

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INDIAN PENAL CODE

Judgment reserved on : November 03, 2008

Judgment delivered on : November 05, 2008

(1) CrI. A. No.246/2006

Qurban Ali ...

Through: Appellant
Ms Ritu Gauba, Advocate

versus

State ...

Through: Respondent
Mr. Amit Sharma, Additional Public
Prosecutor for State

AND

(2) CrI. A. No.1038/2006

Islam ...

Through: Appellant
Ms. Rakhi Nigam, Advocate

versus

State ...

Through: Respondent
Mr. Amit Sharma, Additional Public
Prosecutor for State

SUNIL GAUR, J.

1. In the above titled two appeals, the impugned judgment of 21st March, 2006 and order on sentence of 22nd March, 2006 of the learned Additional Sessions Judge, Delhi is common one. Appellants Qurban Ali S/o Hussain Ali and Islam S/o Mohd. Jaan have been convicted for committing offence under Section 392 read with Section 397 of the Indian Penal Code and they have been sentenced to RI for a period of five years and to pay a fine of rupees five thousand each and in default of payment of fine, they have been directed to undergo RI for a period of six months each. In addition, both the appellants have been sentenced to RI for a period of seven years each for commission of offence

under Section 397 of the Indian Penal Code. Appellant Qurban Ali has been also sentenced under section 25 of the Arms Act to Rigorous Imprisonment for a period of one year and a fine of rupees one thousand and in default thereof, to RI for a period of one month for illegally possessing a country made pistol.

2. Since the impugned judgment and order are common in these two appeals, therefore, they are being disposed of together by this common judgment.

3. The prosecution version as noticed by the trial court is as follows :- On 30.1.2004 at IInd floor, House No.4476, Dau Bazar, Cloth Market, Fateh Puri, all the accused persons entered into the house of the complainant Smt. Sushila Kanodia and looted Smt. Sushila Kanodia and her daughter Anushri Kanodia on the point of knife and pistol of two gold kadas, one silver ring and a mobile phone. When both Smt. Sushila Kanodia and her daughter started making noise, the accused persons tried to flee away from the spot. Accused Qurban and Islam were apprehended on the spot by the public persons whereas accused Arkan managed to escape. Public persons snatched a country made pistol from the hands of accused Qurban whereas a knife was snatched from the hands of accused Islam. Police was informed and SI N.S. Rana alongwith the other police officials reached the spot. I.O. searched the accused persons and a live cartridge was recovered from the right side pocket of the pant of accused Qurban and one live cartridge was recovered from the country made pistol which was snatched by the public persons from accused Qurban Ali. Accused Islam was also searched and two gold kadas and one silver ring were recovered from him which the complainant identified as to be the same robbed from her. I.O. seized the recovered articles after sealing them. I.O. recorded the statement of Smt. Sushila Kanodia and after making his endorsement sent rukka to the P.S. for registration of the FIR. After registration of the FIR, further investigation was marked to SI Naresh Kumar who had already reached the spot. IO arrested the accused persons, took their personal searches, prepared the site plan, interrogated the accused persons and recorded disclosure statements of the accused persons. In pursuance to the disclosure statement, accused Islam got arrested accused Arkan from his house and the mobile phone make Nokia and 400/- rupees cash were recovered from him. IO also arrested accused Arkan in this case and recorded his disclosure statement. Accused Arkan also pointed out the place of occurrence where he was also identified by Smt. Sushila Kanodia and her daughter. After completion of the investigation, challan was filed and the accused persons were sent up for trial.

4. Appellants Qurban Ali and Islam were charged for commission of offence under Section 392/397/34 of Indian Penal Code and Appellant Islam was called upon by the trial court to face trial for commission of offence under Section 25 of the Arms Act. Both the Appellants claimed trial and the prosecution got examined fifteen witnesses in all at trial. The ocular version consists of the evidence of victims i.e. Smt. Sushila, PW-1 and her daughter Anushree, PW-2. Witnesses Vijay Singh, PW-3 and Bhopal Singh, PW-4 were the employees of Pawan Aggarwal, PW-5 and these three witnesses had identified both the Appellants as the assailants in their evidence and Vijay Singh, PW-3 and Bhopal, PW-4 had claimed to have apprehended both the Appellants at the spot. The rest

of the evidence consists mainly of police witnesses. Sub Inspector Naresh Kumar, PW-14 is the main Investigating Officer of this case.

