Abdul Gani Vs State (Govt. of NCT of Delhi)

Court: Delhi High Court

Date of Decision: Oct. 1, 2014

Acts Referred: Arms Act, 1959 â€" Section 2(e), 25, 27
Criminal Procedure Code, 1973 (CrPC) â€" Section 313, 428
Evidence Act, 1872 â€" Section 11, 133, 134
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 20, 61
Penal Code, 1860 (IPC) â€" Section 34, 392, 397, 398, 411

Citation: (2015) 1 Crimes 523 : (2014) 4 JCC 2692

Hon'ble Judges: Sunita Gupta, J

Bench: Single Bench

Advocate: M.L. Yadav, Ankur Sood, Shoumender Mukherji, Nandita Rao and Srilina Roy, Advocate for the Appellant; M.N. Dudeja, A.P.P. and Kamlesh Kumar, S.I, Advocate for the Respondent

Judgement

Sunita Gupta, J.
Vide this common judgment, I shall dispose of three Criminal appeals bearing No. 262/2013, 326/2013 and 638/2013 as

all the appeals have been filed challenging the judgment dated 5th November, 2012 and order on sentence dated 7th November, 2012 passed by

the learned Additional Sessions Judge in Sessions Case No. 94/2011 arising out of FIR 208/2011 under section 392/ 397/ 452/ 34 IPC

registered with Police Station Vivek Vihar. Prosecution case succinctly stated is as follows:-

On 12th July, 2011 at about 11:20 AM, accused Ritesh @ Pandey, Abdul Gani and Sunil came at the house of complainant at Jwala Nagar and

took him inside the godown at ground floor of his house. Accused Abdul Gani caught him, accused Ritesh Pandey put revolver at him and accused

Sunil took out Rs. 3750/- and PAN Card from the pocket of the complainant. In the meanwhile, Satish S/o. complainant reached outside the

godown and saw accused robbing his father and raised alarm. Accused Sunil @ Bablu managed to run away but accused Ritesh @ Pandey and

Abdul Gani were apprehended by the complainant and his son with the help of public. They were beaten by the public. Police was informed who

reached the spot. Accused Abdul Gani and Ritesh Pandey were handed over to the police. On the formal search of accused Abdul Gani, two live

cartridges were recovered from the right pocket of his pant and on formal search of accused Ritesh @ Pandey, a country made revolver was

recovered from his right dub. On the statement of the complainant, FIR under Section 452/ 392/ 397/ 34 IPC and under Section 27/54/59 of

Arms Act was registered. During investigation, vide D.D. No. 22A dated 12th July, 2011, it was informed that Sunil @ Bablu was apprehended

with illicit Gaanja and Rs. 3550/- and PAN Card of complainant were recovered from his possession. He was arrested in this case. After

completing investigation, charge sheet was submitted against the accused persons.

2. After the case was committed to the Court of Sessions, charge under Section 452/ 392/ 34 IPC r/w Section 397 IPC was framed against all the

accused. Separate charge under section 25/54/59 Arms Act against accused Abdul Gani, u/s. 25/ 27/54/59 Arms Act against accused Ritesh @

Pandey and under Section 411 IPC against accused Sunil @ Bablu were framed.

3. In order to substantiate its case, prosecution examined 9 witnesses. All the incriminating evidence was put to the accused persons while

recording their statement under Section 313 Cr.P.C. wherein they denied the case of prosecution and alleged their false implication.

4. According to accused Ritesh, he was lifted from DLF, Bhopura, Sahibabad and was brought to police Station Vivek Vihar. Accused Abdul

Gani and Sunil were already present in the police station. He was severely beaten by the police both at the police station as well as at the spot of

alleged occurrence. Accused Abdul Gani also pleaded that he was not present at the spot. Nothing was recovered from his possession and the

same was planted upon him by the police to falsely implicate him in this case. Accused Sunil took a plea that on 11th July, 2011, he had gone to

Court No. 27 for filing an application for release of his jamatalashi. Some police officials in plain clothes, who were known to him as they had

involved him in previous case also, took him at the gate of the court where police gypsy was parked.

He was put into the gypsy and was assured that he would be released in five minutes. Thereafter, he was taken to the police station and was

beaten up and was told that his mother has lodged a complaint against them, therefore, she should be asked to withdraw the same. He agreed. Stilt

he was beaten up and his signatures were taken on plain papers. He was abused in police station and got medically examined and then falsely

implicated in this case.

