

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

% *Reserved on: 4th September, 2018*
Decided on: 17th September, 2018

+ **CRL.A. 305/2016**

SURENDER @ SONU Appellant

Represented by: Mr.K.Singhal, Advocate

Versus

STATE NCT OF DELHI Respondent

Represented by: Ms.Meenakshi Chauhan, APP
for the State with SI Vijay
Kumar, PS Farsh Bazar

+ **CRL.A. 1051/2016**

NISAR @ PAHARI @ SHAMSHAD AHMED Appellant

Represented by: Mr.Habibur Rahman,
Advocate

versus

STATE Respondent

Represented by: Ms.Meenakshi Chauhan, APP
for the State with SI Vijay
Kumar, PS Farsh Bazar

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Surender @ Sonu and Nisar @ Pahari @ Shamshad Ahmed challenge the impugned judgment dated 1st February, 2016 convicting them for offences punishable under Sections 392/394/397/307/34 and Section 25/27 Arms Act and the order on sentence dated 4th February, 2016 directing them to undergo rigorous imprisonment for a period of seven years each and to

pay a fine of ₹5,000/- each, in default whereof to undergo rigorous imprisonment for a period of six months each, for offence punishable under Section 392/34 IPC read with Section 397 IPC, rigorous imprisonment for a period of seven years each and to pay a fine of ₹5,000/- each, in default whereof to undergo rigorous imprisonment for a period of six months each, for offence punishable under Section 394/34 IPC, rigorous imprisonment for a period of seven years each and to pay a fine of ₹10,000/- each, in default whereof to undergo rigorous imprisonment for a period of one month each, for offence punishable under Section 307/34 IPC, rigorous imprisonment for a period of three years each and to pay a fine of ₹5,000/- each, in default whereof to undergo rigorous imprisonment for a period of six months each, for offence punishable under Section 25 Arms Act and rigorous imprisonment for a period of three years each and to pay a fine of ₹5,000/- each, in default whereof to undergo rigorous imprisonment for a period of six months each, for offence punishable under Section 27 Arms Act.

2. Assailing the conviction, Learned Counsel for Surender @ Sonu submitted that the appellant was not named in the FIR. No description of the appellant was mentioned in the rukka even though the complainant Renu Tayal knew him from before since he had worked in her house. The appellant refused for TIP since he was already shown to the witness. It was urged that first time identification in court is not sufficient to arrive at the conclusion beyond reasonable doubt that the appellant was actual offender. Reliance is placed on the decisions of the Supreme Court reported as 1997 (11) SCC 565 Ganpat Singh v. State of Rajasthan, 2009 (13) SCC 417 State of Andhra Pradesh v. Sayyad Siraj Mohammad & Ors. and decision of this Court in CrI.LP. 400 of 2010 titled as GNCTD v. Rama Shankar Pandey &

Anr. No CCTV footage of the area/locality was produced. Even if the case of the prosecution is accepted, the present case falls under Section 307/34 IPC and not under 392/397 IPC as child who received injury was not aimed at and allegations of robbery have not been proved since there was no recovery of the currency or the looted gold bangles. Children of the complainant Renu Tayal who were present in the house at the time of the incident have not been examined as witnesses. The knife could not be connected with the crime. The pistol was neither recovered at the instance of the appellant nor from his possession.

3. Learned Counsel for Nisar @ Pahari, adopting arguments of learned counsel for Surender, further submits that the fine amount imposed on the appellant should be waived.

4. Learned APP for the State on the other hand submits that the complainant Renu Tayal in her examination reiterated the facts stated by her in the complaint and Kushwant (PW-2) proved the fact of making the call to the police. Both the appellants were identified by her in the court and Nisar @ Pahari was also identified by her in TIP. Sonu @ Surender refused to take part in TIP and failed to give any just explanation for his refusal, hence adverse inference be drawn against him. Clothes, knife and ₹4,600/- were recovered at the instance of Sonu @ Surender from his house. It is further submitted that the case falls under Section 397 IPC even though the knife was not used but mere showing of the deadly weapon that is the knife was sufficient to constitute an offence punishable under Section 397 IPC. To buttress this argument, reliance was placed on the decision of this Court reported as 215 (2014) DLT 60 Sheetal & Ors. v. State (NCT of Delhi). Pistol along with two cartridges was recovered at the instance of Nisar @

Pahari. Ballistic report proves that the empty cartridges found at the spot were fired from the improvised pistol. Lastly, the injuries on child Priyanshu were proved vide MLC Ex.PW-9/A.

