

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

Date of decision: December 19, 2013

+1. CRL.A. 1144/2010

SAROJ @ BHUKHA

..... Appellant

Through : Mr. Avninder Singh, Amicus Curiae
with Mr. Aditya V. Singh, Adv.

versus

STATE NCT OF DELHI & ORS.

..... Respondent

Through: Mr. O.P. Saxena, APP.

2. CRL.A. 1145/2010

PARVEZ

..... Appellant

Through : Mr. S.Hasan Zaidi, Adv.

versus

STATE NCT OF DELHI & ORS.

..... Respondent

Through: Mr. O.P. Saxena, APP.

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. By way of these two appeals, challenge has been made to the judgment dated 22nd July, 2010 passed by the Id.Addl. Sessions Judge whereby both the appellants have been convicted for the offence punishable u/s 394/34 IPC and u/s 397 IPC and order of sentence dated 3rd August, 2010 whereby they have been sentenced to undergo RI for three years for the offence u/s 394 IPC with fine of Rs.1000/- each and in default to further

undergo SI for two months and RI for a period of seven years for the offence u/s 397 IPC with fine of Rs.1000/- each and in default to further undergo SI for months.

2. Briefly the facts relevant for the disposal of the present appeals are that:-

Both the appellants were sent for trial in FIR no.428/05 P.S.Nand Nagri on the allegations that on 27.6.2005 at about 7 pm when the complainant Nadeem, PW-1 and his elder brother Mohd.Riyaz, PW-2 were standing in front of the gate of the park and were talking to each other, both the appellants who were their neighbours, had come to them and asked the complainant Nadeem, PW-1 to give money for drinking liquor. When he refused to give money, appellant Saroj @ Bhukha asked appellant Parvez to teach a lesson to him. Further allegations are that appellant Saroj @ Bhukha caught hold of his hands and appellant Parvez took out ustara from his pocket and attacked on his neck and head and caused injuries to him. When his brother Mohd.Riyaz, PW-2 tried to save him, appellant Saroj @ Bhuka threw the complainant Nadeem, PW-1 on the ground and took out knife from his pocket and ran towards his brother Mohd.Riyaz, PW-2. However, due to fear Mohd.Riyaz ran away from the spot. PCR came to the spot and by then injured/complainant Nadeem had already been taken to the GTB Hospital. Police reached there and recorded statement Ex.PW 1/A of Nadeem, PW-1, on the basis of which FIR Ex.PW 3/D was registered against the appellants.

After completion of investigation challan was filed against the appellants for the offence punishable u/s 324/34 IPC. After supply of copies, Id.M.M. framed a charge against both the appellants u/s 324/34 IPC

to which both the appellants have pleaded not guilty and claimed trial. When the case was fixed for prosecution evidence before the Id.M.M., the Id.M.M. observed that from the evidence of the complainant Nadeem, PW-1 recorded on 29.4.2008, a prima facie case for the offence punishable u/s 397 IPC was made out against the appellants which was triable by the court of Sessions and accordingly the case was committed to the court of Sessions by the Id.M.M. Vide order dated 21.7.2008, the Id.Addl. Sessions Judge framed charge for the offence punishable u/s 392/34 IPC, 394/34 and u/s 397 IPC against both the appellants. Both the appellants had pleaded not guilty to the charge and claimed trial.

3. To bring home the guilt, the prosecution had examined three witnesses i.e., the complainant, Nadeem, PW-1, Mohd.Riyaz, PW-2 brother of the complainant and ASI Ram Bir, PW-3. The appellants in their statement u/s 313 Cr.P.C denied the incriminating evidence against them and stated that they were innocent persons and were falsely implicated. The Id.Additional Sessions Judge after considering the evidence on record held both the appellants guilty for the offence punishable u/s 394/34 IPC and u/s 397 IPC and convicted them thereunder and passed an order of sentence as has been stated above. Aggrieved with the same, present appeal has been filed.

4. Mr.S.Hasan Zaidi, learned counsel for the appellant Parvez as well as Mr. Avninder Singh, Amicus Curiae for the appellant SAROJ @ BHUKHA at the outset have stated that under the instructions from appellants, they are not challenging the conviction of appellants u/s 394/34 IPC. It is submitted that evidence on record does not establish conviction of the appellants u/s 397 IPC, as such, they be given the benefit of doubt and be acquitted for the

said offence. It is further submitted that the appellants have already undergone the sentence as awarded to them in respect of offence punishable u/s 394/34 IPC for which they have been convicted, as such, they be released forthwith.

5. On the other hand, learned APP for the State has submitted that there is sufficient evidence on record and the evidence on record clearly establishes that the appellants have also committed offence punishable u/s 397 IPC and they are rightly convicted by the Id.Addl. Sessions Judge for the said offence.

