
(2011) 01 DEL CK 0407

In the Delhi High Court

Case No : Criminal Appeal 278 and 320 of 2001

Jodhpal and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 13-01-2011

Acts Referred:

Arms Act, 1959 — Section 27
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 120B, 354, 392, 397
Probation of Offenders Act, 1958 — Section 4, 6

Citation : (2011) 1 AD 657

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : M.L Yadav, for the Appellant; Manoj Ohri, APP, for the Respondent

Judgement

Mukta Gupta, J.—The facts leading to the filing of the present appeals are that on 9th January, 1991 when Inspector Rajinder Singh was on patrolling duty with Head Constable Shiv Kumar, Constable Puran Singh and Constable Nathu Lal in the area of Chandrawal at about 4:20 p.m., they heard a noise and saw that one person was being chased by the public who was later identified as Jodhpal Singh s/o Nawab Singh. On being asked, it was revealed that the accused Jodhpal Singh along with co-accused Ravinder Singh, Rajiv Solanki and Vinod Kumar had committed a robbery at House No. 101, Chandrawal and also outraged the modesty of P.W. 3. The police apprehended Jodhpal Singh on the spot and on his personal search, a lady's wrist watch was recovered which was seized vide memo Ex. P.W. 3/H. Statement of P.W. 3 was recorded, on which Case FIR No. 8/1991, Ex. P.W. 3/A was registered at Police Station Civil Lines under Sections 397/354/120-B IPC and Section 27 of the Arms Act. P.W. 3 in her complaint detailing the sequence of events, alleged, that two boys entered the house, threatened her with knives, molested her and when the neighbor rang up the bell, on hearing the voice of Harbans Kaur, took away the articles from the house and ran away. After completion of investigation, charge-sheet was filed. All the

accuseds were charged for offences punishable under Sections 392/397/354/120B IPC and the Appellants were in addition charged for offence punishable u/s 27 Arms Act.

2. Co-accused Vinod Kumar and Rajiv Solanki were acquitted after the trial. Appellants Jodhpal and Ravinder Kumar @ Babloo were convicted for commission of offences u/s 397/354 read with 120B IPC and Section 27 of the Arms Act by the impugned judgment dated 28th March, 2001. They were awarded Rigorous Imprisonment for 7 years for offence punishable u/s 397 IPC, Rigorous Imprisonment for 1 year for offence punishable u/s 354 IPC and Rigorous Imprisonment for a period of 3 years and a fine of 1,000/- each and in default of payment of fine, simple imprisonment for three months for offence punishable u/s 27 of the Arms Act vide order dated 31st March, 2001.

3. Learned Counsels for the Appellants contends that in total 19 witnesses were cited in the charge-sheet however, during trial, the prosecution examined only 10 witnesses and withheld 9 witnesses including the most material witness Smt Harbans Kaur, who raised the alarm. As the prosecution withheld material witnesses, so not only an adverse inference shall be drawn u/s 114(g) of the Evidence Act but also the same casts a serious reflection on the fairness of the trial. Learned Counsel places reliance on *Habeeb Mohd v. State of Hyderabad* : AIR 1954 SC 5; *S.P. Bhatnagar Vs. State of Maharashtra*, and *Khushalbhai Mahijibhai Patel Vs. A Firm of Mohmadhussain Rahimbux*, .

4. It is next contended that P.W. 3 in her testimony remained confused about the identity of the Appellants and identified Ravinder Kumar as Jodhpal and vice versa. In her cross examination, she deposed that when her statement was recorded by the police, till then no accused person was arrested which fact is contrary to the statement of the other witnesses. P.W. 3 on whose sole testimony, the entire case of the prosecution is based, has turned hostile. As per the testimony of P.W. 3, from the time the Appellants entered the house, they demanded a file from her. However, no investigation in this regard was conducted and no such file has been recovered from the Appellants or their co-accused.

