

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

Reserved on: 29.04.2014
Date of Decision: 30.04.2014

+ CRL.A. 1067 of 2010

ANAND KUMAR Appellant

Through: Ms. Nandita Rao, Adv.

Versus

STATE OF DELHI (NCT) Respondent

Through: Ms. Ritu Gauba, APP.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

JUDGEMENT

V.K. JAIN, J.

On 7.9.2002 at about 9:10 p.m., the Police Control Room received information of a quarrel near Arun Memorial Clinic, Gali No.9, Main Market, Samaipur Badli. The information was recorded at Police Station Samaipur Badli vide DD No.23A and a copy of the said DD was given to S.I. Rabinder Singh for investigation. When the aforesaid police officer reached the spot, the Beat Constables were already present there. He recorded the statement of the complainant Smt. Aruna Malekar. The complainant told him that she was running a clinic in the name and style of

Arun Clinic and was a registered Medical Practitioner. At about 9:00 p.m., when she came out of the clinic to close it for the day, two (2) boys came there and one of them complained of having stomach-ache. She asked her brother Madhav Mandal, who was present in the clinic, to check him. When her brother was checking the boy complaining of stomach-ache, the other boy entered the clinic, put a knife on her abdomen and asked her to hand over the *kada* she was wearing. He also threatened to stab her with knife, in case the demand was not complied with. In the meanwhile she as well as her brother raised alarm due to which a crowd gathered there. In the commotion which took place, the boy who had aimed a country made pistol at his brother, tried to run away leaving the country made pistol on the spot. He was, however, apprehended by the members of the public and given a beating. She also alleged that the other person who had managed to flee away leaving the knife on the spot had visited her clinic 2-3 days ago along with his wife and given his name as Anand. The appellant Anand is the person who was apprehended on the spot whereas his co-convict Pushpender is alleged to be the other person involved in the incident. One country made pistol containing a cartridge and one knife were seized by the police from the spot.

2. The appellant as well as his co-convict Pushpender were charged under Section 393/34 of IPC read with Section 398 thereof for attempting to commit robbery and being armed with a deadly weapon at the time of attempting to commit robbery. The appellant Anand Kumar was also charged under Sections 25/27 of the Arms Act for being in possession of a country made pistol and a cartridge. Similar charge was framed against his co-convict Pushpender for using a knife while attempting to rob the complainant. Since the appellant as well as his co-convict pleaded not guilty as many as eleven (11) witnesses were examined by the prosecution. No witness was examined in defence.

3. Smt. Arun Malekar came in the witness box as PW1 and *inter alia* stated that on 7.9.2002, when she came out of her clinic at about 9:00 p.m., the accused persons came there and Pushpender told him that Anand had pain in his abdomen. Since Pushpender requested her to check Anand, she came inside the clinic and asked her brother Madhav Mandal to check him. Pushpender entered the clinic and placed a knife on her stomach while she was seated. As she got up, she caught hold of the knife and raised alarm. Her brother, who was inside the chamber for examining Anand, also raised alarm since Anand had also pointed a country made pistol on him. Her

brother caught hold of Anand and pushed him outside. In the melee, Pushpender fled from the spot dropping his knife there whereas Anand was caught by her brother. The pistol of Anand fell outside the clinic. She further stated that the police officials prepared the sketch of the knife as well as the country made pistol before the same were seized in her presence vide memos Ex.PW1/E and Ex.PW1/F. She also identified her signatures on the sketches Ex.PW1/B and Ex.PW1/C. She identified Ex.P1 as the knife which was seized by the police and Ex.P2 as the pistol which the police had seized from the spot. In cross-examination by the learned Additional PP she admitted that Pushpender had asked her to take out the *kada* which she was wearing at the point of knife and that he had earlier visited her clinic along with his wife.

