

(2010) 07 DEL CK 0346

In the Delhi High Court

Case No : Criminal Appeal No. 632 of 2008

Santosh Kumar Dubey

APPELLANT

Vs

Govt. of NCT of Delhi

RESPONDENT

Date of Decision : 13-07-2010

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 9
Penal Code, 1860 (IPC) — Section 34, 392, 394, 397, 411

Citation : (2010) 07 DEL CK 0346

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : P.R. Aggarwal and Arun Srivastava, for the Appellant; Manoj Ohri, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Pathak, J.—Appellant has been convicted under Sections 392/394/397 IPC by the learned trial court and sentenced to face rigorous imprisonment for seven years and fine of Rs. 1,000/- and in default of payment of fine to undergo rigorous imprisonment for one month u/s 392 IPC; to undergo rigorous imprisonment for seven years and to pay fine of Rs. 1,000/- and in default of payment of fine to undergo rigorous imprisonment for one month u/s 394 IPC; to undergo rigorous imprisonment for seven years and fine of Rs. 1,000/- and in default thereof to undergo rigorous imprisonment for one month u/s 397 IPC. All the sentences have been directed to run concurrently.

2. Appellant has been acquitted of the charge u/s 411 IPC. At the time of his arrest, one country made pistol (desi katta) was recovered from the Appellant and a separate FIR No. 491/2002 u/s 25 Arms Act was also registered against him. This case was also tried with the main case arising out of FIR No. 486/2002 under Sections 392/394/397/411 IPC. However, Appellant has been acquitted in the said case arising out of FIR No. 491/2002 IPC.

3. Aggrieved by his conviction and sentence under Sections 392/394/397 IPC Appellant has preferred this appeal.

4. In brief, prosecution case is that on 29th July, 2002 PW2 Ram Kumar and PW3 Lal Bahadur were sleeping in the factory situated at plot No. A-117, WPIA Ashok Vihar, Delhi where they were working as Supervisor and Peon respectively. On hearing some noise they woke up at about 1:00 am and found Appellant along with accused Subodh (remained Proclaimed Offender during the trial) and Sunil (juvenile) inside the factory. Appellant was armed with a desi katta while Subodh and Sunil were carrying iron rods. Appellant threatened to open fire in case Ram Kumar and Lal Bahadur did not hand over the articles which they were having in their possession. Ram Kumar and Lal Bahadur raised alarm at which Appellant instigated his other two accomplices to give beatings to them. Subodh and Sunil on such instigation gave beatings to Ram Kumar and Lal Bahadur with iron rods. In the meanwhile Appellant snatched wrist watch and Rs. 500/- from Ram Kumar. Thereafter, Appellant and other accused ran away. Someone informed the owner of the factory, Dinesh (PW-9) who came there and removed Ram Kumar and Lal Bahadur firstly to a private nursing home and from there to ESI Hospital.

5. An information was received in the Police Station Ashok Vihar from the ESI Hospital, Basai Darapur regarding the hospitalization of Ram Kumar and Lal Bahadur which was recorded as DD No. 31 and handed over to Sub Inspector Sheesh Pal for inquiry who along with Head Constable Joginder went to ESI Hospital, Basai Darapur and obtained their MLCs. After Ram Kumar was declared fit for making statement, his statement was recorded, on the basis whereof FIR No. 486/2002 under Sections 392/394/397 IPC was registered. Since the Appellant and his co-accused were addressing each other by their respective names while committing the robbery, their names were mentioned by Ram Kumar in his statement recorded by the Police. Ram Kumar also stated that he could identify the accused persons if brought before him.

6. Appellant was arrested on 30th July, 2002 at about 9:00 am. along with Sunil. At the time of his arrest a desi katta was recovered from him along with one live cartridge which was seized by the Police. Co-accused Subodh was also arrested on 30th July, 2002 and from him robbed wrist watch was recovered. Appellant was put to Test Identification Parade (TIP) by PW2 Ram Kumar but he declined to participate therein on the ground that he was already shown to the witnesses. After completion of investigation Appellant along with the co-accused was sent up to face trial.

7. Charges under Sections 392/394/411/34 IPC were framed against the Appellant to which he pleaded not guilty and claimed trial. Prosecution examined sixteen witnesses to substantiate its case. Ram Kumar and Lal Bahadur were examined as PW2 and PW3. They have supported the prosecution version and identified Appellant in the court. Rest of the witnesses were Police officials, Metropolitan Magistrate and doctor. PW4 is Metropolitan Magistrate, who conducted the judicial TIP of Appellant on 1st August, 2002. She has proved the

TIP proceedings vide exhibits PW4/A, PW4/B, and PW4/D. She has deposed that Appellant had shown his unwillingness to join the TIP despite her warning that refusal to join TIP may go against him in the trial as adverse inference might be drawn against him. PW11 Dr. R.K. Sharma has proved the MLCs of Ram Kumar and Lal Bahadur as PW11/A and PW11/B respectively which shows that these persons had sustained multiple injuries on their person on the fateful day.

8. Statement of the Appellant u/s 313 Cr.P.C. was recorded in which entire incriminating material, which had come on record, was put to him. Appellant denied his participation in the crime. He claimed himself to be innocent. He stated that on 28th July, 2002 he was picked up by the Police officials from his residence and later on falsely implicated in this case. He examined one Ajay Kumar in his defence as DW1 who deposed that on 28th July, 2010 at about 2/3 am some Police officials came to the house of the Appellant i.e. G-76, Harkesh Nagar and took him away with them.

