SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Shamshad vs.state

Shamshad vs.state

SooperKanoon Citation : sooperkanoon.com/1206477

Court : Delhi

Decided On : Jun-01-2017

Appellant : Shamshad

Respondent : State

Judgement :

* % + + IN THE HIGH COURT OF DELHI AT NEW DELHI Decided on:

1. t June, 2017 CRL.A. 150/2015 MEHBOOB Represented by: Mr. K.N. Jha, Adv. ..... Appellant STATE (NCT OF DELHI) versus ..... Respondent Represented by: Ms. Rajni Gupta, APP for State with Insp. Gurmail Singh, EOW with SI Alok Vajpayee. CRL.A. 213/2015 & Crl.M.B. 61/2016 SHAHADUT HUSSAIN ..... Appellant Represented by: Mr. Imran Khan, Adv. DHCLSC and Mr. Bharat Chugh, Amicus Curiae.. STATE versus Represented by: Ms. Rajni Gupta, APP for State with Insp. Gurmail Singh, EOW with SI Alok Vajpayee. ..... Respondent + CRL.A. 438/2015 + SHAMSHAD STATE Represented by: Mr. Rajender Chhabra, Adv. ..... Appellant DHCLSC and Mr. Bharat Chugh, Amicus Curiae.. versus Represented by: Ms. Rajni Gupta, APP for State with Insp. Gurmail Singh, EOW with SI Alok Vajpayee. ..... Respondent CRL.A. 479/2015 & Crl.M.B. 369/2017 CRL.A. 150/2015 & Ors. Page 1 of 15 MD. ABDUL QAYUM ..... Appellant Represented by: Mr. Puneet Singhal, Adv. DHCLSC and Mr. Bharat Chugh, Amicus Curiae. STATE versus Represented by: Ms. Rajni Gupta, APP for State with Insp. Gurmail Singh, EOW with SI Alok Vajpayee. ..... Respondent CORAM: HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

(ORAL) 1. Vide impugned judgment dated 25th August, 2014, Mehboob, Shahadut Hussain, Mohd. Abdul Qayum and Shamshad were convicted for the offence punishable under Section 395 IPC read with Section 120B IPC. Shahadut Hussain, Mohd. Abdul Qayum and Shamshad were also convicted for the offence punishable under Section 412 IPC. Vide order on sentence dated 5th September, 2014, all the appellants were sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of `10,000/- for offence punishable under Section 395 IPC and rigorous imprisonment for period of seven years and to pay a fine of `5,000/- for offence punishable under Section 120B IPC. Shahadut Hussain, Mohd. Abdul Qayum and Shamshad were also sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of `10,000/- for offence punishable under Section 412 IPC.

2. Learned counsel for appellant Mehboob contends that one co-accused Bashir Ahmed allegedly involved in the incident was never arrested nor tried, hence conviction of the appellant for offence punishable under Section CRL.A. 150/2015 & Ors. Page 2 of 15 395 IPC i.e. dacoity is liable to be set aside. Appellant Mehboob has not been convicted for offence punishable under Section 412 IPC hence it can safely be held that the prosecution has not proved his involvement in the dacoity as well. No recovery was made pursuant to the arrest of Mehboob. He has been falsely implicated.

3. Learned counsel for Shamshad contends that an alleged offence punishable under Section 356 IPC has been converted into offence punishable under Section 395 read with Section 120B IPC by roping in Mohd. Abdul Qayum who was only plying the rickshaw, as a conspirator to take the number of accused persons to five. In the FIR, complainant stated that chain of the rickshaw was getting disengaged frequently, so he asked them to take the tonga. However Nand Lal, the complainant improved his version in Court to show the complicity of Mohd. Qayum and stated that he forcefully kept their bags in the Tonga. Neither rickshaw of Mohd. Qayum was recovered nor the same was sent for mechanical inspection. In the FIR, it was not stated that threat of giving knife blow was made however the same was deposed to in Court. Though from Ajmeri Gate, the complainant and his brother were to go to Sarafa Bazar, Chandni Chowk, one fails to understand how