4. PW2 Madhav Mandal is the brother of the complainant, he corroborated the deposition of the complainant and stated that when he took Anand inside the chamber for examination he placed a country made pistol on his chest. He (the witness) caught hold of Anand, raised alarm and pushed him out of the chamber. He further stated that he saw Pushpender having a knife in his hand which his sister had caught. He also claimed that Pushpender fled from the spot leaving the knife behind. He also deposed

with respect to the police officials coming to spot and seizing the country made pistol as well as the knife after preparing their sketches. During cross-examination by the learned Additional PP he admitted that the person who had placed knife on his sister had threatened her to hand over the golden *kada* which she was wearing.

5. PW5 Shri Satish is a neighbour of the complainant. He *inter alia* stated that on 7.9.2002, members of the public gathered outside the clinic of a Bengali Doctor on hearing the noise. He further stated that one person had been held by the members of the public. He identified the appellant Anand as the aforesaid person and stated that a knife and a country made pistol were recovered by the police from the spot. He also stated that Anand had disclosed about the involvement of another person who had fled from the spot in the incident.

6. PW6 ASI Dharamvir *inter alia* stated that on 7.9.2002 when he was on patrol along with Constable Sumer he was informed of a quarrel at a doctor's clinic. When they reached the spot they saw some persons beating the appellant Anand. A knife and a country made pistol lying on the spot were then seized. The witness identified the knife Ex.P1 as well as the country made pistol Ex.P2, which were seized from the spot.

PW7 Constable Avdhesh stated that when he reached the spot along with S.I. Rabinder on receipt of copy of DD No.23A, the appellant Anand was found having been beaten by the members of the public. The complainant produced one knife and a country made pistol, Exhibits P1 and P2 respectively, which were seized after their sketches had been prepared.

PW9 S.I. Rabinder Singh corroborated the deposition of PW7 Constable Avdhesh with respect to their going to the spot on 7.9.2002 and seizing a country made pistol as well as a knife from there.

PW11 Shri K.C. Barshney is the Ballistic Expert of FSL, who examined the country made pistol and the cartridge sent to him by the SHO, Police Station Badli and found that the country made pistol was in working order whereas the cartridge was a live cartridge which the witness test-fired through the country made pistol sent to him. He also identified the country made pistol Ex.P1.

7. In his statement under Section 313 of Cr.P.C., the appellant Anand admitted his presence in the clinic of the complainant but denied having shown a country made pistol to Madhav Mandal, brother of the complainant. He claimed that a quarrel had taken place between him and the complainant, who demanded Rs.1,000/-. The accused Pushpender, however, denied his

having gone to the clinic of the complainant as well as the rest of the allegations against him.

8. Vide impugned judgement dated 25.5.2010, the appellant was convicted under Sections 393/34 of IPC read with Section 398 thereof as well as under Sections 25/27 of the Arms Act. Vide impugned Order on Sentence dated 31.5.2010, he was sentenced to undergo RI for seven (7) years and to pay fine of Rs.1,000/- or to undergo RI for two (2) months in default of payment of fine. The appellant was further sentenced to undergo RI for three (3) years and to pay fine of Rs.500/- each under Sections 25/27 of the Arms Act or to undergo, in default of payment of fine, RI for one (1) month each.

Being aggrieved from his conviction and the sentence awarded to him, the appellant Anand is before this Court by way of the present appeal.

9. The conviction of the appellant has been assailed by the learned counsel for the appellant on the following grounds:

- i. There is no evidence of any injury to the complainant though she claims to have caught the knife which the convict Pushpender is alleged to have used to intimidate her.
- ii. There was actually a quarrel between the complainant and the

appellant Anand as would be evident from the information conveyed to the Police Control Room.

iii. There is no evidence of the finger print of the appellant Anand having been found on the pistol seized from the spot.

iv. PW2 Mr. Madhav Mandal was not a doctor and, therefore, there could be no occasion for him to examine the appellant Anand.

v. There is no public witness of the incident which took place in a populated area.

10. As regards absence of injury to the complainant I find that in her cross-examination she was not asked as to whether she had sustained injury when she caught the knife or not. It is not necessary that injury would be caused whenever a person holds the knife in the hand of another person. Unless an attempt is made to snatch the knife and the person holding the knife resists such an attempt, no injury is likely to be suffered by the person seeking to snatch the knife, and there is no evidence of Pushpender having resisted the complainant or trying to pull back the knife towards him. I, therefore, find no merit in the contention advanced by the learned counsel for the appellant.