5. Process of law was set into motion on 6th July 2012 at 1:14 P.M. when information was received that the cousin of the caller was shot at 1/16 Bhola Nath Nagar, Shalimar Park. Aforesaid information was recorded vide DD No. 19A (Ex.PW-4/B) and was entrusted to SI Sunil Kumar. When he reached the spot, he met HC Charan Das and Ct. Karambir and got to know that a child Priyanshu has received gunshot injury. No eyewitness was present at the spot. Injured had been taken to Max Balaji hospital and there was blood in the room. He deputed Ct. Karambir on the spot and left for the hospital with HC Charan Dass. He collected the MLC of injured and seized the pullanda containing the clothes of the injured via seizure memo Ex.PW-8/A. He met Renu Tayal who told him that she was the eyewitness to the incident and gave her statement vide Ex.PW-1/A.

6. Renu Tayal stated that on 6th July 2012 at around 1:15 P.M. she was at her house along with her three children and her husband had gone to the factory when someone knocked at the door of her house. On asking who it was, the person behind the door replied that he had come to meet Manoj, husband of Renu Tayal. On hearing this, she opened the door but couldn't see anyone, so she called the person out saying "*bhai kaun hai*". Immediately thereafter two men came from behind the door and entered the house forcefully. She asked them why they were there. The man at the back was aged about 30-35 years and had put something similar to '*Multani Mitti*' on his face, was wearing a cap and also had a knife in his right hand. The man in the front was also aged 30-35 years, wheatish complexion, medium

built, had curly hair and was holding a gun in his right hand. She asked them what work they had, to which they replied that she should give everything she had to them. She got scared and started screaming and on hearing the commotion, her three kids came out of the room. Immediately after that, the two men took the kids and showed them the knife and gun after which she asked them to leave the kids alone and whatever they wanted they can take it with them and leave. To this, the two men replied saying that they wanted whatever she had and that she should give it to them. She took her three kids along with her to her room and the two men followed her. She gave around ₹12,000-13,000 kept in her purse to the two men after which they demanded more to which she replied she did not have anything more. They put the knife on her daughter and the man with the gun asked her to take off her gold bangles. She then took off the four bangles and gave it to them. Thereafter, they demanded more stuff to which she replied that she did not have anything else and that they could see themselves after which they made her sit in a corner of the room along with her children, they opened the almirah door and took out the purse kept in the almirah. The man with the knife took about ₹1,000/- along with the purse which was kept for household expenses and gave it to the man with the gun who kept it in the front pocket of his pants. He then pointed the gun towards them and demanded more money to which she replied that she had no more money and when they tried to come towards them, she tried to stop him. One of the men took out the gun and fired a round towards them which hit her younger son Priyanshu Tayal on his forehead after which the boy fell down on the floor. On seeing this, she and her elder son started screaming. The two men asked them not to scream after which both the men climbed down the stairs and ran away.

She came out of the house and started screaming. She saw the two men running in the street. She informed her husband about the entire incident on phone. She took Priyanshu Tayal to Max Bala Ji Hospital Patparganj.

7. On the basis of the aforesaid statement, FIR No. 244/2012 (Ex.PW-3/A) was registered at PS Farsh Bazar under Sections 394/397/34 IPC and Section 27 Arms Act.

8. SI Sunil Kumar then came back to the spot and informed the crime team about the incident. The FSL team was also called at the spot. SI Ahat Shyam inspected the spot and submitted his report vide Ex.PW-5/A. Ct. Satender photographed the scene from different angles and the photographs were proved vide Ex.PW-6/A. One empty cartridge, blood gauge, blood earth control and blood stained bed-sheet were lifted from the spot. He prepared a rough sketch of the empty cartridge vide Ex.PW-7/G. All the articles were seized vide Ex.PW-7/B. He prepared a rough site plan at the instance of Renu Tayal vide Ex.PW-18/B. He then returned to the police station and deposited the case property with MHC(M).

