

(2009) 03 CAL CK 0057

In the Calcutta High Court

Case No : CRA 757 of 2006 and CRAN No. 2884 of 2008

Aftab Alam Khan @ Guddu (in Jail)

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Arms Act, 1959 — Section 25(1B), 27

Evidence Act, 1872 — Section 27, 8

Penal Code, 1860 (IPC) — Section 34, 392, 397, 411, 428

Citation : (2009) 03 CAL CK 0057

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Syed Shahid Imam and Nudrat Urshi, for the Appellant; Usuf Ali Dewan, for the Respondent

Final Decision : Dismissed

Judgement

Partha Sakha Datta, J.—The appellant preferred this appeal being aggrieved with the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 8th Court, Alipore on 30th August, 2006 in S.T. No. 3(4) of 2003 whereby conviction was recorded u/s 392/397, and sentence for R.I. of seven years was awarded on account of the charge u/s 397, and R.I. for one year and half for the offence u/s 392/34 IPC with payment of fine of Rs. 2,000/- in default to suffer S.I. for two months with the rider that both the sentences would run concurrently subject to set off u/s 428 of the IPC. P.W. 3, Harendra Nath Mishra and P.W. 4, Sanjit Kumar Thakur were proceeding by a scooter of P.W. 3 at about 9-55 a.m. on 19th September, 2002 along Taratala Road. At about 10-15 hrs. when they came at a place in between M/s. Stone India and Britania a taxi bearing No. WB-19A/7716 overtook their scooter and cornered them, thus compelling them to get the scooter stationery whereupon two miscreants came out from the taxi and one of them held out revolver and then they snatched away P.W.3's briefcase and a mobile phone and then they decamped by that taxi. There was another occupant inside the taxi and also the

driver who did not come out. P.W. 3 and P.W. 4 tried to trace out the taxi but in vain.

2. This was the FIR lodged by P.W. 3 with Taratala Police Station at about 12- 30 hrs. on 19th of September, 2001 which registered P.S. Case No. 147 dated 19th September, 2001 u/s 392/397/25(1B)(a)/27 Arms Act. During investigation charge sheet was submitted against Akhilesh Kumar Gupta, Uma Sankar Gupta, Parvez Alam @ Nausad and Aftab Alam Khan @ Guddu under the aforesaid sections of the law.

3. Learned Trial Court framed charges u/s 392/397 of the IPC and upon conclusion of trial convicted the present appellant Aftab Alam Khan @ Guddu u/s 392/397 IPC and awarded sentence as above. The other accused persons, namely Parvez Alam and Akhilesh Kumar Gupta were convicted u/s 392 IPC and sentenced to suffer R.I. for one year and half with payment of fine of Rs. 1000/- in default to suffer S.I. for two months, while Uma Sankar Gupta was convicted u/s 411 IPC and sentenced to suffer R.I. for 1 year and to pay fine of Rs. 2,000/- only in default to suffer S.I. for 1 month. Of the four convicts Aftab Alam Khan @ Guddu has preferred this appeal. Of the 13 witnesses examined by the prosecution evidence of P.W. 3, Harendra Nath Mishra, the FIR maker, P.W. 4, Sanjit Kumar Thakur, the companion of P.W. 3 in the journey by scooter speak of the incident that took place about 10-15 hrs. on 19th September, 2002. P.W. 3, a resident of Sarkar Para under Maheshtala P.S. was proceeding with his companion P.W. 4 towards destination at Burobazar where he had a business of motor parts at about 9-55 hrs. on 19th September, 2002. P.W. 3 was a pillion driver, while P.W. 4 was driving the scooter. On the way P.W. 3 purchased petrol from one petrol pump of Bagchibabu and when they came at a place in between Britania Company and Stone Indian Ltd. a taxi bearing No. WB 29A 7716 intercepted them and compelled them to come down on the kachha portion of the left hand side of the road. Two persons came out of the taxi; one of them held out a revolver on P.W. 3's forehead while the others snatched away the briefcase from his hand and took out the mobile phone out of the pocket of his shirt and then fled away by taxi. Besides the driver of the taxi there was another occupant noticed by P.W. 3 and P.W. 4. They attempted to trace out the taxi but in vain. This is the evidence of P.W. 3 and P.W. 4.

4. The second part of the evidence of P.W. 3 and P.W. 4 rests with identification of the present appellant by both the witnesses P.W. 3 and P.W. 4 in the T.I. parade conducted by P.W. 12, Sanjoy Chowdhury, Judicial Magistrate on 8th of October, 2002. P.W. 3, his evidence goes, identified Parvez Alam to be the person who snatched away his briefcase and mobile phone and identified the present appellant as the person who held out a revolver against his forehead. P.W. 4, as per his evidence identified the appellant as the person who held out revolver against the forehead of P.W. 3. Before the Magistrate (P.W. 12) P.W. 3 and P.W. 4 identified the appellant Aftab Alam as also Parvez Alam as persons who committed robbery of mobile and briefcase at the point of revolver. The third part

of the evidence of P.W. 3 is identification of briefcase (Mat. Exbt. III) which is said to have been recovered from the accused Akhilesh Gupta. P.W. 3 also identified mobile phone (Mat. Exbt. IV) which was recovered from the possession of Uma Sankar Gupta.

