

(2009) 04 MP CK 0036
In the Madhya Pradesh High Court

Ganesh Singh, Sanjay Khare and Harish Pastaur
Vs
State of M.P.

APPELLANT

RESPONDENT

Date of Decision : 17-04-2009

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 9
Penal Code, 1860 (IPC) — Section 307, 34, 394, 397, 398

Citation : (2009) CriLJ 3691 : (2009) ILR (MP) 2101 : (2009) 3 MPHT 204

Hon'ble Judges : R.C. Mishra, J

Bench : Single Bench

Judgement

R.C. Mishra, J.—This judgment shall govern disposal of all the three appeals as, being related to the same incident, they are interlinked. For the sake of convenience, the appellants shall be referred to by their respective names.

2. Relevant particulars of the appeals and the judgments impugned therein may be tabulated as under:

----- Cr.
Preferred Convicted Sentenced Corresponding Judgment Appeal by u/s to No.

Dated Passed by S.T. No.

1448/19 Ganesh 394 read with undergo RI 94 Singh 397 of IPC for 7 years and
to pay a fine of Rs. 500/- and in default, to suffer RI for 6 months II ASJ,
----- 506-B of IPC undergo RI 15-11-94
Tikamgarh 110/93 for 1 year with the direction that the jail senten- ces
shall run concurr- ently

1451/19 Sanjay 394 read with undergo RI 94 Khare 397 of IPC for 7 years and
to pay a II ASJ, 500/- and in 15-11-94 Tikamgarh 110/93 default, to suffer RI

25/1996 Harish 394 read with undergo RI Pastaur 397 of IPC for 7 years and to
pay a II ASJ, fine of Rs. 500/- and in 18-12-95 Tikamgarh 57/95 default to
suffer RI for 6 months

3. The prosecution story, in short, may be narrated as under:

(i) At the relevant point of time, complainant Dr. Madhu Jain (examined as P.W. 1 in both the trials and hereinafter referred to as "Madhu") was posted as Woman Assistant Surgeon in the Government Hospital at Tikamgarh. She was residing with her husband and daughter in Government Quarter, bearing No. FI & situated in Civil Lines and Krishna Bai (examined as P.W. 2 in both the trials) was in employ as domestic help.

(ii) On 11-10-1992, at about 9.15 p.m., Madhu, while watching Television, asked Krishna Bai, who was observing fast on the eve of Sharad Purnima, to take Kheer (a sweetened preparation of rice and milk). However, saying that she would consume the dish only after lighting up a lamp at the holy plant of Tulsi, Krishna Bai opened the door to the courtyard. As Krishna entered into the courtyard, she found all the three appellants standing there. Sanjay was carrying a knife, whereas Harish and Ganesh were armed with kattas. Sanjay caught hold of her neck; caused her to fall down whereas Harish threw a shawl over her body. She raised alarm but Ganesh, while showing a katta against her chest, threatened to kill her.

(iii) Hearing cry of Krishna, Madhu rushed towards the courtyard but, in the transit, Sanjay fell her down near the door. After pressing her neck, Sanjay rode upon her and after putting a knife over her chest, asked her to hand over key of the almirah and ornaments. As she shouted for help, Sanjay dealt repeated blows with knife on various parts of her body. While offering resistance, she bit his left index finger. The other appellants, who were standing nearby with kattas in their hands, also gave threat to kill Madhu. However, when she declined to give the key or to inform about the jewellery, Sanjay tried to stab in her abdomen but she warded off the stroke and, in the process, sustained injury in the left palm. She also continued to raise alarms. On hearing noise outside, the appellants fled away by climbing over the wall. While running away, Ganesh also snatched nose pin from Krishna Bai.

(iv) Neighbourers including Dr. Ashok Kumar Mishra (P.W. 7 in S;T. No. 110/1993) rushed to the spot. In the meanwhile, Madhu Telephonically informed Dr. Aradhana Johri (P.W. 4 in S.T. No. 110/93) about the incident. She, in turn, transmitted the information to Superintendent of Police, who deputed Ved Prakash Sharma (P.W. 14 in S.T. No. 110/93) to go to spot and deal with the situation.