9. On 7th July 2012, SI Sunil Kumar along with Ct. Satbir and one other constable reached the spot. He interrogated Renu Tayal about the description of accused persons who stated that one of the accused person was a tall person who was perhaps a labourer and had worked at her house 4-5 months prior to the incident. Renu Tayal gave the name of the architect through whom that worker had come to her house to work.

10. Thereafter, SI Sunil Kumar went to the architect whose office was in Vishwas Nagar who stated that the description given by Renu Tayal matches with the worker named Sonu @ Surender (appellant herein) who was residing at Indira Park, JwalaNagar, Shahdara. Police officials went to Jwala

Nagar in search of Sonu @ Surrender. A secret informer informed them that Sonu @ Surrender was residing at House no. 909, Barf Wali Gali near Indira Park, Jwala Nagar, Shahdara, Delhi.

11. Police officials reached the aforementioned address and saw one person who was present outside the house. The secret informer pointed towards that person and told them that he was Sonu @ Surrender who tried to run after seeing the police but was apprehended. Sonu @ Surrender was arrested vide arrest memo Ex.PW-14/A, his personal search was conducted vide Ex.PW-14/B and his disclosure statement was recorded vide Ex.PW-14/D. Sonu @ Surrender then took the police officials to his house and from where ₹4,600/- were recovered from an iron box which was seized vide seizure memo Ex.PW-13/C along with two mobile phones and the clothes which Sonu @ Surrender was wearing on the day of the incident. One buttondar knife was produced by Sonu @ Surrender. The same was seized vide seizure memo Ex.PW-13/B.

12. Search for Nisar @ Pahari was made but he could not be found. In the meanwhile, the injured was shifted to Apollo Hospital and was still unfit for the statement. One bullet was removed from the head of the injured by the doctor at Apollo Hospital which was seized vide Ex.PW-10/A.

13. On 3rd September 2012, SI Sunil Kumar received secret information that Nisar @ Pahari had come to the house of Sonu @ Surrender. He along with Ct. Dinesh and Ct. Kapil went to House No.909, Baraf Wali Gali, Indira Park, Jwala Nagar. On seeing the police, Nisar @ Pahari tried to run but was apprehended. He was arrested vide arrest memo Ex.PW-15/D, his disclosure statement was recorded vide Ex.PW-15/F and his personal search was conducted vide Ex.PW-15/E. Thereafter, Nisar @ Pahari got the pistol

recovered from the house of Yasir at Loni near Bilal Masjid. The magazine contained two live rounds. Pistol along with the cartridges were seized vide seizure memo Ex.PW-15/B.

14. Renu Tayal (PW-1), mother of the injured/complainant deposed in sync with her statement given to the police.

15. Kushant (PW-2), cousin of the injured deposed that on 6th July 2012 he was present on the ground floor in his house and came to know that someone had fired a gunshot on his cousin Priyanshu. He called the police on 100 number.

16. Dr. Kishalay Dutta (PW-9), HOD, Emergency Medicine Department, Max Hospital, Patparganj deposed that on 6th July 2012, the injured Priyanshu Tayal was brought to the hospital with a history of gunshot wound at head. After examination, he prepared the MLC vide Ex.PW-9/A. As per examination, he opined the injuries to be dangerous in nature. He found the following injuries on the injured:

i. Head: 4 X 2 cm gunshot entry wound, ragged margins at right frontal region. Profuse bleeding present, brain matter exposed. No CSF leak seen.

ii. Maxillofacial: right eye haematoma

17. Dr. Jatinder Sharma (PW-11), Senior Neuro Surgeon deposed that on 7th July 2012 he prepared the discharge summary of the injured Priyanshu Tayal vide Ex.PW-11/A.

18. As per the FSL serological report (Ex.PX), blood was detected on exhibits '1a' (One wet, dirty, foul smelling T-shirt), '1b' (One wet, dirty, foul smelling half pants), '1c' (One wet, dirty, foul smelling underwear), '2a' (One dirty brown gauze cloth piece marked as stain prepared from the floor near

the dressing table), '2b' (One dirty brown gauze cloth piece marked as stain prepared from the floor near side of bed'), '2c' (One light dirty brown gauze cloth piece marked as stain prepared from entrance gate), '4' (One dirty yellowish brown gauze cloth piece described as blood gauge), '5' (Pieces of marble described as blood stained earth control), '7' (One bed sheet having few light brown stains), '9' (One dirty metallic piece kept in a plastic container described as bullet).

