
(2009) 10 DEL CK 0220

In the Delhi High Court

Case No : Criminal Appeal No. 520 of 2007

Md. Shamshad

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 13-10-2009

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 120B, 392, 397, 398

Citation : (2009) 10 DEL CK 0220

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Ritu Gauba, for the Appellant; Navin Sharma, APP, for the Respondent

Final Decision : Disposed Off

Judgement

Mool Chand Garg, J.

Crl.M.A.9749/2007 (for delay)

For the reasons stated in the application, the delay is condoned.

Application stands disposed of.

Crl.App.No.520/2007

1. This is an appeal filed by the appellant, Shamshad, who was arrested at the spot after he tried to rob the complainant, namely, Shri Rajneesh Bhayana at 85/8 East Moti Bagh, Sarai Rohilla, Delhi on 27.04.05 where he used to run the business of junk dealer. According to the complainant, the appellant along with one Anzar Ahmed had come to the place of incident armed with a revolver while Anzar Ahmed was armed with country made pistol. Both of them wanted to rob the complainant but on his raising alarm, the employees of the complainant came to his help who were called by the complainant at the spot. The appellant

and his co-accused were not successful as they were apprehended at the spot and were handed over to the Police. Statement was also made by the complainant to the Police dated 27.04.05 which is Ex. PW3/A wherein he stated as under:

Bayan kiya ki mein pata uprokt par rehta hoon aur sarai rohilla east moti Nagh 85/8 mein meri kabadi ki dukan hein. Aaj dinank 27.4.2005 ko samay kareeb 12.15 baje din mein apni dukan mein gaddi par maujood thaa, esi dauran ek ladka jiska naam pata baad daryakat aab Mod. Shamshad s/o Mohd. Tahir R/o E-194 JJ Colony vajirpur delhi maloom huan, dukan ke andar aaya aur isne ek lohe ka tukda (serap) dikhaya aur iska rate poochan, etne me mein esko rate batlata, isi dauran isne apni kameej ke neeche se ek desi katta nikala aur mere sir par laga diya aur isi dauran teen ladke aur dukan me aa ghuse. Unke paas bhi kattee veh chaku thee. Mohd. Shamshad ne kahan ki jo kuch hein nikal de agar short machaya to goli maar deinge. Jo unme se ek chootee ladke ne jiska naam pata baad daryakat Anjar Ahmed s/o khaleem R/o Jhuggi JJ Colony Vajirpur Delhi maloom huan ke paas bhi desi katta thaa ne sath rakhi tijori se rupye nikale veh ek ladke ne ek kapde ka thaila mehroom rang jisme keemti kagjaat veh mohar aadee thee, utha liya thaa. Himaat karke meine ek dam shor macha diya jo shor sun kar meri labour ke aadmi jo andar khana khaa rahen thee, meri madad ke liye aaye. Mohd. Shamshad Hajira ko meine kattee sahit kaboo kiya beh Anjar Ahmed ko mere naukar Ram Gopal @ Tadar ne kaboo kiya thaa lekin dusrein do aadmi jinme se ek ki umar 30-35 saal thi veh doosra darmiyane jism ka thaa veh dono dukan ke bahar khadi maruti vain No. DNC 3456 mein baithkar bhaag gaye. Shor sun kar aas paas ke dukandar bhi vahan par aag mein kaboo karte samay enko thoodi chootein bhi aayee hein. Usei samay meine 100 number ko phone kiya thaa jo aap may staff meri dukan par aaye aur meine Mohd. Shamshad Hajira jisse desi katta baramad huan tha veh Anjar Hajira jiske pass se 1200/- rupye jisne meri tijori se nikale thee veh ek desi katta baramad huan thaa yeh sab aapke havale kiya. Aapne mera bayan likha jo theek hein.

2. The Police after registering an FIR on the basis of the complaint Ex. PW3/A completed the investigation and filed a challan u/s 392/397 IPC read with Section 25, 54 and 59 of the Arms Act. The said challan was committed to the Sessions Court as S.C. No. 143/05 by the Metropolitan Magistrate concerned. The Sessions Judge framed charges u/s 392, 397 IPC r/w Section 27 of the Arms Act to which the appellant pleaded not guilty.

