

Sushil @ Monu Vs. State

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Court : Delhi

Decided On : Apr-30-2012

Judge : Suresh Kait

Appeal No. : CRL. Appeal No. 422 & 423 OF 2011

Appellant : Sushil @ Monu

Respondent : State

Judgement :

SURESH KAIT, J.

1. Vide instant appeal, the both appellant have assailed the impugned judgment dated 08.02.2011 whereby they were held guilty for the offences punishable under Section 392 read with Section 34 Indian Penal Code, 1860 whereas appellant Jitender in addition to above held guilty for the offence under Section 397 Indian Penal Code, 1860.

2. Also challenged the order on sentence dated 15.02.2011 whereby both of them sentenced to rigorous imprisonment for seven years each and to pay fine of `3,000/- each for the offence punishable under Section 392 read with Section 34 Indian Penal Code, 1860.

3. Appellant Jitender further sentenced to undergo rigorous imprisonment for seven years for the offence punishable under Section 397 Indian Penal Code,

1860.

4. Learned Trial Judge has directed that the substantial sentence awarded to the appellant Jitender shall run concurrently and the benefit under Section 428 Cr. P.C. extended to both the appellants.

5. Since both the appellants have been tried and convicted by a joint trial, therefore, both the appeals are being taken up for disposal together.

6. The case of the prosecution in brief is that on 14.02.2010, Sunny / complainant was going to his sister house, along with his cousin brother Tarun. They were having pulsar Motorcycle No.DL-5S-AA-4066 belonging to one Surender; their cousin brother. At about 07:45PM, while passing through Road No.70, New Seemapuri, Delhi near Masjid, they were signalled to stop by both the appellants. Accordingly, Sunny stopped the motorcycle as both the appellants were known to them. They took the motorcycle in the possession. When Sunny and Tarun protested to their act, appellant Jitender took out a knife and on the point of knife both the appellants drove away their motorcycle. Sunny lodged the complaint with police.

7. Thereafter, his statement was recorded, which become the bedrock of the present case. Investigation was taken up by ASI Ved Parkash. During the course of investigation, police arrested both the appellants. The investigation culminated into filing of the charge-sheet against them.

8. Charge for offence the offences punishable under Section 392/34 Indian Penal Code, 1860 was framed against both the appellants, beside a separate charge for the offences punishable under Section 397/411 Indian Penal Code, 1860 against appellant Jitender was framed to they pleaded not guilty and claimed trial.

9. To substantiate the charge, prosecution examined seven witnesses. Thereafter, statement of both the appellants under Section 313 Cr. P.C. recorded wherein the appellant Jitender stated that he was innocent and was apprehended from his house at the instance of Surender @ Leelu Pradhan due to previous enmity. Appellant Sushil @ Monu stated that co accused was his friend and he had enmity

with superdaar Surender @ Leelu. So, he is falsely implicated in this case at the instance of Surender and other witnesses.

10. PW1 Shri Tarun, who is cousin brother of Sunny/ complainant is a star witness of the prosecution appeared in the witness box on 09.08.2010. He deposed in examination-in-chief that he was studying in 09th class. On 14.02.2010, he alongwith his cousin Sunny were going to Seemapuri, Delhi on the motorcycle bearing No.DL-5S-AA-4066 belonging to his uncle Surender @ Leelu Pradhan - to visit his Buaji's house (maternal aunt). Sunny was driving the motorcycle and he was sitting on the pillion seat. At about 07:30PM, they reached near Masjid near New Seemapuri, Delhi. Both the appellants met them. He knew both of them as they used to reside in the same colony where PW1 was residing. Both the appellants signalled them to stop. Both appellant asked them to hand over motorcycle. Appellant Jitender was having a churra (knife) in his hand, due to which they became frightened and both appellant persons snatched motorcycle and took away same towards DTC Deopt. They called their uncle and also called at 100 number. Police reached there and recorded the statement. They had shown the place of incidence to the police. Later on the motorcycle was recovered from the appellant persons.

11. He further identified the motorcycle as Ex.P1 which was produced by superdar Shri Surender Kumar in the Court. The knife which was used by appellant for threatening them was also identified by this witness as Ex.P2.

12. On the date of their examination-in-chief i.e. 09.08.2010, this witness was not cross-examined by learned counsel for both appellants and witness was discharged.

13. Vide order dated 24.11.2010, learned Trial Court recalled this witness for cross-examination under Section 311 Cr. P.C.