5. In support of his defence, he examined DW 1 Sanjeev who was running a photo studio on the ground floor of his house at Gali No. 6, Jwala

Nagar. According to him, he did not see any quarrel taking place in front of his house and that he never handed over the accused Sunil to the

police or gave beatings to him at any point of time.

6. The entire evidence was meticulously examined by learned Additional Sessions Judge. Vide impugned judgment dated 5th November, 2012

and order on sentence dated 7th November, 2012, all the appellants were convicted for offence under u/s. 452 IPC and sentenced to undergo

three years RI with fine of Rs. 5,000/-, in default of payment of which, they were to undergo six months SI. They were also separately convicted

and sentenced as under:--

(a) Abdul Gani--

(i) Sentenced to undergo RI for three years with fine of Rs. 3000/-, in default to undergo SI for three months under section 25 of Arms Act;

(ii) Sentenced to undergo RI for seven years with fine of Rs. 5000/-, in default to undergo SI for six months u/s. 392/ 34 Indian Penal Code.

(b) Ritesh Pandey--.

(i) Sentenced to undergo RI for seven years with fine of Rs. 5000/-, in default to undergo SI for six months for offence u/s. 392/ 34 r/w 397 Indian

Penal Code;

(ii) Sentenced to undergo RI for three years with fine of Rs. 3000/-, in default to undergo SI for three months u/s. 25/ 27 Arms Act.

(c) Sunil--

(i) He was sentenced to undergo RI for seven years with fine of Rs. 5000/-, in default to undergo SI for six months u/s. 392/ 34 Indian Penal

Code.

All the sentences were ordered to be run concurrently and the convicts were granted benefit of Section 428 Cr.P.C.

7. Feeling aggrieved, separate appeals have been preferred by the convicts.

8. Assailing the findings of the learned Trial Court, Sh. M.L. Yadav, Advocate for the appellant-Abdul Gani submitted that the complainant and his

son Satish did not identify the accused. However, conviction of the accused was based on the testimony of the police officials. In the absence of

identification by the complainant and his son, complicity of accused in crime is not established beyond reasonable doubt, as such, he was entitled to

benefit of doubt, in the alternative, it was submitted that the accused is in jail for the last about 2 years and 8 months. As such, he be released on

the period already undergone.

9. Ms. Nandita Rao, Advocate appearing for accused-Sunil submitted that the accused was not arrested from the spot but as per the prosecution

case, he was arrested in some other case where money and Pan Card of the complainant was recovered from his possession. It was submitted that

according to the complainant and his son, all the accused were known to them from before since they were bad character of the area and it is

alleged that immediately after the incident, the public gathered at the spot. However, no public witness has been examined by the prosecution.

Learned counsel also referred to different MLCs of the accused for showing that in the initial MLC, it was mentioned that accused was given

public beatings, however, the same is contrary to the case of prosecution as it is alleged that accused had run away from the spot after the incident.

The complainant is a Special Police Officer and is not an ordinary citizen. As per his case, he is running the business without obtaining any licence,

as such, he is at the mercy of the police officials and got the accused falsely implicated in this case. On the other hand, the accused has examined

PW 1 Sanjeev who is a totally independent witness and has belied the case of prosecution. As such, the findings of the learned Trial Court deserve

to be set aside and the accused is entitled to be acquitted of the offence alleged against him. Alternatively, it was submitted that accused has

remained in jail for a period of about 3 years. As such, he be released on the period already undergone.

10. Sh. Ankur Sood, counsel for the accused-Ritesh submitted that the prosecution case rests on the testimony of the complainant and his son.

Although it is alleged that public had gathered at the spot and had given beatings to this accused as well as Abdul Gani, however, no independent

person has been examined by the prosecution. Moreover, it is also alleged that wife of the complainant also reached the spot, however, she was

also not made a witness. Non-examination of the wife of the complainant as well as any independent witness cast a serious doubt on the

prosecution version. Moreover, as per the case of prosecution, the accused was holding a pistol with which he scared the Complainant. If that is

so, it is highly improbable that he would not scare the public with the pistol, which gathered at the spot and gave him beatings, in any case, as per

the report of FSL, the pistol was not in working condition and, therefore, offence under Section 397 IPC is not made out.

