* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Crl. Appeal No. 146/2001**

% Reserved on: November 16, 2010

Decided on: December 06th, 2010

PRITHVI SINGH ..... Appellant

Through: Mr. Jitin Sahni, Advocate

versus

STATE ..... Respondent

Through: Mr. Pawan Bahl, APP

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Not necessary

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MUKTA GUPTA, J.

1. This appeal lays a challenge to the judgment passed by the learned Trial Court convicting the Appellant for offences punishable under Sections 147/148, 353, 186, 333 and 394 IPC read with Section 149 IPC and sentenced to Rigorous imprisonment for one year for offences under Section 147 and 148 IPC, Rigorous Imprisonment for two years for offence under Section 333

IPC including offences under Section 186 and 353 IPC with fine of ₹2,000/- and in default of payment of fine to undergo further simple imprisonment of three months and a similar sentence for offences under Section 394 IPC. Since the sentences are to run concurrently the quantum of the sentence of the Appellant is two years Rigorous Imprisonment and a fine of ₹4,000/- and in default simple imprisonment for six months. As per the nominal roll at the time of suspension of sentence on 9th April, 2001 the Appellant had undergone a sentence of nearly two months.

2. Briefly, the prosecution case is that on 9th February, 1992 at 9 P.M. Head Constable Nain Singh along with Constable Kaptan Singh had gone to Prithvi Singh (the Appellant herein) to enquire into a complaint lodged by one Mukesh as regards his buffaloes taken away by Prithvi Singh, Hanif and Mahesh. When Nain Singh enquired from the complainant the Appellant stated that since Mukesh had not given his money he took away his buffaloes. On Nain Singh telling Prithvi Singh to return the buffaloes of Mukesh Kumar, Prithvi Singh called his brother Bishambar Singh for his help who was armed with a lathi and gave a lathi blow on the head of Nain Singh. Thereafter, Prithvi Singh raised an alarm "chor chor" and Ashok, Hanif, Mahesh and Dharam Pal also reached the spot and started giving brick blows to Nain Singh and Kaptan Singh. The Appellant also brought out one iron rod from

his room and gave several blows with the same on the person of Nain Singh, as a result of which one of his legs got fractured. The Appellant snatched the service revolver of Nain Singh which was tied on his waist. After snatching the service revolver back from Prithvi Singh, Head Constable Nain Singh fired three rounds in the air. Thereafter, Prithvi Singh pushed Nain Singh to the ground and started pressing his neck and Ashok s/o Bishambar Singh and Mahesh snatched his revolver forcibly. Kaptan Singh, who was also an injured, ran away from the spot. Nain Singh because of the injury lost consciousness. On the complaint of Constable Kaptan Singh the FIR was registered. Both Kaptan Singh and Nain Singh were medically examined. The statement of Nain Singh was recorded after he was declared fit by the doctor. After investigation a charge sheet was filed against the Appellant, Hanif, Mahesh, Dharam Pal, Bishambar Singh, Ashok Kumar s/o Leela Dhar and Ashok Kumar @ Kara s/o Bishambar Singh. Constable Kaptan Singh was not examined during trial as he had expired. After recording of the evidence, the other co-accused were acquitted, however, the Appellant was convicted. The Appellant was convicted for the offences and awarded the sentence as stated above.

3. Learned counsel for the Appellant contends that in view of the contradictions in the testimony of the witnesses, no reliance can be placed on

the same. According to the learned counsel, PW1 Constable Brij Pal says that the Appellant was arrested at the spot whereas the other witnesses have stated that the Appellant was arrested on the next day when he was going on his motor cycle. There is a material discrepancy as regards the time of receipt of information in the police station as PW10 and PW11 gave different versions. PW10 deposed that the information was received at 9 P.M. whereas PW11 deposed that it was received at 10.15 p.m. There is also a discrepancy in the place from where the cover of the revolver was recovered as PW10 says that it was recovered from the roof whereas PW11 says that it was recovered from the spot. PW9 has stated that it was Kaptan Singh and Nain Singh who came to the police post whereas PW10 states that only Kaptan Singh came. There is contradiction not only as regards who came to the police post but also where the statement of Kaptan Singh was recorded. Nain Singh did not know the name of the accused persons and he had written the same on his hand when he appeared in the witness box which fact was pointed out during the trial, resulting in the acquittal of the co-accused persons. As the co-accused persons have been acquitted no case of unlawful assembly is proved and thus the Appellant cannot be convicted for the offences punishable under Sections 147/148 read with 149 IPC. The revolver was snatched by Ashok Kumar @ Kara and Mahesh and thus no case for conviction under Section 394 IPC is

made out against the Appellant. No public witness has been associated in the recovery of the revolver and PW4, Mukesh on whose complaint Head Constable Nain Singh alleges to have gone for verification has also turned hostile. Thus in view of these discrepancies conviction of the Appellant cannot be sustained and the Appellant be acquitted of the offences charged.

