

(2001) 04 RAJ CK 0006
In the Rajasthan High Court
Case No : Criminal Appeal No. 579 of 2000

Sunil @ Surendra

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 13-04-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 360
Penal Code, 1860 (IPC) — Section 307, 324, 326, 34, 380

Citation : (2001) 4 RLW 206 : (2002) 5 WLC 549 : (2001) 4 WLN 204

Hon'ble Judges : Sunil Kumar Garg, J

Bench : Single Bench

Judgement

Sunil Kumar Garg, J.

This appeal has been filed by the accused appellant, who is in jail, against the judgment and order dated 4th October, 2000 passed by the learned Additional Sessions Judge No. 3, Jodhpur in Sessions Case No. 18/2000, by which he acquitted the accused appellant for the offence under Sections 326/34 and 324/34, but convicted him for the offence under Sections 392 read with Section 397 IPC, 307, 326 and 324 IPC and sentenced in the following manner--

_____ Name of accused Convicted Sentence awarded appellant u/s _____

Sunil 392 read with Seven years RI and to pay a fine of Rs. 397 IPC. 100/-, in default of payment of fine, to further undergo three months imprisonment. 307 IPC Five years RI and to pay fine of Rs. 100/-, in default of payment of fine, to further undergo 3 months imprisonment. 326 IPC Three years RI and to pay fine of Rs. 100/-, in default of payment of fine, to further undergo 3 months imprisonment. 324 IPC One year RI. _____

All the above substantive sentences were ordered to run concurrently.

2. It arises in the following circumstances:

On 28.3.2000 at about 9.15 AM, PW8 Kamal Kishore lodged a written report Ex.P/18 before PW6 Bhagwanaram, SHO, Mahamandir Police Station, Jodhpur stating inter-alia that he lived in Jodhpur as a tenant in the house of one Kamal Kishore Gattani and he had a shop of sweets near Mandore Krishi Mandi, Jodhpur and the supervision of goods pertaining to shop was being done by him in the lower poriton of house where he lived and and he used to live in the upper story. It was further stated in the report that on 28.3.2000 early in the morning at about 6.30 AM, he heard the sound of knocking the door and he asked his wife PW1 Nirmala to see who was knocking the door and, thereafter, he went to sleep. It was further stated in the report that after 15-20 minutes, he heard the cries of his wife PW1 Nirmala and, therefore, he went to open the door, but he found that door was closed, but he heard the cries of his wife PW1 Nirmala, who was saying that Sunil (present accused appellant) has killed her. Thereafter, he himself started crying and then he heard the noise of starting scooter and then, door was opened and he found his wife PW1 Nirmala lying on the ground outside the room having blood on her body and on being asked, she told him that accused appellant Sunil and another accused Prakash knocked the door and she opened the door and, thereafter, she went for natural call in the bath room and when she came back from the bath room, she saw accused appellant Sunil and another accused Prakash coming down from the stair-case and she saw the bag, in which money of the shop used to remain, in their hands and seeing her, accused Prakash asked present accused appellant Sunil that this lady PW1 Nirmala should be killed and, thereafter, accused appellant Sunil took out the knife from his pocket and gave knife blows to her and, thereafter, she cried and in the meanwhile, accused appellant Sunil and his associate Prakash ran away alongwith bag, which contained near about Rs. 20 or 21,000/-.

On this report, police registered the case and chalked out FIR Ex.P/19 and started investigation.

It may be stated here that since co-accused Prakash was below 16 years of age, therefore, his case was being tried separately by the Juvenil Court and not alongwith the present accused appellant Sunil.

During investigation, the accused appellant was arrested on 28.3.2000 through Ex.P/22 and the accused appellant gave information to the police to the effect that he could get recovered knife and in pursuance of that information, he got recovered one knife through Ex.P/14. The accused appellant further gave information to the police to the effect that he could get recovered the money, which is alleged to have been stolen away by him and in pursuance of that information, he got recovered the money through Ex.P/16.