11. Reliance was placed on Kiran Mehlawat Vs. State, ; Babulal Jairam Maurya and another Vs. The State of Maharashtra, ; State of U.P. Vs.

Smt. Noorie alias Noor Jahan and others, and Rakesh v. State of NCT of Delhi, Crl. Appeal No. 208/2003 decided by this Court on 20th July,

2010.

12. Countering the submissions of learned counsel for the appellants, it was submitted by the learned Additional Public Prosecutor for the State

that there is no material on record to show that the complainant was a special police officer. A suggestion given to this effect has been denied by

the complainant. It was further submitted that in the initial statement made by the complainant, he gave names of three accused who were known to

him from before and the same assumes significance. Although, during their deposition, the complainant and his son did not identify the accused

Abdul Gani but this accused was arrested at the spot by the complainant and his son with the help of public. His arrest memo was prepared at the

spot and both these witnesses are signatory to the arrest memo. Moreover, two live cartridges were recovered from the pocket of the accused

Abdul Gani which were also seized and both these witnesses are also signatories to the seizure memo. On the same day, the accused was taken

for medical examination and his MLC has been duly proved by Dr. Sachin Harit, PW 10, under the circumstances, it was submitted that the

attendant circumstances clearly proved the involvement of the accused in the crime and, therefore, his conviction is justified.

13. As regards the deficiency pointed out by the learned counsel for the accused regarding non-examination of any independent witness or wife of

the complainant, it was submitted that as per Section 133 of the Evidence Act, it is the quality of the evidence which matters and not the number of

the witnesses. Although public persons should have been examined by the 10 but this short coming does not give any premium to the accused and

there is no reason to discard the testimony of the complainant and his son which finds corroboration from the testimony of the police officials. As

regards the submission that the pistol was not in working order, it was submitted that the same is in-consequential, inasmuch as, the actual user of

the deadly weapon is not necessary. It has come on record that the complainant was scared when he was shown the pistol and on the) point of

pistol he was robbed of his money and PAN Card. AS such, it was submitted that the impugned judgment does not suffer from any infirmity which

calls for interference. He also referred to the antecedents of the accused persons regarding their previous involvements and, therefore, it was

submitted that they do not deserve any leniency. Accordingly, appeals are liable to be dismissed.

14. I have given my considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the record.

15. Before taking up the case of each individual accused, it will be in the fitness of things to have a glance at the evidence led by the prosecution.

16. PW-4 Suresh Gupta is the complainant and unfolded that he is dealing in the business of old cardboards and his godown was on the ground

floor of the house, on 12th July, 2011 at about 11:00-11:30 A.M., he was working in his godown. Three boys, namely, Pandey, Ballu and third

boy, whom he knew by face, came at the godown. All the three boys were known to him as they used to indulge in snatching and other criminal

activities in gali. Accused Pandey was having a revolver and pointed out the revolver on him. Accused Ballu asked him to hand over the money

failing which Pandey would shoot him. The third boy caught him. Ballu took out Rs. 3750/- and PAN Card from the pocket of his shirt. In the

meanwhile, his son satish came at the godown. He raised noise from outside the godown. On hearing the noise, Ballu who had taken out money

and PAN Card from his pocket, fled away from there. Accused Pandey and the third boy also tried to run away but the people of the gali

gathered and both of them were apprehended by his son with the help of the public. Public also gave beatings to accused Pandey and that third

boy. He informed the police who reached the spot. Accused Pandey and the third boy were handed over to the police. His statement Ex. PW 4/A

was recorded by the police. On search of accused persons, two cartridges were recovered from the right pocket of the pant of the third boy while

revolver was concealed by accused Pandey in the dub of his pant which was recovered with two cartridges loaded in the revolver, sketch of the

revolver and cartridges Ex. PW 4/B and PW 4/C was prepared by the police and the same were seized. He identified the pistol Ex. P1 and

cartridges Ex. P2 and Ex. P3 recovered from the possession of accused Pandey. He also identified the cartridges Ex. P4 and Ex. P5 which were

recovered from the possession of third boy. He also identified the currency notes of Rs. 3550/-, Ex. P6 and PAN Card Ex. P7 which were taken

out by accused Ballu from his possession.

17. His testimony finds substantial corroboration from PW 5 Satish who also deposed regarding the incident and apprehension of accused Ritesh

Pandey and a third boy from the spot and recovery of revolver and cartridges from them. However, as regards identity of the accused Abdul Gani,

both these witnesses turned hostile.

