
(2009) 03 RAJ CK 0089
In the Rajasthan High Court

Mahendra Murari @ Babu and Girish Chandra Boss	APPELLANT
Vs	
The State of Rajasthan	RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Arms Act, 1959 — Section 25, 3
Penal Code, 1860 (IPC) — Section 395, 397

Citation : (2009) 2 WLN 179

Hon'ble Judges : Bhanwaroo Khan, J

Bench : Single Bench

Judgement

Bhanwaroo Khan, J.—Jail appeal bearing No. 622/2005 by Mahendra Murarai @ Babu, Nayan Boss and Sunil Boss, and Jail appeal bearing No. 577/2005 by Girish Chandra Boss and Shatrudhan @ Chandan against the judgment dt. 31.03.2005 passed by the Special Judge (Satti Niwaran) & Additional Sessions Judge, Jaipur, whereby all accused-appellants have been convicted for the commission of offence u/s 395, 397, 120-B of the I.P.C. and u/s 3/25 and 4/25 of the Arms Act, against which judgment they have preferred these appeals through Central Jail, Jaipur.

2. Since, both the jail appeals, arise out of the same judgment, therefore, they are being disposed of by this common judgment.

3. The prosecution case unfolded is as follows:

4. On 09.05.2002 at about 10.40 P.M. one Harshvardhan (PW-1) lodged a written report at Police Station Kotwali, Jaipur stating therein that when he was returning from M.I. Road, after getting repaired tape-recorder of his car, he received a telephonic call from his wife informing him to come early as four-boys armed with deadly weapon forcibly entered into the house. After some time they tied her with telephone wire, put knife on the neck of his child and took away Rs. 40,000/-, along with artificial jewellery and cell phone. Out of these four boys, one pushed his wife, resulting into the injury sustained by her.

5. The said report, after investigation, converted into challan for the offence u/s 395, 397, 120-B of the I.P.C. and 3/25 and 4/25 of the Arms Act. Accused-persons denied the charges levelled against them and claimed for trial. The prosecution produced as many as 19-witnesses in support of its case and got exhibited Exhibits P-1 to P-23. The trial Court after evaluating the entire evidence convicted and sentenced the accused-persons, as mentioned above.

6. Since, these appeals have been sent by the appellants from the Jail, an amicus curiae was appointed to represent the accused-appellants.

7. Heard learned amicus curiae for the accused-appellants as well as learned Public Prosecutor for the State and perused the material available on record.

8. The learned amicus curiae for the accused-appellants argued that as per F.I.R. and the statement of PW-3 Beena Verma there were only four-accused, who alleged to have entered into the house. Therefore, offence u/s 395, I.P.C. cannot be made out against them. The fifth accused i.e. Sunil Boss has been involved in the case on the basis of the alleged recovery. There is no evidence of any conspiracy against any of the accused so from all corners the case for the offence u/s 395, I.P.C. against the accused-persons cannot be made out. The trial Court while convicting the appellants for the offence u/s 395, I.P.C. has committed serious illegality. He further argued that there was no use of deadly weapon. The recovery made from each of the accused is also not believable because the independent witnesses have turned hostile and have not supported the prosecution story. When there is no use of any deadly weapon the offence u/s 397, I.P.C. also cannot be made out against any of the accused. The learned Counsel further pleaded that without going into these aspects of the matter, if the trial Court has convicted the accused, the said sentence cannot be sustained. The oral evidence tendered also cannot be believed, as there are material contradictions in totality and the appellants also deserve acquittal.

9. Per contra, the learned Public Prosecutor for the State has argued that though it is an admitted fact that only four-persons were there, but at the time of commission of offence, other persons were also there, who helped them. Hence, conspiracy to commit decoity has been established coupled with this fact recoveries were also made at the instances of the accused-persons, which linked them with the commission of the offence. Identification parade of the accused as well as articles recovered also linked the accused in the commission of the crime. The trial Court after evaluating the entire evidence of the prosecution has rightly convicted the accused-persons.

10. It is an admitted fact that as per F.I.R. and the statements of PW-3 Beena Verma, along with PW-1 Harshvardhan, initially there were four-persons only. The fifth accused-person i.e. Sunil Boss is being linked on the basis of recovery of cell phone and Rs. 4500/-.

11. The date of incident is 09.05.2002 and the recovery from accused Sunil Boss has been made on 12.05.2002. There is no identification of Rs. 4500/- and

simply money recovery cannot led the accused Sunil Boss in commission of crime of decoity u/s 395, I.P.C. The cell phone, though recovered and identified by PW-3 Beena Verma can led to inference that accused Sunil Boss received the stolen property. No explanation is coming forward from accused Sunil Boss about this recovery. The independent witness, if turned hostile, cannot led to disbelieve the recovery of the cell phone.

12. No other evidence of any conspiracy of the accused-persons for the commission of decoity in the house of Harshvardhan (PW-1) is available on the record. The basic ingredients of Section 395 of the I.P.C. is that there should be more than five persons present at the time of commission of dacoity and should conjointly commit the offence is missing in this case. From the evidence available on record it is clear that the persons, who committed offence were only four in number.