PW1 Nirmala was got medically examined by Dr. Jagdish, PW3 and her injury report is Ex.P/12, which shows that she received as many as six injuries on her person and her X-ray report is Ex.P/11, which has been proved by PW2 Dr.A.L.

Chauhan, who has stated that injury No. 3 of PW1 Nirmala was found grievous one as there was evidence of fracture in 3rd rib on left side.

After usual investigation, the police submitted challan against the accused appellant in the Court of Magistrate, from where the case was committed to the Court of Session. Thereafter, the case was transferred to the Court of Addl. Sessions Judge No. 3, Jodhpur.

On 10.5.2000, the learned Addl. Sessions Judge No. 3, Jodhpur framed charges against the accused appellant for the offence under Sections 307, 392 read with 397, 326, 324, 326/34 and 324/34 IPC. The charges were read over and explained to the accused appellant. The accused appellant denied the charges and claimed trial.

During trial, the prosecution in support of its case examined as many as 14 witnesses and got exhibited some documents. Thereafter, statement of the accused appellant u/s 313 Cr.P.C. was recorded. In defence, one witness was produced by the accused appellant.

After conclusion of trial, the learned Addl. Sessions Judge No. 3, Jodhpur through his judgment and order dated 4.10.2000 acquitted the accused appellant for the offence under Sections 326/34 and 324/34, but convicted him for the offence u/s 307, 326, 324 and 392 read with 397 IPC and sentenced in the manner as indicated above holding inter-alia that the prosecution has proved its case beyond all reasonable doubts against the accused appellant for the offence under Sections 307, 326, 324 and 392 read with 397 IPC.

Aggrieved from the said judgment and order dated 4.10.2000 passed by the learned Addl. Sessions Judge No. 3, Jodhpur, this appeal has been filed by the accused appellant.

3. In this appeal, the learned Counsel for the accused appellant has not challenged the findings of the learned Addl. Sessions Judge No. 3, Jodhpur in respect of the incident mainly of the theft and, thereafter, when accused appellant was resisted by the lady PW1 Nirmala, she was given beating by accused appellant. But, he has challenged the findings of the learned Addl. Sessions Judge No. 3, Jodhpur on the following points:-

1. That while accused appellant Sunil and his associate Prakash were running and leaving the house alongwith the bag of stolen property, scuffle took place and in that scuffle, PW1 Nirmala received injuries at the hands of the accused appellant and thus, it cannot be said that at the time of commission of robbery, accused appellant caused grievous hurt to PW1 Nirmala and the injuries, which were caused by accused appellant to PW1 Nirmala, were caused when accused appellant Sunil and his associate Prakash were about to be apprehended and thus, the accused appellant cannot be convicted for the offence u/s 397 IPC as well as for the offence u/s 392 IPC.

2. That from the injuries, which were received by PW1 Nirmala, no case for the

offence u/s 307 IPC is made out.

3. That whatever offence is found to be proved against the accused appellant, since on the date of occurrence, accused appellant was below 21 years of age, lenient view in awarding sentence should be taken.

4. On the other hand, the learned Public Prosecutor supported the impugned judgment and order passed by the learned Addl. Sessions Judge No. 3, Jodhpur.

5. I have heard the learned Counsel for the accused appellant and the learned Public Prosecutor and perused the record of the case.

6. Before proceeding further, medical evidence of this case should be discussed first.

7. The injury report of PW1 Nirmala is Ex.P/12 and to prove the same, the prosecution has produced PW3 Dr. Jagdish.

8. PW3 Dr. Jagdish states in his statement that on 28.3.2000 he was Medical Jurist in the Mahatma Gandhi Hospital, Jodhpur and on that day, he examined PW1 Nirmala and found the following injuries on her person:-

1. Stitched incised wound 2-1 /2cm long on Lt.arm.
2. Stitched incised wound 2cm long on Lt.arm.
3. Four stitched incised wound 3cm, 2-1 /2cm, 2cm and 2cm long on Lt.side of chest postero laterally.
4. Three stitched incised wound 2cm, 1-1/2cm and 1-1/2cm on Lt.side of chest antero laterally.
5. Stitched incised wound 2cm long on Lt. axilla.
6. Two abrasions 3cm x 1/2cm, 2cm x 1/2cm on Lt.side lower part of chest.