4. Learned APP on the other hand contends that the incident is of the year 1992 and the testimony of the witnesses was recorded in the year 1999 and thus there are bound to be minor discrepancies in the version of the witnesses because of the passage of time. Though PW4 Mukesh Kumar has turned hostile but he has deposed that there was a dispute between him and the Appellant as the Appellant had taken away his buffaloes. Thus this part of the testimony of this witness can be relied upon. There is no cross examination of the witness on this aspect. It is also contended that PW7 has deposed that the Appellant admitted taking the buffalo of PW4. There is no cross examination of the witnesses on the issue of buffaloes of Mukesh Kumar being taken by Prithvi Singh. The presence of Prithvi Singh is admitted at the spot as is evident from the suggestion given to PW7 that except Prithvi Singh no other accused was present at the spot. It is argued that there is no controversy as regards the time and place of arrest of the Appellant as all the witnesses except PW1 have stated that the Appellant was arrested on the next day on a

scooter near his dairy. In fact PW1 though has stated that Prithvi Singh was arrested at the spot but while stating so in the Court has identified Bishambar as the person who was arrested at the spot. It is thus contended that there is no discrepancy in this regard in the testimony of the witnesses. Name of the appellant was mentioned in the ruqqa itself. As regards application of Section 147/148 IPC read with Section 149 IPC is concerned it is stated that in terms of the definition of Section 146 even one person who has committed an offence in an unlawful assembly is liable to be convicted for the same. As regards offence under Section 394 IPC it is stated that a bare perusal of the statement of PW7 Head Constable Nain Singh shows that before Ashok and Mahesh, the revolver of the Head Constable Nain Singh was snatched by the Appellant which was snatched back by the Head Constable Nain Singh and thereafter he had fired three rounds in the air. Since the Appellant had snatched the revolver from the person of the PW7 Head Constable Nain Singh, the offence falls under Section 394 IPC. The injury to Head Constable Nain Singh is established by the testimony of PW7 who is the injured himself and PW3, PW5 and the two doctors who have proved the injury on the Right leg to be fracture of one third of shaft of fibula. Thus, the injury on Nain Singh has been proved to be grievous. It is prayed that the appeal is devoid of merit and be, therefore, dismissed.

5. I have heard learned counsel for the parties and perused the record. From the testimony of PW7 Head Constable Nain Singh the sequence of events is apparent and there is no contradiction between his testimony and that of the other witnesses, much less any material contradiction. PW7 has stated that when he went to the place of Prithvi Singh and asked him to return the buffalo to Mukesh Kumar, Prithvi Singh called his brother Bishambar for help who was armed with lathi and gave lathi blow on his person and hit him on his head. Thereafter, on Prithivi Singh raising an alarm, Ashok, Hanif, Mahesh and Dharam Pal reached the spot and started giving brick blows to Nain Singh and Kaptan Singh. Prithvi Singh brought one iron rod from his room and gave a number of blows to Nain Singh one of which caused fracture of his leg. This version of the Appellant is corroborated by the MLC which shows two contused lacerated wounds on the left parieto occipital region of and fracture on the leg region of PW7. PW3 and PW5 have opined the injury on the leg to be grievous in nature. I do not find any discrepancy as regards the place and time of arrest of the Appellant as all the witnesses except PW1 have stated that he was arrested on the next day near his dairy on a scooter. The contradictions sought to be brought in view of the testimony of PW1 is also incorrect as PW1 though stated Prithvi Singh, but identified Bishambar as the person arrested on the spot. Thus according to

PW1 it was Bishambar and not Prithvi Singh who was arrested on the spot. The discrepancy as to the time when the information was received at the police station i.e., 9.50 P.M. or 10.50 P.M, in my opinion, a minor contradiction, in no way discrediting the credibility of the witnesses. As the witnesses were examined after seven years of the incident, such minor variations are bound to occur. The Hon'ble Supreme Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujrat (1983) 3 SCC 217* held:

> "Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

6. Thus the testimony of PW7 Nain Singh, the injured, that when he had gone to inquire into the complaint of Mukesh, Prithvi Singh gave him blows with an iron rod as a result of which his leg got fractured duly corroborated by the medical evidence in the form of MLC Exhibit PW3/A wherein the doctor opined the injury to be grievous in nature based on the radiological opinion of PW5 Dr. S.C. Bhalla who examined the x-ray of the injured, proves the commission of offences under Sections 186, 353 and 333 IPC by the Appellant.