they landed up in front of Hanuman Mandir, Jamuna Bazar. No description of the accused has been mentioned in the FIR. As per the notes in the site plan, four persons were involved. No previous involvement of the appellant has been proved. Thus even if the case of the prosecution is accepted, at best the appellants can be convicted for offence punishable under Section 356 IPC or 392 IPC and they be thus released on the period already undergone. Reliance is placed on the decisions of this Court in Shafiq Vs. State (Crl.A. 397/2006 decided on 6th January, 2009), Sammi & CRL.A. 150/2015 & Ors. Page 3 of 15 Anr. Vs. State (Crl.Rev. P. 565/2014 decided on 27th April, 2015) and Ikrar Vs. State Govt. of NCT of Delhi (Crl.Rev. P. 454/2014 decided on 5th November, 2015).

4. Learned counsel for Mohd. Abdul Qayum contends that Constable Vijay Kumar in his deposition stated that he was with the investigating officer from 17th to 19th May, 2012 and in the first disclosure statement, Shamshad did not disclose the name of Mohd. Qayum. Thus only to make out a case of dacoity, name of the appellant has been introduced as a conspirator. Alleged recovery from the house of the appellant is unbelievable. ASI Om Prakash in his deposition stated that the house of Mohd. Qayum was a hut type house having no door. No person was present. No public witness was associated with the recovery. Further when appellant Mohd. Qayum was brought to Delhi by train, he was in unmuffled face. Thus, he refused to undergo the test identification parade rightly. Moreover, Shayam Babu deposed that photograph of Mohd. Qayum was shown to them on the mobile phone. Appellant has been falsely implicated thus he be acquitted.

5. Learned counsel for Shahadat Hussain adopting the arguments of other counsels contends that the allegation against the appellant is of recovery of 9600/-. The recovery so made is not connected to the offence and no one identified the currency notes to be those of the employer of the complainant. Further no evidence has been led to show that Shyam Babu and Nand Lal were employees of Prahlad Khandelwal as no documentary proof was produced.

6. Supplementing the arguments of learned counsels for the appellants, Mr. Bharat Chugh, learned Amicus Curiae contends that having been CRL.A. 150/2015 & Ors. Page 4 of 15 convicted for offences punishable under Section 395 IPC and

Section 120B IPC, appellants Shamshad Hussain, Mohd. Qayum and Shahadat Hussain could not be convicted for offence punishable under Section 412 IPC. Reliance is placed on the decision reported as (2014) 1 Cal LT299Swapan Kumar Khan & Ors. Vs. State of West Bengal.

7. Learned APP for the State countering the pleas of learned counsels for the appellants contends that the prosecution has proved its case beyond reasonable doubt from the testimony of Nand Lal and his brother Shyam Babu who were carrying money of their employer. The fact that Shyam Babu and Nand Lal were in the employment of Prahlad Khandelwal has been deposed to by Prahlad Khandelwal himself who appeared in the witness box as PW-5. There is no improvement in the deposition of complainant before Court from the statement on the basis of which FIR was registered. He stated about the threat of knife blow. The fact that Mohd. Qayum persuaded the complainant and his brother to take Tonga is mentioned in the rukka also. Elaboration of facts mentioned in the rukka cannot be held to be major improvement as in the FIR entire details are not required to be given. Immediately after the incident, appellant Shamshad who was plying the Tonga was arrested and from him, the bag containing 31.50 lakhs were recovered. On the disclosure statement of Shamshad, Shahadat Hussain was arrested on 19th May, 2012 from whose possession 9600/- were recovered. He was kept in muffled face. On an application filed before the learned Trial Court for getting the test identification parade conducted, Shahadut Hussain refused to undergo the test identification parade on 25th May, 2012 by which time the complainant and his brother had left for Pratapgarh from Delhi thus there was no way that the police officer could show their faces to the two CRL.A. 150/2015 & Ors. Page 5 of 15 witnesses. Mohd. Qayum was arrested on 14th July, 2012. His face was not muffled during the transit journey to Delhi from his native place Badayun. 2 lakhs were recovered at the instance of Mohd. Qayum besides 35000/- and 40,000/- deposited in the account of mother of Mohd. Qayum and Mehboob which fact has been deposed by PW-8 Harpal Singh Chauhan, Manager, Punjab National Bank for which no explanation was rendered by the two appellants. On 22nd July, 2012, Mehboob was arrested. Test identification parade was conducted and on 30th July, 2012 Shayam Babu identified Mehboob though Nand Lal could not identify him on 26th July, 2012. However, in Court both Nand

