
(2002) 05 AHC CK 0010
In the Allahabad High Court
Case No : Criminal Revision No. 1204 of 1984

Nand Kishore (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 23-05-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 386
Penal Code, 1860 (IPC) — Section 323, 394

Citation : (2002) 2 ACR 1796

Hon'ble Judges : Bhanwar Singh, J

Bench : Single Bench

Advocate : V.S. Singh, for the Appellant; A.G.A, for the Respondent

Final Decision : Allowed

Judgement

Bhanwar Singh, J.—This is a revision against the judgment and order dated 22.6.1984, passed by Sri S. S. Gupta, the then IInd Additional Sessions Judge, Hamirpur, whereby Criminal Appeal No. 29 of 1981 filed by the revisionist Nand Kishore was dismissed and his conviction u/s 394, Indian Penal Code and sentence of rigorous imprisonment for a period of two years was confirmed.

2. It is note-worthy that the aforesaid criminal appeal was earlier allowed in part by Sri H. C. Shukla, Vth Additional Sessions Judge, Hamirpur, vide his judgment of April 28, 1981 and the conviction of the revisionist u/s 394, Indian Penal Code was set aside. The revisionist was, however, convicted u/s 323, Indian Penal Code and sentenced to pay a fine of Rs. 300 and in default of payment of fine, he was directed to serve in prison for three months. Obviously, sentence of imprisonment had not been imposed upon him.

3. The complainant Radhey Shyam challenged the verdict of Sri H. C. Shukla, Vth Additional Sessions Judge, Hamirpur, by filing Criminal Revision No. 1390 of 1981 before this Court. The said revision was allowed and the judgment of Vth Additional Sessions Judge, Hamirpur, was set aside. By virtue of the judgment of

January 21, 1983, this Court remanded the case for reappraisal of the evidence and then a fresh decision. After remand of this case, Sri S. S. Gupta, IInd Additional Sessions Judge, Hamirpur heard Criminal Appeal No. 29 of 1981 afresh and dismissed it by upholding the conviction of the accused u/s 394, Indian Penal Code and the sentence of two years" rigorous imprisonment as awarded by the Chief Judicial Magistrate. It is now this judgment of Sri S. S. Gupta, the then IInd Additional Sessions Judge, Hamirpur, which has been challenged before this Court in the present revision.

4. Briefly stated, the prosecution case was that the complainant Radhey Shyam was, on 16.10.1979 at 8 p.m., returning from his shop situated in grain market Sumerpur of district Hamirpur. When he reached close to his house, the accused Nand Kishore assaulted him with two lathi blows from behind and after snatching the crippling gold chain from around his neck, tried to flee away. The complainant raised an alarm, whereupon Prem Das, Ayodhya Prasad and one Ram Bihari were attracted to the site of occurrence. Radhey Shyam's relation Badri Prasad, who was also accompanying him and other witnesses, apprehended the accused on the spot and recovered the looted gold chain. Nand Kishore was carried to the police station and handed over to the police and thereafter, an F.I.R. was lodged, whereupon a case u/s 394, Indian Penal Code was registered. The complainant had suffered two injuries-one over right side of parietal region of his scalp, and the other traumatic swelling over dorsum of the left hand. The blood stained kurta of the complainant and the gold chain recovered from the accused as also his lathi were taken by the police in its custody and memos Exts. Ka.-2 and 3 were prepared in respect thereof. Nand Kishore was medically examined the same day and he was found in a drunken state. He however, complained of pain over left side as well as right side of his right leg and also left fore-arm. The Investigating Officer, after investigation of the case, submitted charge-sheet against the revisionist, who pleaded not guilty at the trial and stated that he had been falsely implicated on account of enmity.

