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AJIT SINGH

v.

STATE OF HARYANA

FEBRUARY 8, 1996

B

[G.N. RAY AND N.P. SINGH, JJ.]

*Indian Penal Code, 1860/TADA Act :*

C

*Sections 392, 394, 397/5—Two accused convicted for offences under—Country-made Pistol not used in robbery, but presumably by way of self-defence—Conviction of appellant —Accused under Sections 397 and 394 unsustainable and hence unjustified—Conviction under S.392 sustained—However sentence reduced to five years imprisonment—No appeal preferred by co-accused presumably due to poverty—He will also be entitled to the benefit of modification of sentence passed against the other accused in similar circumstances.*

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*Shri Phool Kumar v. Delhi Administration, [1975] 1 SCC 797 and Piara Singh v. State of M.P., [1992] Suppl. 3 SCC 45, relied on.*

E

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 782 of 1995.

From the Judgment and order dated 11.12.93 of the Designated Court, Sonipat in Sessions Case No. 106 of 1992, Sessions Trial No. 161 of 1993.

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Sushil Kumar for the Appellant.

I.S. Goyal for the Respondent.

The following Order of the Court delivered :

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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 Section 394, 392 and 397 IPC and Section 5 of TADA Act. But at

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the trial the accused stood charged for offences under Sections 392, 397

and 394 IPC before the Designated Court, Rohtak at Sonapat.

The prosecution case in short is that on 12.4.90 when PW 7, Suresh being accompanied by his brother PW 8, Subhash was going on a scooter to village Gadwal from Gohana, 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 to do so. The accused however caught hold of the scooter by its handle and pointed pistol on the back of Suresh urging him to handover 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 thumb and first finger of 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.

According to the prosecution case, both the accused were arrested on 16.5.90 and at the instance of the accused, the wrist watches snatched from PWs 7 and 8 were recovered on 18.5.90 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 evidences 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.

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

A of such contention, a decision of this Court in *Shri Phool Kumar v. Delhi Administration*, [1975] 1 SCC 797. Mr. Sushil Kumar has also submitted that conviction under Section 397 IPC of co-accused who was unwarned, 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

B 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 country-made pistol presumably by way of self

C 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 now and when the said country-made pistol was recovered from the possession of the appellant

D Ajit. There is no reliable and unimpeachable evidence which may connect the appellant with the commission of the offence 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

E 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.

F 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 appellant should be convicted under Section 397 and 394 IPC. But in our view, on the basis of depositions of PWs 7 and 8 the appellant's

G conviction under Section 392 IPC should be sustained. The convictions under Section 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 Section 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

H 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.

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 Section 394 and 397 IPC. We order accordingly. In this connection, reference may be made to the decision of this Court in *Piara Singh v. State of M.P.*, [1992] Suppl. 3 SCC 45 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.

G.N.

Appeal party allowed.