11. As regards the information given to the Police Control Room,

admittedly the information was not given either by the complainant or by her brother. It has come in evidence that Mr. Madhav Mandal had pushed the appellant Anand out of the chamber after he raised alarm inside the examination chamber whereas the complainant raised alarm outside the said chamber. The country made pistol which the appellant Anand was carrying with him also fell down at that time. In these circumstances any passerby or neighbour could initially have taken it as a case of quarrel and informed the Police Control Room accordingly.

12. The plea of quarrel taken by the appellant Anand does not inspire confidence. Ordinarily if a doctor demands charges which the patient considers to be excessive he would either request the doctor to reduce the charges or go to another doctor and a quarrel between a doctor and a patient is unlikely to ensue for such a reason. More important, this is not the case of the appellant Anand that he was armed with a country made pistol or a knife when he visited the clinic of the complainant on 7.9.2002. The deposition of the complainant and her brother, which finds corroboration not only from an independent witness PW5 Satish but also from the police officials who went to the spot and seized the weapons, proves that a knife and a country made pistol were actually recovered from the spot. This is not the case of the

appellant Anand that some other person had come to the clinic of the complainant armed with a country made pistol and/or a knife and the said country made pistol and/or knife were left by that person in the clinic of the complainant and were later planted on him. Therefore, the recovery of the country made pistol loaded with a cartridge and a knife from the spot wholly negates the defence taken by the appellant.

13. It has also come in the deposition of PW5 Satish that in his presence the appellant Anand disclosed involvement of another person in the incident who had fled from the spot. This is not the case of the appellant Anand that he was accompanied by Pushpender or any other person when he went to the clinic of the complainant. In his statement under Section 313 of Cr.P.C. Pushpender altogether denied having gone to the clinic of the complainant on that date.

14. As regards finger prints on the pistol I find that there is absolutely no cross-examination of the Investigating Officer on this aspect. He was not asked as to why he had not lifted the finger prints on the pistol seized from the spot. Moreover it is settled legal proposition that no benefit of a defect in the investigation accrues to the accused unless he can show that he has been prejudiced on account of such a defect.

It was held by the Hon'ble Supreme Court in Karnel Singh vs. State of M.P. JT 1995 (6) SC 437, it is not proper to acquit the person due to defective investigation, if the case otherwise stands established, since doing so would be falling in to the hands of the erring Investigating Officer.

The Apex Court in Dhanaj Singh @ Shera & Ors. v. State of Punjab (2004) 3 SCC 654, held, "in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

The Apex Court in the case of Paras Yadav v. State of Bihar AIR 1999 SC 644, enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

15. As regards Madhav Mandal not being a qualified medical practitioner, I find that it has come in his cross-examination that he has a Certificate of BIMS. It is not uncommon in our country to take treatment from persons who possess such certificates and are not duly qualified medical practitioners. PW2 Madhav Mandal appears to be one such practitioner and used to work in the clinic of the complainant since the year 1995. Therefore, it cannot be said that the complainant would not have asked him to examine the appellant.

16. As regards the absence of a public witness, I fail to appreciate how the prosecution could have examined a public witness of the incident other than the complainant and her brother when no other person was present in the clinic of the complainant, at the time the incident took place. The recovery of the country made pistol and the knife from the spot was witnessed by PW5 Shri Satish, who was a neighbour of the complainant, besides the police officials who seized the weapons from the spot. Therefore, it cannot be said that no witness from the public was associated with the investigation of the case.

17. One issue which came up for consideration during the course of arguments as to whether the appellant and his co-convict attempted robbery

or they only committed criminal trespass in the clinic of the complainant, having made preparations to cause robbery and to hurt or put into fear of hurt or assault the complainant and/or her brother using the weapons they were carrying in case their attempt was resisted. Though neither the complainant nor her brother initially deposed with respect to Pushpender demanding the *kada* which the complainant was wearing, both of them admitted, when cross-examined by the learned Additional PP that Pushpender had, in fact, demanded the said *kada*.

