

(2009) 11 DEL CK 0388

In the Delhi High Court

Case No : Criminal Appeal No. 236-37 and 670 of 2006

Lal Singh and Another

APPELLANT

Vs

State NCT of Delhi
 Rajesh Vs State

RESPONDENT

Date of Decision : 18-11-2009

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 392, 397

Citation : (2009) 11 DEL CK 0388

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Saahila Lamba and K.B. Andley and M. Shamikh, in Criminal A. No. 670/200, for the Appellant; R.N. Vats, APP, for the Respondent

Judgement

V.K. Jain, J.—These appeals are directed against the judgment dated 8th March, 2006 and Order On Sentence dated 13th March, 2006, whereby all the appellants were convicted u/s 392 IPC read with Section 397 thereof and the appellant Rajesh as well as his co-accused Mohd. Nazim were also convicted u/s 25 of Arms Act. All the appellants were sentenced to undergo rigorous imprisonment for 7 years each and to pay a fine of Rs. 1,000/- or to undergo RI for 6 months each in default u/s 392 read with Section 397 IPC. The appellant Rajesh was also sentenced to undergo RI for one year and to pay a fine of Rs. 500/- or to undergo RI for one month in default u/s 25 of Arms Act.

2. The case of the prosecution, as disclosed in the FIR lodged by Shri Kaushal Kishore was that on 28th November, 2000, at about 10.45 P.M., he was waiting at ISBT in order to take a bus for going to railway station. One auto rickshaw bearing No. DL 1RC 5704 came up to him. One person was sitting alongwith the auto rickshaw driver whereas two persons were sitting on the rear seat of the auto rickshaw. The boys who were sitting on the rear seat invited him to join them in the auto rickshaw. On enquiry, the auto rickshaw driver told him that he

would charge Rs. 10/- for taking him to railway station. The complainant thereupon sat on the rear seat of the auto rickshaw, in between the boys who were sitting there. The driver took the auto rickshaw via Ring Road. When the auto rickshaw reached behind Red Fort, one of the boys sitting on the rear seat, put a knife on his neck, while the other boy put a knife on his stomach. The boy, who was sitting with the driver, pressed his mouth with a muffler and thereupon all of them threatened to kill him, in case he raised alarm and asked him to handover whatever he had with him. They removed Rs. 1500/- from his pocket, besides removing the wrist watch, which he was wearing. They also snatched his briefcase which contained a number of articles, including one blanket, one shawl, one calculator making CITIZEN and one camera making YASHICA and Rs. 700/- cash. The auto rickshaw driver then stopped the auto rickshaw and all of them pushed him out, threatening to kill him in case he made noise. The complainant took the help of a police vehicle and lodged a report, which led to registration of the case.

3. Appellant No. 2 in Crl.A. 236-237/2006, Shri Anil Kumar @ Ajju died during pendency of the appeal and the information regarding his death has been confirmed by the concerned SHO vide his report dated 5th October, 2009.

4. During trial, the complainant came in the witness box as PW-1 and supported the case stated by him in the FIR. He identified the appellant Lal Singh as the person who was sitting with the driver and appellant Rajesh as one of the two persons who were sitting on the rear seat of the auto rickshaw. Anil was identified as the driver of the auto rickshaw. According to him, when the auto rickshaw came behind Red Fort, the appellant Rajesh kept knife on his neck whereas Lal Singh pressed his mouth with a muffler and thereafter those persons asked him to handover whatever he had in possession or else they would kill him. They removed Rs. 1500/- besides his wrist watch and briefcase which contained camera make YASHICA, calculator make CITIZEN and important documents. After going a little ahead, Anil stopped the auto rickshaw and then he was pushed out of the auto rickshaw.

5. PW-5 Constable Raj Pal has stated that on 29th November, 2000, he alongwith Investigating Officer went to ISBT in search of the accused persons. At about 3.00 P.M., they received a secret information that four persons who were wanted in this case, were coming from Gandhi Nagar side in three-wheeler scooter bearing No. 5704. When they stopped the auto rickshaw, its occupants started running, but were apprehended. He identified appellant Rajesh and Lal Singh amongst the person who were apprehended by them and stated that one knife was recovered from Rajesh and one from his co-accused Mohd. Nazim. He further stated that accused Rajesh got recovered one camera from his house whereas Lal Singh got recovered one suitcase. According to him, Anil also got recovered one calculator from the rear seat of the auto rickshaw alongwith a ladies shawl and some cash. Cash was also seized from Lal Singh. The recovered articles were identified by the witness during trial.