3. The prosecution to prove its case has examined 12 witnesses namely, PW1 ASI Pradeep Verma - finger print proficient, PW2 H.C. Rajinder Prasad, PW3 Rajneesh Bhayana-complainant, PW4 Ram Gopal - employee of PW3, PW5 Khushwant Kaur - ASI, PW6 Ct. Joginder, PW7 Anglab Ahmed - owner of maruti van bearing No. DNC 3456, PW8 Mohd. Zahid - initial owner of maruti, PW9 SI Risal Singh - who went to spot and apprehended the accused persons, received copy of FIR & rukka from PW6, PW10 K.C. Varshney - Sr. Scientific officer (Ballastic) who gave the FSL report regarding the fire arms seized which is

Ex.PW9/1, PW11 Captain Rakesh Bakshi - Nodal officer, Bharti Televentures Ltd., PW12 Mr. Kuldeep Singh - LDC Shiekh Sarai, Transport Deptt who has brought the entire record of Maruti Van No. DNC 3456.

4. The complainant appeared as PW3 before the Ld. ASJ and has reiterated his statement made to the Police in his deposition by stating:

I am running a shop at 85/A, East Moti Bagh, sarai Rohilla, Delhi. On 27.04.2005, at about 12.15/12.30 PM I was present at my shop, five persons entered inside my office, two were having fire arms and two were having knives, one of them showed me one piece of iron and asked about the rate. That person immediately thereafter took out a firearm from his dub of the pant and kept the same on my temple. At that time three more persons were inside my shop also took out their weapons and one person was standing outside my office. The person who placed the firearm on my temple threatened me to hand over whatever cash amount, kept in the shop as well as with me and also the gold which was wearing at that time. He asked not to raise an alarm. Out of fear I handed over the key of the locker in my shop to that person. He opened the locker and took out the money along with one or two other documents with rubber stamps kept there. I raised alarm. My labour was sitting at the backside of my shop. When my labour tried to open the door of my office it was found bolted from inside. All these accused persons then thereafter tried to flee form the shop after opening the door of the office. I meanwhile overpowered one of the persons who had put the firearm upon me. The witness identified accused Shamshad, who is present in the court, as the accused who had put firearm upon him and was apprehended by him. My labour Ram Gopal had apprehended accused Anjad, who is present in the court and identified by pointing out. The other three accused managed to flee in a red maruti van No. DNC 3456. I rang up the police. The police reached thereafter about half an hour. One firearm was recovered from accused Shamshad by the police. My statement was recorded. Same is Ex.PW3/A. The firearm recovered from accused Shamshad was taken into possession. It was opened and examined. It was loaded with one bullet inside. The sketch of the firearm and bullet was prepared. Same is Ex.PW3/B. It was seized vide memo Ex.PW3/C after making a pullenda with a seal. One firearm was also recovered from accused Anjar Ahmed. It was having one bullet inside it. The sketch of firearm and bullet was prepared. Same is Ex.PW3/D. A sum of Rs. 1200/- of my shop of the denomination of Rs. 100/- was recovered from accused Anjar Ahmed. The firearm, bullet and the currency notes were packed in a pullenda which was duly sealed and was seized by memo Ex.PW3/E. The Crime Team was also called at my shop and some chance prints were lifted. The maruti van was recovered from the Inderlok area after one hour same day. The police had lifted the chance prints from this maruti van. Accused Shamshad and Anjar Ahmed were arrested vide memo Ex.PW3/F and G. Their personal search was conducted vide memo Ex.PW3/H and I.

At this stage two sealed parcels bearing seal of FSL are opened. Firearm is

Ex.P-1 and P-2, cartridges P-3 and P-4 are the same which was recovered from the accused. 12 currency notes of the denomination of Rs. 100/- are Ex.P-5/a to Ex.P-5/12. I do not recognize the third accused Askeen as he was not the person entered in my shop.

5. It is interesting to note that while in the statement made by the appellant u/s 313 Cr.P.C. he has taken a defence that he has been falsely implicated in this case because there was some dispute regarding immediate payment of dues to the complainant by the appellant and one Anzar Ahmed. He has not given suggestions in the cross-examination or has not led any defence evidence to substantiate his plea. No record has been placed as to whether any dues were payable to the complainant by them or there was any previous transaction where he might have dealt with the complainant for the sale of scrap or otherwise on account of which he was indebted to the complainant. Even the amount was also not disclosed. The revolver & katta has been seized from the spot by the prosecution of which a sketch has also been prepared which is Ex.PW3/D and shows that it was a desi katta though as per the FSL it has not been found to be in working order.

6. The Trial Judge taking into consideration the evidence which came on record convicted the appellant & Anzar Ahmed u/s 392, 397 IPC r/w Section 27 of Arms Act and has sentenced both of them to undergo R.I. for 7 years.