14. During cross-examination, on 04.01.2011 this witness admitted that Sunny made a call at 100 number by which he stated that there were three persons, who snatched the motorcycle. He denied to the suggestion put by learned defence counsel that Sunny told that accused persons had also snatched a black colour

bag besides the motorcycle. He could not identify the persons, who snatched the motorcycle as there was darkness. He did not know the accused persons in the Court prior to the incident. He admitted that both the appellants/accused persons had not snatched their motorcycle. He had named the accused persons before the Court at the instance of police official and accordingly deposed before the Court against the appellants.

15. On the request of learned Prosecutor, this witness was allowed to be re-examined. In the re-examination, PW1 Tarun deposed that he was studying in 09th class. He did not know the meaning of Oath. He admitted that one has to tell truth after taking Oath. He did not know the number of the police official who pressurised him; however they met him outside the Court. He could not tell their names. He could also not tell whether they were in civil dress or in police uniform. He did not remember their names as well.

16. Regarding the examination-in-chief dated 09.08.2010, a specific question was put to the witness by learned Prosecutor, which reads as under:-

“Q. Whether the signature at point A and B on statement dated 09.08.2010 are yours or not?

Ans. This question was at least repeated by the public prosecutor 10 times and witness kept on giving the evasive answer and ultimately admitted that these are his signatures.”

17. Further this witness tried to disown his earlier statement recorded by learned Trial Court on 09.08.2010 by giving contradictory answers. Learned Prosecutor had to confront different portions of the examination in chief of this witness to him such as portion A to A; portion B to B; portion C to C; and portion D to D.

18. I note that this witness had totally resiled from his examination-in-chief recorded by learned Trial Court on 09.08.2010.

19. The complainant - Sunny appeared as PW2 in the witness box on 09.08.2010 and deposed in examination-in-chief that he alongwith Tarun were going to New Seemapuri, Delhi to serve food to his sister on a red colour pulsar motorcycle

bearing No.DL5S-AA-4066. The said motorcycle was belonged to his cousin namely Surender @ Leelu Pradhan. At about 07:30PM, when they crossed Masjid at New Seempuri, Delhi both the appellants present in the Court met them. He knew them previously as they were living in the same colony. Both the appellants signalled them to stop. Both the appellants were under influence of liquor. Appellant Jitender took out a knife and threatened them to leave the motorcycle. The witness made them understand to which they did not understand both the appellant snatched their motorcycle. Appellant Jitender drove the said motorcycle and appellant Sushil @ Monu sat on the pillion seat and both of them ran way towards Seemapuri. He called at 100 number. Police reached their and recorded his statement Ex.PW2/A. He had also shown the place of incidence to the police.

20. PW2 further deposed that he alongwith three police officials tried to locate the appellants, but could not be traced in the night. On next day, both the appellants were met the witness at about 08:00AM in the police station. He identified the motorcycle as Ex.P1 and the knife as Ex.P2. Further, he deposed about his participation in the arrest of appellants and investigation and identified his signatures on different memos.

21. I note this witness was also not cross examined on that very date by defence counsels, despite opportunity given. Subsequently, like PW1, this witness was also recalled under Section 311 Cr. P.C. and his cross examination, by learned defence counsel, conducted on 04.01.2011.

22. During cross-examination, PW2 admitted that in the call at 100 number, he had told the police that there were three persons, who snatched the motorcycle. He denied the suggestion that he had stated in the aforesaid call that one black colour bag was also snatched with the motorcycle. He had not stated that name of both the appellants in the call made by him at 100 number. He did not know the name of the culprits at the time when he made call at 100 numbers as all the three persons were wearing cap on their faces. He admitted that he did not see the face of all the three persons, who snatched the motorcycle. However, admitted that he knew appellants prior to the incident. But he deposed that appellants had not snatched the motorcycle.

23. This witness further deposed that neither both the appellants were not arrested, nor the motorcycle was recovered in his presence. He made his statement before the Court on 09.08.2010 under the pressure of police official as they threatened him to implicate in police case. No document was prepared by the police in his presence; however, police obtained his signatures on some blank papers. He did not depose anything against the appellants in the police station. He further deposed that during his examination in chief before the Court on 09.08.2010, he wrongly identified the appellants at the instance of police officials.

24. As this witness also resiled from his examination-in-chief, learned Prosecutor re-examined him.

25. I note that this witness also confronted with his examination-in-chief as recorded by learned Trial Court on 09.08.2010.