7. I am not in agreement with one finding of the learned Trial Court that the offence under Section 394 IPC has been proved as the grievous injury was

caused to the injured by the Appellant while snatching the service revolver. PW7 in his testimony has stated that the Appellant gave several blows by an iron rod resulting in a fracture of his leg. It is further stated that Prithvi Singh attempted to snatch the revolver which he snatched back from him and then fired three rounds in the air. Thus, the Appellant has not inflicted the grievous hurt while committing the offence of robbery i.e. snatching of the revolver. Section 394 IPC is attracted where the injury is caused to the complainant or the other witnesses when the assault is made upon them with the primary object of enabling the accused to commit robbery. When the assault or injury has no relation whatsoever to the commission of the offence of robbery though the robbery is committed at the same time or immediately thereafter the accused cannot be held guilty for offences under Section 394 IPC. At this stage it would be relevant to reproduce Section 394 IPC.

> "394. Voluntarily causing hurt in committing robbery.-- If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

The present is a case where grievous hurt has been caused by the iron rod independent of snatching of the revolver and thus the offence committed by the Appellant is punishable under Section 392 IPC and not Section 394

IPC. An offence punishable under Section 392 is a minor offence of one punishable under Section 394 IPC. Hence the conviction of the Appellant is converted to one for an offence under Section 392 IPC.

8. The next issue which arises in the present appeal is whether an offence punishable under Section 147 and 148 read with 149 IPC is made out against the Appellant when no other accused has been convicted i.e. whether a single person can be convicted of an offence of unlawful assembly. It would be appropriate to reproduce Sections 146, 147, 148 and 149 of the IPC:

> "Section 146 rioting – Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.
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> 147. Punishment for rioting – Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
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> 148. Rioting, armed with deadly weapon – Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
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> 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object – If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as

> the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

The Hon'ble Supreme Court in *Amar Singh & Ors v. State of Punjab, (1987) 1 SCC 679* held:

> 9. In our opinion, there is much force in the contention. As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, as required under Section 141 IPC. In our opinion, the convictions of the appellants under Sections 148 and 149 IPC cannot be sustained.

One person alone cannot form an unlawful assembly within the meaning of Section 141 IPC which is one of the essential ingredients for offences under Section 147/148 read with Section 149 IPC. Thus, the conviction of the Appellant under Sections 147, 148 read with Section 149 IPC cannot be sustained.

9. The issue which now arises for consideration is whether in the absence of aid of Section 149 IPC the Appellant can be convicted for the substantive offences in a case where the Appellant is charged for the substantive offence

read with Section 149 IPC. The Hon'ble Supreme Court in *Nallabothu Venkaiah v. State of Andhra Pradesh, JT 2002 (6) SC 213* held that the conviction under Section 302 simplicitor without the aid of Section 149 is permissible if overt act is attributed to the accused resulting in fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence. Thus, if the evidence on record proves the commission of substantive offence by an accused he can be convicted for the same even though he is charged for the substantive offence read with Section 149 IPC. The evidence on record in the present case proves beyond reasonable doubt that overt acts for substantive offences under Sections 186, 333, 353 and 392 IPC have been committed by the Appellant.

10. Thus, the appellant is guilty for offences punishable under Sections 186, 333 and 353 and also for offences punishable under Section 392. The commission of offence under Section 147, 148 read with Section 149 IPC, has not been proved. The learned Trial Court has awarded a sentence of Rigorous imprisonment of two years with a fine of ₹2,000/- and in default of payment of the fine to undergo further simple imprisonment for three months for offences under Section 333 IPC including offences under Sections 187 and 353 IPC . I do not find any reason to modify this sentence. The learned Trial

Court had awarded a similar sentence for offence under Section 394 IPC r/w 149 IPC. However, this Court instead of convicting the Appellant under Section 394 IPC r/w 149 IPC has converted the same to one under Section 392 IPC simplicitor. An offence under Section 392 IPC is punishable for Rigorous Imprisonment for a term which may extend to ten years and fine. In view of the fact that the incident is 18 years old, it would be appropriate if the Appellant is directed to undergo Rigorous Imprisonment for one year with a fine of ₹2,000/- and in default of payment of fine to undergo further Simple Imprisonment for three months for offence punishable under Section 392 IPC. All the sentences will run concurrently.

11. The Appeal is partly allowed. The Appellant is on bail. He be taken into custody to undergo the remaining sentence. The bail bond and surety bond be discharged.

(MUKTA GUPTA)
JUDGE

DECEMBER 06, 2010
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