(v) On being informed by the persons gathered around the spot that the

miscreants were hiding themselves in the nearby bushes, Ved Prakash started intensive search for the offenders with the help of the members of the Police force and the public. However, on being surrounded, Ganesh suddenly came out of the bushes situated behind the quarter allotted to the Executive Engineer and fired a shot through katta at Dr. A.K. Mishra, who was able to save himself. Ved Prakash Sharma also resorted to fire from his service revolver. Ganesh tried to run away but was immediately apprehended and, in the process, Constable Sitaram also sustained injuries. Ganesh was severely beaten by the members of the public and Krishna's nose pin was also recovered from his possession.

(vi) Upon a report (Exh. P-1) given by Madhu herself, a case under Sections 307 and 394 read with of the IPC and Sections 25 and 27 of the Arms Act, was registered as Crime No. 410/92 at Kotwali Tikmagarh. Madhu, Krishna and Ganesh were immediately taken to the hospital where Dr. Nand Kishore Chaurasiya (P.W. 9) examined them. Another report (Exh. P-7) submitted by Dr. A.K. Mishra led to registration of a case u/s 307 of the IPC as Crime No. 411/92. During investigation, Sub Inspector J.P. Verma (P.W. 15) seized Havai Chappal and a shawl from the spot and a knife from possession of Madhu. He also recovered a katta from the bushes at the instance of Ganesh.

(vii) Sanjay could be apprehended on 12-10-1992 and at his instance, another katta was recovered from the back side of his house situated in Nutan Vihar Colony.

4. After due investigation, showing Harish as absconding, charge-sheet was filed against all the three accused before CJM, Tikamgarh who committed the case to the Court of Session for trial.

5. In the trial numbered as S.T. No. 110/93, both Ganesh and Sanjay were charged with the offences punishable under Sections 394, 397 and 307 (on two counts viz. for attempting murder of Madhu and Dr. A.K. Mishra) of the IPC and Sections 25 and 27 of the Arms Act. They abjured the guilt and pleaded false implication. In the examination u/s 313 of the Code of Criminal Procedure, they further pleaded that at the time of alleged incident, they were present at the nearby betel shop run by Ramesh Kumar. According to them, after taking betel, Sanjay had returned home whereas Ganesh was apprehended by police officials on mere suspicion and was brutally beaten.

6. The prosecution sought to prove the charges against Ganesh and Sanjay by examining as many as 16 witnesses including Madhu, Krishna and Dr. A.K. Mishra whereas one Ramesh Kumar, a Panwala (betel shop owner), whose shop was situated affront the Hospital, was called in defence.

7. On a critical appreciation of the entire evidence on record, learned Trial Judge, for the reasons recorded in the judgment dated 15-11-1994, came to the following conclusions as recorded in Para 39:

(i) The appellants Ganesh, Sanjay and Harish being armed with katta, knife and

katta respectively, were conjointly involved in attempting to commit robbery in the house of Madhu.

(ii) Sanjay, by inflicting repeated blows with a knife, made an attempt to kill Madhu who, while saving herself, had bitten his left index finger.

(iii) Ganesh was apprehended immediately after the incident; he fired a shot through his katta at members of public, who being enraged, had beaten him.

8. However, in the operative part of the judgment, learned ASJ, for the reasons best known to him, did not record the consequent conviction pertaining to the offence under Sections 307 and 307 read with Section 34 of the IPC.

9. On behalf of the appellants viz., Ganesh and Sanjay, legality and propriety of the impugned convictions have been challenged on the following grounds:

(i) Non-conduction of the test identification parade for ascertaining the identity of Sanjay who, admittedly, was not previously known to Madhu.

(ii) Non-corroborative evidence of Krishna as to the robbery of her nose pin as well as the identity of the appellants.

(iii) In absence of evidence to the effect that the katta allegedly seized from the possession of Ganesh was in a working condition, the offence u/s 397 of the IPC was not made out.

10. During pendency of their appeals preferred by Ganesh and Sanjay, co-accused Harish surrendered himself before CJM, Tikamgarh on 1-3-95. He was duly arrested and after further investigation, a supplementary charge-sheet was submitted against him in the Court of Chief Judicial Magistrate, Tikamgarh, who committed the case to the Court of Session for Trial.

