

Ajit Singh

Vs

State of Haryana

Criminal Appeal No. 782 of 1995

(G. N. Ray, N. P. Singh JJ)

08.02.1996

ORDER

1. This is an appeal filed by the appellant from jail under Section 19 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as TADA). It appears that initially the charge-sheet was submitted against the appellant and the co-accused Raj Pal under Sections 394, 392 and 397 IPC and Section 5 of TADA Act. But at the trial the accused stood charged for offences under Sections 392, 397 and 394 IPC before the Designated Court, Rohtak at Sonapat.

2. The prosecution case in short is that on 12-4-1990 when PW 7, Suresh being accompanied by his brother PW 8, Subhash was going on a scooter to Village Gadwal from Gonana, both the said accused suddenly appeared armed with pistol and they made an attempt to stop the scooter, but his brother Subhash did not allow them to do so. The accused however caught hold of the scooter by its handle and pointed the pistol on the back of Suresh urging him to hand over whatever valuable was in his possession. Out of fear, Suresh handed over a purse containing Rs. 1775 and his wrist-watch and the wrist-watch of his brother Subhash was also removed by the other accused Rajpal forcibly. Thereafter, an attempt was made to snatch the scooter. PW 7, Suresh, then picked up an empty drum of milk and hit the accused Ajit with such drum. The accused Ajit thereafter opened fire from the pistol at Suresh which hit the left hand of Suresh and the thumb and first finger of the left hand of Suresh were injured. Suresh and Ajit grappled with each other. At that stage, the accused Ajit inflicted a tooth bite on the left arm of Suresh and challenged both the brothers by firing the pistol but Suresh and Subhash could escape. On the next day, an FIR was lodged with the Police Station Baroda in the district Rohtak :

3. According to the prosecution case, both the accused were arrested on 16-5-1990 and at the instance of the accused, the wrist-watches snatched from PWs 7 and 8 were recovered on 18-5-1990 which are stated to have been buried in a garden. It is also the prosecution case that both the accused did not agree to attend the test identification parade and as such test identification parade was not held. Considering the evidence adduced in this case, the learned Designated Court convicted both the accused for offences under Section 392 read with Section 397 IPC and also under Section 394 IPC and passed a sentence of 10 years' rigorous imprisonment against both the accused and also a fine of Rs. 250 under Section 394 in default of making payment of fine, to undergo further rigorous imprisonment for three months. Both the said accused were also sentenced to undergo rigorous imprisonment for seven years for offences under Section 392 read with Section 397 IPC.

4. Mr. Sushil Kumar, learned Senior Counsel appearing as amicus curiae for the appellant in this case, has submitted that an accused cannot be convicted under Section 397 IPC if he had not used a weapon. In support of such contention, a decision of this Court in Phool Kumar v. Delhi Admn.

[(1975) 1 SCC 797 : 1975 SCC (Cri) 336] was cited. Mr. Sushil Kumar has also submitted that conviction under Section 397 IPC of co-accused who was unwarned (sic unarmed), only indicates that there has been non-application of mind to the facts of the case in convicting the accused. Mr. Sushil Kumar has also submitted that against the appellant, Ajit, no conviction under Section 397 was warranted even if the prosecution case is accepted on its face value. He has indicated that it appears from the evidence of the witnesses for the prosecution that for committing alleged robbery, the said pistol was not used but when a milk can was thrown by Suresh on the accused Ajit, he had opened fire from his countrymade pistol presumably by way of self-defence which hit the thumb and finger of the left hand of Suresh, PW 7. Accordingly, the conviction of Ajit under Section 397 is also unjustified. Mr. Sushil Kumar has submitted that the evidences adduced in this case do not inspire confidence. It also does not appear how and when the said countrymade pistol was recovered from the possession of the appellant Ajit. There is no reliable and unimpeachable evidence which may connect the appellant with the commission of the offences alleged against him. So far as the identification of the accused is concerned, it is an admitted position that in the presence of PW 7, the accused were taken out from police lock-up and they were interrogated. Hence no reliance can be based on identification of the accused in court. Mr. Sushil Kumar has submitted that the accused should be acquitted by giving benefit of doubt. Mr. Sushil Kumar has further submitted that in any event, since from the date of their arrest, the appellant is in custody and by this time he has suffered detention for more than five years. The appellant should be released even if his conviction under Section 392 is sustained by this Court.

5. It appears to us that there is force and justification in the contention of Mr. Sushil Kumar. In the facts and circumstances of the case, we do not think that the appellant should be convicted under Sections 397 and 394 IPC. But in our view, on the basis of depositions of PWs 7 and 8 the appellant's conviction under Section 392 IPC should be sustained. The convictions under Sections 394 and 397 IPC do not appear to be justified. Such convictions are set aside. We therefore allow the appeal in part by setting aside the convictions and sentences under Sections 394 and 397 IPC but conviction under Section 392 is affirmed. The appellant is stated to have undergone sentence for more than five years. In the facts of the case, justice will be met if the sentence for offence under Section 392 IPC is reduced to the period of five years. The appellant would be released forthwith if he is not wanted in connection with any other criminal case provided by this time he has undergone detention for five years.

6. So far as the co-accused Rajpal is concerned, it does not appear that he has preferred any appeal against his conviction. The learned counsel for the State is also not in a position to apprise this Court as to whether any appeal has been preferred by the said accused, Rajpal. In view of our finding in respect of the appellant Ajit Singh, the co-accused Rajpal is also entitled to the same benefit of conviction only under Section 392 and order of acquittal in respect of offence under Sections 394 and 397 IPC. We order accordingly. In this connection, reference may be made to the decision of this Court in *Pyare Singh v. State of M. P.* [1992 Supp (3) SCC 45 : 1992 SCC (Cri) 977] where this Court has indicated that if any of the accused fails to prefer an appeal due to poverty or otherwise, he will be entitled to the benefit of the modification of sentence passed against the other accused in similar circumstances by this Court. Such course of action by this Court, in our view, will be consistent with the justice to be made in the facts of the case. We may also indicate that it appears to us that presumably the co-accused has failed to prefer any appeal before this Court not out of his own accord but due to poverty. We, therefore, direct that the sentence for the offence under Section 392 IPC is reduced to a period of five years for Rajpal also. The co-accused Rajpal would also be released if he is not wanted in connection with any other criminal case provided by this time he has undergone imprisonment for five years.