

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

+ CRIMINAL APPEAL No. 299/2000

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Date of decision : 15th January, 2015

PRIYA SWAMI

..... APPELLANT

Through : Mr. Daviender Hora, Advocate and
Mr. Sikandar Khan, Advocate.

versus

STATE

..... RESPONDENT

Through : Shri Sunil Sharma, APP for the State.

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

JUDGMENT (ORAL)

1. Above referred appeal is directed against the impugned judgement dated 04.10.1999 convicting the appellant Priya Swami under Section 302/392/397 Indian Penal Code and order on sentence dated 16.10.1999 awarding the appellant to undergo life imprisonment for the offence committed under Section 302 Indian Penal Code and was further sentenced to undergo rigorous imprisonment for a period of 5 years each for the offences under Section 392/397 Indian Penal Code.
2. The prosecution case as it emerges from the record is that on 05.07.1984, Surinder Kumar made a complaint to the police that his brother Khushi Ram ply (sic) a three wheeler scooter; that on 04.07.1984 at about 11:30 P.M. his brother Khushi Ram came back to the house and informed him and his uncle Ravi Dutt that his

H.M.T. Kohinoor watch and Rs.25/- have been robbed by four persons, as a result of which he (Surinder Kumar), his brother Khushi Ram, uncle Ravi Dutt and neighbour Hari Prakash left for searching the said four boys; that on reaching Tapkana Pul, Delhi, they found appellant; that on pointing towards him, appellant started running; that while chasing appellant other 3/4 boys came in front of them and out of them one co-accused Sanjay caught hold of Khushi Ram and other co-accused Raju gave a knife blow toward the left abdomen of Khushi Ram and Sanjay gave lathi blow on the leg of Hari Prakash but Surender Kumar and others did not give up chasing them and when they reached near them his uncle apprehended one of the boys and the boy stabbed on the neck and body of his uncle Ravi Dutt, who fell on the ground; that Surinder and Hari Prakash took Khushi Ram in a three wheeler scooter to Hindu Rao Hospital, got him admitted there and returned to the spot and found that the dead body of his uncle Ravi Dutt was lying there near the Jhuggi and that those four boys have murdered his uncle.

3. On the basis of above statement of Surinder Kumar, a case under section 302/307/392/341/34 Indian Penal Code was got registered against the accused persons. Initially the charges were framed against six accused persons, i.e. Mohinder, Lekhraj, Lakhan, Priya Swami, Raju, Panna, Puran and Sanjay. Accused Mohinder and Lekhraj were not committed to the court of Session while accused Raju and Panna died during the trial. Accused Sanjay died during the appeal and his appeal stands abated.

4. To bring home guilt of the accused, the prosecution examined 20 witnesses and after the prosecution closed its evidence, statement of the four accused persons i.e. Puran, Priya Swami, Sanjay and Lakhan were recorded under section 313 Code of Criminal Procedure. All the accused persons denied the prosecution story in toto and claimed to be tried.
5. Learned counsel for appellant submitted that the prosecution has miserably failed to prove its case beyond reasonable doubt and that the recovery against the accused persons is highly suspicious on the ground that the police did not join any public witness before interrogating the accused persons, regarding their disclosure statement and making recoveries from them.
6. It is further submitted by the learned counsel for the appellant that the accused were produced for Test Identification Parade in the court without muffled faces and as such the identification is not legal and that the prosecution has failed to produce the material witness.
7. Learned counsel for the appellant also contended that learned Trial Court has convicted and reached the conclusion of the guilt with regard to the appellant merely on the basis of statement of the complainant Surender recorded under Section 161 Code of Criminal Procedure and the learned Trial Court has relied upon the statement made by Maheshwar Prasad Singh recorded before learned Metropolitan Magistrate under Section 164 Code of Criminal Procedure.
8. It is also submitted by learned counsel for the appellant that no case under Section 397 Indian Penal Code is made out as there is no evidence on record to suggest that knife was used to commit the robbery.