11. Appellant Harish was charged with the offences punishable u/s 394 read with Section 397 of the IPC only. He also raised defence of false implication. To bring home the charges, the prosecution preferred to examine only 6 witnesses including Madhu, Krishna Bai, Harinarayan, Dr. N.K. Chaurasiya and J.P. Verma, who were examined in the trial of other appellants. The evidence of other witness M.L. Ahirwal (P. W. 5) related to registration of a case upon the written report (Exh. P-1). No evidence was adduced by Harish in support of his defence. On conclusion of the trial, learned ASJ, for the reasons assigned in the judgment dated 18-12-1995, found that guilt of Harish for the offences charged with was also proved beyond a reasonable doubt. He, accordingly, convicted and sentenced him as mentioned hereinabove.

12. Legality and propriety of the convictions of Harish have been questioned inter alia on the grounds of non-conduction of the test identification parade; non-corroborative evidence of Krishna and non-recovery of katta from his possession.

13. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, has submitted that the convictions

were well-merited.

14. Before proceeding to appreciate the merits of the rival contentions in a proper perspective, it is necessary to first advert to the medical evidence available on record. Dr. Nand Kishore Chaurasiya (P.W. 9) testified that in the medical examination conducted on 11-10-1992 at 10.30 p.m., he had noticed the following injuries on the persons of Madhu, Krishna and Ganesh-

Injuries on the body of Madhu:

- (i) Incised wound over dorsal surface of the 1st phalanx of the thumb of left hand 1 cm x 1/4 cm x 1/4 cm in the middle.
- (ii) Incised wound over 1st phalanx of the index finger, left palmer surface 1/2 cm x 0.1 cm x 0.1 cm.
- (iii) Two minute incised wounds, middle phalanx palmer surface, each 1/4 cm x 0.1 cm x 0.1 cm on the left ring finger.
- (iv) Two incised wounds on the little finger, left 2nd phalanx, palmer surface 1/4 cm x 0.1 cm x 0.1 cm.
- (v) One abrasion on distal phalanx of dorsal surface of little, right and middle finger left, each about 1 1/2 cm x 1/2 cms, irregular area.
- (vi) Two incised wounds on the dorsomedial surface of middle of left forearm 2" x 0.1 cm x skin deep.
- (vii) Incised wound on middle of left cheek 1cm x 1/2cm x 1/4cm.
- (viii) Abrasion on right side temporal region 1 1/2" x 0.2"
- (ix) Sub conjunctive haemorrhage left eye in 2 cm x 1 cm area,
- (x) Bruise molar prominence left eye in 1" x 1/2" area
- (xi) Abrasion right side nose in 1/2cm x 1/2 cm area,
- (xii) Three abrasions on left side throat, each about 1cm 1/4 cm.

Injuries on the body of Krishna:

- (i) Four abrasions over dorsal surface left index finger and on dorsal surface of middle left finger and two on dorsal surface on left hand each in size 1 cm x linear.
- (ii) Abrasion on right side upper part of throat size 2 cm x 1/2 cm
- (iii) Abrasion on left side over nose size 1/2 cm x 1/4 cm area

Injuries on the body of Ganesh:

- (i) Bruise on eye lid, left eye
- (ii) Bruise on lower eye lid, right eye

(iii) Eight bruises on back, shoulder, back of chest and lumber region size 4" x 1" to 6" x 1 1/2"

(iv) Multiple small abrasions size 0.2 cm x 0.2 cm, 1 cm x 1/2 cm in outer part of both legs.

15. In the opinion of Dr. Nand Kishore Chaurasiya, all the injuries found on the body of Madhu except injury Nos. (v), (viii) and (xii)(above) were inflicted by hard and sharp object whereas the above mentioned three injuries and all the injuries noticed on the persons of Krishna and Ganesh were caused by hard and blunt object. In the cross-examination, the medical expert denied the suggestion that he had exaggerated the number of injuries found on the person of Madhu, who happened to be his colleague.

16. Existence of under-mentioned injuries on the body of Sanjay at 5 p.m. on 12-10-1992 was proved by Dr. R.K. Pateria (P.W. 10):

(i) Two teeth mark over flexar surface of left index finger, distal phalange, wound is lacerated.