5. The prosecution examined as many as seven witnesses in support of its case and the charge levelled against the accused. P.W. 1 was complainant Radhey Shyam himself. In addition, P.W. 2 Badri Prasad, P.W. 3 Prem Das and P.W. 4 Ayodhya Prasad were also examined in support of the charge. P.W. 5 Head Constable Rajendravar Singh proved the chik report and G.D. report P.W. 6 Dr. G. P. Ojha proved the injury report. P.W. 7 Sub-Inspector Chandra Bhan Singh, who had investigated the case, proved site-plan Ext. Ka.-8 and charge-sheet Ext. Ka.-9. The accused had not examined any witness in support of his defence version.

6. The Chief Judicial Magistrate, after scrutinising the evidence on record and hearing the parties, arrived at a conclusion that the charge u/s 394, Indian Penal Code was fully established against the accused. On the basis of this conclusion, the Chief Judicial Magistrate recorded a finding of the accused being guilty u/s 394, Indian Penal Code and accordingly, convicted and sentenced him to undergo

two years" rigorous imprisonment. The IInd Additional Sessions Judge, on having heard both the parties as well as the State dismissed Criminal Appeal No. 29 of 1981 and upheld the Chief Judicial Magistrate's judgment of conviction and sentence. Feeling aggrieved of the said judgment, the accused Nand Kishore has filed this revision.

7. I have heard learned Counsel for the revisionist and learned Additional Government Advocate and also perused the record.

8. The first argument, which has been advanced on behalf of the revisionist, is that the High Court while setting aside the first verdict of April 28, 1981 of Vth Additional Sessions Judge, Hamirpur, passed in Criminal Appeal No. 29 of 1981 and remanding the case for a fresh decision, exceeded its jurisdiction as it amounted to enhancement of the sentence and that too without giving an opportunity of hearing to the accused Nand Kishore. In this context, a reference was made to the proviso to Clause (e) of Section 386 of the Code of Criminal Procedure. The said proviso postulates that a sentence shall not be enhanced unless the accused has an opportunity of showing cause against such enhancement. Keeping the legal aspect of the above provision in my consideration, I am of the view that the contention of the learned Counsel for the accused-revisionist is devoid of merit as the High Court had not enhanced the sentence imposed by Sri H. C. Shukla, Vth Additional Sessions Judge, vide his judgment passed in the criminal appeal. It had simply set aside the said verdict of conviction and sentence. It is significant to note that Sri Shukla converted the offence from one u/s 394, Indian Penal Code to Section 323, Indian Penal Code only and punished the accused-revisionist with a bare sentence of fine of Rs. 300. In that judgment, the learned Additional Sessions Judge set aside the Chief Judicial Magistrate's judgment of conviction of the accused u/s 394, Indian Penal Code on the ground that the gold chain with its hard hooks could not have been snatched away from around the neck of the complainant unless an injury was caused on the neck of the victim. It will help in better understanding of the point relied upon by the Vth Additional Sessions Judge, if I quote the observation made by him in his judgment of April 28, 1981. The relevant part of such observation may be quoted as below:

... This hook was found very tight and it was not possible to open the hook unless some instrument was used. It is not understandable how the chain was snatched away. Neither the hook was widened, nor the chain was broken. The chain is not of pure gold. Therefore, the metal is hard on account of mixture of copper. It is also very significant that although the chain was pulled by force but no injury was caused on the neck. The chain cannot be taken out of the head because it is very short. If the chain was pulled with full force, it must have caused some injuries on the neck. But the medical report shows that there was no injury on the neck. Therefore, it appears that this part of the story that the Appellant snatched away the chain appears to be an exaggeration, to make the case very serious, and cognizable by the police. As regards the inflicting of the

injuries on the head of Radhey Shyam, this part of the story is corroborated by the medical evidence. Therefore, the statement of the witnesses regarding the inflicting of injuries on the head of Radhey Shyam can be believed in spite of the fact that the witnesses are interested and chance witnesses. Therefore, the Appellant can be convicted only u/s 323, Indian Penal Code. He cannot be convicted u/s 394, Indian Penal Code.

