

(2014) 03 DEL CK 0109

Delhi High Court

Case No: Criminal Appeal 525 of 2012

Mohd. Samim

APPELLANT

Vs

The State (Govt. of NCT) Delhi

RESPONDENT

Date of Decision: March 3, 2014**Acts Referred:**

- Arms Act, 1959 - Section 27
- Penal Code, 1860 (IPC) - Section 34 394 397

Citation: (2014) 3 AD 381**Hon'ble Judges:** S.P. Garg, J**Bench:** Single Bench**Advocate:** Deepak Vohra, for the Appellant; Lovkesh Sawhney, APP., for the Respondent**Final Decision:** Allowed

Judgement

S.P. Garg, J.

Challenge in this appeal is to a judgment dated 25.08.2011 of learned Addl. Sessions Judge in Sessions Case No. 19/10 arising out of FIR No. 365/08 PS Patel Nagar by which the appellant-Mohd. Samim was held guilty for committing offences punishable under Sections 394/397/34 IPC and 27 Arms Act. By an order dated 27.08.2011, he was awarded RI for seven years u/s 397 IPC; RI for seven years with fine Rs. 1,000/- u/s 394 IPC and RI for four years with fine Rs. 500/- u/s 27 Arms Act. All these sentences were to operate concurrently. The prosecution case as projected in the charge-sheet was that on 03.09.2008 at about 07.15 A.M. at house no. C-5, DDA Flat, New Ranjit Nagar, Delhi, the appellant in furtherance of common intention with his associates (since absconding) robbed Payal, Nitu and Ram Narayan and deprived them of Rs. 40,000/-, jewellery articles, mobile phones. It was further alleged that while committing robbery, the appellant and his associates were armed with "deadly" weapons and they inflicted injuries to Ram Narayan. Police came into motion when information about a "quarrel" was conveyed and Daily Diary (DD) No. 9 (Ex. PW-11/A) was recorded at 07.52 A.M. at PP New Ranjit Nagar. The

investigation was assigned to HC Sansar Pal. The Investigating Officer, after recording Nitu's statement (Ex. PW-3/A), lodged First Information Report. Statements of the witnesses conversant with the facts were recorded. During investigation, exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was filed against the appellant-Mohd. Samim; he was duly charged and brought to trial. The prosecution examined twelve witnesses to establish his guilt. In 313 statement, the accused denied his complicity in the crime and pleaded false implication. He further stated that when he had gone to the complainant to demand Rs. 3,000/- for the white-wash done by him; he was beaten and falsely implicated. He, however, did not prefer to lead any evidence in defence. Being aggrieved and dissatisfied, the appeal has been preferred.

2. I have heard the learned counsel for the parties and have examined the record. It is relevant to note that the investigation agency during investigation was unable to identify and arrest the alleged associates of the appellant who had joined him for committing robbery. The police did not establish the "particulars" of the said assailants. The complainant and other eye witnesses relied upon by the prosecution did not give their broad features/description. No investigation was carried out as to how and since when, the appellant was in association with those assailants and from where they had procured the "deadly" weapons. Only the appellant was apprehended at the spot. No robbed article was recovered from his possession. At the time of his apprehension, he was also not in possession of any "deadly" weapon. It has come on record that he had sustained injuries on his body; was taken to DDU hospital at around 08.46 A.M. and was medically examined vide MLC (Ex. PW-7/A). It is not clear as to who had taken him to the Emergency Department, DDU hospital as the name of said person does not find mention therein. Nature of injuries sustained by him was ascertained "simple" caused by blunt object. Daily Diary (DD) No. 9 (Ex. PW-11/A) recorded at 07.52 A.M. pertains to a "quarrel" at C-5, DDA Flat, New Ranjit Nagar, Delhi. The prosecution did not examine PCR officials to find out as to when the PCR van arrived at the spot and the patient was taken to DDU hospital. PW-11 (HC Sansar Pal) deposed that the injured was shifted to hospital by PCR van along with Const. Promod. The prosecution did not, however, examine Const. Promod and his name does not find mention in the MLC. PW-12 (Insp. Babu Lal) claimed that on receipt of DD No. 9 (Ex. PW-11/A) he along with HC Sansar Pal and Const. Promod went to the spot. He, however, did not mention if the injured was found present at the spot. Contrary to that, he deposed that the assailant who had sustained injuries had already been taken to DDU hospital by PCR. Apparently, the police officials have not given correct version as to when and by whom the appellant was taken to DDU hospital. It belies the statement of the complainant that the injured was handed over to the police on their arrival.

3. The appellant's conviction is based upon the ocular testimonies of PW-3 (Nitu), PW-4 (Payal) and PW-8 (Ram Narayan) who are all interested witnesses. No

independent public witness was associated at any stage of the investigation. It is alleged that the appellant was given beatings by the public. However, no such public witness who had allegedly given beatings was joined in the investigation. All these witnesses have given entirely inconsistent and contradictory statements regarding the circumstances leading to the occurrence. PW-3 (Nitu) did not claim if the appellant had fired any shot from the country-made pistol during the incident. PW-4 (Payal) in her deposition before the Court deposed that the assailants had fired thrice. In the cross-examination also she reiterated that the appellant had fired from the pistol and it missed. PW-8 (Ram Narayan) was silent if any bullet was fired by any of the assailants. He further stated that the appellant did not "use" the pistol during the incident. The Investigating Officer did not find any fired or empty cartridge at the spot. It is unclear as to at which of the inmate the fire shot was aimed at. The prosecution witnesses have given inconsistent statements regarding the presence of Khushi in the house at the time of occurrence. PW-3 (Nitu) and PW-4 (Payal) claimed that at the time of occurrence Khushi had gone to take clothes from the washer man. However, PW-8 (Ram Narayan) admitted in the cross-examination that at the time of incident Payal, Nitu and Khushi were present in the house. They all saw him being hit by a hammer. The prosecution though cited Khushi as a witness did not examine her during trial. No reasons have been offered for withholding this crucial witness. In the complaint (Ex. PW-3/A), Nitu disclosed that Rs. 40,000/- allegedly robbed belonged to Khushi. She further disclosed that Khushi would be in a position to disclose the details of the articles robbed from the almirah. Adverse inference is to be drawn against the prosecution for withholding Khushi. The prosecution did not collect any evidence during investigation to show ownership of the mobile phones allegedly robbed from the victims. No call details of the phones were collected. Khushi was not examined to prove that Rs. 40,000/- belonged to her.