9. Learned counsel for the State submits that the prosecution has been able to establish their case beyond reasonable doubts. The statement of PW14 Khushi Ram makes it abundant clear that appellant was present at the spot of incident and this PW14 Khushi Ram pointed out the appellant as the person, who had robbed him of his wrist watch and Rs.25/- by showing a knife.
10. Prosecution has further proved the recovery of belongings of khushi ram and weapons of offence from the possession of the accused person as per the disclosure statements made by them.
11. We heard the counsel for the parties and considered their rival contentions. We may notice that the FIR was registered on the basis of statement given by Surender, the complainant who died during the pendency of the trial. Thus, the FIR was not proved.
12. In the present case, we may also notice that the statement under Section 164 Code of Criminal Procedure was recorded of Maheshwar Prasad Singh, but, he was not produced in court.
13. PW14 Khushi Ram is the star prosecution witness as he was admittedly present with Surinder Kumar and Hari Prakash at the time of incident and was caught hold off by the accused Sanjay and was stabbed with knife by accused Raju on the left side of abdomen. He also identified Raju, Sanjay and Priya Swami in court and also deposed about the Lathi blow given by accused Sanjay to Hari Prakash. He stated nothing about the murder of Ravi Dutt as he fell down on being stabbed and while that Ravi Dutt was still chasing the accused people.
14. Since, the entire case of the prosecution rests on the witness PW14 Khushi Ram, we deem it appropriate to reproduce the entire

evidence of PW14 Khushi Ram who was robbed and stabbed, which reads as under:

"In July, 1984 I used to ply scooter taxi. The number of my scooter taxi was DHR2652. On 4th of July, 1984 at about 11 or 11:15 p.m. while I was coming back home from the side of Tri Nagar three persons gave signal to me to stop near the Tapkana bridge. Thinking that they were passengers, I stopped my scooter. Priya Swami accused who is present in court today (correctly identified) asked me for a match box. He also asked me as to what the time was. I told him the time. Thereupon Priya Swami, the accused took out a knife and robbed me off Rs.25/- in currency notes and a challan chit relating to my scooter taxi. I was also robbed of my wrist watch. Thereafter, I went away to my house and told my uncle Ravi Dutt and brother Surinder as to what had transpired. On coming to know of the incident Ravi Dutt and Surinder along with me came back to the place of occurrence in the three wheeler scooter of Hari. Hari was our neighbour and the scooter was driven by him. When we reached Tapkana Bridge I found Priya Swami, the accused there. I pointed out towards him to my companions. On that Priya Swami ran towards the canal. We ran after him. From in front of us 3 or 4 more persons came and one of them whose name is Sanjay and is present in court (Sanjay accused correctly identified) caught hold of me. Another person whose name is Raju and who is also present in court (Raju accused correctly identified) gave me a knife blow towards the left of my abdomen. While we were running after Priya Swami, Ravi Dutt was ahead of us. Behind him was my brother Surinder. I was behind Surinder and Hari Prakash was just behind me. While we were chasing Priya Swami, Sanjay accused had given a lathi blow to Hari Prakash. It was thereafter, the Sanjay accused had caught hold of me and Raju accused had given me knife blow. On receiving the knife blow, I had fallen down. My brother Surinder and Hari Prakash took me in the scooter of Hari Prakash to my house from where my brother Surinder and my brother in law Mange Ram took me to Hindu Rao Hospital, where I was admitted. Later I came to know that Ravi Dutt had been murdered."

15. On careful analysis of the evidence of PW14 Khushi Ram, it would show that on 04.07.1984 between 11-11:15 p.m., when he was

returning back, three persons had signalled him to stop his scooter taxi. Under the impression that they were passengers, he stopped his scooter on which the appellant, who had been identified by him in court, requested him for a match box and also asked the time. There upon, the appellant took out a knife and robbed Rs.25/-, his wrist watch and a challan chit relating to his scooter taxi. This part of his statement had not been shaken during the cross examination.

16. PW14 Khushi Ram identified the appellant herein as the person who had robbed him and also had a knife in his hand. Based on the statement, we are of the view that learned Trial Court rightly convicted the appellant for the offences committed under Section 392/397 Indian Penal Code.
17. Further reading the evidence of this witness would show that when he reached his house, narrated the entire incident to his uncle Ravi Dutt and brother Surender. With the help of their neighbour Hari Prakash, Ravi Dutt, Surender and PW14 Khushi Ram went to the spot of incident in three wheeler scooter of Hari Prakash. The witness thereafter narrated that when the above persons reached Tapkana Bridge, they found the appellant, when the witness pointed towards appellant on which appellant ran towards canal and they chased him, thereafter, 3-4 persons came out. He identified one of them as Sanjay (since died), who had caught hold Khushi Ram and another person as Raju (since died) gave a knife blow towards the left of abdomen of Khushi Ram. This witness also testified that when appellant were chased, lathi blow was given by Sanjay to Hari Prakash. After receiving the knife blow, this witness was removed by his brother Surender and Hari Prakash to the house and thereafter to the hospital. PW14 has ascribed no role to the appellant for causing