5. It is next contended that it is the case of prosecution that P.W. 10 Inspector Rajinder Singh arrested the Appellant Ravinder Kumar @ Babloo from his house on 27.01.1991 and from the personal search of the accused, he recovered five silver coins from his pocket and also some other robbed articles were recovered from his house which were seized by the police. This version of the police is highly improbable as no prudent person would carry the robbed articles (silver coins) with him for as many as 19 days after the incident Hence, the testimony of the prosecution witnesses is unreliable and does not inspire confidence.

6. Learned Counsel for the Appellants further contended that the statement of the Complainant was recorded at the house of the neighbor Sunil Sharma and not at the place of occurrence. The Complainant has falsely implicated the Appellants so that her relations with the neighbours do not come to light The

testimony of P.W. 10 Inspector Rajender Singh that he handed over the seal RSA after sealing the parcel on the 9th January, 1991 to ASI Shiv Kumar P.W. 8 and took it back only after 4-5 days is not corroborated by the testimony of P.W. 8 ASI Shiv Kumar. The Appellant Jodhpal has not been identified by P.W. 7 Puran Singh who is the person who allegedly overpowered him. No independent witness has been examined to prove the seizure of the two daggers by P.W. 8 from the place of occurrence. The testimony of P.W. 8 as regards seizure of the dagger is not corroborated by any other witness. The factum of the clothes of P.W. 3 being cut by the Appellant during robbery has not been proved as the clothes when were produced in the Court, did not have any cut marks. The testimony of P.W. 3 that her nude photographs were taken is wholly unreliable as neither any camera nor any photographs were recovered either from the place of occurrence or from the Appellants. The Appellants have been convicted on the sole testimony of P.W. 3 whose version is wholly unreliable and thus the Appellants are liable to be acquitted.

7. Per contra, learned APP contends that from the testimony of P. W. 3, the commission of offence u/s 397/354 IPC is dearly proved. Both the Appellants were armed with deadly weapons i.e. daggers which they showed to her and thereafter molested her and robbed the house. Though the Appellants may not have succeeded in taking away the file because the neighbour in the meantime rang the door-bell, they took away valuable articles from the house, which were recovered from the Appellants. The testimony of P.W. 3 is corroborated by the fact that soon after the incident, Appellant Jodhpal was apprehended, on the raising of the noise, by the neighbor, P.W. 7 Puran Singh who though has not specifically identified him because of confusion, but the fact that it was Appellant Jodhpal who was apprehended, is proved by the testimony of P.W. 8 ASI Shiv Kumar and P.W. 10 Inspector Rajender Singh. The fact that the clothes of the P.W. 3 were cut by the daggers by the Appellants has been proved as by the seizure memo Ex. P.W. 3/E which itself shows that her clothes were cut. Thus, P.W. 3 has rightly pointed out in the Court at accused Ravinder and Jodhpal, as the persons who came to her house at the day of the incident. However, she has wrongly identified accused Ravinder as Jodhpal and accused Jodhpal as Ravinder. Thus, though initially there was a confusion of identity, however, in her cross-examination by the APP, she clarified that she did not know the names of the Appellants. Reliance is placed on *Simon and Ors. v. State of Karnataka* 2004 1 AD (S.C.) 1 : 2004 (2) SC 694, to contend that mere wrong identification by one of the eye-witnesses by itself cannot be fatal to the prosecution case. Thus, the fact that she could not recognize as to who tore her clothes is of no consequence as both the accused used deadly weapons during the commission of offence and the Appellants have been charged for offence u/s 354 read with Section 120B IPC as each of the accused is liable for the acts of his co-accused. From the testimony of P.W. 4, the mother of P.W. 3 it is clear that the offence committed by the Appellants was a premeditated act as they ensured that the parents of P.W. 3 left the house on the false pretext that DDA officials were demolishing their house at

