Pradeep vs State on 3 October, 2011

Author: Mukta Gupta

Bench: Mukta Gupta

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ Crl. A. No. 611/2001

% Reserved on: July 28, 2011

Decided on: October 03, 2011

SHAHNAWAZ ..... Appellant
Through: Mr. I.B.S. Thokchom, Adv.

versus

STATE N.C.T. OF DELHI ..... Respondent
Through: Mr. Manoj Ohri, APP for State with
Mr. Manoj Kumar, SI, P.S. Seelampur.

AND

Crl. A. No. 615/2001 & Crl. M.A. No. 971/2011

ASHRAF ..... Appellant
Through: Mr. Ajay Kumar Porwal, Advocate.

versus

STATE (NCT) OF DELHI ..... Respondent
Through: Mr. Manoj Ohri, APP for State with
Mr. Manoj Kumar, SI, P.S. Seelampur.

AND

Crl. A. No. 259/2003 & Crl. M.A. No. 771/2011

SALIM @ ALLAHDIYA ..... Appellant
Through: Ms Saahila Lamba, Adv.

versus

STATE (G.N.C.T.) OF DELHI ..... Respondent
Through: Mr. Manoj Ohri, APP for State

AND

IRFAN ALIAS BABLOO ..... Appellant
Through: Mr. Rohit Bhargava, Adv.

versus

STATE N.C.T. OF DELHI ..... Respondent
Through: Mr. Manoj Ohri, APP for State with Mr Manoj Kumar, SI, P.S. Seelampur.

AND

Crl. A. No. 218/2002 & Crl. M.A. No. 1701/2010 & Crl.M.A. No. 2335/2011

PRADEEP ..... Appellant
Through: Mr. S.C.Jain, Adv.

versus

STATE ..... Respondent
Through: Mr. Manoj Ohri, APP for State with Mr. Manoj Kumar, SI, P.S. Seelampur.

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. By the present appeals, the Appellants lay a challenge to the judgment dated 21st August, 2001 passed by learned Additional Sessions Judge convicting the Appellants for offences punishable under Sections 452/395/397/34 IPC and Section 27 of Arms Act and order on sentence dated 21st August, 2011 whereby Appellants were sentenced to undergo Rigorous Imprisonment for 3 years and a fine of Rs. 1,000/-, in default of payment of fine to further undergo Rigorous Imprisonment for one month for offences punishable under Section 452 IPC., Rigorous Imprisonment of 7 years and fine of Rs. 1,000/-, in default of payment of fine to undergo Rigorous Imprisonment of one month under Section 397 IPC. Appellant Salim was also sentenced to undergo Rigorous Imprisonment for three years and to pay a fine of Rs, 500/- and in default of payment of fine to undergo Rigorous Imprisonment of 15 days for offence punishable under Section 27 Arms Act.

2. Briefly the prosecution case is that on 8th July, 1999 at about 2:45 p.m. 5/6 persons entered shop no. C-217, Gali No. 9, Chauhan Banager of Jugal Kishore and robbed one gold Kada, 2 gold Rings and Rs.20,000/- in cash. They used knife and country made pistol at the time of commission of the crime. The Complainant Jugal Kishore was taken to GTB Hospital from where the Police was informed. During investigation, accused Pradeep and Irfan @ Babloo were arrested on 18th July, 1999 in case FIR No. 395/1999 under Sections 186/353/332/506/34 IPC at PS Seelampur. During

interrogation in the said case they made a disclosure statement wherein they disclosed their involvement in the present case. Thereafter they were arrested in the present case. The Appellants in their disclosure statement pointed out the place of occurrence and the place of concealing of knife. On 29 th July, 1999, accused Salim was arrested on the basis of secret information and he made a disclosure statement and pursuant thereto got recovered a buttandar knife. He also pointed the place of occurrence and got co-accused Shahnawaj arrested on 29th July, 1999. On the basis of disclosure made by Salim and Shahnawaz, accused Ashraf was arrested on 21st August, 1999. TIP of the accused persons was conducted and they were identified by PWs Inderjit and Kanwar Pal. After completion of investigation, charge sheet was filed. The learned Trial Court after recording the statement of the prosecution witnesses and the accused under Section 313 Cr.P.C. convicted and sentenced the Appellants as above.

3. Learned counsel for the Appellant Sahnawaz contends that none of the Appellants was arrested on the spot. Sahnawaz was arrested on 29th July, 1999 on the disclosure of co-accused Salim who was already in police custody in another case FIR No. 395/1999. The injury on the person of the complainant is not corroborated by the medical evidence placed on record. Further the bloodstained shirt of the complainant with cut marks was not seized. There is no recovery of knife/katta from the Appellant nor is any money/ring alleged to have been robbed recovered. It is contended that the identification of the Appellant is doubtful as there are contradictions in the testimony of the witnesses in this regard. PW4 in his testimony before the Court has accepted that the Investigating Officer had shown him 2-4 photographs and asked him to state what he had narrated to him. There was no use of deadly weapon by the Appellant at the time of commission of the alleged offence. Thus the provisions of Section 397 IPC are not attracted.