5. In their statements under Section 313 of Cr. P.C. recorded by the trial court, both the Appellants claimed to be innocent but did not lead any evidence in their defence. After the trial, both the Appellants stood convicted and sentenced as detailed in the opening paragraph of this judgment.

6. Both the sides have been heard and with their assistance the evidence on record have been scrutinized.

7. Learned counsel for Appellant Qurban Ali contends that no Test Identification Parade of this Appellant was got conducted and the material witnesses, i.e., PW-1 and PW-2 do not identify Appellant Qurban Ali as the culprit and it is thus submitted that the present case is of mistaken identity and no recovery has been effected from or at the instance of Appellant Qurban Ali. It is pointed out by the defence that as per the evidence of Pawan, PW-5, that Appellant Qurban Ali had thrown away the country made pistol on the ground and it was recovered by the police from the ground. Attention of this court has been drawn to the evidence of Bhopal, PW-4 to show that the alleged recovery of the country made pistol was from the hand of Appellant Qurban Ali. According to learned counsel for appellant Qurban Ali, this material contradiction renders the prosecution case about recovery of the country made pistol from Appellant Qurban Ali doubtful. It is urged on behalf of the Appellant Qurban Ali that there was no use of weapon by Appellant Qurban Ali and the evidence of the public witnesses, PW-3 to PW-5, has been wrongly relied upon by the trial court as they are interested witnesses. Lastly, it is submitted on behalf of Appellant Qurban Ali that the application filed by this Appellant for reduction of sentence to the period already undergone, i.e., about five and half years, and for waiving of the fine deserves to be allowed, as the Appellant is not a previous convict and his conduct in jail has been satisfactory and is a poor person and has old parents to support.

8. On similar lines is the submission advanced on behalf of Appellant Islam. In addition, on merits, it is submitted that the victims, i.e., PW-1 and PW-2 have not identified this Appellant and as per the deposition of the victims, the faces of the assailants were not covered and despite that no Test Identification Parade was arranged. It is asserted that on the next day of the incident, Appellant/accused was shown to the victim. It has been pointed out that the victims in their evidence have not claimed that they had witnessed any recovery from Appellant Islam. It is urged that it is the prosecution case that the knife was recovered from the front pocket of Islam, whereas as per the evidence of Vijay Singh, PW-3, the knife had fallen down when he had apprehended Appellant Islam. It is pointed out that as per the prosecution case, the seal after use was given to Bhopal Singh, PW-4 by the Investigating Officer but Bhopal Singh, PW-4 has denied it. It is also pointed out that Vijay Singh, PW-3 has stated in his evidence that they had remained at the spot for about 10-15 minutes, whereas Constable Ravinder, PW-7 has stated in his evidence that they remained at the spot till about 7 PM and he is contradicted by Sub Inspector Ritesh Kumar, PW-10, who claims to have

remained at the spot till 10 PM. According to the learned counsel for appellant Islam, the above referred infirmities in the prosecution case, renders the entire prosecution case doubtful and it is submitted that in spite of above said shortcomings, Appellant Islam has been convicted by the trial court which is illegal and thus, his acquittal is prayed for.

9. Mr. Amit Sharma, learned Additional Public Prosecutor for the State submits that the conviction of both the Appellants and the sentenced imposed upon them is perfectly legal and is duly supported by the evidence on record. It is submitted that the infirmities pointed out in the prosecution case are inconsequential and do not affect the credibility of the prosecution case and there is no merit in these two appeals.