Uttam Nagar. From the testimony of P.W. 3 duly corroborated by that of P.W. 4 and other witnesses, the commission of offence u/s 397/354 read with 120B is proved beyond-reasonable doubt. The non-recovery of the camera or the photographs do not belie the statement of P.W. 3 who has clarified that she was very perplexed at that time and she only saw a flash. Moreover, during the pendency of the trial, a letter was seized by P.W. 10 vide seizure memo Ex. PX purportedly written by one Jai Singh Tyagi on behalf of the accused persons to the father of P.W. 3 threatening him to withdraw the case against the accused otherwise he and his family members would be killed and the nude photographs of his daughter would be publically displayed. The delay in the trial was not on account of the non-production of the prosecution witness. However, since the learned trial court directed the prosecution to examine all its witnesses by a particular date, hence, only essential witnesses were examined. No adverse inference can be drawn against the prosecution on this account. Thus, the prosecution has proved its case beyond reasonable doubt and the present appeal is devoid of any merit.

8. I have heard the learned Counsel for the parties and perused the record. P.W. 3 the Complainant is the victim in the present case. Her testimony describes the sequence of events. The incident is dated 09.01.1991, whereas the testimony of this witness was recorded on 01.09.1999 i.e. more than eight and half years after the incident and thus there are bound to be variations because of lapse of time. P.W. 3 has stated that on 09.01.1991 she was studying at her house and on hearing the bell, she opened the door and found two persons. One of them asked, whether her parents had gone to Uttam Nagar to which she answered that they had left the house half an hour ago. They again emphasized that her parents had not reached at Uttam Nagar. P.W. 3 in her statement further states that when she opened the door, Ravinder and Jodhpal Singh entered into the house and they were having knives in their hands and except that they were not carrying any bag etc. with them. She has further clarified that the accused were having open knives with them. According to P.W. 3 Appellant Ravinder Kumar probably asked for water from her when she opened the door and as she went to the kitchen to take the water, two of them entered into the house, one of the accused came to the kitchen while the other bolted the door and followed them. The accused came into the kitchen, pressed her mouth, dragged her into the bedroom and threatened her that he would kill her if she raised an alarm. They tied her with the nylon ropes which they had brought with them and tied her mouth with chunni and asked her to hand over the keys of the almirah. On her resistance to hand over the keys, they threatened her that in case she immediately did not hand over the keys to them so that they could take the file belonging to her father, they would kill her mother and father within half an hour. On her further resistance to reveal the place where the keys were kept, they gave her beatings and fist blows by hands and also threatened to kill her besides killing her parents. Thereafter, one of the above named accused lifted her and brought her to the drawing room and the other searched the keys of the almirah

in the bedroom. The muffler which was tied on her eyes was opened when she was brought to the drawing room and in the drawing room after laying her on the deewan, they asked her to take off her clothes and when she showed stiff resistance, they cut her clothes with the knife. They untied her hands and pushed her backwards and one of them came over her body physically and the other took her nude photographs. In her testimony, the witness has clarified that she was so shocked and perplexed at that time, that she just had a glimpse of flash, but was not sure as to whether her nude photographs were taken or not. Mere non-recovery of the photographs or the camera cannot discredit the testimony of this witness. The Complainant identified the Appellant Ravinder Kumar as the accused who had torn her clothes with the knife. Thereafter, the bell rang which was answered by Ravinder Kumar and he asked the deliveryman who had come to deliver gas cylinder to go away. Thereafter, the Appellant Ravinder came inside and she heard him discussing with Appellant Jodhpal Singh whether Solanki had got the vehicle arranged or not. In the meanwhile, again the bell rang and one Sikh lady who resided in the neighborhood and was a distant relative came. Though accused Ravinder told her that he was a relative but as she knew all the relatives, she became suspicious about the Appellants and raised the alarm "Bachao Bachao". On hearing the alarm, Ravinder who had opened the door fled away from the front door and Jodhpal fled from the backdoor of the house.