4. Learned counsel for the Appellant Ashraf contends that the learned trial court while passing the impugned judgment lost sight of the material fact that the Appellant was implicated by the police on the basis of disclosure statement allegedly made by accused Pradeep and Irfan @ Babloo who were arrested in some other case. None of the prosecution witnesses have identified the Appellant. Also there is no recovery of the robbed articles from the Appellant. Learned counsel contends that the Appellant was a juvenile at the time of the commission of the alleged offence hence the benefit under Section 7A of the Juvenile Justice(Care & Protection of Children) Act, 2000 (in short „the J.J. Act) ought to have been granted to him.

5. Learned counsel for the Appellant Salim contends that the impugned judgment is liable to be set aside as none of the prosecution witnesses have identified the Appellant. Further the recovery of the weapon of offence is from an open place i.e. from heep of bricks near the wall of tentwala school, Jafrabad which is accessible to all. Thus the said recovery is not admissible. There are contradictions in the testimony of the witnesses in regard to the time for which the accused persons remained inside the shop of the complainant. It is also contended that the Appellant was a juvenile at the time of alleged offence. Hence the benefit under Section 7A of the J.J. Act be granted to him.

6. Learned counsel for the Appellant Irfan @ Babloo contends that when the Appellant was produced in the Court his face was not muffled and PW4 has admitted that he was shown the photographs in the police station and thereafter he identified the Appellant in the TIP on the basis of

those photographs. Reliance is placed on Surya Murthi & Anr. Vs. Govindaswami, AIR 1989 SC 1410. It is contended that the Appellant was a juvenile at the time of the commission of the alleged offence and his date of birth is 11 th October, 1998. Thus the benefit of juvenility be extended to the Appellant. It is stated that the Appellant has been in custody for two years and four months and in alternative he be released on the period already undergone.

7. Learned counsel for the Appellant Pradeep contends that the conviction is based upon the disclosure statement of the co-accused in another FIR and the name of the Appellant is not mentioned in the same. There is no recovery of stolen articles and the case property has not been identified or produced by the prosecution. Further, the opinion of the doctor has not been taken to connect the weapon of offence to the injury suffered by the complainant. Reliance is placed on Jafar Malik vs. State(NCT of Delhi) 160(2009) DLT 224 and Kamal Kishore vs. State(Delhi Administration) 1997 JCC 250 to contend that the conviction based solely on the disclosure statement of the Appellant is insufficient without any corroborative evidence. Appellant has not been identified at any point of time. Learned counsel for the Appellant contends that the Appellant was a juvenile at the time of commission of crime hence the benefit of juvenility be extended to him.

8. Learned APP for the State contends that two knives have been recovered pursuant to the disclosure made by Salim, Pradeep and Irfan. PW5, PW6 and PW10 have deposed about the incident. PW3 and PW4 have specifically identified the accused persons in the court. In the statement under Section 313 Cr.P.C. the accused persons have admitted their identification. Reliance is placed on Umar Abdul Sakorsorathia vs. Intelligence Officer, Narcotic Control Bureau, 2000 (1) SCC 138 and D. Gopalakrishnan vs. Sadanand Naik and others, 2005 (1) SCC 85 to contend that the photo identification followed by identification in the Court can be the basis for convicting the accused person. The testimony of the prosecution witnesses is clear and cogent. Thus there is no illegality in the impugned judgment. The present appeals have no merit and are liable to be dismissed.

9. I have heard learned counsel for the parties and perused the record.

10. PW3 Jugal Kishore is the injured complainant who has deposed that on 8th July 1999 at about 2.45 P.M. he was present at his shop situated at C-217, Chauhan Bangar, Gali NO. 9. At that time five-six persons who were armed with Kattas and knives had entered his shop. This witness identifies all the five accused persons to be the same who had entered the shop and put kattas and knives on them. This witness has further deposed that accused Pradeep is the same person who had taken out Rs. 20,000/- from the cash box and had given a knife blow on his left side of abdomen. This witness has also identified the accused Ashraf and Shahnawaz present in the Court. He has stated that in the month of August he had come to Karkardooma Courts and on that day identified accused Salim, Pradeep and Irfan.