26. PW3 Shri Surender @ Leelu Pradhan, owner of the motorcycle bearing No.DL-5S-AA-4066 deposed in chief examination that on 14.02.2010, his motorcycle was taken by his cousin Sunny to visit his sister's place who was residing in Seemapuri, Delhi. At about 07:30 - 07:40PM, Sunny called him on telephone and told that his motorcycle was snatched by Sushil @ Monu and Jitneder (appellants) near Masjid, New Seemapuri, Delhi. He knew both the appellants as they were earlier residing in same colony. He asked Sunny to remain at the spot and to make a complaint at 100 number. After that he alongwith his family members reached at the spot. Police also arrived at the spot. Later on, both the appellants were apprehended by the police at Gol Chakker, Seemapuri, Delhi, on the pointing out of Sunny He identified his motorcycle in the police station and got released the same on superdari vide Superdarinama Ex.PW3/A.

27. Needless to mention here that this witness was also not cross examined on the day of recoding his examination-in-chief. However, he was also recalled under Section 311 Cr. P.C. and his cross- examination conducted on 21.01.2011.

28. During his cross-examination, he deposed that no case was pending between him and brother of appellant (Jitender) namely Dharmender. He stated that he was a leader of Bhartiya Janta Party and holding the post of State Secretary of Uttar

Pradesh. He was not holding the area of Seemapuri, Delhi. He denied to the suggestion that he had good relations with the police of Seemapuri police station. He did not tell as to who had snatched the motorcycle from Sunny and Tarun as the incident did not occurred in his presence.

29. This witness was also re-examined by learned Prosecutor, as the witness also resiled from his earlier deposition.

30. Learned Trial Judge did not consider the statements made by PW1 Tarun; PW2 Sunny and PW3 Surender @ Leelu Pradhan during cross-examination on the ground that their statements were recorded on 09.08.2010. At that time, appellants did not choose to cross-examine any of these witnesses. Subsequently, an application for recalling of these witnesses for cross-examination was moved; which was allowed and pursuant thereto, PW1 Tarun; PW2 Sunny and PW3 Surender @ Leelu Pradhan were called to which they appeared in the witness box on 04.01.2011 i.e. after a lapse of 04 months. At that juncture, they tried to resile from their earlier depositions; however the tone and tenor of their cross-examination clearly revealed that something might have transpired in between 09.08.2010 till 04.01.2011, which made these witnesses to wriggle out from their earlier statement by not identifying the appellants.

31. Ld. Trial Judge, It is further recorded that cross-examination of PW1 reflects that he was contradicting himself, as much as, at one stage he deposed that he could not identify the persons who snatched the motorcycle as there was darkness, but went on admitting the suggestions given by learned defence counsel that both appellants had not snatched their motorcycle. If due to darkness he could not identify the persons who snatched the motorcycle, then how he could admit the suggestion of learned defence counsel that the appellants had not snatched the motorcycle, in as much as he also went on deposing that he did not know the appellants prior to the incidence. According to him, he has deposed before the Court against the appellants at the instance of police officer. Thereupon, this witness was re-examined by learned Prosecutor and in cross-examination he could not tell the number of police officials, who pressurised him to make statement earlier. He could not tell their names, he also could not tell even

whether they were in civil dress or in police uniform. He went to the extent of deposing that he was coming to the Court for the first time on that day. Thereupon, he was shown his signature at point A and B on statement dated 09.08.2010, which was recorded his examination-in-chief. Atleast, that question was repeated by learned Prosecutor, ten times and the witness kept on giving evasive answers and ultimately, admitted that the statement dated 09.08.2010 bears his signatures at points A and B. Thereupon, his attention was drawn to the statement made by him before the Court on 09.08.2010, wherein he deposed that accused persons were known to him from earlier as they used to reside in the same colony where he was residing, which he denied.

32. However, subsequent part of his statement that on 14.02.2010, he alongwith his cousin Sunny were going on motorcycle bearing No.DL-5S-AA-4066 belonging to his uncle Surender @ Leelu Pradhan to Seemapuri to visit his Bua's residence and Sunny was driving the same, while he was sitting on pillion seat. At about 07:30PM, when they reached near Mosque, New Seemapuri, Delhi, both appellants met them and gave signal to stop motorcycle, thereupon they stopped the same, but appellants asked them to hand over motorcycle. Appellant Jitender was having a churra (Knife) in his hand - due to which they got frightened. After snatching their motorcycle, both appellants ran away was not denied by him, but he merely pleaded that he did not remember the same.

33. Learned Trial Judge after considering the testimony of PW1 Tarun and PW2 Sunny was of the opinion that it stands established beyond reasonable doubts that both the appellants had committed the robbery of pulsar motorcycle bearing No.DL-5S-AA-4066. It stands further proved from the testimony of officials witnesses i.e. PW5 Constable Shobir, PW6 Contsable Sarvesh and PW7 ASI Ved Parkash duly corroborated complainant Sunny that on 15.02.2010, they had gone in search of appellant and when they reached Golchakar, both appellants were seen coming from the side of Old Seemapuri on the robbed motorcycle. They were identified by Sunny and on his identification, they were apprehended and motorcycle was seized and recovered, which was also identified by Sunny.