He has further stated that out of six injuries, injuries No. 1 and 2 were simple in nature and injury No. 6 was caused by blunt object and rest were caused by sharp edged weapon and for, injuries No. 3 to 5, he advised X-ray. He has proved the injury report Ex.P/12.

9. Another doctor produced by the prosecution in this respect is PW2 Dr.A.L.Chauhan, who has stated that after seeing the X-ray plates, he came to the conclusion that there was evidence of fracture in third rib on left side.

10. On the back of Ex.P/13, it was further written by PW3 Dr. Jagdish that injury No. 3 of PW1 Nirmala might be dangerous to life.

11. Thus, from the statement of PW3 Dr. Jagdish and PW2 Dr. A.L. Chauhan, it has been established that PW1 Nirmala received six injuries, out of which, five injuries were caused by sharp edged weapon and injury No. 3, which was on chest, was found to be grievous in nature as there was evidence of fracture in

third rib on left side.

12. So far as who has caused these injuries to PW1 Nirmala is concerned, there is statement of PW1 Nirmala. She has stated that these injuries were caused by accused appellant by knife and this fact is not very much in dispute in this appeal and thus, the findings of the learned Addl. Sessions Judge No. 3, Jodhpur that these injuries were caused by accused appellant to PW1 Nirmala are liable to be confirmed.

13. So far as the time of causing of these injuries to PW1 Nirmala is concerned, it may be stated here that these injuries were caused to PW1 Nirmala after the commission of theft by accused appellant and when accused appellant Sunil and his associate Prakash were to move from the house of PW8 Kamal Kishore, they were resisted by PW1 Nirmala as she saw the money bag in the hands of accused appellant and when she tried to take the money bag back, injuries were caused to her by accused appellant by knife. It means the injuries, which were caused to PW1 Nirmala, were caused by the accused appellant after commission of theft of money bag belonging to PW8 Kamal Kishore.

14. In the above facts and circumstances, it is to be seen whether the case u/s 392/ 397 IPC and furthermore u/s 307 IPC has been made out or not.

Case for the offence u/s 392/ 397 IPC

15. The accused appellant was charged for the offence u/s 392/ 397 IPC and the learned Addl. Sessions Judge No. 3, Jodhpur has convicted the accused appellant for the offence u/s 392 read with Section 397 IPC. The pertinent question for consideration is whether the findings of the learned Addl. Sessions Judge No. 3, Jodhpur in this respect are correct one or not.

16. Before a person can be convicted for the offence u/s 397 IPC, the prosecution must prove:

(i) that the commission of robbery or dacoity; In the case of robbery a conviction under this section is equally good, whether the number of the accused be five or under,

(ii) that the accused used a deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt;

(iii) that the above acts were done during the commission of robbery or dacoity.

17. Section 390 IPC says when theft is robbery in the following manner:

When theft is robbery. - Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

18. In the present case, there is no dispute on the point that the money bag was

stolen by the accused appellant from the house of PW8 Kamal Kishore and at that time, accused appellant did not use any deadly weapon or cause grievous hurt or simple injury to anybody.

19. In my considered opinion, where at the time of committing robbery the accused did not use any deadly weapon or cause grievous hurt to anyone or even attempt to cause grievous hurt to any person, but caused those injuries while they were about to be apprehended by any person, after commission of theft, who came there on hearing alarm raised, the accused should not be convicted u/s 397 IPC.

20. In the present case also, the injuries, which have been caused to PW1 Nirmala by the accused appellant, were not caused at the time when commission of theft took place, but injuries were caused to PW1 Nirmala by the accused appellant when he was to run away from the scene after commission of theft and when he was apprehended by PW1 Nirmala and when she saw that accused appellant was having a money bag belonging to PW8 Kamal Kishore and when she resisted, then accused appellant gave knife blows to PW1 Nirmala.