18. PW 8 ASI Mohd. Ali, on receipt of DD No. 8A Ex. PW 1/A, went along with Head Constable Satish and Constable Ashwini to house No.

211, Gali No. 6, Jwala Nagar, Shahdara where he met complainant Suresh Kumar Gupta and his son Satish Kumar Gupta along with some public

persons who had apprehended the accused Abdul Gani and Ritesh @ Pandey. He also deposed regarding recovery of two live cartridges from

right side pocket of pant of accused-Abdul Gam and pistol and cartridges from the possession of the accused Ritesh Pandey which were taken

into possession after preparing their sketch. He also deposed regarding recording the statement of complainant and getting the case registered.

19. It has further come in the statement of PW 7-SI Manu Kumar that on the same day, i.e., 12th July, 2011, he arrested accused Sunil @ Bablu

in case FIR 209/2011 under Section 20/ 61/85 NDPS Act, Police Station Vivek Vihar. In that case accused made a disclosure statement Ex. PW

7/A pertaining to this case, as such, he informed the police station about the same. ASI Mohd. Ali reached the spot and arrested the accused in

this case. Rs. 3550/- and PAN Card in the name of the complainant was recovered from the possession of accused Sunil which was seized vide

memo Ex. PW 7/D. Accused Abdul Gani and Ritesh Pandey were taken to Dr. Hedgewar Hospital on 12th July, 2011 and were medically

examined vide their MLCs Ex. PW 10/A and Ex. PW 10/B. This, in nutshell, is the case of prosecution.

20. Now, I shall advert to the case of each appellant separately.

Abdul Gani

21. Police machinery was set in motion on sending an information by the complainant Suresh Gupta which resulted in recording of DD-8A, Ex.

PW 1/A whereby he informed the police officials that some bad characters had come to his house in order to rob him and two of them were

caught hold by him, police be sent. Thereafter, ASI Mohd. Ali along with Head Constable Santosh and Constable Ashwini Tyagi reached the spot

where accused Abdul Gani and Ritesh @ Pandey were handed over to the police. Statement of the complainant Suresh Gutpa, Ex. PW 5/A was

recorded by the investigating officer of the case and at the very initial juncture, the complainant had disclosed that three boys, namely, Pandey,

Gani and Ballu R/o Jwala Nagar, Delhi who were known to him from before as they used to indulge in snatching and bad activities in the area

came and robbed him of his money and PAN Card on the point of revolver. As such, at the earliest available opportunity, the complainant had

named ""Gani"" as one of the assailant of the crime. However, for reasons best known to them, the complainant and his son chose not to identify the

accused in the Court. However, the same does not cast any dent on the prosecution version, inasmuch as, the contemporaneous record establishes

beyond reasonable doubt that it was accused Abdul Gani who was apprehended at the spot and was handed over to the police as it has come in

the statement of PW 8 ASI Mohd. Ali that when he reached the spot, accused Abdul Gani @ Gini and Ritesh @ Pandey were produced before

him by the complainant and his son. On personal search of accused Abdul Gani, two live cartridges were recovered from the right side pocket of

his pant. Sketch of the cartridges was prepared vide Ex. PW 4/C and the same were seized vide seizure memo Ex. PW 2/A. The accused was

arrested vide memo Ex. PW 2/C and his personal search was conducted vide memo Ex. PW 2/E. The seizure memo as well as the arrest memo

bears the signatures both of complainant Suresh Kumar Gupta as well as his son Satish. The complainant has admitted that the FIR was registered

on his statement which also bears his signatures at Point-A. In his statement, he has referred the name of accused Abdul Gani as ''Gani''. He also

admits that the arrest memo and the seizure memo bear his signatures. He also admitted that Ex. PW 2/A, Ex. PW 4/C and Ex. PW 2/C bears the

thumb impression of accused Abdul Gani. Not only that, after the arrest of the accused, he was also sent for his medical examination to Dr.

Hedgewar Hospital where he was examined by PW 10 Dr. Sachin Harit who prepared the MLC Ex. PW 10/A and found swelling over left foot

and right thumb. Under the circumstances, participation of the accused in the crime was established beyond reasonable doubt and prosecution had

succeeded in establishing that in furtherance of his common intention, the accused robbed the complainant Suresh Gupta of his money and PAN

Card. As such, he was rightly convicted under Section 452/ 392/ 34 IPC.