5. The incident took a somewhat dramatic turn as sometime after the incident Akhilesh Gupta the taxi driver from whose possession briefcase of P.W. 3 was recovered, being accompanied by P.W. 5, Monoj Shaw, and one Ashoke proceeded to Taratala P.S. to report about the incident where police seized the taxi under a seizure list (Ext. 5/1). Involvement of Akhilesh Gupta having been found he was made accused in the case and recovery of briefcase was said to have been effected by the I.O. on 23rd September, 2002. Since Akhilesh Gupta is not the appellant here nothing should be stated against him in this appeal. This is only by way of passing reference.

6. P.W. 6, Md. Riyaz is an important witness because evidence has it that on 18th September, 2002 police recovered one pistol from the possession of the appellant Aftab Alam from inside a tin box kept beneath the cot in his house. As per his evidence the pistol was found containing a bullet. Pistol was marked (Mat. Exbt. VI) and bullet (Mat. Exbt. VIII). This witness was cross-examined at length but his evidence could not be shaken all through so far as the appellant is concerned.

7. Evidence of P.W. 10, Dulal Chatterjee who is an Arms Expert is important. He examined the pistol with bullet as was recovered from the appellant and found that one 8 mm live reamed rifle cartridge with the improvised pistol was in working condition at the time of test. (Mat. Exbt. A/1). The cartridge was marked LR/1 and the witness said both A1 and Lr/1 were firearms. In crossexamination the witness has stated that there is no mention in his report as to on which date the arms were last used before his examination.

8. P.W. 13, Debashis Chakraborty is the I.O. of the case who says that on the basis of source information he arrested Akhilesh Gupta, Uma Sankar Gupta and Parvez Alam on 23rd September, 2002 from the crossing of Circular Garden Reach Road and Bhukailash Road near Babubazar and pursuant to their statements he recovered mobile phone from the accused Uma Sankar Gupta and the briefcase from Akhilesh Gupta and arrested the present appellant on 24th September, 2002 during investigation and being led by him he had been to the ground floor of the premises No. 45/H/8 Circular Garden Reach Road, Calcutta - 23 and on being pointed out by the appellant he seized one country-made improvised on shooter pistol having bar, barrel and trigger along with live cartridge bearing mark 8 mm K.F.OO at the bottom and cartridge was found loaded inside the pistol and was found concealed inside a tin box under the wooden cot of his room. He seized the same in presence of one S.K. Suraj and another Md. Riyaz (P.W. 6) under a seizure list (Exbt. 6). The said pistol was marked as (Mat. Exbt. VI). Such recovery of pistol was made from the appellant on 28th September, 2002 pursuant to his statement.

9. Thus, we find so far as the present appellant is concerned case against him rests on evidence of P.W. 3, P.W. 4, P.W. 6, P.W. 10, P.W. 12 and P.W. 13. To summarize, P.W. 3 and P.W. 4 narrated the incident as stated above and identified the appellant Aftab Alam in jail on 8th of October, 2002 as the person who along with another committed robbery on the point of revolver. Before the Magistrate (P.W. 2) P.W. 3 identified Aftab Alam by touching his shoulder as the person who committed robbery along with Parvez Alam in respect of mobile phone and briefcase from his possession on the point of revolver, while P.W. 4 identified the appellant Aftab Alam @ Guddu by touching his hand as the person who committed robbery of mobile phone and briefcase on the point of revolver. It has been argued that in FIR P.W. 3 did not mention the physical feature of the appellant and P.W. 12, the Magistrate who held T.I. parade on 8th October, 2002 did not also mention in his report as to the physical features of the appellant. Further, it is submitted that the appellant was shown to P.W. 3 and P.W. 4 by the police before they were placed in the T.I. Parade. I fail to be impressed by the argument of the learned defence counsel. The report of the T.I. Parade held by P.W. 2 has been marked (Exbt. 11). Before the Magistrate the appellant did not point out that he was shown to P.W. 3 and P.W. 4 prior to holding the T.I. parade. T.I. parade was held on 8th of October, 2002, while the appellant Aftab Alam @ Guddu was arrested on 24th September, 2002. Thus, there was only a time gap of about 14 days between the date of arrest of the appellant and the date of holding T.I. parade. It cannot be said that there was inordinate delay from the date of incident in holding T.I. parade. Incident took place on 19th September, 2002. There is no evidence, no circumstance to suggest that P.W. 3 and P.W. 4 had occasion to view the appellant at the instance of the I.O. before holding T.I. Parade. Evidence of P.W. 3 and P.W. 4 was recorded on 9th of July, 2003. Both P.W. 3 and P.W. 4 had identified the appellant in court also to be the person who held out revolver against the forehead of P.W. 3. Revolver was seized on 28-09-2002 by P.W. 13 in the presence of P.W. 6. The evidence of the Arms Expert Dulal Chatterjee (P.W. 10) clearly revealed that at the time of testing the pistol was found in working condition and had accompanied with it one 8 mm. live reamed rifle cartridge and both were firearms. Thus, against the appellant there are two convincing pieces of evidence; one is recovery of the pistol and the other is identification of the appellant by P.W. 3 and P.W. 4 in the T.I. parade as also before the court. Learned Counsel for the appellant submitted that even if recovery of pistol against the appellant is taken for granted as per the version of the prosecution it cannot be said that the said pistol was used by the appellant at the time of alleged commission of robbery. This argument does not hold good for the reason that P.W. 3 and P.W. 4 identified the appellant to be the person who held out revolver against P.W. 3 and revolver was seized from the possession of the appellant within 9 days from the date of the incident. It was argued by the learned advocate appearing for the appellant that the alleged statement of the appellant pursuant to which recovery was said to have been effected cannot be said to be truly statement u/s 27 of the Evidence Act because the said statement does not bear the signature of the appellant. True, the statement does not bear

