

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

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Reserved on: 4th July, 2019
Decided on: 17th September, 2019

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CRL.A. 837/2017

MOHD. KHADIM HUSSAIN

..... Appellant

Represented by: Mr. Krishan Kumar, Adv.

versus

STATE

..... Respondent

Represented by: Ms. Rajni Gupta, APP for
the State with SI Virendra
Kumar PS Seelampur.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present appeal, Mohd. Khadim Hussain challenges the impugned judgment dated 4th November 2016 convicting him for the offences punishable under Sections 394/411/458 IPC in FIR No. 602/2015 registered at PS Seelampur and the order on sentence dated 10th November 2016 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹2,000/- and in default whereof to undergo simple imprisonment for a period of 30 days for the offence punishable under Section 394 IPC , rigorous imprisonment for a period of five years and to pay a fine of ₹2,000/- and in default whereof to undergo simple imprisonment for a period of 30 days for the offence punishable under Section 458 IPC and rigorous imprisonment for a period of one year and to

pay a fine of ₹1,000/- and in default whereof to undergo simple imprisonment for a period of 15 days for the offence punishable under Section 411 IPC.

2. Learned counsel for the appellant submits that the conviction of the appellant is based on the sole testimony of the complainant coupled with the recovery of the surgical blade and scissor. The alleged incident took place at 4:00 A.M., when there was no light so it was impossible for the complainant to have seen the appellant commit the said crime. Furthermore, the complainant has stated that he handed over his underwear to the police while the same ought to have been seized by the police from the doctor who conducted the MLC. The investigating agency has not sent the seized articles that is blood stained underwear, surgical blade and scissors to FSL to ascertain whether the blood present on it was of the complainant. Furthermore, as per the statement of the Investigating Officer, no blood was found on the blade. Therefore, the recovery of the alleged weapon cannot be connected to the present crime. Reliance is placed upon the decision of the Supreme Court reported as (2012) 4 SCC 722 Govindraju @ Govinda v. State and the decision of the Delhi High Court in Crl. L.P. 745 of 2016 State v. Suresh Kumar @ Sunny & Ors. He further submits that the place of arrest of the appellant is also highly doubtful. As per the arrest memo he was apprehended from his residence at Bihari Building, Shastri Park whereas as per the testimony of the complainant he was apprehended at the Tea Stall of Sardarji in Bihari Building.

3. Per contra, Learned APP for the State submits that the MLC clearly mentions that physical assault has been done by the neighbour. Further the time on the MLC is 5:16 A.M., which shows that the incident occurred in

the wee hours of the morning. The complainant is also consistent in his testimony and has identified the appellant as the person who inflicted injuries on him. Furthermore, the mobile phone and surgical blade have been recovered from the appellant linking him to the offences committed by him.

4. Process of law was set into motion on 19th August 2015 at around 4:57A.M. when information was received by Ct. Vikram through wireless operator that “*Shastri Park Metro Station ke pas, Bihari Building ke bahar, caller ki naak pe chaku maar kar rupay cheen liye hain*”. Aforesaid information was recorded vide DD No.10B (Ex. PW-3/A) and was assigned to ASI Fateh Singh. He along with Ct. Rajeev reached at the spot at about 5:15 A.M. where he came to know that the injured was taken to Jag Pravesh Chandra Hospital by PCR van. He went to the hospital where he collected the MLC of the injured and recorded the statement of the injured Pappu who stated that he was a resident of Jhuggi near Shastri Park where he stays as a tenant and works as a vegetable seller. On 19th August 2015 at about 2:00 A.M. he was sleeping in his jhuggi after taking the meal. He had ₹4,000/- each in the pockets on both sides of his shorts. At around 4:00 A.M. he felt that someone was taking out money from his pocket, he immediately opened his eyes and saw his neighbour Khadim had taken out money from both his pockets by cutting them with blade. When he tried to catch Khadim, he hit on his nose with the blade. He stated that on further checking he realised that Khadim ran away after taking his blue colour Samsung mobile phone and ₹8,000/-. He did not remember either the mobile or IMEI number. On the basis of the aforesaid statement (Ex.PW-6/A), FIR No. 602/2015 (Ex.PW-1/B) was registered for offences

punishable under Sections 452/394 IPC at PS Seelampur.

