

(2014) 11 DEL CK 0090

In the Delhi High Court

Case No : Criminal Appeal Nos. 414 and 429 of 2008 and Crl. A. No. 74 of 2009

Jai Mohan

APPELLANT

Vs

State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 27-11-2014

Acts Referred:

Arms Act, 1959 — Section 25, 27, 39
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 307, 34, 392, 394, 397

Citation : (2015) 1 AD 235

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : A.K. Choudhary, Anil Choudhary, S.N. Pandey and Kulvinder Singh, Advocate for the Appellant; Isha Khanna, APP. and Narender Kumar, SI, Advocate for the Respondent

Judgement

Dr. S. Muralidhar, J.

Introduction

1. These three appeals are directed against the impugned judgment dated 16th April 2008 passed by the learned Additional Sessions Judge ("ASJ") in SC No. 36 of 2007 convicting the Appellants for the offences under Sections 392/ 34, 397/ 34 Indian Penal Code, 1860 ("IPC") and additionally convicting Nawab (Appellant in Criminal Appeal No. 74 of 2009) under Section 411 IPC and the order on sentence dated 19th April 2008 whereby the Appellants were sentenced to undergo 7 years rigorous imprisonment ("RI") and fine of Rs.5,000 and in default to undergo simple imprisonment ("SI") for 3 months for the offence under Section 392/ 34 IPC and to RI for 7 years for the offence under Section 397/ 34 IPC and additionally the Appellant Nawab was sentenced to RI for 3 years for the offence under Section 411 IPC.

2. At the outset it requires to be noticed that as far as Criminal Appeal No. 74 of 2009 is concerned, the Appellant Nawab despite issuance of bailable warrants on

6th September and 11th November 2013 could not be traced at the address given by him. On 29th November 2013, the Court was informed by the SHO of Police Station ("PS") Mandawali that no person by the name of the Appellant was found residing at the address given by him i.e. Village Jamalpur, District Aligarh, UP and the address of the surety was also incorrect. As a result, the Court has been unable to secure the presence of the Appellant in Criminal Appeal No. 74 of 2009. It appears to the Court that the Appellant has avoided appearing before the Court despite efforts to secure his presence.

Case of the prosecution

3. The case of the prosecution is that Vishwanathan Ravi (PW-5), an Administrative Officer working with Tata Motors was, on 12th December 2003, going to Syndicate Bank, Hasanpur depot Patparganj for depositing Rs.6,75,550 of the said company. He had kept the cash in his brief case along with the deposit slips. He reached the bank in his official vehicle, a Tata Sumo, being driven by his driver Ajay (PW-7). PW-5 reached the bank at around 9.20 am. While getting down from the car and approaching the entrance of the bank, he was accosted suddenly by three young men, two of whom were carrying pistols. While two of them put a pistol each to his head, the third snatched the brief case carried by him. All three then started running towards the motorcycle parked outside the gate of Hasanpur Depot. PW-5 started chasing them and raised an alarm. The members of the public there started throwing stones on the three assailants. As they started the motorcycle, PW-5 pulled the motorcycle. As a result, it lost balance and threw them on the ground.

4. While two of the men i.e. Jai Mohan (A-2) (Appellant in Criminal Appeal No. 414 of 2008) and Harender Tomar (A-1) (Appellant in Criminal Appeal No. 429 of 2008), were apprehended at the spot, the third person Nawab (A-3) (Appellant in Criminal Appeal No. 74 of 2009) who ran away with the brief case was chased and later apprehended by Constable Suresh (PW-9). While from the possession of A-1 and A-2 two pistols were recovered, PW-9 recovered a desi katta from A-3. Even while A-1 was being apprehended, he fired from his pistol at the public. Apart from the two pistols recovered from A-1 and A-2, one fired cartridge and live cartridges were also recovered. A PCR van then reached there.

The investigation

5. As soon as the incident took place, DD No. 10A was received at PS Mandawali. Constable Munesh Kumar (PW-10) picked up the DD from the Duty Officer. He met Sub-Inspector ("SI") Radhey Lal (PW-14) and Constable Prem Pal (PW-8) and reached the spot.