9. On the basis of the above findings, the Vth Additional Sessions Judge, Hamirpur, held the accused Nand Kishore not guilty u/s 394, Indian Penal Code and accordingly set aside his conviction under that section. He was, however, convicted u/s 323, Indian Penal Code and keeping in view the jail term of about ten days, the learned Additional Sessions Judge, imposed upon him a fine of Rs. 300 only. In default of payment of the fine, he had to serve rigorous imprisonment for three months.

10. The complainant felt aggrieved of conversion of Nand Kishore's conviction from u/s 394, Indian Penal Code to Section 323, Indian Penal Code and to seek redressal of his grievance, he filed a criminal revision before this Court. It was numbered as 1390 of 1981 and decided on January 21, 1983. The finding of Vth Additional Sessions Judge, as recorded in his judgment of April 28, 1981, was held by this Court to be not sustainable on the ground that it was the incorrect assessment of the evidence, whereupon the hook of the gold chain was held to be so hard as not to widen without the help of instrument. The reasoning on the basis of which this observation was made was that the complainant was using the chain by wearing it and putting it off daily and, therefore, there should not have been any difficult situation for him to use it without the help of instrument. Further, the jeweller must have so made it that it could be used without the help of instruments. As regards the possible injuries which should have been suffered by the complainant around his neck at the time of chain being pulled, this Court observed that it is not always necessary that a person should suffer injuries if a chain around his neck is pulled out. It was on these conclusions and findings drawn by this Court that the conviction of Nand Kishore u/s 323, Indian Penal Code alone was set aside and the case was remanded to the appellate court for reappraisal of evidence and then decide as to whether any other offence was committed by the accused or not. In pursuance of these directions, Criminal Appeal No. 29 of 1981 stood restored and this time, it was heard by Sri S. S. Gupta, then IInd Additional Sessions Judge.

11. It is thus abundantly clear from above that there was no enhancement of sentence by this Court and, therefore, the order of remand was perfectly valid. Though it is not on record, yet it may be well imagined that by that time Sri H. C. Shukla, Vth Additional Sessions Judge had been transferred from district Hamirpur and the appeal after restoration came to be heard by the IInd Additional Sessions Judge. On having heard the matter afresh, the IInd Additional Sessions Judge dismissed the appeal filed by Nand Kishore and confirmed the verdict of conviction and sentenced u/s 394, Indian Penal Code as

recorded by the Chief Judicial Magistrate, Hamirpur. It is note-worthy that the chain was summoned by the IInd Additional Sessions Judge for demonstration and observation as to whether its hook could be opened without the help of an instrument or not. The IInd Additional Sessions Judge, as is evident from the perusal of his judgment, took up the task of handling the chain himself. He observed that it could be opened by him without the help of any instrument in presence of both the parties. He, however, added further, "No doubt, about a minute was spent in opening that hook but it was because a portion of that part of "S" type hook which was meant for opening the chain while putting it on the neck, was missing, and, therefore, the portion which was left, was not in a gripable position." In this context, it is note-worthy that neither the Vth Additional Sessions Judge, Sri H. C. Shukla while hearing the appeal earlier, nor Sri S. S. Gupta, IInd Additional Sessions Judge at the time of hearing the appeal second time after its restoration on being remanded by the High Court, could open the hook conveniently. Whether the said hook was opened with the help of instrument by Sri Shukla or by Sri Gupta without the help of instrument, the fact remains that the hook was not easily openable. Sri Gupta has clearly observed in his judgment that although no instrument was required or used by him while opening the hook, yet it took one minute, i.e., 60 seconds to open the hook and the reason for consumption of that time was that he was not able to take in his grip the hook, as the same was missing. It was not the complainant's case that such a hook was lost in the process of chain being snatched away. It is thus clear that it was not easy to open the chain and if it was wrested from the neck of the complainant, abrasions should have certainly been suffered by him. The injury report Ext. Ka.-6 shows that Radhey Shyam suffered only one injury on his scalp, which was a lacerated wound. According to him, he suffered this injury when the accused inflicted a lathi blow on his head from behind. This injury was simple. The gravity of this injury would be dealt with in latter part of this judgment. Here, it is enough to say that the complainant did not suffer any injury around his neck and it can well be observed from the discussion made above that it was not possible to pull the chain out of the neck unless force was used and in that event, injuries in the shape of abrasions would have been the imminent result. I, therefore, agree and appreciate the finding recorded by Sri Shukla and do not approve of what has been observed by Mr. Gupta. When he himself had to spend 60 seconds to widen the hook, the view of Sri Shukla gets fortified. Considering this important aspect of the matter, I am of the decisive view that the chain could not have been pulled out of the neck of the complainant without an injury being caused. Therefore, the theory of chain-snatching does not appear to be probable. Sri H. C. Shukla, Vth Additional Sessions Judge rightly acquitted the accused of the charge u/s 394, Indian Penal Code. The findings of the Chief Judicial Magistrate and that of IInd Additional Sessions Judge Sri S. S. Gupta are not sustainable.