22. Even as regards offence under Section 25 of Arms Act, it stands proved from the testimony of prosecution witnesses that two cartridges were

recovered from the possession of the accused which were live cartridges and the same were sent to FSL and as per the report given by Sh. K.C.

Varshney, Assistant Director, Ballistic, the cartridges were live ones and can be fired through .32"" bore firearm. The exhibits are

firearm/ammunition as defined in the Arms Act, 1959. Necessary sanction was obtained from PW 9 Sh. Asif Mohd. Ali, Additional DCP (East).

In view of this voluminous evidence coming on record against accused Abdul Gani, the mere fact that the complainant and his son chose not to

identify him during their deposition in the Court, accused does not get any benefit. Under the circumstances, he was rightly convicted by the

learned Additional Sessions Judge and the same does not call for any interference.

23. Coming to the quantum of sentence, as per the nominal roll of the appellant, he has undergone sentence including under trial period as on 25th

September, 2014 for a period of 2 years 7 months and 9 days besides earning remission of 7 months and 27 days. His conduct is reported to be

satisfactory. Keeping in view the totality of the facts and circumstances of the case, the substantive sentence of the appellant is modified to the

period already undergone while the sentence of fine remains unaltered.

Sunil @ Ballu

24. In the initial statement Ex. PW 4/A made by the complainant to the police, he had specifically named all the three accused by referring them as

Pandey, Gani and Ballu who were residents of the same colony and were bad character of the area. He has also specified the role of each and

every accused. As regards Sunil @ Ballu he had deposed that he asked him to take out whatever he has otherwise he will be killed by Pandey

who was having revolver with him. Thereafter, this accused took out money approximately Rs. 3750/- and his PAN Card from his pocket. When

his son Satish came and raised alarm then on seeing the public this accused managed to escape from the spot. This fact was reiterated by the

complainant when he appeared in the witness box and his testimony was substantially corroborated by his son PW 5 Satish.

25. It has further come on record that after escaping from the spot on the same day he was apprehended by SI Manu Kumar and was arrested in

case FIR No. 209/2011 under Section 20/ 61/85 NDPS Act registered with Police Station Vivek Vihar. He made a disclosure statement Ex. PW

7/A pertaining to this case and thereafter information was given to Police Station whereupon ASI Abdul Gani arrested him and recovered Rs.

3550/- and PAN card, belonging to the complainant, from his possession. A suggestion was given to PW-7 SI Manu Kumar that the accused was

having Rs. 4000/- which was shown as the case property of this case which was denied by him. Even if it is taken that currency notes had no

identification marks and, therefore, it is not established that this money belongs to complainant but the fact remains that the accused was also found

in possession of PAN Card belonging to the complainant for which no explanation has been given by accused.

26. Much emphasis was laid by learned counsel for the appellant by referring to the MLCs of accused prepared at different hospitals. However,

the same also does not help the accused, inasmuch as, after the arrest, accused was taken to Dr. Hedgewar Hospital where his MLC was

prepared on 12th July, 2011 with history of swelling and tenderness of right foot. Subsequently when he was produced in the Court, he himself

moved an application for getting his medical examination done and, as such, the learned Metropolitan Magistrate directed to get his medical

examination done from GTB Hospital. A perusal of the MLC goes to show that it refers to the earlier MLC prepared at Dr. Hedgewar Hospital

on 12th July, 2011. When subsequent MLC on 13th July, 2011 was prepared under the orders of the court at that time, history was given of

swallowing of surgical blade two days back, in this MLC also there is mention of swelling and tenderness of right foot. As such, from the MLCs,

the accused does not get any benefit.

27. Although, it is true, that as per the case of prosecution after the incident, public had gathered at the spot, however, no public person has been

examined by the prosecution. PW 2 Head Constable Satish and PW 8 ASI Mohd. Ali have deposed that public persons were asked to join the

proceedings, however, none agreed. In Kiran Mehlawat (supra) relied upon by the learned counsel for the appellant Ritesh, the effect of non-

examination of witness on the veracity of the case set up by the prosecution against the accused was considered and reliance was placed on the

observations made by Hon''ble Supreme Court in the decision reported as Takhaji Hiraji Vs. Thakore Kubersing Chamansing and Others, where

it was observed as under:-

32. ... So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of

independent witnesses. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution

case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or

made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and

withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness

would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and

examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses

may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced.