6. While PW-10 was left at the spot, PW-8 along with PW-14 went to the Lal Bahadur Shastri ("LBS") Hospital where the three injured accused as well as PW-5 had been taken in the PCR van. The MLC of PW-5 (Ex.PW-2/A) shows that he was brought to the LBS Hospital at 10.50 am with alleged history of assault and was shown to have suffered simple injuries. The MLC of A-1 (Ex.PW-2/B)

shows his time of arrival at 10.40 am with remarks "history of assault, beaten by public". He is also shown to have suffered simple injuries. The MLC of A-2 (Ex.PW-2/C) shows the time of his arrival at 10.30 am again with the remarks "history of assault, beaten by public". The MLC of A-3 Nawab (Ex.PW-3/A) shows several injuries on his person with the time of arrival at 11.40 am and he was shown to have been brought by Constable Kewal Singh while A-2 was brought by ASI Fayaaz Ahmed and A-1 by Head Constable ("HC") Jayanti Prasad. PW-5 is shown to have been brought by Constable Zamir.

7. According to PW-14, SI Radhey Lal recorded the statement of PW-5 (Ex.PW-5/A) at the hospital. A rukka was prepared on the said statement at around 1 pm (Ex.PW-14/A) and sent through PW-8 for registration of the FIR. PW-5 and the three accused thereafter reached the spot and PW-14 prepared the site plan (Ex.PW-5/DA) on the pointing of PW-5.

8. PW-9 handed over to PW-14 the black colour Safari brief case which was operated by combination lock and which contained cash. PW-5 then helped PW-14 to open the brief case. The cash inside it was counted and totalled to Rs.6,75,550. There was a pay-in slip of Tata Motors for depositing the money in Syndicate Bank and two visiting cards of PW-5. A memo of the contents of the brief case was prepared (Ex.PW-5/1). The kattas and cartridges recovered from the accused were kept in separate pullandas and sealed with the seal of VPS. The police also seized the black colour Bajaj Pulsar motorcycle from the spot which had been used by the accused. This was seized under memo Ex. PW-5/8.

9. At around 1.30 pm, PW-8 returned to the spot with the copy of the FIR and original rukka and handed it over to PW-14. At around 3.30 pm, the three accused were formally arrested under seizure memos (Ex.PW-5/9, PW-5/10 and PW-5/11) and their personal searches were conducted. Their disclosure statements (Ex.PW-8/B, PW-8/C and PW- 8/D) were recorded. They were kept in police lock-up that evening and produced before the learned Metropolitan Magistrate ("MM") on the next day and remanded to judicial custody. It is not in dispute that no Test Identification Parade ("TIP") was conducted. It appears that at one stage of the case, the three accused filed applications seeking TIP but that was declined.

The trial

10. The prosecution examined 15 witnesses. When the evidence was put to the accused under Section 313 Cr PC, they denied it and each of them claimed that he was arrested from the place of his ordinary residence and that he had been falsely implicated. The defence of each of them was that they were not at the spot at all. On the side of defence, K.K. Sharma, Judicial Assistant, Record Room of the Delhi High Court was examined as DW-1 and Anil Kumar Mahto, Ahlmad of the Court of the learned MM of Karkardooma Courts, Delhi was examined as DW-2.

11. Charges were framed against the three Appellants for the offences under

Sections 394/ 397/ 307/ 411/ 34 IPC read with Section 25/ 27 of the Arms Act. A separate charge was framed against A-3 for the offence under Section 411 IPC and under Section 25/ 27 of the Arms Act. A separate charge was also framed against A-2 for the offence under Section 25/ 27 of the Arms Act.

The trial Court judgment

12. The trial Court by the impugned judgment dated 16th April 2008 found the three Appellants guilty of the offences under Sections 392/ 34 and 397/ 34 IPC and A-3 additionally for the offence under Section 411 IPC. However all the Appellants were acquitted for the offence under Section 307 read with Section 34 IPC and A-2 and A-3 were also acquitted of the offences punishable under Section 25/ 27 Arms Act. The trial Court in the impugned judgment came to the following conclusions:

(i) No sanction was obtained under Section 39 of the Arms Act for prosecuting the Appellants for the offence punishable under Section 25/ 27 of the Arms Act and, therefore, on the said technical ground both A-2 and A-3 were acquitted of the said offence.