Lal and Shayam Babu identified Mehboob. Thus, from the testimonies of two victims and the recoveries made, the prosecution has proved beyond reasonable doubt that the appellants committed offences punishable under Sections 120B/395/412 IPC and not 392 or 356 IPC.

8. Process of law was set into motion on 17th May, 2012 when Ct. Vijay Kumar was on patrolling duty and around 9:45 A.M., when he reached at Hanuman Mandir, Yamuna Bazaar, he saw some persons running and one person namely Nand Lal told him that they were running with his bags. He chased and apprehended one of them along with one bag and Nand Lal told him that the recovered black bag containing `31,50,000/- belonged to his employer. Nand Lal told him that the other associates of the man who was apprehended had run away with another bag of red colour containing `3,50,000/-. In the meantime, ASI Om Prakash along with Ct. Gurmeet reached the spot. The name of the person, who was apprehended, was revealed as Shamshad.

9. Statement of Nand Lal Ex.PW-4/A was recorded wherein he stated CRL.A. 150/2015 & Ors. Page 6 of 15 that he and his brother Shyam Babu were in employment of Prahlad Khandelwal at his jewelry shop in Shyam Bihari Lane, Pratapgarh, Uttar Pradesh since last two years. Their duty was to bring and deliver cash as per the instruction of Prahlad Khandelwal. On 16th May 2012, he and Shyam Babu took `35,00,000/- in black and red bags and left around 10:00 P.M., to board Shiv Ganga express train from Allahabad, Uttar Pradesh for Delhi to hand-over the delivery of cash to one Ashish Bansal in Chandni Chowk. He was having the black bag containing `31,50,000/- and his brother Shyam Babu was having the red bag containing `3,50,000/-. On 17th May, 2012 around 9:00 A.M., they arrived at New Delhi Railway Station and hired a rickshaw to go to Chandni Chowk. Since the chain of the rickshaw was disengaging a number of times, the rickshaw puller stopped the rickshaw where one Tonga was stationed. There were three persons already sitting in the Tonga apart from the Tonga driver. He and Shyam Babu sat on the front side of the Tonga and put their bags under the seat. While the Tonga driver engaged them in a conversation, he got suspicious that the three other passengers were checking their bags. When he asked the Tonga driver to stop, he increased the speed and those three men threatened them to sit

quietly otherwise they would kill them. They raised alarm and the Tonga driver stopped the Tonga at Hanuman Mandir, Yamuna Bazaar. Those three men and the Tonga driver pushed both of them and ran away towards the bridge with both their bags. In the meantime, police came there and apprehended Shamshad with the bag containing 31,50,000/-.