13. The evidence of conspiracy is not available on record so in all probability no case u/s 395, I.P.C. has been made out against accused-appellants. The trial Court while holding them guilty for the offence u/s 395, I.P.C. has committed serious error of law and has not seen this aspect of the matter.

14. It revealed by the learned Public Prosecutor for the State that all accused-persons after undergoing the sentences awarded to them have already been released, but accused Girish Chandra Boss is still in custody. Accused Girish Chandra Boss undergo his sentence for the offence, as mentioned above.

15. Now, the question remains about the offence u/s 397, I.P.C. From the F.I.R. and the statements of PW-1 Harshvardhan and PW-3 Beena Verma, it is well proved that the four accused forcibly entered into the house and putting Smt. Beena Verma under fear of knife and katta, took away Rs. 40,000/- and artificial jewelry. All these four persons have been identified by Beena Verma (PW-3).

16. The learned amicus curiae for the accused-appellants argued that son of Harshvardhan (PW-1) and Beena Verma (PW-3) was not produced in the evidence, is of no help to them. An information (Exhibit P-16) u/s 27 for the recovery of the money was given by accused Girish Chandra Boss (Exhibit P-17) by Shatrudhan, (Exhibit P-18) by Mahendra Murari @ Babu and (Exhibit P-19) by Nayan Boss and in consequence thereof artificial neckless and Rs. 2000/- were recovered vide Exhibit P-9 at the instance of accused Shatrudhan and "katta" along with three-cartridge and Rs. 3900/- through Exhibit P-30 were recovered at the instance of Girish Chandra Boss. One knife, Rs. 3000/- and a bag were recovered vide Exhibit P-13 on the basis of information tendered by accused Mahendra Murari @ Babu. From the possession of Nayan Boss an artificial neckless and Rs. 4000/- were recovered vide Exhibit P-12. The recovered articles were identified vide Exhibit P-5. The accused-persons were also identified vide Exhibit P-4.

17. From the oral evidence coupled with testimony of identification parade and also of the recovered articles clearly establish that the accused-persons while

committing robbery put Smt. Beena Verma (PW-3) and her child under threat and forcibly took away Rs. 40,000/- and artificial jewelry also. It has also been established that all the four accused-persons by putting Smt. Beena Verma (PW-3) and her child under fear by using knife and "katta" committed robbery and took away the articles recovered from them. They were identified by the witnesses.

18. The learned amicus curiae for the accused-appellants argued that neither any injury nor use of any weapons has been found and the evidence tendered is of no help to the prosecution because "katta" is certainly deadly weapon, but the other aspect of Section 397, I.P.C. is not available on record, because none of the witness was given serious injuries or injury by the accused. Hence, in absence of grievous hurt, offence u/s 397 I.P.C. also not made out against the accused-person. It is an admitted fact that only force push was given by one of the accused to Smt. Beena Verma (PW-3) by which she fell down and got hurt. Of course there is no injury report in this case, but the version given clearly reveals that the accused persons using force pushed Smt. Beena Verma (PW-3) and knife was put on the neck of his child, therefore, force was used for the commission of robbery. Section 394, I.P.C. provides that while committing robbery voluntarily hurt is caused the offence u/s 394, I.P.C. will be made out. In absence of any grievous hurt and on the basis of the evidence tendered by the prosecution a clear case u/s 394, I.P.C. has been made out against all accused-persons. The trial Court by convicting the accused-persons for the offence u/s 397, I.P.C. has committed serious error of law.

19. From the discussions, as above, it is borne out that the offence u/s 395 and 397, I.P.C. are not made out against the accused-persons viz., Girish Chandra Bos, Mahendra Murari @ Babu, Nayan Boss, Sunil Boss and Shatrudhan @ Chandan and instead of offence u/s 394, I.P.C. is clearly made out against the accused-persons viz., Girish Chandra Boss, Mahendra Murari @ Babu, Nayan Boss and Shatrudhan @ Chandan, and against the fifth accused Sunil Boss the offence u/s 411, I.P.C. has been made out to the extent that the appeals deserve to be accepted and allowed.

20. The offence u/s 3/25 and 4/25 of the Arms Act is also made out against accused Girish Chanda Boss from whose possession a country-made pistol, along with three-cartridge was recovered, which comes under the definition of the Arms Act about which he has no proper license, but against rest of the accused no case u/s 3/25 of the Arms Act is made out.

21. Consequently, both these jail appeals are partly allowed. Accused-appellants viz., Girish Chandra Boss, Mahendra Murari @ Babu, Nayan Boss, Sunil Boss and Shatrudhan @ Chandan are acquitted of the offence u/s 395 and 397 of the I.P.C., instead accused-appellants viz., Girish Chanda Boss, Mahendra Murari @ Babu, Nayan Boss and Shatrudhan @ Chandan are convicted for the offence u/s 394 of the I.P.C. and they are sentenced to undergo rigorous imprisonment for a period of five-years and all to pay a fine of Rs. 5000/- in default further to

undergo six months imprisonment. Accused Girish Chanda Boss's conviction for the offence u/s 3/25 of the Arms Act and sentence imposed by the trial Court is maintained. Accused Sunil Boss is also convicted for the offence u/s 411 of the I.P.C. and sentenced to undergo three years rigorous imprisonment with a fine of Rs. 1000/- in default of payment to further undergo one month imprisonment.