(ii) The failure to examine the other police officials whose names were mentioned in DD No. 11A (Ex.PW-1/D) did not affect the prosecution case. It was the choice of the prosecution to examine the witnesses who supported their case.

(iii) The failure to mention the names of the accused in DD No. 16A did not affect the case of the prosecution. The said DD entry is formal in nature and the details contained in the FIR were not required to be repeated in the DD entry.

(iv) The delay in registering the FIR at about 1.20 pm in relation to the incident which occurred at 9.30 am was satisfactorily explained by the prosecution. The accused as well as PW-5 were under treatment at the LBS Hospital and this has been substantiated by the evidence placed on record.

(v) The failure to mention the full value of the property in Columns 9 and 10 of the FIR was technical lacuna and did not affect the prosecution case since the value of the stolen property was already mentioned in the body of the FIR.

(vi) Even though PW-5 did not himself give the statement in Hindi, he identified his signatures on the complaint and also confirmed that the statement had been recorded by the police. There was no doubt about its veracity. PW-5 was not confronted with his supplementary statement and therefore no reference could be made to it. PW-5 mentioned their names in the FIR only after the police gave him the details.

(vii) The failure to mention the names of the accused in the Complainant's MLC did not have any consequence.

(viii) The delay in recording the statement of PW-11 was not asked to be explained by putting any questions to him or to the IO in their cross examination. In any event that could not be the sole factor for disbelieving his

evidence. He appeared to be a natural witness. He admitted that he came to know the names of the accused on being told by the police.

(ix) PW-7, the driver, was not an eye witness and he had not identified the accused. In any event, the evidence of PW-5 was trustworthy and not shaken in his cross-examination. The fact that the brief case contained two deposit slips which aggregated to the amount carried in the brief case corroborated the fact that PW-5 had brought the money for depositing it in the bank. Of the public witnesses examined, PW-11 was trustworthy. The evidence of PW-6 also proved the arrest of A-3.

(x) The fact that the MLCs of the accused mentioned that they were beaten by the public and they were brought by the police officials corroborated the case of the prosecution that they were very much present at the scene of the occurrence.

(xi) In the present case, no hurt was caused to anyone including PW-5 as a result of the alleged firing by the accused. Even the injuries sustained by PW-5 were not as a result of any act of the accused. Therefore, no separate charge under Section 307 IPC was required. On the facts of the present case the accused could only be convicted under Sections 392 and 397 read with Section 34 IPC and they were acquitted of the offence under Section 307 IPC. A-3 was additionally convicted under Section 411 IPC.

Submissions of counsel for the Appellants

13. Mr. A.K. Chaudhary, learned counsel appearing for A-2 Jai Mohan and Mr. S.N. Pandey, learned counsel appearing for A-1 Harender Tomar, first submitted that the genesis of the case was itself doubtful. Reliance was placed on the decision in *Deepak Kapoor v. State* 2007 [1] JCC 694 (Del). PW-5's conduct of fearlessly chasing the gun wielding assailants, after surrendering the suitcase to them out of fear, appeared improbable. It was submitted that the evidence of PW-5 had several inconsistencies and importantly PW-5 failed to identify the accused in Court. In this regard reliance was placed on the decisions in *State (Delhi Administration) Vs. Shri Gulzari Lal Tandon*, and *Chandan @ Babar Vs. State Govt. of NCT of Delhi*, . Relying on the decision in *Anoop Singh Vs. The State*, it was submitted that it would be unsafe to place implicit reliance on the testimony of a witness who had seen the Appellants for less than a few minutes several years prior to the deposition.

14. It was further submitted doubtful that the sum of Rs.6,75,550 was kept in the brief case since no other witness was examined. There was no satisfactory explanation why for deposit of such a substantial sum two deposit slips were filled up and no one else from the bank was examined. Only photocopies, and not the original, of the currency notes purportedly stolen were produced. Further, despite the apprehension of the Appellants from the spot with the pistols and cartridges and their being purportedly beaten by the public, no witness from the public was examined.