10. On the basis of the aforesaid statement FIR No.107/2012 was registered under Sections 392/4
IPC at PS Kashmeri Gate (Ex. PW- 1/A). Shamshad was arrested vide arrest memo Ex. PW-2/C. Black coloured CRL.A. 150/2015 & Ors. Page 7 of 15 bag (Ex. P-1) containing `31,50,000/- was seized vide seizure memo Ex. PW-2/A. Disclosure statement of Shamshad was recorded vide memo Ex.PW-6/A. ASI Om Prakash prepared the site plan (Ex. PW-4/B). On the pointing out of Shamshad, Shahadut Hussain was apprehended from Boulevard Road vide arrest memo Ex. PW-6/B. `9,600/-(9 notes in the denomination of `1,000/- and 6 notes in the denomination of 100/-) were recovered from the possession of Shahadut Hussain which were part of the robbed money and the same were seized vide seizure memo Ex. PW-6/D. Mohd. Abdul Qayum was arrested from village Goramai, District Badayun vide arrest memo Ex. PW-9/B. Disclosure statement of Mohd. Abdul Qayum was recorded vide Ex. PW-9/D. On the basis of disclosure statement of Mohd. Abdul Qayum, `2,00,000/-, part of the robbed money was recovered from a house situated at Village Gadimaidu, Bhajanpura from a polythene which was lying beneath the bricks and the same were taken into possession vide seizure memo Ex. PW-3/A. On 22nd July, 2012, Mehboob was arrested from Kadar Chowk, Badayun vide arrest memo Ex. PW-7/A and his disclosure statement was recorded vide Ex. PW-9/E.

11. On 25th May, 2012, ASI Om Prakash along with Insp. Gurmail Singh raided the house of Mehboob and Mohd. Abdul Qayum and recovered a passbook and two slips regarding deposit of money from the possession of Nasima, mother of Mehboob and Mohd. Abdul Qayum. The passbook and slips were taken into possession vide Ex. PW-9/F.

12. PW-8 Harpal Singh Chauhan, Bank Manager, Punjab National Bank, Sheikhupur, District Badayun exhibited the statement of account pertaining to the customer Smt. Naseem Jahan, A/c No.3140000100099922 vide Ex.PW-8/A. During his cross-examination he stated that he did not know CRL.A. 150/2015 & Ors. Page 8 of 15 who deposited `35,000/- and `40,000/- in the aforesaid account on 25th May 2012.

13. Nand Lal who was examined as PW-4 in Court deposed in sync with his earlier statement made before the police. He also stated that he had handed over the train ticket to the police and the same were seized vide seizure memo Ex. PW-4/C.

14. PW-2 Shyam Babu corroborated the testimony of Nand Lal. During his cross-examination, he pointed out towards Mohd. Abdul Qayum as the person who was pulling the rickshaw on the day of the incident which they boarded from New Delhi Railway Station.

15. PW-5 Prahalad Khandelwal deposed that on 16th May 2012, he had handed over `35 lacs to Nand Lal and Shyam to be delivered to Ashish Bansal at his jewelry shop in Chandni Chowk. On 17th May 2012, at about 9:30 A.M. he received a phone call from Nand Lal stating that they have been robbed of `35 lacs at Jamuna Bazaar, Old Delhi. He stated that he instructed Nand Lal to inform the police immediately. In the meantime, he received a phone call from PS Kashmere Gate asking about Shyam Babu and Nand Lal.

16. Contention of learned counsel for the appellants that in order to show that five persons were involved in the offence, Mohd. Qayum has been roped as an accused as there was no overt act on his part stated in the rukka but in the deposition Nand Lal attributed overt act against him, deserves to be rejected. In the rukka Nand Lal stated that chain of the rickshaw got disengaged frequently, thus the rickshaw puller asked them to hire a Tonga which was stationed there wherein three passengers were already sitting. Shayam Babu also deposed that chain of the rickshaw was repeatedly CRL.A. 150/2015 & Ors. Page 9 of 15 disengaging, thus after travelling for half a kilometer, rickshaw puller asked them to take a tonga which was waiting at the road side wherein three persons were