I also find that the demand of *kada* by Pushpender was also alleged in the FIR lodged by the complainant. Therefore, it cannot be said that the deposition of the complainant and her brother with respect to demand of *kada* by Pushpender was an afterthought, prompted by the cross-examination of the learned Additional PP. Even otherwise, in the normal course of human conduct a person who enters a place with the intention of committing robbery would demand the valuable such as jewellery which the victim is wearing, at the time the weapon is shown to her. In fact, the very purpose of intimidating the victim by showing a weapon to her is to take the valuables he/she has with him/her by putting him/her in fear of hurt or assault in case he/she does not part with the valuables. Therefore, I am

satisfied that Pushpender, co-accused of the appellant, did demand the gold *kada* which the complainant was wearing and thereby attempted to commit robbery of the said *kada*. Had the complainant not gathered courage, caught the knife and raised alarm, Pushpender and the appellant Anand would have succeeded in executing the robbery they had planned.

The very fact that the appellant accompanied Pushpender who represented to the appellant that he was suffering from stomach-ache and later intimidated the brother of the complainant using a country made pistol, proves beyond reasonable doubt that he and Pushpender shared a common intention to commit robbery in the clinic of the complainant and it was in furtherance of the said common intention that the appellant aimed a country made pistol at the brother of the complainant whereas Pushpender intimidated her with a knife. Therefore, the appellant has rightly been convicted under Section 393 of IPC read with Section 34 thereof.

18. As deposed by the complainant and her brother, the appellant was carrying a country made pistol with him which he used to intimidate the brother of the complainant and it was found by the Ballistic Expert PW11 Shri K.C. Barshney that the aforesaid country made pistol was a fire arm and the cartridge found in it was ammunition. The pistol, unquestionably, is a

deadly weapon, Section 398 of IPC, therefore, was rightly applied in his case on account of his being armed with a deadly weapon at the time of attempt to commit robbery. Since the appellant was found in possession and actually used a fire arm, his conviction under Sections 25 and 27 of the Arms Act also cannot be faulted with.

19. The learned counsel for the appellant relied upon the decision of this Court in Crl. A. No.208/2003 titled Rakesh Vs. State of NCT of Delhi decided on 20.7.2010. Considering that the country made pistol which the appellant Anand carried with him was found to be a fire arm within the meaning of the Arms Act and it also contained a cartridge which was found to be ammunition within the meaning of the said Act and further considering that the appellant Anand actually used the said country made pistol for intimidating the brother of the complainant, the aforesaid judgement would have no application to the facts of this case.

In the case relied upon by the learned counsel for the appellant it was found that the pistol in question was not in working condition and test cartridge could not be fired from it. It was held by this Court that a fire arm which is defective and unworkable is still a fire arm within the meaning of Section 2(e) of the Arms Act. It was further held that if the accused is

carrying a weapon which is not in working condition and, therefore, cannot cause any grievous body harm or injury it would not qualify to be regarded as a deadly weapon within the meaning of Section 398 of the Act. However, since the country made pistol found from the appellant was not found to be defective and a test cartridge was successfully fired from it, it would certainly be a deadly weapon.

20. As regards sentence, since the minimum sentence prescribed under Section 398 of IPC is seven (7) years, there is no scope for reduction of the substantive sentence awarded to the appellant. The fine imposed on him being almost token fine no ground for its reduction is made out. It is, however, directed that in default of payment of fine imposed under Sections 393/34 read with Section 398 of IPC, the appellant would undergo SI for one (1) month as against RI for two (2) months awarded by the trial court. In default of payment of fine imposed under Sections 25/27 of the Arms Act, he shall undergo SI for fifteen (15) days each instead of RI for one (1) month each awarded by the trial court.

The appeal stands disposed of accordingly.

One copy of this order be sent to the concerned Jail Superintendent

for information and necessary action.

LCR be sent back along with a copy of this order.

APRIL 30, 2014
b'nesh

V.K. JAIN, J.