34. It is further recorded that appellant Jitender was also facing charge under Section 397 Indian Penal Code, 1860; in as much as robbery was committed on the pointing out of churri/knife. Needless to say that knife is a deadly weapon.

35. Learned Trial Judge relied upon **Phool Kumar v. Delhi Administration : AIR 1975 SC 905** wherein it has been held as under:-

“Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 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 7 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.”

36. It was further held that carrying a deadly weapon, open to the view of the victim is sufficient to frighten to terrorize them. However, any overt act such as brandishing of the knife or causing of grievous hurt with it is not necessary to bring the offence within the ambit of Section 397 Indian Penal Code, 1860.

37. The case of **Phool Kumar (supra)** was further reiterated by the Apex Court in **Ashfaq v. State : 2004AIR (SC) 1253** wherein it was held that what is essential to

satisfy the word "uses" for the purposes of Section 397 Indian Penal Code, 1860 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.

38. I note, learned Trial Judge has also clarified on the submission of learned defence counsel that in the arrest memo Section was mentioned as 342 Indian Penal Code, 1860 and later on it was converted to 382 Indian Penal Code, 1860, explanation has been given by the investigating officer of the case by mentioning that clerical mistake had occurred by mentioning Section 342 Indian Penal Code, 1860. However that was rectified, in as much as, in the endorsement Ex.PW7/B itself the investigating officer had directed for registration of case under Section 382 Indian Penal Code, 1860. The charge sheet was however submitted under Sections 392/397/411/34 Indian Penal Code, 1860. But from that appellants do not get any benefit, even if the investigating officer had submitted challan under Section 382 Indian Penal Code, 1860, since allegations clearly attracted provisions of Section 392/397 Indian Penal Code, 1860 even then charge could have been framed against the appellants under those Sections.

39. Ms.Tanushree Banerjee, learned counsel appearing on behalf of both the appellants relied upon the deposition of PW1 and PW2 when they were recalled, who have not supported the case of the prosecution. She submitted that learned Trial Judge has not considered the evidentiary value of their deposition. Had learned Trial Judge considered the same, the result would have been different and the appellants were entitled to acquittal.

40. Controverting it, Ms.Rajdipa Behura, learned APP for State submitted that PW1, PW2 and PW3 fully supported the case of the prosecution when their examination-in-chief were recorded on 09.08.2010; however they resiled from their statements when they were recalled under Section 311 Cr. P.C. At the time of recording examination-in-chief on 09.08.2010, opportunity was given to the appellants for their cross-examination, however, they preferred not to avail the same. The aforesaid witnesses, thereafter were recalled on the application moved

by them and were cross-examined on 04.01.2011. They resiled from their statement recorded on previous date i.e. 09.08.2010.

41. I have heard Id. Counsels appearing on behalf of the parties.

42. In the facts and circumstances of the case, PW1 Tarun, PW2 Sunny and PW3 Surender have fully supported the case of the prosecution against the appellants. The opportunity granted to appellants, who opted not to cross-examine them. Thereafter, the witnesses were recalled on the application moved and then all the three witnesses mentioned above, resiled from the statement recorded on 09.08.2010.

43. I note all the three witnesses resiled from their statements. Learned prosecutor confronted them with their statements. Here, I have no hesitation to say, firstly; there was no necessity to confront the statement recorded in the Court on Oath as same is admissible. Though, there is no illegality in confronting with the said examinations, normally confrontations have to be done with the statements recorded under Section 161 Cr. P.C. during investigation of the matter, which is inadmissible in the Evidence Act. Therefore, the appellants cannot get any benefit of the statements made subsequently by the witnesses on being recalled for their cross-examination under Section 311Cr. P.C. on 04.01.2011. Even otherwise, the prosecution has fully proved its case against the appellants.

44. In my opinion, though all the three witnesses deserves to be prosecuted as they resiled from their statements made on Oath; however, learned Trial Judge not resorted to any action against them. Therefore, I am also of the opinion that if the appellants stand convicted, their purpose to get the appellants acquitted has already been defeated.

45. In view of above discussion and submission of the Id. Counsel, I find no infirmity in the impugned judgment and order on sentence passed by learned Trial Judge. Therefore I concur with the same.

46. Consequently, both Criminal Appeal Nos.422/2011 and 423/2011 are dismissed.

47. No order as to costs.

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