21. Thus, in my view, offence u/s 397 IPC against the accused appellant is not proved by the evidence on record.

22. Similarly, the case of the accused appellant would not be covered by Section 392 IPC, as at the time of commission of offence, the accused appellant did not cause voluntarily or attempt to cause hurt to PW1 Nirmala.

23. The result of the above discussion is that the accused appellant in the present case cannot be convicted for the offence u/s 392/ 397 IPC and instead his case would fall under the category of simple theft u/s 380 IPC.

24. Hence, the findings of the learned Addl. Sessions Judge No. 3, Jodhpur convicting the accused appellant for the offence u/s 392/ 397 IPC are liable to be set aside and instead of 392/ 397 IPC, the accused appellant is liable to be convicted for the offence u/s 380 IPC.

Case for the offence u/s 307 IPC

25. To prove the charge for the offence u/s 307 IPC, the prosecution has to prove:

1. That the accused did an act.
2. That it was done--
 - (i) with the intention, or
 - (ii) with the knowledge--
 - (a) of causing death;
 - (b) of causing such bodily injury as the accused knew to be likely to cause the

death of the person to whom the harm was attempted to be caused; or

(c) of causing bodily injury to a person and the bodily injury intended to be inflicted would have been sufficient in the ordinary course of nature to cause death; or

(d) that the act if completed would have been so imminently dangerous that it would have in all probability caused death or such bodily injury as is likely to cause death; and the act attempted was committed without any excuse for incurring the risk of causing death or such injury as aforesaid.

26. Apart from this, to justify a conviction u/s 307 IPC, it is not essential that bodily injury capable to causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. It is also not necessary that injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. Attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

27. In the present case, the accused appellant has given as many as five blows with knife on the person of PW1 Nirmala and out of six injuries, injury No. 3 was found to be grievous one, as there was evidence of fracture in third rib on left side. Her X-ray report Ex.P/11 further shows that apart from fracture in 3rd rib on left side, there was a partial collapse of left side lung with surgical emphysema left side chest wall extending to neck region.

28. It may be stated here that result is not to be seen and the act of the accused has to be seen. In the present case, since accused appellant has attempted more than thrice with sharp edged weapon i.e. knife and caused injuries to PW1 Nirmala, therefore, intention on the part of the accused appellant to murder PW1 Nirmala can be inferred. The knife itself is a dangerous weapon and the accused appellant has caused injury on chest of PW1 Nirmala, which is vital part of the body.

29. the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section.

30. In the present case, in FIR Ex.P/18, there is a mention of the fact that another accused Prakash told accused appellant Sunil that this lady PW1 Nirmala should be killed since she had seen them and, thereafter, accused appellant took out knife from his pocket and gave many blows on the person of PW1 Nirmala.

From this act, intention on the part of the accused appellant to murder PW1 Nirmala can be gathered.

31. In these circumstances, the learned Addl. Sessions Judge No. 3, Jodhpur was right in convicting the accused appellant for the offence u/s 307 IPC and his findings in this respect are liable to be confirmed.

On point of sentence

32. The accused appellant has been sentenced to five years RI for the offence u/s 307 IPC. The question is whether this sentence is just or not, looking to the entire facts and circumstances of the case.

33. The case of the accused appellant is that on the date of occurrence, the accused appellant was of 18 years and below 21 years of age and he is a young man and, therefore, lenient view be taken in awarding sentence to him.

34. It may be stated here that sentencing is a delicate task requiring an inter-disciplinary approach and calls for skills and talents. The determination of the right measure of punishment is often a point of great difficulty. Hard and fast rules cannot be laid down, but the decision must be left to discretion, and discretion has to be guided by a variety of considerations.

35. There are so many decisions of the Hon"ble Supreme Court as well as of many High Court describing various principles in deciding the quantum of punishment to be imposed on offenders and after going through them, the following conclusion can be drawn:-

1. The twin objects of punishment are to prevent a person who has committed a crime from repeating it and to prevent others from committing similar crimes. The sentence passed on the offender must be the least that will achieve both these objects. In deciding the measure of punishment the court ought to take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, and his age, character and antecedents.