The court of facts must ask itself--whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so,

whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of

drawing an adverse inference may arise, if the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable

the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses.

28. Tested on the aforesaid anvil of law, can it be said that non-examination of public person was fatal to the case of prosecution. In that case also,

the mother of the deceased was not examined by the prosecution and a plea was taken that non-examination of mother of deceased led to adverse

inference against the prosecution. It was observed that merely because a material witness is not examined by the prosecution, a criminal court

would not lean to draw an adverse inference that if he was examined, he would have given a contrary version. The illustration (g) appended to

Section 11 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate

the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-

examination of a witness even if the witness is a material witness. The afore-noted observations of Supreme Court in Takhaji"s case (supra) also

bring out that the non-examination of a material witness is not fatal in every case, it is only in cases where there is an infirmity or doubt in the case

set up by the prosecution, that the non-examination of material witness assumes significance. Even if it is assumed that the mother of the deceased

was a material witness, the same would not be fatal to the case of the prosecution if the prosecution is able to establish the guilt of accused Sunil

beyond any reasonable doubt.

29. Moreover, it is settled principle of law that, it is not the number of witnesses but quality of their evidence which is important, as there is no

requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured

principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or

otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses, it is quality

and not quantity, which determines the adequacy of evidence as has been provided by section 134 of the Evidence Act. Thus, conviction can even

be based on the testimony of a sole eye witness, if the same inspires confidence, (vide: Vadivelu Thevar Vs. The State of Madras, ; Kunju @

Balachandran Vs. State of Tamil Nadu, ; Bipin Kumar Mondal Vs. State of West Bengal, ; Mahesh & Anr. vs. State of Madhya Pradesh (2011)

9 SCC 626; Prithipal Singh etc. Vs. State of Punjab and Another etc., ; Kishan Chand Vs. State of Haryana, and Gulam Sarbar Vs. State of

Bihar (Now Jharkhand), .

30. In the instant case, both the witnesses have fared well during cross examination and nothing material could be elicited to discredit their

testimony. None of the accused is alleging any enmity ill will or grudge against the complainant or his son for which reason they would falsely

implicate them in this case allowing the real culprit to go scot free. The submission of learned counsel for the appellant that the complainant was

SPO does not find support from any material available on record and complainant has categorically denied the suggestion that he is SPO of the

area. Similarly the submission that complainant is running his business at the mercy of police officials as he is not holding any licence for the

business, has no legs to stand.

31. In the aforesaid scenario merely because the wife of the complainant or any public person of the locality was not examined by the prosecution,

no adverse inference can be drawn as the case of the prosecution stands established from the testimony of complainant himself duly corroborated

by his son PW 5 Satish and the police officials.

32. The accused Sunil took a plea that on 11th July, 2011, he came to Court No. 27 for filing application for release of Jamatalashi but some

police official in plain clothes took him in gypsy to police station where he was beaten up. According to him, his mother has lodged a complaint

against the police officials. He was asked to withdraw the same to which he agreed yet he was falsely implicated in this case. Although he has

examined DW 1 Sanjeev in his defence but testimony of this witness is very vague, inasmuch as, he has merely deposed that no quarrel ever took

place in front of his house nor he gave beatings to accused Sunil at any point of time. It is not even the case of prosecution that accused Sunil was

given any beatings by the public at the spot as the case of prosecution is that when son of the complainant raised alarm then this accused fled away

along with the robbed money and PAN Card belonging to the complainant. Therefore, his testimony does not help the accused in any manner.

Moreover, he has not been able to prove his defence that he was picked up from the Court. No complaint allegedly made to the police by his

mother has been proved on record. As such, this appellant was rightly convicted for offence under Section 452/ 392/ 34 IPC and no interference

is called for.

33. As per the nominal roll of appellant-Sunil, he has undergone sentence including under trial period as on 25th September, 2014 for a period of

3 years 2 months and 12 days besides earning remission of 3 months and 18 days. His conduct is reported to be satisfactory. Keeping in view the

totality of the facts and circumstances of the case, the substantive sentence of the appellant is modified to the period already undergone. However,

the sentence of fine remains unaltered.