(ii) Two teeth mark over palmer aspect of left index finger, distal phalange, pattern of the injuries is elliptical.

According to the medical expert, these injuries were caused by teeth bite within a period of 24 hours.

17. It is true that, in both the trials, Krishna Bai (P.W. 2) neither identified any one of the appellants as the persons involved in the alleged incident nor supported the assertion as recorded in her police statement (Exh. P-4) that one of the intruders had snatched her nose pin but, her evidence duly corroborated other material particulars of the prosecution case. The injuries found on the body further supported her version. In such a situation, failure of Krishna Bai to identify the appellants as one of the intruders in the quarter of Madhu did not assume any significance.

18. Coming to the evidence of Madhu, it may be observed that she not only reiterated the facts as stated in the report (Exh. P-1) scribed by her immediately after the incident but also identified each one of the appellants as the persons; involved therein. According to her, hearing shrieks of Krishna Bai, as she rushpd towards the courtyard, Sanjay, who was standing affront the door, carrying a knife in his hand, obstructed her way and by causing her to fall down, demanded key of Almirah and ornaments by placing leg on her chest and pressing her neck whereas other appellants, who were armed with kattas, were also pressurizing her to fulfill the demand by giving threats to kill her. She categorically stated that while offering resistance, she continued to raise alarm and, in the meanwhile, was repeatedly assaulted by Sanjay with the knife. As per her statement, Sanjay even attempted to push the knife into her abdomen but she was able to thwart the move by catching hold of the instrument. The injuries as described in the report (Exh. P-9) clearly reflected that she was assaulted repeatedly by a hard

and sharp weapon. Moreover, opinion of Dr. R.K. Pateria (P.W. 10) that the injuries found on left index finger of Sanjay were the result of teeth bite also substantiated the corresponding explanation furnished by Madhu.

19. Dr. Aradhana Johri (P.W. 4), a colleague and next-door neighbour of Madhu, testified that she had passed on the information about the incident as given by Madhu to the Superintendent of Police on telephone. Ved Prakash Sharma (P.W. 14), the then Additional S.P. also corroborated the fact that he was directed by the S.P. only to immediately visit the spot and nab the miscreants. He further described as to how with the help of police force and mob gathered around the house of Madhu, Ganesh, who was concealing his presence behind the fencing on the backside of the Govt. Quarters allotted to Madhu and the Executive Engineer, could be apprehended. As per his version, when Ganesh fired a shot to scare away the persons proceeding to surround him, he also opened fire from his service revolver. This assertion was duly supported by Dr. Ashok Kumar Mishra (P.W. 7), who further stated that after being apprehended, Ganesh was severely beaten by members of the public. The medical evidence as to the corresponding injuries and recovery of katta from his possession were the cogent incriminating circumstances against Ganesh. Thus, identity of Ganesh as the person involved in the robbery was not only established from the sworn testimony of Madhu but was also confirmed adequately from the other evidence on record.

20. It is relevant to note that in S.T. No. 57/95, Madhu reiterated the facts as deposed by her in the previous statement recorded in S.T. No. 110/1993. She duly identified Harish as the companion of Sanjay & Ganesh and further asserted that he was also armed with a katta. Nothing could be elicited in her cross-examination as to suggest that she was, in any way, interested in implicating Harish on absolutely false grounds or mere suspicion created by his abscondence. v

21. As pointed out already, Madhu is a well-qualified doctor. Apparently, she had ample opportunity to see the uncovered faces of the appellants. Looking to the number and situs of injuries, it was not expected from her that she would forget faces of the persons who had subjected her to such a traumatic experience. It is well settled that evidence as to identification of the accused for the first time in the Court is not totally irrelevant and inadmissible. Law on the subject was explained by the Apex Court in *Budhsen and Another Vs. State of U.P.*, in the following words:

Facts which establish the identity of an accused persons are relevant u/s 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification,

therefore, seems to be to test and strengthen the trustworthiness of that evidence! It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration.

22. Sworn testimony of Madhu in both the trials did not suffer from any serious infirmity with reference to the substratum of prosecution based on her report only. Accordingly, in the peculiar facts and circumstances of the case, learned Trial Judge did not commit any illegality in treating the evidence of Madhu as to dock identification of the appellants as worthy of credence. The defence of being present, at the relevant point of time, in front of nearby betel shop was too fragile to warrant acceptance. Moreover, Ramesh (D.W. 1) also admitted that hearing commotion, Ganesh had run away from his shop.