9. Learned trial Judge found the testimony of PW2 and PW3 trustworthy and reliable and sufficient enough to conclude beyond shadow of reasonable doubt that the Appellant along with his accomplices had entered in the factory premises and robbed Ram Kumar of his valuables and while committing robbery used desi katta being a deadly weapon, thus, had committed offence u/s 397 IPC; since Ram Kumar and Lal Bahadur were also given beatings by iron rods at the time of robbery, resulting in injuries to them, Appellant had also committed offence u/s 394 IPC.

10. I have carefully gone through the depositions of PW2 and PW3 and find the same to be trustworthy and reliable. Both the witnesses have corroborated each other on material points and their testimony has remained unshattered in their cross examination. In my view, they are trustworthy and reliable witnesses and have rightly been believed by the learned trial court for holding that it is the Appellant who along with his accomplices had committed the armed robbery. At the time of robbery Appellant was armed with a desi katta which he used for threatening PW2 and PW3. Witnesses were also given beatings by iron rods by the accomplices of the Appellant at his instigation which also resulted in injuries on their person. Appellant has been identified by PW2 Ram Kumar and PW3 Lal Bahadur in the court as the same person who was carrying desi katta in his hand while committing robbery and had threatened them with dire consequences in case they did not hand over the valuables in their possession to the Appellant. Identification of the Appellant in the court is to be accepted as he had refused to participate in the TIP which fact goes against him. Injuries on the person of PW2 and PW3 have been duly proved by the doctor and lend credence to their version. There is no reason as to why these PWs would depose falsely against the Appellant more so when no previous enmity has been proved. In my view, learned trial court has rightly accepted the testimonies of PW2 and PW3 while convicting the Appellant under Sections 392/394/397 IPC.

11. I do not find any force in the contention of the learned Counsel for the

Appellant that the refusal to participate in TIP by the Appellant would not be sufficient to draw an adverse inference against the Appellant since he was shown to the PWs prior to the holding of TIP. I have gone through the cross examination of PW2 and PW3 carefully and find that no such question was put to these witnesses that the Appellant was shown to them in the Police Station by the Investigation Officer. No such defence was set up in the cross examination of these witnesses. PW16 Sub Inspector Sheesh Pal, Investigating Officer of this case, categorically deposed that he directed the accused to remain in muffled face till the holding of TIP. In his cross examination, no question was put to PW16 that the Appellant was not kept in muffled face after his arrest till his TIP was conducted on 1st August, 2002. Moreover endorsement on the application (Ex.PW4/C) made by the Investigation Officer before the Metropolitan Magistrate shows that the accused was produced with muffled face. In his cross examination PW16 has denied the suggestion that before the TIP Appellant had been shown to the witnesses in the police station. Appellant was arrested on 30th July, 2002 and an application for conducting TIP was made on the same day and TIP was conducted on 1st August, 2002. The promptness shown in conducting the TIP also rules out the possibility of Appellant having been shown to the witnesses in the Police Station, inasmuch as, no suggestion was put to the PW2 and PW3 in this regard. No suggestion was put to these witnesses that they had visited the Police Station between 30th July, 2002 to 1st August, 2002 nor was there any evidence on record to show that Appellant was shown to PW2 and PW3 in the Police Station or at any other place prior to holding of TIP. In these circumstances, an adverse inference has to be drawn against the Appellant and his identification in the court by the PW2 and PW3 would be sufficient to fix his identity.

12. It is well settled that substantive evidence of the witness is his evidence in the court. However, if the accused person is not known to the witness concerned then identification of the accused by the witness after his arrest is of a great importance because it furnishes an assurance that investigation is proceeding on right direction in addition to furnishing corroboration of the evidence to be given by the witness later in the court during the trial. The aim of holding TIP, during investigation stage is to test the memory of the witnesses based on first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witnesses of the crime. The necessity of holding identification parade arises only when the accused are not previously known to the witnesses. The identification can only be used as a corroborative piece of evidence of the statement made by the witnesses in the court. u/s 9 of the Evidence Act, the facts, which establishes the identity of the accused persons, are relevant. As a general rule, the substantive evidence of a witness is his statement made in the court. The purpose of holding identification parade is to test the memory of the witnesses which might fail with the lapse of time. By adopting this course justice and fair play can be assured both to the accused as well as to the prosecution.

13. In this case, identification parade was held without any undue delay. However, Appellant declined to participate in the identification parade on the ground that he was shown to the witnesses in the Police Station. This fact he has failed to establish during the trial inasmuch as no such suggestion was even put to the material witnesses i.e. PW2 and PW3 in this regard. In view hereof an adverse inference can safely be drawn against the Appellant. Appellant has been identified in the court by the PW 2 and PW3 and such identification would be sufficient to fix the identity of the Appellant as the culprits within the meaning of Section 9 of the Evidence Act.

14. I also do not find any force in the contention of the learned Counsel that since recovery of Desi Katta from the Appellant has been disbelieved he cannot be convicted u/s 397 IPC. PW2 and PW3 have categorically deposed that Appellant was armed with a Desi Katta at the time of robbery which he used in threatening them to handover the robbed articles. This clearly shows that at the time of committing robbery Appellant used a deadly weapon so as to create a terror in the mind of victim (PW2) and this fact is itself sufficient to attract the provisions of Section 397 IPC. Appellant was arrested the next day and Desi Katta was allegedly recovered from him by the police officials. Merely, because such recovery has failed, by itself would not be sufficient to disbelieve the version of PW2 and PW3 regarding Appellant being in possession of a Desi Katta at the time of commission of offence. Thus this argument of the counsel for the Appellant is rejected.

15. In the light of the above discussions, I do not find any material irregularity, impropriety or any illegality in the impugned judgment. The minimum sentence provided u/s 397 IPC is of seven years which has been awarded by the learned trial court and the same requires no interference. The sentence awarded u/s 392 and 394 IPC also requires no interference keeping in mind the nature of the offence.

16. Appeal is dismissed.