

Shri Phool Kumar

Vs

Delhi Administration

Criminal Appeal No. 62 Of 1971

(A. Alagiriswami, R. S. Sarkaria JJ)

13.03.1975

JUDGMENT

UNTWALIA, J. –

1. In the night between September 8 and 9, 1966, to be precise, at about 1.45 a.m. on September 9, a daring robbery was committed at a petrol pump of the Gasolene Service Station on the Mall, Delhi. The robbers who are said to be four in number broke into the office of the service station and decamped with Rs. 585 in cash after locking in the two attendants. After investigation three persons were put on trial in the Sessions Court. One of the culprits, named Sube Singh, absconded. The names of the three are (1) Phool Kumar, (2) Ram Kumar and (3) Dharampal. The latter two were acquitted by the learned Assistant Sessions Judge, Delhi for want of sufficient evidence against them. The only person convicted at the said trial was appellant Phool Kumar. He has been convicted under Section 397 of the Penal Code and sentenced to undergo rigorous imprisonment for seven years. A concurrent sentence of six months was also imposed for his conviction under Section 342 of the Penal Code. The Delhi High Court maintained his convictions and sentences and dismissed his appeal. He has approached this Court by special leave.

2. Mr. R. Banna, learned Counsel for the appellant took pains to submit as many as eight points in support of this appeal. The first seven points were concerned with the assailing of concurrent findings of the fact recorded by the two courts below and do not merit any specific mention or detailed discussion. The eighth point was a question of law. After briefly referring to the facts found against the appellant to justify his conviction for robbery the point of law will be discussed hereinafter in this judgment.

3. The two eye-witnesses to the occurrence are PW 13 Sham Lal and PW 16 Ram Sewak. At the time of the occurrence both were discharging their respective duties as the employees of the service station. PW 16 was working as a salesman and PW 13 was employed as a helper. The prosecution story as broadly told by them is that while they were sitting outside the office of the petrol pump two persons who were identified as appellant Phool Kumar and Ram Kumar (since acquitted) came there. Phool Kumar was armed with a knife while Ram Kumar has a small gun in his hand. The former asked PW 13 to hand over the keys. On being told that the keys were with PW 16 the appellant asked him to hand over the keys. To terrorize PWs 13 and 16 Ram Kumar fired three shots in the air one of which struck the window panes of the office while the other two hit the ground. The appellant and his associates thereafter opened the door of the office, ransacked the drawers of the table and decamped with the money lying in the cash box, after pushing PWs 13 and 16 in the office and bolting its door from outside. It is not necessary for us to mention the details of the information given to the police and the facts leading to the apprehending of the three culprits after

getting the clue from the absconding accused Sube Singh. Suffice it to say that the evidence of identification in court against the culprits given by PWs 13 and 16 was not found to be of a kind which could by itself form the basis of the conviction of the accused put on trial. One of the two eye-witnesses had not identified the appellant at all at any of the identification parades and one of them identified him at the fourth or the fifth round. The clinching evidence against the appellant was his thumb impression on the kunda of the cash box. It was conclusively proved to be his on the opinion of the expert. The report of the expert was used as evidence by the prosecution without examining him in court. Neither the Court thought it fit nor the prosecution or the accused filed any application to summon and examine the expert as to the subject-matter of his report. The Court was bound to summon the expert if the accused would have filed any such application for his examination. That not having been done the grievance of the appellant apropos the report of the expert being used without his examination in court made in the High Court and repeated in this Court had no substance. The evidence of PWs 13 and 16 against the appellant in court found ample and clinching corroboration from the fact of his thumb impression occurring on the kunda of the cash box. Soon after the occurrence during the course of the investigation photographs of the impressions on the kunda had been taken long before the appellant was apprehended for his participation in the crime. There was absolutely no scope for any kind of manipulation in the matter as was argued on behalf of the appellant in desperation. We are, therefore, clearly of the opinion that the participation of the appellant in the commission of the robbery at the petrol pump was proved beyond any reasonable doubt; so also the charge under Section 342 of the Penal Code.

4. The last submission on behalf of the appellant was that sentencing him to undergo rigorous imprisonment for seven years under Section 397 of the Penal Code was illegal and he ought to have been convicted under Section 392 simpliciter which would have enabled the Court on the facts of this case to pass a lesser sentence of imprisonment. Reliance was placed upon the majority opinion of the Full Bench of the High Court of Punjab & Haryana in the case of State v. Chand Singh (ILR (1970 2 Punji and Har 108). The argument was attractive at the first sight but did not stand our careful scrutiny.

5. Section 392 of the Penal Code provides :

Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person : vide Section 397. A difficulty arose in several High Courts as to the meaning of the word "uses" in Section 397. The term 'offender' in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter use of the gun by one of the culprits whether he was accused Ram Kumar or somebody else, (surely one was there who had fired shots) could not be and has not been the basis of sentencing the appellant with the aid of section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or

terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.

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 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 (AIR 1932 Oudh 103); Nagar Singh v. Emperor (AIR 1933 Lah 35) and Inder Singh v. Emperor (AIR 1934 Lah 522) 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 (AIR 1956 Bom 353) 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.

In that case also the evidence against the appellant was that he carried a knife in his hand when he went to the shop of the victim. In our opinion this is the correct view of the law and the restricted meaning given to the word 'uses' in the case of Chand Singh (supra) is not correct.

8. For the reasons stated above we see no justification to interfere with the convictions of and the sentences imposed upon the appellant under any of the counts. The appeal accordingly fails and is dismissed.

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