already sitting in the tonga besides tongawala. By Nand Lal merely deposing in Court that the rickshaw puller took their bags and put the same in the tonga which was stationed there, is not a material improvement. It is the consistent statement of the witnesses that it was Mohd. Qayum who asked them to take the tonga which was already stationed there. Further, at the instance of Mohd. Qayum, 2 lakhs of the robbed money was recovered from his plot lying beneath the bricks which were in four packets, each packet containing 50,000/-. Further two sums of 35,000/- and 40,000/- were credited on 25th May, 2012 in the account of mother of Mohd. Qayum and Mehboob, after the incident as deposed to by Harpal Singh Chauhan, the bank manager. Once recovery of 2 lakhs was proved from Mohd. Qayum and two credit entries of 35000/- and 40,000/- on 25th May, 2012 in the account of mother of the two appellants have been proved, it was for Mohd. Qayum and Mehboob to explain the circumstance and account for the money because the facts were specially in their knowledge. In his statement under Section 313 Cr.P.C., Mohd. Qayum baldly denied the recovery of 2 lakhs however admitted the account statement of his mother to be matter of record. No explanation was rendered either by Mohd. Qayum or by Mehboob as to how the said amount came into the account of their mother. From the evidence on record, the complicity of Mohd. Qayum besides Mehboob as the fifth person in the offence is writ large and thus the contention that there is an improvement in the statement of the complainant by attributing role of Mohd. Qayum of putting the bags in the Tonga is required to be rejected.

17. Merely because Nand Lal in his statement before the Court stated that CRL.A. 150/2015 & Ors. Page 10 of 15 they took the route because digging was going on or that he put the bag in the tonga would not amount to material improvement as it is well settled that the FIR need not contain each and every detail of the incident and is not an encyclopedia of the prosecution case. [See State of U.P. Vs. Naresh & Ors. (2011) 4 SCC324and Surjit Singh @ Gurmit Singh Vs. State of Punjab (1993) Supp (1) SCC208].

18. Learned counsel for Shamshad has strenuously contended that offence punishable under Section 356 IPC has been converted to Section 395 read with Section 120B IPC. Section 356 IPC defines assault or use of criminal force to any

person in attempting to commit theft on any property which that person is then wearing or carrying. In the present case, the appellants have not only attempted but completed the offence hence ingredients of Section 395 IPC are attracted and not Section 356 IPC.

19. Recovery of rickshaw or its mechanical inspection was not necessary to prove the prosecution case. Further, the fact that the site plan notes four persons would not belie the prosecution case because a conspiracy may not be unearthed immediately and since Shamshad was the first person arrested who did not name Mohd. Qayum whose complicity came to be known from the disclosure statement of the co-accused and recovery of money, it cannot be said that Mohd. Qayum has been added as an accused as an afterthought or that the offence if at all is of robbery and not dacoity as five persons were not involved.

20. To come out of the ambit of Section 395 IPC, learned counsel further contends that in the FIR it is not stated that any threat was given. In the rukka it is stated that when the complainant asked the tongawala to stop, he started plying it faster and the three passengers threatened them that they CRL.A. 150/2015 & Ors. Page 11 of 15 should keep quite or else they would kill them. The two brothers shouted for help however they actually stopped only near Hanuman Mandir, Jamuna Bazar and the three passengers and tongawala ran away with the bags after pushing the two brothers towards the bridge. Even in his deposition before Court Nand Lal stated about the threat given and that when he objected, they asked them to keep quite or they would be given knife blows. It is not the case of either Nand Lal or Shayam Babu that knife was shown however the fact that a threat was extended is the consistent case of the prosecution. Section 391 defines dacoity and Section 395 provides the punishment for the offence of dacoity. Section 390 IPC defines robbery which provides that if theft or extortion is done by putting a person in fear of instant death or instant hurt or instant wrongful restraint to that person, the same would amount to robbery. Further, if five or more persons conjointly commit or attempt to commit a robbery the same is an offence of dacoity. Thus, ingredients for offence punishable under Section 395 IPC are that there should be five or more persons and the victim/ victims should be put under the fear of death or hurt or wrongful restrain to commit theft or extortion. If a

weapon of offence is used, the same would attract Section 397 IPC.