12. Even as regards the lathi blow being inflicted to the complainant, the prosecution evidence is not worth-credible. In this context, it may be recalled

that the complainant, besides himself, examined two witnesses, namely, Badri Prasad (P.W. 2) and Prem Das (P.W. 3). Admittedly, Badri Prasad is the relation of the complainant. His sister's son is married to the daughter of the complainant and obviously, therefore, he has to be termed as an interested witness. His house was not situated within the vicinity of the complainant's residence, nor any other probable justification has been brought forward to create confidence in the factum of his presence at the site of occurrence. P.W. 3 Prem Das is also a highly interested witness, as he was Munim of the complainant Radhey Shyam. It is no doubt true that the evidence of an interested witness or a relation cannot be brushed aside merely because of the fact of his being interested. His testimony has to stand the test of credibility. Keeping these principles in view, if the statements of two witnesses are scrutinised, it would appear that their evidence is not trust-worthy. According to the complainant's version, the accused first struck a lathi blow on his head and then wrested the chain from around his neck and with the chain in his hand, he started running on the road but after a brief chase, he was apprehended. Whereas the complainant disclosed that Nand Kishore was caught at a distance of ten paces towards south of the place where he was injured, P.W. 2 Badri Prasad testified that the accused was arrested on the same spot, on which he had given a lathi blow to Radhey Shyam. Contrary to this, P.W. 3 Prem Das stated that Nand Kishore was not arrested at the place of Radhey Shyam being assaulted but at a distance of 8 to 10 paces. According to him, the place of arrest of the accused was in south-east corner of Radhey Shyam's house. Apart from this, P.W. 3 disclosed that Nand Kishore was not armed with a lathi at the time when he took the gold chain out of Radhey Shyam's neck. Question arises-where the lathi had gone and if the accused threw it away, it must have been recovered and brought to the police station along with the accused. Badri Prasad clarified it further in unambiguous terms that Nand Kishore was not having any lathi at the time of his being arrested. Converse to this, Radhey Shyam, the complainant recited in his complaint that the lathi by which he was assaulted, was recovered from the accused and it was handed over to the police at the time of report being lodged. As stated by Dr. G. P. Ojha, the injury of the complainant was simple. There was no bleeding from the lacerated wound, although the injured was examined a little after the occurrence. P.W. 4 Ayodhya, though discharged subsequently, disclosed that Nand Kishore was beaten by the witnesses. It was not the prosecution case. P.W. 6 Dr. G. P. Ojha also confirmed that Nand Kishore complained of pain in his both the legs and left hand. Nand Kishore was smelling of liquor at the time of his medical examination. It appears from all above that Nand Kishore was framed in this case on account of animosity with the complainant.

13. In view of the discussions made above, I am of the decisive opinion that the prosecution failed to establish its case beyond a reasonable doubt.

14. In the result, this revision succeeds and it is hereby allowed. The judgment in revision as also the verdict of the Chief Judicial Magistrate are set aside. The accused-revisionist is acquitted of the charge u/s 394, Indian Penal Code He is

on bail to which he need not surrender. His bail bonds stand cancelled and sureties discharged.