11. PW4 has stated that he was working in the shop J.N. Die Chem at about 2.45 P.M. When they were sitting in their shop with its owner PW3 Six boys entered their shop and pointed out knives and kattas on them. This witness has further deposed about the commission of robbery and stated that on 7th August, 1999 he had gone to Tihar Jail and identified accused Babloo @ Irfan. He has

further stated that he had also identified accused Pradeep on that day but had not done the same before the Magistrate because he was extended threats by his associates. On 14th September, 1999 he had identified accused Salim to be the same person who had stabbed PW3. It would be relevant to note that PW3 Jugal Kishore identified Appellant Ashraf and Shahnawaz when he came to the Court on 27th July, 1999. This witness has further stated that he does not remember the date but in the month of August he identified Appellants Salim, Pradeep and Irfan in the Court itself. On being cross-examined by the learned APP this witness has clarified that on 27th July, 1999 he went to Court for first time when he identified accused Ashraf and Shahnawaz when his supplementary statement was also recorded. Further on 29th September, 1999 he again went to Court and identified Appellants Salim, Irfan and Pradeep and his supplementary statement regarding identification was recorded. Due to confusion, he could not tell the exact date. PW4 Inderjeet has deposed about the incident and has also identified Appellant Irfan @ Babloo in the TIP proceedings and has stated that due to fear and threat extended by the associates of the other Appellants, he did not identify them during the TIP. This witness has further identified Appellant Ashraf and Shahnawaz in the Court correctly.

12. Hon ble Supreme Court in State of Karnataka vs. Deja K Shetty, 1993 Suppl. SCC (14) held that the identification of accused in Court without conducting TIP would not render identification invalid. Thus the identification of accused persons in Court by PW3 an injured witness and PW4 is valid and cogent evidence admissible in law. I find no merit in the contention of the learned counsel for the Appellants that identification of the accused when produced in the Court has no evidenciary value as the same was conducted after a lapse of one month. It is only after the accused persons were arrested in another case and pursuant to their disclosure in the same, the Appellants were arrested in this case and identified.

13. I find no merit in the contention of the learned counsel for the Appellants that there is a discrepancy in the statement of the witnesses as regards the time the accused were present in the shop. The only discrepancy is that PW3 had stated that the accused persons remained in the shop only for ½ minute whereas PW4 stated that they remained in the shop for about 5 minute. This minor discrepancy is bound to occur in the testimony of the witnesses. PW10 Kunwar Pal, employee of Jugal Kishore has corroborated the statements of PW3 and PW4 to the effect that on the date of incident 5 to 6 persons had entered the shop and forcibly took money, finger ring etc. and has narrated the facts of the incident as they unfolded. This witness has also deposed that it is correct that he told the police that the six persons who entered their shop were having knives and country made pistols. PW13 Constable Santosh Kumar has deposed that pursuant to the disclosure, Appellant Salim led the police party to the spot where he had concealed the knife and on his pointing out a buttondar knife was recovered. The contention of the learned counsel that the recovery of weapon of offence is from an open place does not inspire confidence and is liable to be dismissed.

14. As regards the contention of learned counsels that no offence under Section 397 IPC is made out it may be noted that the essential ingredients to bring the charges under Section 397 IPC are (i) commission of robbery or dacoity (ii) that the accused used the deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt and (iii) the above act was done during

commission of robbery or dacoity. In the present case, the witnesses have stated that Appellants when entered the shop of Jugal Kishore, they were armed with knives and katta. PW3 the injured witness in his testimony has specifically deposed that Appellant Pradeep inflicted knife blow on his abdomen and committed robbery, whereas PW4 Inderjeet has deposed that on 14th September, 1999 he had gone to Tihar Jail along with investigating officer and at that time he had identified accused Salim who had stabbed Jugal Kishore at the time of occurrence. PW5 Jagdish Kumar has deposed that six boys entered their shop who were armed with knife and kattas in their hands and while pointing out knife and kattas to them they asked them to handover whatever they had. One of the boys inflicted knife injury in the stomach of Jugal Kishore. Keeping in view the discrepancies in the testimony of witnesses in regard to the identification of the person who stabbed PW3 no clear evidence has surfaced thus benefit of doubt has to be extended to the accused persons in this regard. Further though witnesses have stated the accused were armed with knives and kattas, it is not clarified which of the accused persons were armed with weapons and used them. Thus the Appellants cannot be convicted for offence under Section 397 IPC.

15. PW3 Jugal Kishore in his testimony has stated that at the relevant point of time he was sitting inside his shop and at that time five six persons who were armed with kattas and knives entered his shop and put the knife on all of them. Further all the five accused persons present in the court were identified by him as the persons who had entered his shop and put kattas and knives on them. It is stated that while pointing knives and kattas the accused persons had asked him to hand over whatever they had and he handed over his kada which was made of gold and two gold rings and another accused took out Rs. 20,000/- from the cash box. PW4 Inderjeet deposing on the similar lines has stated that at about 2.45 p.m. on the date of incident when he along with his owner Jugal Kishore and other employees were sitting in the shop, six boys entered the shop and pointed out their knives and kattas on them. The boys who were standing on the counter asked Jugal Kishore to hand over every valuable thing on which Jugal Kishore handed over both his gold rings and forcibly took the money. PW10 has also deposed that at the time of incident six boys entered the shop and robbed one gold kada, two gold rings and Rs. 20,000/- from his owner Juggal Kishore. Thus the witnesses have clearly deposed about the incident as it unfolded and proved the factum of commission of the offence. In regard to the identity of the accused persons PW3 and PW4 have identified the Appellants herein as the persons who had entered the shop on 8th July 1999. The only variance is on the aspect of ascribing particular roles to each one of the boys and whether each one of them used knife. Hence the prosecution has established its case beyond reasonable doubt against the accused persons for offences under Section 395/34 IPC.