5. Thereafter, ASI Fateh Singh along with Ct. Rajiv and the complainant went to the place of occurrence where he prepared the site plan at the instance of the complainant vide Ex. PW-6/B. The complainant handed over his blue shorts to him having cut marks of blade on both the sides, which was seized vide seizure memo Ex. PW-6/E and deposited in the malkhana..

6. Thereafter, he called the complainant to Shastri Park Police Chowki and they left in search of Khadim. Khadim was found in his jhuggi and was identified by the complainant as the person who robbed and caused injuries to him. He was apprehended with the assistance of Ct. Sonu. Khadim handed over the robbed articles that is one LAVA mobile phone and ₹3,850/- which were seized vide seizure memo Ex. PW-6/D and Ex. PW-6/E respectively. On search of Khadim, one scissor and a surgical blade was recovered from the pocket of his trouser. There was no blood stain on the blade. Sketches of the surgical blade and scissors were prepared vide Ex. PW-7/A and they were seized vide seizure memo Ex. PW- 6/F. Khadim was arrested vide arrest memo Ex. PW-6/B, his personal search was done vide Ex. PW-6/C and his disclosure statement was recorded vide Ex. PW-7/B. The site plan of the place of recovery was prepared vide Ex. PW 13/B. Receipt of LAVA mobile phone was seized vide seizure memo Ex. PW-7/C and Ex. PW-7/D.

7. On completion of investigation, charge sheet was filed. Charge was framed vide order dated 18th January 2016 for offences punishable under Sections 392/397/452/411 IPC against the appellant. Additional Charges were framed against the appellant vide orders dated 19th September 2016 and 3rd October 2016 for offences punishable under Section 458 IPC and

Section 394 IPC respectively.

8. Pappu (PW-6), complainant deposed in sync with his statement made before the police. He also stated that on the day of the incident, at about 3:00A.M. when he woke up, he saw Khadim leaving the jhuggi. He further stated that he had a total sum of ₹8000/- in his shorts. He had called the police on 100 number from Rizwan's phone and was taken to the hospital by the police. He stated that his statement was recorded by the Investigating Officer in the police station. He had purchased LAVA mobile phone from Saleem 2-3 days prior to the date of incident. On 20th August 2015 at around 5:00 P.M. he saw the appellant drinking tea at the tea stall of Sardarji in Bihari Building. He went to the Police Chowki and informed the constable about the presence of the appellant. Thereafter, two police officials came there and apprehended the appellant. In his cross-examination, he stated that he got to know Mohd. Khadim 10 days prior to the date of the incident. as he was residing adjacent to his jhuggi. In his cross-examination he further stated that the sister of the accused Zarina had threatened him by visiting his *rehri* few days after the incident and asked him to get her brother released. He further denied any rivalry between Imran and Khadim.

9. Saleem (PW-12), stated that he and Pappu used to sell vegetables in the area of Kailash Nagar, Gandhi nagar etc. He had not sold any mobile phone to Pappu and his thumb impression was obtained on a blank paper by the police. In his cross-examination conducted by the counsel for Mohd. Khadim, he stated that his jhuggi is situated 5-6 jhuggis away from jhuggi of Pappu and that the voice from jhuggi of Pappu can be heard till his jhuggi. but he did not hear any voice from jhuggi of Pappu on 19th August 2015 as he was sleeping. The complainant and the appellant were enemies but he did

not know the cause for enmity.