6. PW-7 ASI Bhagwan Dass has corroborated the statement of PW-5 as regards apprehension of the appellants and recovery from them. PW-8 SI Satpal has corroborated the deposition of PW-5 Constable Raj Pal regarding arrest of the appellants and recovery of one buttondar knife Ex. P-3 from the appellant Rajesh. PW-10, SI Arvind Pratap Singh, has also corroborated the deposition of PW-5, Constable Raj Pal, and PW-7, ASI Bhagwan Das, as regards apprehension of the appellants and recovery from them. He has also identified the articles which were recovered from the appellants, as also the knife which was recovered from Rajesh.

7. PW-4 Shri Narender Kumar, Metropolitan Magistrate has stated that on 2nd December, 2000, all the accused were produced before him in muffled face. They, however, refused to join Test Identification Parade (TIP) despite a warning to them that an adverse inference may be drawn during trial. The proceedings conducted by him in this regard are Ex.1/B. He has further stated that on 13th December, 2000, he also conducted TIP of the case property and complainant Kaushal Kishore correctly identified camera, calculator, two pants, underwear, woolen cap, towel, two shirts, jarsi, one bed sheet, one pillow cover, two pairs of kurta pajama vide proceedings Ex.PW-4/D.

8. In their statement u/s 313 of Cr.P.C., the appellants denied the allegations against them. They, however, admitted that they had refused to join test-identification-parade. The appellant, Rajesh claimed that he refused to join test identification parade as he did not know the meaning of test identification parade and he did so at the instance of the police. The appellant Lal Singh stated that he was shown to the complainant and witnesses in police station and, therefore, he refused to join test-identification-parade.

9. I see no reason to disbelieve the testimony of the complainant as regards the incident that took place with him and the identity of the persons involved in commission of robbery. He had no enmity or ill-will against the appellants and, therefore, had no reason to implicate them in a false case of robbery.

10. Though the appellant Lal Singh claims that he was shown to the complainant and the witnesses at the police station, there is no material on record to substantiate the plea taken by him. In fact during cross-examination of complainant, Kamal Kishore, no suggestion was given to him that the appellant Lal Singh was shown to him in the police station. The complainant specifically stated that he had not seen the accused persons prior to giving the statement to the police and even before coming to the court. Thus, the appellant Lal Singh had no justified reason to refuse to join the test identification parade. The reason given by the appellant Rajesh to the Trial Court for refusing to join test-identification-parade is just meaningless. A perusal of the proceedings conducted by PW-4, Sh. Narender Kumar, Metropolitan Magistrate shows that a specific warning was given to him that an adverse inference may be drawn against him on account of his refusal to join it. Despite the warning he persisted in refusing to join the test-identification-parade. There is no material on record which may

give rise to the inference that the appellant had refused to join T.I.P. at the instance of some police officer. The reason given by the appellants to the learned Metropolitan Magistrate for refusing to join T.I.P. was that the police was in possession of their photographs. There is no material on record to show that the photographs of the appellants were taken by the police before they were produced in the court on 2nd December, 2000, when they refused to join test-identification-parade. In any case, even if the police had photographs of the appellants in its custody that has no consequence unless the photographs were shown to the witness, before the appellants refused to join T.I.P. This is not the case of the appellants that their photographs were shown to the complainant prior to 2nd December, 2000. No such suggestion was given to the complainant, when he came in the witness box.

11. Since the appellants refused to join T.I.P. without any justified reason, an adverse inference can be drawn against them that had they participated in the test-identification- parade, they would have been identified by the complainant. If the accused of his own volition declines to join T.I.P. without reasonable cause, he does so at his own risk and cannot be heard to say that in the absence of T.I.P., his identification was not proper. Similar view was taken in *Suraj Pal and Others Vs. State of Haryana*,