15. It was submitted that there was an unexplained delay in registering the FIR and this was fatal to the prosecution's case. Reliance was placed on the decisions in Thulia Kali Vs. The State of Tamil Nadu, ; State of Andhra Pradesh Vs. M. Madhusudhan Rao, ; Pannayar Vs. State of T. Nadu by Inspector of Police, ; Ramesh Kumar Vs. The State (Delhi Admn.), and Mangal Singh Vs. State, .

16. It was pointed out that the columns in the FIR regarding value of the property were left blank and the parentage of the Appellants was also not indicated. This showed that the Appellants were falsely implicated. The language used in tehrir/rukka was not that of PW-5 at all. It appeared to have been written up at a later point of time. This substantiated the plea that PW-5's signatures were simply taken on blank papers and the whole case was manipulated by the police. Even the DD Nos. 10A, 11A and 15B do not mention the names of the accused. Reliance was placed on the decision in State (Delhi Administration) Vs. Shri Gulzari Lal Tandon, to contend that even where the circumstances raise a serious suspicion against the accused, suspicion however grave it may be, cannot take the place of proof.

Submissions of the APP

17. In response, Ms. Isha Khanna, the learned APP, submitted that PW5 was a natural witness and his inability to precisely identify the appellants ought not to be viewed as a weakness in the prosecution case but indicative of the fact that no attempt had been made to manipulate the case. However, PW-5 was sure that three persons were apprehended at the spot and he was candid enough to admit that he gave their names only on being told by the police. As long as the photocopies of the currency notes were taken in the presence of the Court before being handed over to PW-5, it was sufficient compliance with the requirement of the law of evidence.

18. Ms. Khanna further submitted that no question was put to the IO regarding PWs 7 and 11 being planted witnesses. PW-9 was again a trustworthy witness as regards the arrest and recovery of the country made pistol from A-3.

Analysis of the evidence of the Complainant

19. The star witness of the prosecution case was no doubt PW-5, the Complainant. A reading of his deposition reveals that he more or less stuck to his version given in the first instance to the police. The material details of the event as described by him remained uncontradicted in his cross-examination. PW-5 was a natural and trustworthy witness, who did not make any attempt to embellish his version. He appears to have spoken only of matters personal to his knowledge. His conduct of giving up the brief case to the accused when two of them put their pistols on his head and thereafter chasing them when they turned to run towards the motorcycle, is also natural. The criticism of his deposition that it was unlikely that he acted fearlessly in chasing appears unjustified. It is only expected that in the first instance after giving up the brief case on fear of being

put to death, PW-5 in a reflex action tried to pull the motor cycle in which the accused were escaping when he realized that what had been taken away from his possession was a brief case containing his company's cash of over Rs.6.75 lakhs.

20. The deposition of PW-5 also confirms that there were three persons at the spot. The MLCs of the three accused persons and PW-5 fully corroborated the sequence of events as spoken to by the prosecution. Each of the MLCs of the accused notes that they were beaten by the public. The theory that they were picked up from their respective places of residence by the police and falsely implicated is totally belied by the MLCs prepared by doctors at government hospitals who had no previous enmity against any of the accused and had no reason to connive with the police to fabricate evidence.

21. PW-5 has been candid that the statement was not written in his own hand but by someone else. It is possible that PW-14 dictated it in Hindi to some other person but PW-5 had certainly confirmed that the statement (Ex.PW5/A) that was recorded was what he had given to the police. The fact that the language used in the statement may have been something that PW-5 could not be expected to normally speak does not either dilute the veracity of his statement or impeach its credibility. The statement does end with the lines that it has been read over and explained to him and found to be correct.

22. The extensive cross-examination of PW-5 does not appear to have yielded much for the accused. He came in a car which was driven by PW-7 who dropped him just outside the bank and then went away to park the car and waited for PW-5 to return. This explains why PW-7 himself did not witness the occurrence and only came back later. In the considered view of the Court, the evidence of PW-5 is natural and trustworthy and it was safe for the trial court to base the conviction of the accused persons primarily on his evidence.