21. From the facts noted above, it cannot be said that there is material improvement in the statement of Nand Lal or that the ingredients of Section 395 IPC are not made out.

22. Further contention of learned counsel for the appellants that since accused Bashir Ahmed could not be arrested and only four accused were sent for trial, the appellants cannot be convicted for offence punishable under Section 395 IPC deserves to be rejected following the decision of the Supreme Court reported as (2009) 11 SCC709Raj Kumar @ Raju Vs. State CRL.A. 150/2015 & Ors. Page 12 of 15 of Uttaranchal wherein the Supreme Court held that if the involvement of five or more persons is proved then the non-trial or conviction of less than five persons would still attract Section 395 IPC. The Supreme Court held- 20. It was contended before this Court that as the High Court found that only three persons had participated in the occurrence, there was an error in convicting them for dacoity, since the offence of dacoity could not be committed by less than five persons. This Court, however, negatived the contention observing as under: (Saktu case [(1973) 1 SCC202:

1973. SCC (Cri) 307]. , SCC p. 204, para

6) 6. The charge in the instant case is that apart from the named seven or eight persons, there were five or six others who had taken part in the commission of the dacoity. The circumstance therefore that all, except the three accused, have been acquitted by the High Court will not militate against the conviction of those three for dacoity. It is important that it was at no time disputed that more than 13 or 14 persons had taken part in the robbery. The High Court acquitted a large number of the accused because their identity could not be established. The High Court, however, did not find that the group which committed robbery in the house of Jwala Prasad consisted of less than five persons. (emphasis supplied) 21. It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed

or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons-or even one-can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity. CRL.A. 150/2015 & Ors. Page 13 of 15 23. From the evidence of the complainant Nand Lal, Shyam Babu, Prahlad Khandelwal and the immediate apprehension of Shamshad with an amount of 31.50 lakhs followed by the arrest of the other three appellants and consequent recovery from Shamshad, Mohd. Qayum and the amount of 35000/- and 40000/- deposited in the account of mother of Mohd. Qayum and Mehboob soon after the date of the incident and the appellants being duly identified by the complainant and his brother in Court, the prosecution has proved beyond reasonable doubt that the appellants committed offences punishable under Sections 395/120B IPC.

24. Learned amicus curiae has brought to the notice of this Court the decision in Swapan Kumar Khan (supra) wherein the Division Bench of the Calcultta High Court held that an accused can either been involved in the offence under Section 394/395/397 IPC or 412 IPC.

25. Section 412 IPC reads as under:-

"412. Dishonestly receiving property stolen in the commission of a dacoity.- Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to be- lieve to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with 1[imprisonment for life]., or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. 26. Thus, it is only the receiver of stolen property in the commission of dacoity who can be punished for offence punishable under Section 412 IPC. The person who himself commits dacoity cannot be the receiver of the CRL.A. 150/2015 & Ors. Page 14 of 15 property stolen in the commission of dacoity as he has committed the substantive offence.

27. In view of the discussion aforesaid, the conviction of the appellants for offences punishable under Section 395 and Section 120B IPC is upheld. Conviction of Shahadut Hussain, Mohd. Abdul Qayum and Shamshad for offence punishable under Section 412 IPC and consequent sentence on this count is set aside. The order on sentence directing the appellants to undergo rigorous imprisonment for seven years and to pay fine of 10000/- each for offence punishable under Section 395 IPC and rigorous imprisonment for seven years and fine of 5000/- each for offence punishable under Section 120B IPC is upheld.

28. Appeals and applications are accordingly disposed of.

29. Copies of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellants.

30. Trial Court Record be returned.

31. The dates already fixed are cancelled. JUNE01 2017 v mittal (MUKTA GUPTA) JUDGE CRL.A. 150/2015 & Ors. Page 15 of 15

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com