9. Two persons who came to her house on that day were rightly identified by her as Appellant Ravinder Kumar and Jodhpal Singh. Though initially she was confused in identifying Ravinder as Jodhpal and Jodhpal as Ravinder, however, this fact has been clarified by her in the cross-examination wherein she stated that she was not aware of the names of accused Ravinder and Jodhpal either at the time of making the statement or even today. But she was sure that they were the people who had come to her house on the date of incident and committed the offence as stated by her in the examination-in-chief. She also clarified that the Appellant Jodhpal Singh was apprehended immediately after the incident. Thus there is no merit in the contention of the teamed counsel for the Appellant that the Complainant failed to identify the Appellants. Moreover, the version of P.W. 3 stands corroborated by P.W. 4, her mother who has stated that on 09.01.1991 at about 12:30 noon when she along with her husband was present in her house, three young persons entered the house and informed that their house situated in Uttam Nagar was about to be demolished by the DOA and they should reach Uttam Nagar. P.W. 4 deposed that they waited for the arrival of their daughter P.W. 3 till 2:00 p.m. and thereafter after taking lunch they left the house at about 2:45 p.m. leaving their daughter in the house. When they reached Uttam Nagar, they found no DDA personnel on the spot, on enquiries from the neighbours, they found no clue about the DDA staff and they immediately rushed back to their house. P.W. 4 identified the Appellants Jodhpal Singh and Ravinder and co-accused Vinod Kumar, who has been acquitted as the persons who had come to their house. As per P.W. 4, when they returned, they

saw a lot of crowd in their house and came to know that a robbery has taken place and their daughter has been molested. P.W. 4 also checked up and found out that gold and silver articles, cash and wrist watch were missing from the house. These articles were correctly identified by her on 8th April, 2009 when the T.I.P. proceedings were conducted by P.W. 9, Sh. Nepal Singh, the then Metropolitan Magistrate who has also corroborated this fact. Neither P.W. 4 nor P.W. 9 has been cross-examined and thus their testimonies have gone unchallenged. Immediately after the incident, P.W. 7 Puran Singh who heard the hue and cry of Smt Harbans Kaur overpowered Jodhpal Singh with the help of other people of the locality. In the meanwhile, police also reached there who conducted his personal search from which one lady's wrist watch of citizen make was recovered, and was identified by the Complainant to be her mother's wrist watch. This version of P.W. 7 Puran Singh is corroborated by P.W. 8 ASI Shiv Kumar and P.W. 10 Inspector Rajinder Singh who were on patrolling duty at the relevant time and on hearing the noise had come there and saw that accused Jodhpal Singh was being overpowered by one Puran Singh P.W. 7 along with other people of the locality. The clothes of the Complainant with cut marks were seized vide seizure memo Ex. P.W. 3/E. There is no challenge to this seizure memo in the cross-examination. Thus, I find no merit in the contention of the learned Counsel that the clothes recovered were not having cut marks as the seizure memo Ex. P.W. 3/E clearly records that the clothes of the Complainant were having cut marks. Merely because the learned trial court did not record the observation to this effect when the clothes were opened in the Court, the same does not belie the statement of P.W. 3 that her clothes were cut and these clothes with cut marks were seized. By the testimony of PW 3 duly corroborated by P.W. 4, P.W. 7, P.W. 8, P.W. 9 and P.W. 10, the prosecution has proved beyond reasonable doubt the offences committed by the Appellants.