16. However, Appellant Ashraf, Irfan @ Babloo and Salim had filed an application under Section 7A and Section 15 of the J.J. Act before this Court whereupon the state was directed to verify the age of the Appellants and file a status report.

17. As per the bone age test conducted of the Appellant Ashraf the medical board opined his age to be around 26 years as on 6 th April, 2011. Thus, his age on the date of commission of crime would be around 13 years. Appellant Salim was opined to be around 27 years as on 3rd March, 2011. Considering the report the age of the Appellant Salim comes out to be around 14 years at the time of commission of offence. The birth certificate of Appellant Irfan Ahmed was verified from the office of

the Sub Registrar (Birth and Death) Central Record Office. As per the verification report the certificate issued vide no. 2706 dated 15th October, 1981 in respect of Irfan Ahmed son of Smt. Jamrud was found to be genuine and the date of birth of the Appellant is 11 th October, 1981. Thus his age on the date of commission of crime was around 17 years. Thus the Appellants Ashraf, Irfan @ Babloo and Salim are entitled to get the benefit of juvenility being below the age of 18 years at the time of commission of offence. Hon ble Supreme Court in Hari Ram Vs. State of Rajasthan (2009) 13 SCC 211 has held that a juvenile, who had not completed 18 years on the date of commission of the offence is entitled to benefit of the J.J. Act.

18. The Hon ble Supreme Court in Bhoop Ram vs. State of U.P., AIR 1986 SC 1329 held:

> "7. On a consideration of the matter, we are of the opinion that the appellant could not have completed 16 years of age on 3-10- 1975 when the occurrence took place and as such he ought to have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act 1951 and dealt with under Section 29 of the Act. We are persuaded to take this view because of three factors. The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on 30-4-1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in schools for benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the Trial would lend credence to the appellant's case that he was less than 10 years of age on 3-10-1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date of the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts.
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> 8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for

> being detained there. In a somewhat similar situation, this Court held in Jayendra v. State of U.P. 1982 Cri.LJ 1000 that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed."

19. In view of the fact that the Appellants Ashraf, Irfan @ Babloo and Salim were juvenile at the time of the commission of offence and the said benefit has to be extended to him, while maintaining the conviction of the Appellants, Ashraf, Irfan and Salim the order on sentence is set aside. The appeals and the application qua them are disposed of accordingly.

20. The prosecution has established its case beyond reasonable doubt against the Appellants Pradeep and Shahnawaz also. Appellant Pradeep has also claimed the benefit of the provisions of J.J. Act claiming to be a juvenile at the time of commission of crime. The Bone age report in this regard has been received wherein his age has been opined to be 30 to 35 years as on 6 th April, 2011. The incident is dated 8th July, 1999. Thus, his age on the date of commission of crime would be over 18 years. Hence, he being not a juvenile at the relevant point of time, no benefit of juvenility under the J.J. Act can be extended to him. The evidence placed on record is clear and cogent which shows that on 8th July, 1999 the Appellants along with the juvenile co-accused committed the offences punishable under Section 452/395/34 IPC. I find no infirmity in the impugned judgment convicting the Appellants. Appellants were awarded sentence of Rigorous Imprisonment for seven years for offence punishable under Section 397 IPC. No separate sentence was awarded for offence punishable under Section 395 IPC being a minor offence of Section 397 IPC. It may be noted that the offence committed is serious in nature and the fallacy in the prosecution case to bring home the charge of 397 IPC was that the prosecution could not prove specifically which of the Appellants used the weapon of offence. It is well settled that criminal liability for offence under Section 397 IPC cannot be fastened with the aid of Section 34 IPC. It is relevant to note that the robbery was committed and Appellants were armed with deadly weapons. Thus keeping in view the gravity of offence I find no ground to modify the order on sentence. The Appellants Pradeep and Shahanawaz would serve the remaining sentence. Appellant Shahnawaz is on bail, he is directed to surrender to undergo the remaining sentence. His bail bond and surety bond are cancelled.

Appeals and applications stand disposed of accordingly.

MUKTA GUPTA, J OCTOBER 03, 2011