7. It will be also of assistance to take note of the cross-examination conducted on Rajneesh Bhayana, the complainant, which is as under:

It is incorrect to suggest that no such incident had taken place. It is incorrect to suggest that the two accused apprehended at the spot had ever come to my shop to sell their material. It is incorrect to suggest that I use to issue the slips for payment of the junk material and I use to make the payment after one week. It is incorrect to suggest that any amount was due to any of the accused from me. It is incorrect to suggest that the two accused apprehended at the spot were asking me to settle the account which I refused and had torn their slips. It is wrong to suggest that in connivance with the police I have falsely implicated the two accused in this case. It is incorrect to suggest that IO after thoroughly in connivance with me has falsely implicated the accused in this case.

8. A perusal of the cross-examination goes to show that the story of the appellant in his grounds of appeal that he was to receive a sum of Rs. 16,000/- or that a slip of that amount has been received by him from Rajneesh Bhayana has not been even put to the witness. It is also not suggested that the said slip after tearing was thrown outside the shop as is sought to be urged in the grounds of appeal. No evidence which may go to show that PW3 was in the habit of issuing similar slip to other persons from whom he used to purchase the scrap as pleaded in the grounds of appeal has even been suggested to the witness. The other suggestion given by the appellant to the aforesaid witness has been denied by him.

9. As regards the other grounds raised by the appellant they have been dealt with by the Ld. ASJ in the impugned judgment, which reads as under:

11. The evidence of the complainant and his employee Ram Gopal is direct and convincing. Complainant could have been a victim of the incident which however was failed by his courage. There is no reason to believe the defence as put forward in their statement by the two accused Shamshad and Anzar Ahmed. Nothing has been brought to show of their working as rag pickers and their having dealings with complainant except a verbal plea.

12. On the other hand their arrest is from the spot at the time of incident itself with loaded firearm and thereafter there is registration of FIR by PW2 HC Rajinder Parsad proved by Ex.PW2/A within two hours of the incident containing all details of the occurrence as reported in the complaint Ex.PW3/A.

17. However, none of the contention of the defence is to be accepted as being without merits. The recovery of mobile phone from accused Shamshad has been shown in his personal search memo Ex.PW3/II conducted by the IO and silence of the same in complaint would not make it doubtful. This recovery as per PW9 SI Risal Singh was made from accused and even if there is no evidence of ownership of this mobile connection it would hardly effect the veracity of the statement of the IO on this point. The IO has collected the call detailed record of mobile phone of accused Shamshad which has been proved as Ex.PW9/G. He has also collected the call detail records of mobile phone number 9810253414 which according to PW11 Captain Rakesh Bakshi Nodal Officer Bharti Televenture Ltd. was issued in the name of Mohd. Ashkeen at the address of A15/115A, DDA Flat, Four storey, Inderlok and call detailed records of this mobile telephone number has been proved as Ex.PW9/G. The study of the call records of the two mobile telephone shows that 5 telephone calls were made on telephone number 9810253414 on 26.04.2005 from telephone No. 9811796629 and 3 telephone calls were made on the same number on the date of incident on 27.04.2005. This evidence accordingly coupled with the fact that maruti van was of accused Ashkeen shows the involvement on his part by playing a shadow role. His denial is not to be accepted. The challan delivery of maruti van was executed by accused Ashkeen and proved as Ex.PW7/A as pointed out by the APP is of a date 24.03.2004 which is prior to the date of incident and same mobile phone of accused Ashkeen has been mentioned on that. Accordingly plea of showing no connection between accused Ashkeen and mobile connection is worthless and is to be rejected.

18. Counsel's feeble attempt to negativate the involvement of accused Ashkeen by placing reliance on the statement of complainant that he was not at the spot is of no benefit to his defence. This is not even the police case that accused Ashkeen was seen by anyone at the spot. Against him the case of the prosecution is based on the material that his maruti van was used of which he was the owner and was in possession and he was in active conversation on his mobile phone with accused Shamshad on the date of incident and a day before.

19. The prosecution evidence is convincing and is documents based coming from independent source leaving no room for doubt. The prosecution evidence as is held has proved beyond doubt the charge u/s 120B IPC against all the three accused and accused Anzar Ahmed and Shamshad are also held guilty for the charge u/s 392 read with Section 397 IPC and also for the offence u/s 27 Arms Act for using the fire arms in the course of committing robbery. They are convicted accordingly for the same. Dictated and announced in the open court on 26.02.2007.