6. I have considered the submissions made and perused the material on record.

7. The FIR Ex.PW 3/D was registered on the statement of complainant Nadeem, PW-1, Ex.PW 1/A made to IO ASI Ram Bir, PW-3 wherein he has stated that on the day of occurrence he was present at the spot along with his brother Mohd.Riyaz, PW-2 and both the appellants had come and demanded money from him for drinking liquor. He had refused to give money. Thereupon, appellant Saroj @ Bhukha had caught hold of him from his arm and appellant Parvez took out ustra and gave ustra blows on his neck and head. He has also alleged that when his brother Mohd.Riyaz, PW-2 tried to save him, appellant Saroj @ Bhukha took out a knife from his pocket and tried to stab Mohd.Riyaz, PW-2 but he ran away. In the evidence before the court Nadeem, PW-1 has deposed that the appellants and their one more associate snatched Rs.1600/- from him. All three took out knives and razor and assaulted him. He has deposed that appellant Saroj @ Bhukha was having ustra and appellant Parvez was having knife. His brother Mohd.Riyaz, PW-2 had reached the spot when he had already

sustained injuries.

8. In cross-examination, he has deposed that there were number of persons who had assaulted him and his brother Mohd.Riyaz, PW-2 and both the appellants had tried to save them from the assailants and that the appellants were not involved in the alleged incident. He has deposed that there were other persons who were armed with knife/ustara who had assaulted him. On being re-examined by the Id.APP, he has admitted having compromised with the appellants.

9. The above witness i.e., Nadeem, PW-1 is making different statements at different stages. In the statement made to the police Ex.PW 1/A on the basis of which FIR Ex.PW 3/D was registered, he has stated that appellant Parvez took out ustara and gave ustara blows on his neck and when his brother Mohd.Riyaz, PW-2 tried to save him, appellant Saroj @ Bhukha took out knife and tried to stab him. In the statement before the court he has stated that both the appellants i.e., Saroj @ Bhukha and Parvez and one more person namely Shafid had met him at the spot and demanded money. On refusal by him, all three took out knives and ustra. As per him, appellant Saroj @ Bhukha was having ustra while appellant Parvez was having knife. His brother Mohd.Riyaz, PW-2 had come later.

10. There are substantial variations in his statement before the court as compared to the statement Ex.PW 1/A made to the police about the weapon of offence as has been noted above. In evidence he has stated that Mohd.Riyaz, PW-2 had come later when he had sustained injuries while in statement to the police, he has stated that Mohd.Royaz, PW-2 was present and appellant Saroj @ Bhukha had shown knife to him. However, in

evidence, he has not stated anything about weapon of offence being shown by appellant Saroj @ Bhukha to Mohd.Riyaz, PW-2. Further in cross-examination he has stated that appellants were not armed with weapons. The cross-examination was recorded after a gap of few months of recording of examination-in-chief. Even if ignoring his statement in cross-examination, it is not established beyond reasonable doubt that appellant Saroj @ Bhukha was armed with knife and appellant Parvez was armed with ustra, as is the case of prosecution.

11. The other eye witness to the occurrence is Mohd.Riyaz, PW-2 who has deposed that both the appellants had assaulted them with ustra when they refused to give money. He was treated hostile by the Id.APP and was cross-examined at length. In cross-examination he has deposed that appellant Saroj @ Bhukha has assaulted him with knife. He has not stated about use of any weapon by appellant Parvez. His evidence is also not in consonance with evidence of Nadeem, PW-1. Further MLC Ex.PW 3/A of Nadeem, complainant, PW-1 is not proved by the prosecution by calling any doctor. The same was exhibited in the evidence of IO, PW-3. There is no opinion whether the injuries inflicted on the complainant were caused by knife or ustara as is the case of the prosecution. Further in the MLC Ex.PW, the injuries have been opined as simple.

12. In view of the above discussion and the evidence on record, the charge against the appellant Saroj @ Bhukha having armed with knife and appellant Parvez having armed with ustra and having used the same in the commission of robbery under section 397 IPC is not established beyond reasonable doubt. However, there is sufficient evidence on record to convict the appellants u/s 394/34 IPC and the Id.Addl. Sessions Judge has rightly

convicted them for the said offence.

13. In view of the above, both the appeals are partly allowed. The conviction of the appellants u/s 394/34 IPC and the sentence awarded to the appellants u/s 394/34 IPC i.e., RI for a period of three years with fine of Rs.1000/- each and in default to further undergo SI for two months as awarded by the Id.Addl. Sessions Judge is upheld. The conviction of the appellants u/s 397 IPC and consequently the sentence awarded for the said offence are hereby set aside. It is pointed out that the appellants are in custody for more than three years and six months. The appellants be released forthwith if not required in any other case.

Both the appeals stand disposed of in the above term.

VEENA BIRBAL, J

DECEMBER 19, 2013

ssb