingredients of offence punishable under Section 402 IPC, relies upon the statement of ASI Mahender Singh and Ct. Gurcharan, who overheard the appellants' intention and the purpose for assembling at the spot. Contention of learned counsel for the appellants is that the appellants were allegedly behind a big statue which was more than the height and width of any of the members of the raiding party and thus what is being stated on the back side could not be heard properly. Ct. Gurcharan has not been examined as a witness and thus the only person who overheard the conversation was ASI Mahender Singh. Though ASI Mahender Singh stated that he heard their plan and that Javed was saying that they would commit dacoity in the bus meant for going to Shahdara while boarding the bus from ISBT and he would cover the driver at point of Katta whereas Wahid would cover the conductor with Katta and Ayyub, Pradeep, Mehmood and Raju Churiwala would rob the commuters of the bus at the point of knives however, ASI Mahender Singh has not stated the language used by Javed thus indicating what exactly he had stated.

22. Further, the appellants have examined Ali Hasan, the chowkidar at Maharaja Agrasen Park, ISBT, Kashmere Gate, Delhi as DW-2 who stated

that he was on duty in the said park on 18th April, 2011 from 5.00 P.M. to 11.00 A.M. and during his duty hours he remained present at the duty and no incident took place in the park. Though in his cross-examination he fumbled but on seeing the register he reiterated that he was on duty on 18th April, 2011. Ali Hasan was a natural witness and there is no mention of Ali Hasan in the entire prosecution case or that any other person was doing the duty of chowkidar.

23. In view of the evidence of Ali Hasan, the fact that ASI Mahender Singh did not state verbatim what was stated by Javed or the other accused and his version was the conclusion of what he heard the appellants said, this Court is of the considered opinion that the appellants are entitled to the benefit of doubt.

24. Consequently, this Court finds it to be a fit case for setting aside the conviction of the appellants for offences punishable under Sections 402/34 IPC and Section 25 Arms Act.

25. Appeals are disposed of accordingly. Appellants be released forthwith if not required in any other case.

26. Copy of this order be sent to Superintendent, Central Jail Tihar for updation of the Jail record and intimation to the appellants.

27. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 05, 2018
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