the signature of the appellant but Exbt. 17, (not Exbt. 18 as wrongly recorded by the learned Judge in his judgment) is the statement of the appellant the relevant portion of which is that he could point out the revolver if he was taken to his house. Doubt is expressed as to the disclosure of the appellant about keeping revolver in his house, but doubt cannot be expressed at the least about recovery of revolver from the house of the appellant on 28th of September, 2002. Even if, for the sake of argument Exbt. 7 is not taken to be a statement u/s 27 of the Evidence Act the fact of recovery pursuant to the alleged statement of the appellant is quite admissible u/s 8 of the Evidence Act. Non-mentioning of the physical features of the appellant by the Magistrate at the time of holding T.I. Parade is not fatal because identification by P.W. 3 and P.W. 4 of the appellant is a fact. It is quite impossible on the part of P.W. 3 to describe vividly in the FIR the physical features of the miscreants but it was in the FIR itself that the miscreants were aged between 20/25 years and he could recognize them. FIR was lodged at 12-25 hrs., i.e. within two hours of the incident. The place of occurrence is in between the factory of M/s. Stone India and M/s. Britannia Industries. The statement of Uma Sankar Gupta which was recorded by the I.O. on 23rd September, 2002 helped the I.O. to apprehend the appellant and that the appellant had kept revolver with him was stated by convict Uma Sankar Gupta. Pursuant to the statement of Uma Sankar Gupta who implicated himself as also the appellant mobile phone was recovered from Uma Sankar Gupta and revolver was recovered from the appellant Aftab Alam Khan. Even if the statement of co-accused is negated recovery of revolver against appellant together with identification of the appellant by P.W. 3 and P.W. 4 both in the T.I. parade and in the court conclusively established the commission of offence u/s 392/397 against the appellant. Not only Uma Sankar Gupta, the statement of Akhilesh Kumar Gupta which was also recorded on 23rd September, 2002 (Exbt. 16) implicates the present appellant as the person who had possessed revolver which was allegedly used in the commission of offence. There is no animosity between the appellant and P.W. 6 so that it cannot be said that P.W. 6 was not speaking the truth when he spoke about seizure of revolver from the appellant by the I.O. Why P.W. 3 did not immediately rush to the police gumty which was close to the place of occurrence is no answer to the prosecution case. Within two hours of the incident P.W. 3 and P.W. 4 rushed to the police station and lodged FIR. Learned defence counsel urged the court to appreciate the prosecution case from the stand point of improbability. It does not appear to me that the narration of the prosecution incident and evidence of P.W. 3, P.W. 4, P.W. 6, P.W. 12 and P.W. 13 with respect to the involvement of the appellant suffers from any infirmity or improbability.

10. Thus, having regard to the fact and circumstances of the case, as well as evidence on record I do not think that the learned Judge committed any illegality in convicting the appellant u/s 392/397 IPC. As regards sentence I do not think that any interference is necessary. Learned Counsel for the appellant submitted that the appellant is in jail since 24th September, 2002 and has already suffered

imprisonment of 6 years 4 months and 23 days. If it is so, then obviously that the appellant has almost completed his sentence and can expect his release shortly.

11. The appeal fails and is dismissed. The judgment and order of the learned trial court against the appellant is confirmed. A copy of this judgment and order shall be sent to the correctional home where the appellant is lodged.

12. Urgent xerox certified copies of this judgment, if applied for, be given to the parties as expeditiously as possible.