Ritesh @ Pandey

34. Basically two fold submissions were made by the counsel for this appellant:--

(i) Non-examination of wife of the complainant and any independent witness;

(ii) No offence under Section 397 IPC is made out as, as per the FSL report, pistol was not in working condition.

35. As regards the first limb or argument, the same has been dealt with above by observing that non-examination of wife or any independent

witness does not cast any dent on the prosecution version.

36. The only question remains for consideration is whether the conviction of the appellant can be sustained under Section 397 IPC as the weapon

in question was not in working order.

37. Section 397 of the Indian Penal Code states:

Sec. 397 - Robbery or dacoity, with attempt to cause death or grievous hurt.--If, at the time of committing robbery or dacoity, the offender uses

any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which

such offender shall be punished shall not be less than seven years.

38. Learned counsel for the appellant has relied upon a judgment by a Division Bench of the Bombay High Court in Babulal Jairam Maurya and

another Vs. The State of Maharashtra, , where the question for consideration was whether a toy gun can be regarded as a deadly weapon and it

was observed:

The weapon used must have a deadly potential. A toy pistol can never be said to be a deadly weapon whatever the impression it seeks on the

frightened victims. In other words, a fake pistol though used as a deadly weapon and assumed to be one by the victims is not a deadly weapon as

contemplated by S. 397, I.P.C. A toy pistol continues to be a toy pistol whatever be its impact on the frightened victims. The learned Public

Prosecutor disputes this contention saying that a weapon becomes deadly when it is used as such a weapon and has that effect upon the victims.

The language of Sections 397 and 398 which deal with? ""deadly weapons"" indicates the correctness of Learned Public Prosecutor''s submission.

The weapon used has to be a deadly weapon and not assumed or mistaken to be a deadly weapon. Michael was using a toy pistol and that is the

end of the matter so far as the applicability of S. 397 I.P.C. is concerned.

39. However, this decision is not applicable to the present case as the weapon in question was a real weapon and not assumed or mistaken to be

deadly weapon. Although the weapon was not in a working condition and required repair but the same cannot be termed as ''toy'', in fact, the

revolver was found to be loaded with two live cartridges.

40. The learned counsel for the Appellant has also relied upon Rakesh versus State of NCT of Delhi, Crl. Appeal No. 208/2003 decided by this

Court on 20th July, 2010, however, this case is not applicable to the present case as the Court was dealing with a case u/s. 398 and 458 IPC. The

learned Single Judge referred to the definition of ''deadly weapon'' as defined in Black''s Law Dictionary which is as under:

any fire arm or other weapon, device, instrument, material or substance"", whether animate or inanimate, which in the manner it is used or is

intended to be used is known to be capable of producing death or serious bodily injury. Such weapons or instruments are made and designed for

offensive or defensive purposes or for destruction of life or inflation of injury, one which, from the manner used, is calculated or likely to produce

death or serious bodily injury.

41. It also observed:--

17. The purpose of using a deadly weapon at the time of committing robbery, dacoity or attempting one, is obviously to overawe and instill a

sense of fear in the victim. However, when the so called weapon is in a non working condition, used merely as a camouflage, whether such

weapon could fall within the definition of "deadly weapon" is a matter of debate, it can be urged that the victim who is put in fear, of life or grave

injury, lest he parts with his belongings, has no way of knowing that the weapon being pointed at him is not in working condition or is fake. The

victim in such situation will not resist the offence thinking that his/her, life is in danger. The fear for life/hurt created in the mind of the victim is a

direct result of the act of the accused.

42. The question whether a weapon which otherwise is "deadly" but not in working order can apply to accused u/s. 397 IPC was left open.

43. However, the expression--""offender uses any deadly weapon"" used in Section 397 IPC was examined by the Supreme Court in Shri Phool

Kumar Vs. Delhi Administration, and it was observed as under:--

6. Section 398 uses the expression ""armed with any deadly weapon"" and the minimum punishment provided therein is also seven 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 seven years under

section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under

Section 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.

7. If the deadly weapon is actually used by the offender in the commission of the robbery such as in causing grievous hurt, death or the like then it

is clearly used. In the cases of Chandra Nath v. Emperor; Nagar Singh v. Emperor and Inder Singh v. Emperor some overt act such as brandishing

the weapon against another person in order to overawe him or displaying the deadly weapon to frighten his victim have been held to attract the

provisions of Section 397 of the Penal Code. J.C. Shah and Vyas, JJ. of the Bombay High Court have said in the case of Govind Dipaji More v.