injury to him. He has also not described any role to this appellant for inflicting any injury to any other person. As per the disclosure statement of the appellant, a knife and Rs.25/- wrapped in a piece of paper were recovered from his Jhuggi along with a challan chit in the presence of PW10.

18. The submission made by learned counsel for the appellant that a case under Section 397 Indian Penal Code is not made out as the knife was not used to commit the robbery is without any force.
19. In the case of ***Ashfaq Vs. State reported in 2004 (2) ACR 1169***, it was held that to satisfy the word 'Uses' for the purpose of Section 397 Indian Penal Code, in case a robbery is committed by an offender who was armed with deadly weapon which was within the vision of the victim and capable of creating a terror in the mind of the victim and that it would be necessary to establish that the deadly weapon was actually used. It was held as under:

“7. *So far as the contention urged as to the applicability of Section 397 IPC and the alleged lack of proof of the necessary ingredients therefor, is concerned it proceeds, in our view, upon a misconception that unless the deadly weapon has been actually used to inflict any injury in the commission of the offence as such, the essential ingredient to attract the said provision could not be held to have been proved and substantiated. We are of the view that the said claim on behalf of the appellants proceeds upon a too narrow construction of the provision and meaning of the words "Uses" found in Section 397 IPC. As a matter of fact, this Court had an occasion to deal with the question is the decision reported in AIR 1975 SC 905 (Phool Kumar v. Delhi Administration) and it was observed as follows :*

“

Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. this has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years under Section 398, if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability to the minimum punishment under section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz. "Uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery."

8. *Thus, what is essential to satisfy the word "Uses" for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be."*

20. The evidence of PW14 Khushi Ram clearly suggests that when he was robbed, the appellant had a knife in his hand. Since, the knife was

within the vision of the victim, it was capable creating terror in his mind and thus, it is not necessary that the knife was actually used.

21. Law is well settled that a statement recorded under Section 161 and 164 Code of Criminal Procedure can be used either for corroboration or contradiction. Section 157 of the Evidence Act makes it clear that a statement under Section 164 Code of Criminal Procedure can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. Since the defence would have no opportunity to cross examine the witness whose statements were recorded under Section 161 or Section 164 Code of Criminal Procedure, such statements can not be treated as substantial evidence.

22. In the case of ***R. Shaji Vs. State of Kerala AIR 2013 SC 651***, it has been held as under:

“14. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 Code of Criminal Procedure can be used only for the purpose of contradiction and statements under Section 164 Code of Criminal Procedure can be used for both corroboration and contradiction.....

16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Code of Criminal Procedure, can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Code of Criminal Procedure, such statements cannot be treated as substantive evidence.”

23. Learned Trial Court while convicting the appellant under Section 302 Indian Penal Code has relied upon the statement made by the

complainant under Surinder (since deceased) under Section 161 Code of Criminal Procedure and of Maheshwar Prasad Singh recorded before learned Metropolitan Magistrate under Section 164 Code of Criminal Procedure, who was not produced in court as a witness.

24. We are in view that learned Trial Court has erred while convicting the appellant for committing the offence under Section 302 Indian Penal Code as there is no evidence on record. The learned Trial Court has rightly convicted the appellant for the offences under Section 392/397 Indian Penal Code are concerned, but the learned Trial Court, in our view has erred while awarding rigorous imprisonment for five years for each offence i.e. 392/397 Indian Penal Code as the minimum sentence prescribed is 7 years under Section 397 Indian Penal Code. Resultantly, the appeal is allowed in part. The nominal roll of appellant has been called, as per which he has already undergone 6 years 29 days of sentence. He has also earned remission of 4 months and 19 days. The appellant is sentenced to undergo rigorous imprisonment for 7 years. Appellant is present in court today. The appellant shall be taken into custody to enable him to serve the sentence for remaining the period.

G. S. Sistani, J

Sangita Dhingra Sehgal, J

January 15, 2015
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