4. PW-8 (Ram Narayan) is alleged to have suffered injuries during the incident. However, MLC (Ex. PW-6/A) reveals that he was taken to DDU hospital at 07.10 P.M. The Investigating Officer did not explain the inordinate delay in taking the injured Ram Narayan Chauhan to the hospital. He did not get any serious injury. Only bruises over right shoulder were found. It belies the statement of PW-8 (Ram Narayan) that the assailants had hit him by a hammer. He did not elaborate as to on which body part, he was inflicted hammer blow. In the cross-examination, he was unable to disclose as to when he was taken to the hospital. His statement that he was medically examined at 03.00 or 04.00 P.M. is at variance with MLC (Ex. PW-6/A). It is mystery why PCR officials did not shift him to hospital along with the appellant.

5. There are vital discrepancies in the statements of the prosecution witnesses as to the exact role played by the each assailant. PW-3 (Nitu) deposed that when the three assailants entered the house she asked them to go out. On that, one boy identified as Mohd. Shamim took out her mobile and purse containing Rs. 1,500/-. She did not depose if the appellant was armed with any weapon at that time or had commanded her to hand over the mobile and the purse containing cash. She further deposed

that the appellant thereafter put pistol/katta on the right side of her temple. The other two associates took out two long knives. One of them put the knife at Payal and removed her neck chain, tops and mobile. The other took out Rs. 40,000/- from the dressing table. The appellant asked her to hand over the key of the almirah and threatening to shot if she raised alarm. The appellant gave her "fist" blow on her refusal to give key. She was not aware as to what articles were removed from the almirah. In the meantime, Ram Narayan came to the flat and the accused persons gave beatings to him and snatched his mobile phone. PW-4 (Payal) gave entirely inconsistent version and stated that when the three assailants entered the house, one of them took out a katta; put it on her neck and removed her gold jhumki, gold chain, mobile phone and purse containing Rs. 40,000/- lying on the bed. She did not identify the appellant as the assailant who put knife upon her to remove her neck chain, tops and mobile. She further elaborated that the two boys were also having knives in their hands and they all gave beatings to them and fired thrice. Thereafter, they took them in another room; they were made to sit there and while going outside, they tried to bolt the door. She was silent if any article was robbed from Ram Narayan or Nitu. She was declared hostile and was cross-examined by the learned Addl. Public Prosecutor after Court's permission. Only in the cross-examination, the witness admitted the suggestions put to him by the prosecutor. In the cross-examination, she was unable to tell as to when the police arrived the spot; who had informed them and where the memos were arrived. She was also unable to disclose the names of the public persons who had arrived at the spot. PW-8 (Ram Narayan) did not claim his presence at the spot when the articles were taken out from Payal and Nitu. He deposed that when he entered the room, an individual breaking the almirah by a hammer attacked him and asked for its key. He did not depose if any article was robbed or snatched by any of the assailants in his presence. He also did not depose if the public had arrived at the spot and had given beatings to the appellant. On scrutinising testimonies of these witnesses relied upon by the prosecution, apparently they have given entirely conflicting version about the incident. It was not the case of the prosecution that after his apprehension, the appellant had consumed some poisonous substance. PW-4 (Payal) disclosed that after the accused was beaten by the neighbours, he took out something from his pocket, consumed it and became unconscious. The prosecution version that the complainant Nitu had caused a fist blow/danda blow on the head of the victim inspires no confidence. The assailants who were allegedly armed with various deadly weapons were not expected not to resist the attack. None of the inmates was injured with any such "deadly" weapon. In the disclosure statement (Ex. PW-11/A), it was recorded that the accused used to earn his livelihood by white washing. The Investigating Officer did not verify the antecedents of the appellant. Categorical defence was taken by the appellant in 313 statement that on that day he had gone to the house of the complainant to demand Rs. 3,000/- which he were to take for the job of painting/white wash done by him in 2008. He was hit by danda on the back of his head and became unconscious. The defence seems probable.

6. In the light of major discrepancies and conflicting statements, the eye witness account given by PWs, does not inspire confidence. It appears that they have not given or presented true facts. The investigation conducted by the Investigating Officer is highly unfair. Earlier the investigation was assigned to HC Sansar Pal as recorded in DD No. 9 (Ex. PW-11/A). It appears that subsequently in the end to cover up the lapses, it was mentioned that SI Babu Lal also went to the spot. There is no mention if investigation was assigned to him. PW-11 (HC Sansar Pal) and PW-12 (Insp. Babu Lal) have given different version if they all had gone to the spot together. In the light of above discussion, the appeal is accepted. Conviction and sentence of the appellant are set aside. The appellant shall be released forthwith if not required to be detained in any other case. The Trial Court record be sent back forthwith with the copy of the order.