10. Learned Counsels for the Appellants laid much emphasis on the fact that 19 witnesses were cited however, the prosecution examined only 10 witnesses and thus material witnesses like Smt. Harbans Kaur, Moharrar Malkhana etc. have not been examined and reliance has been placed on Habib Mohamad (supra) and Khushalbhai Mahijibhai Patel (supra) to contend that adverse inference has to be drawn u/s 114(g) of the Evidence Act if material witnesses are not examined. In this regard, it would be relevant to note that the offences were committed on the 01.09.1991, the charge against the Appellants was framed on 4.11.1992, however, the prosecution witnesses could not be examined till 16.09.1997 on one pretext or the other. On 2nd August, 2000 last opportunity was granted to the prosecution to produce the remaining prosecution evidence on the next date, failing which the evidence would stand closed and the same was closed on 20th September, 2000. Thus, the prosecution could not examine all the witnesses and examined only the essential witnesses. In view of the peculiar facts of the present case, the decision relied upon by the Appellant are of no avail.

11. There is no merit in the contention that Section 397 IPC is not made out. P.W. 3 has stated that when the Appellants entered the house, they had open

knives in their hands and the entire sequence of events shows that she and her parents were being threatened to be killed in case she did not hand over the keys of almirah. In view of the statement of the Complainant that the Appellant had open knives, the use of deadly weapon is clearly attracted along with the offence of commission of robbery and thus the Appellants are liable to be convicted for offence punishable u/s 397 IPC. Thus, there is no illegality in the judgment convicting the Appellants for the offences u/s 397/354 read with Section 120B IPC and 27 Arms Act.

12. An application bearing No. 392/2002 under Probation of Offenders Act, 1958 on behalf of Ravinder @ Babloo has been filed. It is stated that the Appellant Ravinder Kumar was of an adolescent age i.e. about 18 years and 8 months at the time of commission of offence. He has already undergone 2 years 8 months and 23 days in jail. In the application prayer has been made that in the event of conviction of Ravinder Kumar, he may be released under the benevolent provisions of Section 4 or Section 6 of the Probation of offenders Act, 1908. It is also stated that the probation can be granted even when the offender is convicted for an offence punishable u/s 397 IPC. Reliance has been placed on *Ishar Das Vs. The State of Punjab*, ; *Mohammad Giasuddin v. State of Andhra Pradesh* AIR 1977 SCC 1926; *Musakhan and Others Vs. State of Maharashtra*, ; *Ved Prakash Vs. State of Haryana*, *Roshanali Burhanali Syed Vs. State of Gujarat*, ; *Masarullah Vs. State of Tamil Nadu*, *Abdul Gafoor Goga v. State* 1985 (8) DPJ 34; *State of Haryana v. Prem Chand*, 1997 (7) SCC 756 and *Satar Masiah v. State of Delhi* 1982 Cri L.J. 224. Learned Counsel for the Appellant Jodhpal also states that even he had just completed 21 years of age at the time of commission of offence. He has already undergone a sentence of imprisonment of 2 years, 8 months and 23 days. Thus, he may also be granted the benefit of Section 4 and 6 of the Probation of Offenders Act.

13. The Appellant Jodhpal was admittedly more than 21 years of age at the time of commission of offence. In the present case, the offence committed is serious in nature and is punishable with a minimum sentence of imprisonment for a period of seven years. Moreover, during the pendency of the appeal, as per the nominal roll, misconducts in the jail were also reported against this Appellant. Since Appellant Jodhpal has failed to show reformation even after the sentence of imprisonment, I do not find it to be a fit case to release the Appellant Jodhpal on probation. Thus, the conviction and sentence awarded by the learned Trial Court as against Jodhpal is upheld. All the three sentences would run concurrently.

14. Criminal Appeal No. 278/2001 is dismissed. Bail bond and surety bond of the Appellant Jodhpal are cancelled. Appellant Jodhpal be taken into custody to undergo the remaining sentence.

15. As regard Appellant Ravinder @ Bablu, since he was below 21 years of age, a decision as regards the grant of probation can only be taken after calling the report of the Probation Officer. The Respondent is directed to furnish a report of

Probation Officer within four weeks. Learned Counsel for the State will ensure that the report of the Probation Officer as regard the Appellant Ravinder Kumar is received within a period of four weeks from today.