2. The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious pre-conceptions should be strictly disregarded. The court must bear in mind the necessity of proportion between an offence and the penalty. The maximum penalty provided for any offence is meant for only the worst cases.

3. No sentence should ever appear to be vindictive. An excessive sentence defeats its own object and tends to further undermine the respect for law. The jails should be reserved for the reception of those who perform criminal acts of not merely a technical but of a criminal character. If the law permits a sentence of fine as an alternative, there is no need of the sentence of imprisonment, unless of course the gravity of the offence or the antecedents of the offender demand it.

4. First and/or youthful offenders should invariably be treated leniently, and in applying provisions of law like the First Offender's Probation Act or Section 360 Cr.P.C., it would be better for the court to err on the side of liberality. On the other hand, a person who has taken to a life of crime or who has refused to take a lesson from his previous convictions should be meted out severe punishment.

5. A deterrent sentence is wholly justifiable when the offence is the result of deliberation and pre-planning, is committed for the sake of personal gain at the expense of the innocent, is a menace to the safety, health or moral well being of the community, or is difficult to detect or trace. Unlike those acts which are universally acknowledged to be a criminal nature, an act which has only recently been made offence or which is not unlawful in other parts of the country or State or which is not essentially criminal in character, deserves leniency, except in the case of persistent offenders.

36. Since it is case of theft as well as attempt to murder lady PW1 Nirmala, therefore, accused appellant does not deserve much sympathy. However, since he is a first offender and below the age of 21 years, leniency can be showered on him to some extent.

For the offence u/s 307 IPC

37. Looking to the entire facts and circumstances of the case the fact that the accused appellant is in jail since 28.3.2000, the prayer of the learned Counsel for the accused appellant that accused appellant be sentenced to the period already undergone, cannot be accepted. However, if his sentence for the offence u/s 307 IPC is reduced from 5 years RI to 4 years RI, it would meet the ends of justice. For the offence u/s 380 IPC

38. The accused appellant has been convicted for the offence u/s 380 IPC instead of 392/ 397 IPC.

39. Looking to the entire facts and circumstances of the case, for the offence u/s 380 IPC, if the accused appellant is sentenced to one year RI and to pay fine of Rs. 100/-, in default of payment of fine, to further undergo one month imprisonment, it would meet the ends of justice.

For the offence u/s 326 and 324 IPC

40. Since the accused appellant has been convicted and going to be sentenced for the offence u/s 307 IPC, there is no need to convict the accused appellant separately for the offence under Sections 326 and 324 IPC. Hence, the conviction and sentence passed by the learned Addl. Sessions Judge No. 3., Jodhpur vide judgment and order dated 4.10.2000 for the offence u/s 326 and 324 are set aside.

In the result, the appeal, is disposed of in the following manner:

1. the appeal of the accused appellant @ Sunil Surendra is partly allowed in the manner that he is acquitted of the charges for the offence u/s 392/ 397 397 IPC

and the judgment and order of the learned Addl. Sessions Judge No. 3 dated 4.10.2000 convicting and sentencing him for the said offences are set aside and instead of 392/ 397 IPC, he is convicted for the offence u/s 380 IPC and for the said offence u/s 380 IPC, he is sentenced to undergo one year RI and to pay fine of Rs. 100/-, in default of payment of fine, to further undergo one month imprisonment. The conviction of the accused appellant for the offence u/s 307 IPC recorded by the learned Addl. Sessions judge No. 3, Jodhpur vide judgment dated 4.10.2000 is maintained. But, the order of sentence dated 4.10.2000 passed by the learned Addl. Sessions Judge No. 3, Jodhpur sentencing him to five years RI for the offence u/s 307 IPC is modified to the extent that accused appellant is sentenced to four years RI instead of five years RI.

The substantive sentences shall run concurrently.