23. It transpires from the evidence on record that while fleeing away, Sanjay had left his knife at the spot. No dispute was raised as to the fact, recorded in memo (Exh. P-4), that on being produced by Madhu, it was seized by the Investigating Officer J.P. Verma (P.W. 15). As stated by her, upon her disinclination to hand over key of the Almirah and ornaments, the same knife was used for causing injuries to her. Nevertheless, Section 394 of the IPC covers the offence of voluntarily causing hurt of either description in attempting to commit robbery. It also embodies principle of constructive liability. Consequently, Ganesh and Harish, despite the fact that none of the injuries received by Madhu was attributable to any one of them, were liable to be convicted for the offence under the Section.

24. For these reasons, none of the contentions raised against legality and propriety of the conviction u/s 394 of the IPC deserves acceptance.

25. This brings me to the crucial question namely whether the facts and circumstances of the case attract applicability of Section 397 of the IPC that provide for minimum punishment for certain aggravated forms of robbery.

26. Shri Surendra Singh, learned Senior Counsel appearing on behalf of appellant Ganesh, has strenuously contended that merely carrying a katta that was not subjected to test fire was not sufficient to make him liable for enhanced punishment u/s 397 of the IPC. To fortify the contention, reliance has been placed on a Single Bench decision of the Orissa High Court in Piyus Ekka and Others Vs. State of Orissa, , and a Division Bench decision of Bombay High Court in Babulal Jairam Maurya and another Vs. The State of Maharashtra, . However, Shri Sharad Verma, learned Counsel for appellant Harish, by making attention to decision of the Apex Court in Sukhwinder Singh alias Jaggi Vs. State of Punjab, , has submitted that at the most, the offence u/s 397 read with Section 511 of the IPC would be made out against him.

27. The arguments are apparently misconceived in view of the fact that from the evidence on record, the appellants were found guilty of attempt to commit robbery by demanding key of the almirah and ornaments from Madhu by overawing her with deadly weapons like knife and kattas whereas Section 397 of the IPC prescribes enhanced punishment for using a deadly weapon at the time of committing robbery. As an obvious corollary, Section 397 had no application to the case where robbery was not actually completed. Even so, measure of punishment had to be regulated by Section 398 of the IPC that provides for minimum punishment of 7 years' imprisonment in a case of attempt to commit robbery when armed with deadly weapon Shri Phool Kumar Vs. Delhi Administration, referred to. In this view of the matter, the conviction of the appellants for the offence u/s 394 read with Section 397 deserves to be converted into one u/s 394 read with Section 398 of the IPC. But, in absence of corresponding charge, it would not be possible to uphold conviction of Ganesh of the offence of criminal intimidation punishable u/s 506-B of the IPC.

28. In the result-

(i) the appeal (Cri. Appeal No. 1448/1994) preferred by Ganesh is allowed in part. His conviction u/s 506-B of the IPC and consequent sentences are hereby set aside. However, his conviction u/s 394 read with Section 397 is converted into one u/s 394 read with Section 398 of the IPC and is sentenced to undergo RI for 7 years and to pay a fine of Rs. 500/- and in default, to suffer RI for 6 months.

(ii) Sanjay's appeal (Cri. Appeal No. 1451/1994) is allowed in part. His conviction u/s 394 read with Section 397 is converted into one u/s 394 read with Section 398 of the IPC and is sentenced to undergo RI for 7 years and to pay a fine of Rs. 500/- and in default, to suffer RI for 6 months.

(iii) the appeal presented by Harish (Cri. Appeal No. 25/1996) is allowed in part. His conviction u/s 394 read with Section 397 is converted into one u/s 394 read with Section 398 of the IPC and is sentenced to undergo RI for 7 years and to pay a fine of Rs. 500/- and in default, to suffer RI for 6 months.

29. The appellants are on bail. They are directed to surrender to their bail bonds for undergoing the remaining part of sentences.

30. Copy of the judgments be retained in the connected criminal appeals.