12. The testimony of the complainant as regards identity of the appellants also finds corroboration from recovery of the stolen articles from them. The deposition of the police officials shows that one camera was recovered from the almirah of the house of the appellant Rajesh whereas one suitcase was recovered from the house of the appellant Lal Singh. The suit-case contained a number of articles including some clothes and bed-sheet. PW-1 Kamal Kishore has duly identified the camera as well as the clothes which were recovered from the appellants. He identified these articles firstly during judicial T.I.P. and thereafter during trial. The appellants do not claim any of these articles. Therefore, there is no reason to disbelieve the testimony of the complainant as regards ownership of the articles which were recovered from the possession of the appellants. In fact articles such as wearing apparel can be identified by a person merely by having a look at them as he has been wearing those articles from time to time. A particular article may be identified by frequent use which leads to recognition of the article. In the present case, not only have the articles been identified during trial, they were also identified during Test- Identification-Parade conducted by the learned M.M. Since the appellants were found in possession of stolen articles soon after the theft, and they have not come forward with any explanation for these articles being in their possession, it can be presumed, as provided in Section 114(a) of Evidence Act that either they had committed theft of these articles or they had received or retained the same knowing the same to be stolen property. Since this is not the case of the appellants that they had received these stolen articles from some other person, the appropriate presumption should be that they had committed theft of these articles from the possession of the complainant.

13. The testimony of the complainant shows that the appellant Rajesh kept a knife on his neck and then he was asked to hand over whatever he was carrying with him. A knife was, thus, used in commission of the robbery. Even if a person simply carries a weapon with him and that weapon is seen by the victim at the time of the commission of the robbery that amounts to use of weapon in commission of robbery. Here, the weapon has been actually used for threatening the complainant.

14. In *Shri Phool Kumar Vs. Delhi Administration*, the accused was carrying a knife in his hand at the time the robbery was committed. It was found from the deposition of PW-16 that the appellant/accused Phool Kumar had a knife in his hand. The Hon'ble Supreme Court held that he was therefore carrying a deadly weapon. In *Salim Vs. State (Delhi Administration)*, the Hon'ble High Court of Delhi held that to categorise knife or to fix its size for it to be a deadly weapon may not be appropriate. It was held that to say that a knife to be a deadly weapon should be of a particular size would not be a correct statement. In *State of Maharashtra v. Vinayak* 1997 Cri.L.J. 3988 Bombay High Court held that knife is a deadly weapon within the ambit of expression deadly weapon used in Section 397 of IPC. Therefore, irrespective of the size, any knife is a deadly weapon and therefore, accused Rajesh is liable to be punished u/s 392 of IPC read with Section 397 thereof.

15. However, as far as the appellant Lal Singh is concerned, admittedly neither he was carrying any weapon nor did he use the weapon in commission of the offence. Therefore Section 397 of IPC does not apply in his case. The testimony of the complainant, however, shows that the appellant Lal Singh who was sitting on the front seat alongwith the driver had pressed his mouth with a muffler and thereafter all of them including Lal Singh had asked the complainant to hand over whatever he had with him and then removed cash and other articles which the complainant was carrying with him in the auto-rickshaw. Therefore, it is evident that the appellant Lal Singh is guilty of commission of robbery, which is punishable u/s 392 of Indian Penal Code. It would be pertinent to note here that Section 397 of the Indian Penal Code by itself does not create any offence. It only makes the robbery punishable with imprisonment for a term which shall not be less than seven years in case a deadly weapon is used or grievous hurt is caused or an attempt to cause death or grievous hurt is made. The substantive offence for which Section 397 provides minimum punishment is robbery or dacoity, as the case may be. Therefore, it is not necessary to award sentence of minimum 7 years to the appellant Lal Singh.

16. As regards conviction of the appellant Rajesh u/s 25 of Arms Act, no arguments were advanced on his behalf. In any case, the deposition of PW-5 Ct. Raj Pal, PW-8 SI Satpal and PW-10 SI Arvind Pratap Singh shows that he was found in possession of a buttondar knife at a public place. He has therefore been rightly convicted u/s 25 of the Arms Act.

17. For the reasons given in the preceding paragraphs, while maintaining

conviction of the appellant Rajesh u/s 392 of IPC r/w Section 397 thereof, the conviction of the appellant Lal Singh is upheld only u/s 392 of IPC without application of Section 397 thereof. The conviction of the appellant Rajesh u/s 25 of Arms Act, which otherwise was not assailed during arguments is also maintained. The sentence awarded to the appellant Rajesh does not call for any interference and is accordingly maintained. The sentence awarded to the appellant Lal Singh is, however, reduced to rigorous imprisonment for 3 years and fine of Rs. 1000/-. In default of payment of fine, he shall undergo SI for three months. One copy of this judgment be sent to trial court and one copy be sent to Jail Superintendent for information of the appellants and for record.