10. This incident of robbery had taken place in broad day light and both the Appellants were caught red handed at the spot and the robbed articles, i.e., two gold bangles, one silver ring, one mobile phone and cash of Rs.400/- were recovered from Appellant Islam. In such a situation, it is indeed preposterous to contend that no Test Identification Parade of the Appellants was held. It was not required. Some vague doubt is sought to be created regarding the identity of both the Appellants. No doubt, that one of the victims, i.e., Sushila, PW-1, has tried to cover up by stating again in her evidence that Appellant Islam might be the same person who was apprehended by the public at the spot. This will not be of any help to the case of the Appellants because this witness PW-1 has earlier stated in her evidence that accused Islam, present in the court, is the same person, who was caught by the public at the spot. As far as deposition of Anushree, PW-2 is concerned, I find that she has categorically identified the Appellant Qurban Ali as one of the assailant but she was not sure about Appellant Islam. However, her evidence cannot be viewed in isolation and the material evidence of Vijay Singh, PW-3 and Bhopal Singh, PW-4 needs to be looked into as they are the prime witnesses, who had apprehended Appellants Qurban Ali and Islam and it transpires from their evidence that they have clearly and categorically identified both the Appellants. Furthermore, the prime evidence of Vijay Singh, PW-3 and Bhopal Singh, PW-4 stand duly corroborated from the evidence of eye witness Pawan Aggarwal, PW-5.

11. In the face of the aforesaid evidence, the plea of the Appellants of mistaken identity cannot be accepted. The contradiction in the evidence of Bhopal Singh, PW-4 and Pawan, PW-5 regarding the recovery of country made pistol being made from the ground or from the hand of Appellant Qurban Ali is not material one, for the reason, the evidence of Bhopal, PW-4 carries weight and has been rightly relied upon by the trial court because he is the one who had apprehended Appellant Qurban Ali. Whether the recovery of knife is effected from the person of Appellant Islam or from the ground at the spot, would not affect the veracity of the prosecution case as such like variations are likely to occur due to lapse of time and are not material one. Denial by Bhopal Singh, PW-4 of receiving the seal after use is not of any consequence as the defence has not been able to show that there was any tampering with the case property of this case. Power of observation differs from person to person and the variation of timings inter se the evidence of PW-3, PW-7 and PW-10 regarding staying at the spot would not cause any dent in the prosecution case as it is not shown as to why the evidence of the Investigating Officer on this aspect should not be relied upon. In fact, the Investigating Officer is the

best person to depose about it and his evidence cannot be brushed aside lightly because I find that the evidence of the Investigating Officer of this case is worthy of reliance and the trial court has rightly acted upon it.

12. After having scanned through the evidence of material public witnesses, i.e., PW-3 to PW-5, I find that their evidence cannot be dubbed as that of interested witnesses because it is not shown as to why these public witnesses would falsely implicate these two Appellants. Otherwise also, I find that the evidence of these three material public witnesses, i.e., PW-3 to PW-5 is trustworthy and has been rightly relied upon by the trial court.

13. In the last, conviction of both the Appellants with the aid of section 397 of the Indian Penal Code is assailed by placing reliance upon case of Ram Shankar vs. State of Madhya Pradesh, 1981 CrL. L.J. 162, wherein the Apex Court took note of the fact that the accused in that case was a school teacher and the robbed amount of Rs.3.85 was trivial and it was recommended to the Government to exercise its power of clemency under section 432 of the Cr. P.C. to remit or reduce the sentence.

14. The aforesaid decision was in the peculiar facts of the said case and is no precedent for reducing the sentence of the Appellants to the period already undergone by them, which is more than five years. As such, the applications filed by the two Appellants for reducing their sentence to the period already undergone do not merit acceptance and are dismissed as such.

15. When the evidence on record is viewed as a whole, I find that the conviction and the sentence imposed upon both the Appellants is perfectly justified and it calls for no interference by this court. Resultantly, the conviction and sentence imposed upon Appellants Qurban Ali and Islam are upheld and both these appeals are dismissed being meritless.

16. These two appeals and the pending applications stand accordingly disposed of.

Sd./-
SUNIL GAUR, J

November 05, 2008