10. Chander Shekhar (PW-2), Nodal Officer, brought the Call Details Record (Ex.PW-2/B) in respect of mobile no. 9717995384 for the period 18th August 2015 to 20th August 2015. He also brought the original Customer Application Form (Ex.PW-2/A) according to which mobile no. 9717995384 was subscribed to Munna. He also placed on record certificate under Section 65B in respect of the Call Details Record vide Ex.PW-2/C.

11. Munna (PW-11), stated that he obtained mobile no. 9717995384 in the year 2012. He gave this number to Mohd. Alam who had been using the number since the day of the subscription. In his cross-examination he stated that Mohd. Alam was residing in Bihari building, Shastri Park and the complainant was also a resident of their village.

12. Dr. Amitabh Kumar (PW-8), Associate Specialist, Department of Surgery, TATA Main Hospital stated that on 19th August 2016 he was working as Medical Officer at Jag Pravesh Hospital when the complainant was brought to the hospital by HC Kailash at 5:16 A.M. with alleged history of physical assault by his neighbour. He prepared MLC No. 9114 vide Ex. PW 8/A. On examination Dr.Amitabh Kumar found “*CLW 4 cm x 0.5 over nose present*” on injured Pappu. The nature of injury was opined to be simple. In his cross-examination he stated that the injury can be caused by the sharp edge of *kada*.

13. Mohd. Khadim in his statement recorded under Section 313 Cr.P.C. stated that he was picked up by the police from his shop which was at a distance of 10 steps from his jhuggi. He further stated that no mobile phone, scissors or surgical knife were recovered from him and that the amount of ₹3,850/- belonged to him. He had dispute with Imran, landlord of the

complainant Pappu, who had a vegetable shop just adjacent to his shop. There used to be frequent exchange of hot words on issue of extension of shop. He had no enmity with Pappu and he didn't know him. Pappu implicated him at the instance of Imran as he was his tenant.

14. No doubt Salim (PW-12) has not supported the case of the prosecution and has also denied that he sold the phone to the complainant however the said evidence is not relevant to the main case of the prosecution because the main case of the prosecution is of Khadim entering the jhuggi of Pappu, taking away sum of ₹8,000/- from his shorts and when Pappu confronted him Khadim gave injury by blade on the face of Pappu and fled away. Despite his extensive cross-examination nothing has come on record to show that the incident as alleged had not taken place. Version of Pappu is corroborated by the injury received by him as noted in his MLC Ex.PW-8/A. Appellant has been named by the complainant in the FIR itself which was made soon after the incident.

15. Case of the complainant is that at about 4.00 a.m. he felt some sensation as if someone was cutting his pocket and when he woke up, he saw the appellant leaving the jhuggi. When he caught the appellant, they jostled whereafter the appellant inflicted a blade injury on his nose. He called the police from his mobile phone. Even in the first PCR call made which was recorded vide DD No.10B at 4.57 a.m. on 19th August, 2015, it is noted that outside Bihari building after inflicting injury on the nose of the caller, the assailant has snatched the money and ran away. The call was made from phone No.9717995384. Further, shorts of the appellant was also seized which was blood stained and there were cut marks on the pocket. The said recoveries have been proved by the witnesses including the

complainant and merely because Salim has not supported the case of the prosecution qua giving of the phone to Pappu is no ground to reject the otherwise cogent testimony of the prosecution witnesses. It may be noted that the incident took place after 4.00 a.m., Pappu reached the hospital at 5.16 a.m. on 19th August, 2015 and the statement of Pappu the complainant, was recorded at 6.25 p.m. that is soon after the incident wherein name of Khadim has been mentioned. Hence, version of the complainant is duly corroborated by other evidence on record.

16. In view of the facts noted, this Court does not find any error in the conviction of the appellant for offences punishable under Sections 394, 458 and 411 IPC and order on sentence. Appeal is accordingly dismissed and conviction is upheld. It is directed that the appellant be released on the period already undergone, if not required in any other case.

17. Copy of this order be sent to Superintendent Central Jail Mandoli for updation of the Jail record and intimation to the appellant.

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 17, 2019

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