19. As per the opinion in FSL Ballistic report (Ex.PY), the crime cartridge case of 7.65mm marked exhibit 'EC1' had been fired through the improvised pistol marked exhibit 'F1'. The individual characteristic striation marks present on crime bullet marked exhibit 'EB1' were insufficient for comparison and opinion whether it has been discharged through 7.65mm improvised pistol marked exhibit 'F1' or not.

20. As noted above, Nisar @ Pahari was identified by the complainant, the eye witness in TIP proceedings and before the Court. Further, at his instance the improvised pistol from which the cartridge case of 7.65 mm was discharged, has also been connected with the opinion of the ballistic expert.

21. Case of learned counsel for the appellant Surender @ Sonu is that the identification for the first time in the Court cannot be relied upon. The incident took place on 6th July, 2012 at about 1.15 p.m. where besides looting the cash and jewellery from the complainant, the appellants who were armed with knife and gun also fired a shot which hit the son of the complainant. On the same day, statement of the complainant was recorded on which the FIR in question was registered. In the complaint the complainant gave adequate description of the two accused and on the next day itself, she stated that the tall person had worked as a labourer at her

house 4-5 months ago and from the said lead given by the complainant through the architect, appellant Surender @ Sonu was arrested on the same day i.e. 7th July, 2012 and on the next day, produced in Court in a muffled face from where he was sent to judicial custody.

22. On an application moved for conducting TIP proceedings of the appellant Surender @ Sonu, he refused to undergo the same at Tihar Jail in the presence of the learned Metropolitan Magistrate when the complainant had reached Tihar Jail for identification. The reason given by Surender @ Sonu at the time of TIP proceedings to not join the same was that his photo was taken at PS Farsh Bazar by public person in civil clothes and also police persons. He was seen by many public persons and made to roam around in Court building in unmuffled face. Suggestion given to the Investigating Officer in the cross-examination was that he took the photo on his mobile phone and showed it to the witness. However, the suggestion given to Renu Tayal is that she saw the accused outside the Court complex while sitting in the car on 26th September, 2012. Thus, there is no suggestion to Renu Tayal that before TIP was refused, the photograph of Surender @ Sonu was shown to the witness.

23. Contention of learned counsel for Surender @ Sonu that even if the prosecution case is accepted, the offence at best allegedly committed is punishable under section 307/34 IPC deserves to be rejected. Surender @ Sonu and Nisar @ Pahari both were armed with weapon of offence which they used to loot the money and jewellery of the complainant and they not only put the complainant and her children in fear of hurt they even caused grievous/dangerous hurt to loot the property. Hence, offences punishable under Sections 397/394 IPC are clearly made out.

24. Hon'ble Supreme Court in the decision reported as AIR 1975 SC 905 Phool Kumar v. Delhi Admn., held that mere showing of the deadly weapon would attract offence under Section 397 IPC. It was held:

"4. The last submission on behalf of the appellant was that sentencing him to undergo rigorous imprisonment for seven years under Section 397 of the Penal Code was illegal and he ought to have been convicted under Section 392 simpliciter which would have enabled the Court on the facts of this case to pass a lesser sentence of imprisonment. Reliance was placed upon the majority opinion of the Full Bench of the High Court of Punjab & Haryana in the case of State v. Chand Singh [ILR (1970) 2 Punj and Har 108] . The argument was attractive at the first sight but did not stand our careful scrutiny.

5. Section 392 of the Penal Code provides:

"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."

The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High Courts as to the meaning of the word "uses" in Section 397. The term "offender" in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter use of the gun by one of the culprits whether he was accused Ram Kumar or somebody else, (surely one was there who had fired three shots) could not be and has not been

the basis of sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code."

25. In view of the discussion aforesaid, this Court finds no error in the impugned judgment of conviction or order on sentence.
26. Appeals are dismissed.
27. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellants.
28. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 17, 2018
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