State that if the knife was used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with

his property, that would amount to ''using'' the weapon within the meaning of Section 397.

44. The Supreme Court while interpreting Section 397 IPC took notice of the language of Section 398 IPC wherein the words used are ''the

offender is armed with any deadly weapon''. The Supreme Court has observed that, for the purpose of Section 397 IPC actual use of the deadly

weapon is not required, even brandishing and showing the deadly weapon so as to instill fear and threat in the mind of the victim so that he does

not resist, fearing danger, is sufficient. The Supreme Court has reiterated this view and has further observed in Ashfaq Vs. State (Govt. of NCT of

Delhi), :

Thus, what is essential to satisfy the word ''"uses"'' for the purposes of Section 397 IPC is the robbery being committed by an offender who was

armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it

should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

45. Thus, from the ratio in Phool Kumar (supra) and Ashfaq (supra), it is clear that in order to sustain conviction under Section 397 IPC it is not

essential that the deadly weapon is actually put to use.

46. This is further fortified by the fact that the term ''"fire arm"'' as defined in Section 2(e) of the Arms Act means:

(e) ''"firearms"'' means arms of any description designed or adapted to discharge a projectile or projectiles of any kind by the action of any

explosive or other forms of energy, and includes,-

(i) artillery, hand-grenades, riot-pistols or weapons of any kind designed or adapted for the discharge of any noxious liquid, gas or other such

thing,

(ii) accessories for any such firearm designed or adapted to diminish the noise or flash caused by the firing thereof,

(iii) parts of, and machinery for manufacturing, firearms, and

(iv) carriages, platforms and appliances for mounting, transporting and serving artillery.

47. The definition of the term ""fire arm"" includes, cartridges. For the purpose of Section 2(e) of the Arms Act, pistol or weapon or arm though not

working is still a fire-arm if it can be used with some repairs. A fire-arm which is defective or unworkable is a fire-arm within the meaning of

Section 2(e) of the Arms Act if it has not lost its specific character and has not ceased to be a fire-arm. In Queen-Empress Vs. Jayarami Reddi,

the Full Bench opined:

1. We think there is no doubt that the revolver in the case is a fire-arm within the meaning of the Act. The question is not so much whether the

particular weapon is serviceable as a fire-arm, but whether it has lost its specific character and has so ceased to be a fire-arm, in referring to the

serviceable character of the arm we think the decision in The Queen v. Siddappa I.L.R. 6 Mad. 60 was not correct and that the proper test was

lost sight of. Whether in any particular case the instrument is a fire-arm or not, is a question of fact to be determined according to circumstances,

we answer the question in affirmative.

48. Thus a defective fire arm which can be used after repair and has not lost its character of fire arm is a fire arm within the meaning of Section 2(e)

of the Arms Act. Even as per Ballastic report, the country made revolver .32"" bore recovered from the possession of appellant Ritesh is designed

to fire a standard .32"" cartridge. It is not in working order in its present condition and requires repair of the fire mechanism to bring it in working

order. However, the revolver was loaded with two cartridges which were found to be live one. Possibility of accused himself being not aware of

the fact that it was not in working order at that point of time cannot be ruled out otherwise he would not have loaded it with live cartridges.

Moreover, it has come on record that victim was put in fear of instant hurt when revolver was put on his neck by accused Ritesh and was

threatened by accused Sunil to part with his belongings failing which he would be killed by accused Ritesh. Under the circumstances, it was

established that accused was armed with a deadly weapon which was within the vision of complainant so as to be capable of creating a terror in his

mind. As such, offence under Section 397 IPC was clearly made out. It seems that such a plea was not taken by accused before the learned Trial

Court and is being taken for the first time at the appellate stage. Even if it is so, no fault can be found in this finding of learned Trial Court which

warrants interference.

49. As per the nominal roll of appellant-Ritesh, he has undergone sentence including under trial period as on 25th September, 2014 for a period of

3 years 2 months and 13 days besides earning remission of 7 months and 27 days. His conduct is reported to be satisfactory. However, the

minimum sentence prescribed under Section 397 IPC is 7 years. Under the circumstances, no interference is called for even regarding quantum of

sentence. All the appeals stand disposed of accordingly.

A copy of this judgment be also sent to concerned Jail Superintendent for information and compliance.

Trial Court record be sent back along with a copy of this judgment.