10. It has been submitted by learned APP that since the appellant was arrested from the spot and has been identified by the complainant and was also found in possession of a desi katta despite evidence of FSL that the same was not in working order, the substantive offence of attempting to rob upon the complainant with the help of a deadly weapon stands proved by the prosecution and, therefore, Trial Judge was right in convicting the appellant for the offence u/s 392, 397 IPC r/w Section 27 of Arms Act and has rightly sentenced both of them to undergo R.I. for 7 years each for the offence u/s 397 IPC and also to pay a fine of Rs. 5,000/- each and in default of payment of fine to further undergo S.I. for 3 months.

11. Taking all these facts into consideration and having perused the record, I am of the considered view that the submission made by learned Counsel for the appellant does not inspire any confidence. There is no infirmity in the approach of Learned ASJ while convicting the appellant.

12. The appellant has also questioned the quantum of sentence awarded to him by submitting that the katta as per the FSL was not found in a working order and therefore, it was not a case where the use of deadly weapon can be attached to the role of the appellant in this case. It is stated that even if the case of the prosecution is taken at the highest the sentence awarded to the appellant of minimum RI for 7 years u/s 397 IPC is not justified.

13. However, the arguments addressed on behalf of the appellant that the katta was not in a working order & could not have been used is of no consequence because the sketch of the weapon shows that it looks like a desi katta and moreover it has come in the evidence that the same was taken out from the shirt by the appellant and was shown to the complainant at the time of attempting to commit robbery.

14. Reference can be made to a judgment delivered by Apex Court in the case of Phool Kumar v. Delhi Administration 1975 Cri.L.J. 778 (1) where the word "used" has been considered and defined. The relevant portion of the judgment delivered in that case by the Apex Court is as under:

4. The last submission on behalf of the appellant was that sentencing him to undergo rigorous imprisonment for 7 years u/s 397 of the Penal Code was illegal and he ought to have been convicted u/s 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 and Haryana in the case of State Vs. Chand Singh Mit Singh and Another, 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 u/s 392 cannot be less than 7 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 some body 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 P.W. 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.

6. Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years under S.398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment u/s 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz., "uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the

offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery.

15. Reference can also be made to a judgment delivered in the case of Jai Parkash Vs. The State, where it was held:

21. Therefore, it stands established beyond all reasonable doubt that the appellant had committed offence of robbery punishable u/s 392. I.P.C. and as such he had been rightly convicted. However, it is to be seen if he is liable to minimum punishment of 7 years as provided u/s 397 I.P.C. Before I proceed to determine that question I may make it clear that Section 397 I.P.C. does not make any act an offence. It only provides minimum punishment for some offences under certain circumstances i.e. when deadly weapon is used or grievous hurt is caused or attempt to cause death or grievous hurt is made. The learned Additional Sessions Judge was under a wrong impression that Section 397 independently makes any act an offence. Substantive offences for which Section 397 provides minimum punishment are robbery and dacoity when deadly weapon is used or grievous hurt is caused etc. Therefore there was no necessity of framing of two charges one punishable u/s 392 I.P.C. and the other punishable u/s 397 IPC. Charge should have been in respect of offences punishable u/s 392 read with Ss.397 and 34, I.P.C.

23. The word "uses" was interpreted by Supreme Court in Shri Phool Kumar Vs. Delhi Administration, It is laid down that it is not necessary that deadly weapon must be actually used by the culprit in the robbery or dacoity by way of causing hurt or brandishing the same and that it is "used" within the meaning of Section 397 if the deadly weapon is merely held out for terrorising or frightening a victim to obtain property. In the present case threatening by the appellant with a pistol was sufficient to constitute use of the same.

16. However, as held by the Apex Court in the case of Phool Kumari v. Delhi Administration (Supra), the minimum punishment can be attracted only where the commission of robbery was successful by user of a deadly weapon. Thus, in a case where robbery could not be committed or the attempt to commit robbery failed, then the offender may not attract the minimum sentence.

17. In view of the aforesaid, since in the present case also the attempt to commit robbery was foiled by the employees of the complainant by apprehending the appellant and his associates despite the fact that he was in possession of a katta which also was not in a usable condition as per the report of FSL, it cannot be said that the petitioner is liable to attract the minimum sentence i.e. RI for 7 years.

18. In the aforesaid circumstances, taking all the facts into consideration including the involvement of the appellant in other cases, the sentence awarded

to the appellant u/s 392/397 IPC is reduced to RI for 5 years while maintaining sentence of fine of Rs. 8000/- and in default of payment of fine, the sentence would only be SI for three months. The sentence awarded on other counts is maintained.

19. Appeal stands disposed of. The fees of amicus curiae is fixed as Rs. 5000/-. TCR, if any, be sent back along with a copy of this order. A copy of this order be also sent to the appellant through Jail Superintendent.