

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl. Appeal No. 430/2000 & Crl.M.B. 1290/2011

% Reserved on: 2nd November, 2011

Decided on: 29th November, 2011

MANOJ KUMAR & ANR.

..... Appellant

Through: Mr. Sameer Chandra and Mr. Wiqar
Ahmed, Advs. with Appellant No.1 in
person.

versus

STATE

..... Respondents

Through: Mr. Manoj Ohri, APP with SI Rakesh
Kumar, PS Bhajanpura.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal the Appellants lay a challenge to the judgment dated 23rd May, 2000 convicting them for offences punishable under Section 394/34 IPC and the order on sentence dated 24th May, 2000 directing them to undergo Rigorous Imprisonment for a period of four years and a fine of Rs. 2,000/- each and in default of payment of fine to undergo Simple Imprisonment for two months. Besides Appellant No.2 Ashok has been convicted and sentenced for offence under Section 398 IPC as well and directed to undergo Rigorous Imprisonment for a period of 7 years and fine of Rs. 4,000/- and in default of payment of fine Simple Imprisonment for four months.

2. Learned counsel for the Petitioner contends that the complainant knew the Appellants very well. Despite knowing the Appellants she did not name

them in the FIR. The identity of the Appellants was deliberately concealed and in the FIR it was stated that unidentified assailants came to the house. Admittedly, the Appellants and the complainant are neighbours. In the cross-examination PW2 the complainant has admitted that the distance between their houses is 10 paces and that the complainant had got the work of electricity done in May/June 1998 from the Appellant No.2. The Appellants who are brothers and one more accused Subhash who was their friend were falsely implicated in this matter at the instance of the complainant as the Appellants were demanding the money due from the complainant for the electricity work done by them which the complainant was not paying. The learned Trial Court has not considered the explanation rendered by the Appellants in their statements under Section 313 Cr.P.C. Further, no conviction can be based on the solitary testimony of PW2, the complainant Santra Devi as the same is not reliable. Her children who were sleeping with her and other eye-witnesses were deliberately not examined by the prosecution. No robbery has been proved. The Appellants have not been apprehended at the spot, however it is shown that they were apprehended on the next date on a secret information. Allegedly a toy pistol was recovered, however there is no allegation in the entire deposition of PW2 that any pistol was shown.

3. It is further contended that the testimony of PW2 is full of contradictions. In the site plan the place of incident is mentioned as the third floor of the house. PW2 in her examination-in-chief states that the incident took place at the first floor whereas in the cross-examination it is stated to have taken place on the second floor. The injury received on the

complainant is superficial in nature and no opinion has been given by the doctor that the injury could be caused by a knife like instrument. In the MLC it is stated that she was attacked by an instrument and not by a knife. Since the complainant admittedly knew the Appellants, the refusal of TIP cannot be taken as adverse. Reliance is placed on *Murari Vs. State II (2011) DLT (CRL.) 609 (DB)*. Further there is no evidence that the complainant withheld the names of Appellants in the FIR because she was under fear. A serious adverse inference needs to be taken against the prosecution case. Reliance is placed on *K. Ashokan & Five Ors. Vs. State of Kerala 1998 (2) JCC (SC) 170*.

4. Learned APP on the other hand contends that though the complainant admits knowing the Appellants in the cross-examination, however the version of the complainant is corroborated by the MLC and the time of arrival in the MLC. The complainant is an injured witness and thus her testimony cannot be brushed aside lightly. In view of the testimony of the complainant, it is a clear case of attempt to commit robbery and thus the appeals are liable to be dismissed.

5. Briefly the case of the prosecution is that PW2 Santra Devi alleged that on the night intervening 17th January, 1999 when she was sleeping at her house at 2.00 AM three boys came in her bed-room and pointed a knife towards her and asked her to hand-over whatever she has. When she told those boys that she will not give them anything, they injured her. In the meantime her children woke up and told her to hand-over the things sought by the assailants. One of the three boys gave a knife blow on her neck and when she tried to get rid of them, she sustained injury on her finger. On her

raising alarm all the three boys ran away. FIR under Section 307/34 IPC was registered and thereafter Section 393 IPC was added. On completion of investigation a charge-sheet was filed. After recording the statements of the witnesses and the accused persons, the learned Trial Court convicted both the Appellants and co-accused Subhash as stated above. No appeal against this judgment appears to have been filed by co-convict Subhash.

6. In the present appeal Appellant No.1 has already undergone the sentence by the time the appeal came up for hearing and since the Appellant No.2 was not available, non-bailable warrants were issued against him and presently he is in custody. A perusal of the testimony of PW2 shows that she has been confronted with the earlier statements made by her. PW2 in the Rukka states that unidentified assailants came to the house. However in her cross-examination she admits that in the month of May/June 1998 she has got electricity work done from the Appellant No.2. It is the case of the Appellants that Rs. 2,000/- were due from the complainant and since they were repeatedly demanding the money from her which she failed to pay, she has falsely implicated them. PW2 though admits having got the work done but states that there was no money due and in fact she volunteered to state that the money was given in advance. Though the Appellants in the FIR are not named nor any description was given, it is nowhere revealed how the Police reached their house on the next day and apprehended them. Strong reliance is placed by the prosecution on the fact that the statement of PW2 is corroborated by the MLC as she received injury on the neck. It may be noted that the injury on the neck is 6 Cms long and a superficial injury. The Doctor has been cross-examined and she admits that such an injury comes

under the purview of simple injury. Further, it may be noted that in the alleged history it was not mentioned that injury was given by the knife but it was stated that she was attacked with a sharp instrument.

7. There is no doubt that the conviction can be based upon the sole testimony of an injured witness. However, the witness should be reliable. In the present case not only despite knowing the Appellants the complainant does not name them but there are lot of contradictions even as to the place of incident in her testimony. In the FIR she stated that the assailants demanded whatever she had, whereas before the Court she stated that the assailants demanded keys from her. Further in the FIR nowhere it is mentioned that the Appellant No.1 pointed out pistol towards her, however in the Court during examination-in-chief it was mentioned that he pointed out country-made pistol towards the complainant. It may be noted that no recovery of pistol has been made and all that has been recovered is admittedly a toy pistol. Further all other material eye-witnesses have been held back and thus adverse inference needs to be drawn against the prosecution in such a case. Moreover, there are contradictions even in the statement of the complainant with regard to the place of incident. In her examination-in-chief she has stated that the incident took place in the bedroom first floor whereas in her cross-examination she has stated that the incident took place on the second floor.

8. In view of the inconsistencies in the statement of the complainant, I do not find it to be a fit case to uphold the conviction of the Appellants on the basis of uncorroborated testimony of the complainant. The appeal is therefore allowed. The impugned judgment and order dated 23rd May, 2000

and 24th May, 2000 are set aside. The Appellants are acquitted of the charges framed. Superintendent Tihal Jail is directed to release the Appellant No.2 who is in custody forthwith if not required in any other case.

(MUKTA GUPTA)
JUDGE

NOVEMBER 29, 2011
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