Other evidence

23. The criticism that both PW-7 and 11 are planted witnesses, does not appear to be justified when their evidence is carefully scrutinized. PW- 11 had a roadside kiosk for a tea stall and it was perhaps not shown in the site plan for that reason. As pointed out by the trial Court that even if PW-11 was not examined till two months after the incident and after the first draft of the charge sheet was prepared, that by no means impinges on the credibility of his testimony. No questions were put to PW-11 to elicit the reason for delay in his statement being recorded. Likewise, PW-7 also appears to be a natural witness as he speaks only to the extent that he observed what happened at the scene of crime soon after he reached there. The evidence of PW-9 is also quite convincing. He is the one who apprehended A-3 and recovered the katta from him.

24. Learned counsel for A-1 urged that the entire story of apprehension and recovery of the pistol from A-1 was itself unbelievable and in fact there was no katta at all. This Court is unable to agree with the above submission. The evidence of PW-14, the JO, fully corroborates the evidence of PW-5 regarding the

apprehension and recovery of pistols from the three persons who had confronted PW-5, with two of them pointing their pistols to his head. There are no doubt some minor contradictions in the testimonies of PW-5 and PW-14 but these are not material enough to cast any doubt on the prosecution version.

25. The arrest memo no doubt shows at a later point of time the formal arrest of the three accused but the evidence of PW-5, corroborated by PW-14 and PW-9 and the two other witnesses i.e., PW-7 and PW-11 clearly spells out the fact that the three accused were apprehended at the spot itself. It does appear that their formal arrest was shown at a subsequent point of time after they were taken to the police station.

26. With PW-5 and three accused having been taken to the hospital for their treatment, the delay in formally recording the FIR stands explained. It is not fatal to the case of the prosecution.

27. Learned counsel appearing for the A-1 Harender Tomar pointed out that the motorcycle which was recovered was not found in a working condition and that it was unlikely that such a motorcycle would have been used by the three accused in the incident. The submission overlooks the fact that the motorcycle was pulled from behind as the three accused were running away and the motorcycle fell to the ground. It is possible that the motorcycle ceased to work thereafter. There is nothing to show that it was not working prior to the incident.

28. The failure to produce the original currency notes in the Court does not appear to be of much significance since the photocopies were in fact produced. No doubts were raised as to whether they were correctly identified by PW-5 as the notes that were in the brief case which was stolen by the Appellants.

29. Relying on the decision in *Ashfaq Vs. State (Govt. of NCT of Delhi)*, and *Ajay v. State* 2007 (1) C.C. Cases (HC) 218, it is submitted that the actual use of the weapon to create terror has not been proved in the present case and that in any event as far as A-1 is concerned since recovery of the weapon from him is riddled with doubts, he cannot be convicted for the offence under Section 397 IPC.

30. The Court finds it difficult to accept this submission since the charge against A-1 is under Section 397 read with Section 34 IPC and in the manner in which the occurrence has been described as having taken place, the common intention of the three accused in committing the robbery is writ large.

31. Learned counsel for the Appellants urged that the failure to conduct the TIP despite applications being made in that behalf by the Appellants rendered the prosecution case weak particularly since PW-5 had not identified the Appellants.

32. The decision not to have a TIP was perhaps dictated by the fact that the three Appellants were apprehended at the spot and in the presence of PW-5 and he also went along with them to the hospital for the treatment soon thereafter. It was perhaps not anticipated that PW-5 might not be able to clearly identify the three accused in the Court. In any event, the holding of a TIP is only to lend

assurance to the case of the prosecution regarding the identity of the accused. If there is other convincing evidence then it does not matter that the TIP is not conducted.

33. For the aforementioned reasons, this Court is unable to find any error having been committed by the trial Court in convicting the Appellants for the offences with which they have been charged.

34. Even on the aspect of sentence since the minimum sentence for the offence under Section 397 IPC is seven years, the sentence awarded to the Appellants cannot be said to be excessive.

Conclusion

35. The appeals are accordingly dismissed. The bail bonds of the Appellants are cancelled.

36. It is, however, clarified that since the Appellant Nawab in Criminal Appeal No. 74 of 2009 did not appear, despite the persistent efforts made to trace him by issuance of bailable warrants, he is given liberty, after he is taken into custody or he surrenders, to have his appeal heard on merits. The trial Court will initiate steps to have him taken into custody forthwith.

37. The Appellants shall surrender forthwith, failing which they shall be taken into custody, for serving out the remainder sentence.

38. A copy of this judgment along with the trial Court record be sent to the trial Court forthwith for further steps.