

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

Date of Decision: 8th July, 2016

T. RAMESH + **CRL.A. 718/2014**
..... Appellant
Through: Mr.Jatin Rajput and Mr Anupam
Dubey, Advocates
versus
STATE Respondent
Through: Ms Neelam Sharma, Additional
Public Prosecutor for the State
+ **CRL.A. 1597/2014**
RADHIKA @ KALIMA Appellant
Through: Ms Saahila Lamba, Advocates
versus
STATE Respondent
Through: Ms Neelam Sharma, Additional
Public Prosecutor for the State

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The challenge in the aforesaid two appeals filed by the appellants is to the judgment dated 28.02.2014 and order on sentence dated 05.04.2014 in Sessions Case No.69/11 arising out of FIR No.273/2011 Police Station Saraswati Vihar, Delhi under Ss.452/392/394/397/34 IPC vide which the appellants were convicted for offences punishable under S.452/34 IPC and 394/397 IPC and sentenced to undergo rigorous imprisonment for a period of three years under S. 452/34 IPC with fine of Rs.1,000/-; in default to undergo simple imprisonment for one month; sentence of five years rigorous imprisonment under S. 394 IPC with fine of Rs.2,000/-; in default to undergo three months simple imprisonment for a period of three months and to undergo rigorous imprisonment for seven years under S. 397 IPC. All the sentences were ordered to run concurrently. Both the appellants were granted benefit of S. 428 of Cr.PC.

2. A2 – Radhika worked as a domestic maid in the house of PW2 – Smt Veena Guglani at House No. A- 35, Lok Vihar, Pitampura, Delhi for one month. On 11.07.2011 at about 12 pm, she came along with her daughter Laxmi and requested her to keep her daughter for some work. When complainant refused, she went away. Again at about 2.30 pm, she came along with her daughter and asked for drinking water. However, she was sent back as complainant had some work to do. At about 3:30 pm, again she visited her house and said that she had forgotten her mobile in the house. After taking mobile and drinking water, she went back. At about 6:15pm, she again rang the door bell of complainant and asked for water. The complainant went in kitchen to bring water and when the complainant brought water, Radhika had come inside the house accompanied by her husband – T. Ramesh (A-1) and asked water for him as well. She asked the complainant to employ her husband (A-1 – T. Ramesh) in the factory whereupon the complainant told A2 that she will talk to her husband. Instead of going, A1 pulled complainant towards the puja room and pushed her head on the floor and gave her beatings and pressed her neck. Despite her resistant, A-1 continued to beat her. In the meantime, complainant heard the screams of her mother-in-law. A1 came to the complainant and started giving her beatings with the walking stick of her mother-in-law. In the mean time, after hearing the screams of her mother-in-law, neighbours raised alarm. Both the accused ran towards the back door. When complainant rescued herself, she saw her mother in law lying in the lobby in a pool of blood. She bolted the inside doors and raised alarm through *jalidar* door and dialled at 100 number. The police and neighbour came. In the mean time, both the accused broke the lock of back door and managed to escape. However, A2 was apprehended near the under-construction house while A1 managed to flee away. On receipt of DD No.68B, Sub Inspector Surender Kumar (PW17) along with Constable Kuldeep Singh (PW14) reached the spot where Constable Sri Krishan (PW8) and HC Praveen (PW12) (beat staff) met him there. Public persons with the help of beat officers were bringing two ladies in injured condition out of the house. One QRT and PCR van also reached at the spot. Both

the injured – Smt Veena (PW2) and Smt. Shanti (PW1) were shifted to hospital. Smt Veena was found fit for making statement as such her statement Ex.PW12/A was recorded which resulted in registration of FIR by ASI Tej Singh (PW3) Ex.PW3/A. Crime team was called at the spot. Sub Inspector Matadin Meena (PW4) alongwith the team consisting of the photographer – Constable Parvinder (PW5), finger print proficient Constable Ramesh reached the spot and found blood stained mark on the main gate of the house up to door of living room. Blood in huge quantity was found at two places in the drawing room and blood stains on the floor of the house. On the sofa, one blood stained stick was also found. Blood was also found on the table and TV rack. One lead glass was found in broken condition. In the other bedroom, blood, broken pieces of bangles and one plastic glove with blood and blood stains were found. Constable Parvinder took 40 photographs of the spot Ex.PW5/B1 to PW5/B40. The articles lying at the spot were seized vide seizure memos by Sub Inspector Surender Kumar (PW17). ASI Dayanand (PW11) also produced A1 who was apprehended by him while he was running on the road and his clothes were stained with blood. Both the accused were arrested vide arrest memos Ex.PW8/F1 and PW8/G1 respectively. MLCs of both the injured were prepared. The doctor handed over the clothes of the victims which were seized. On 20.07.2011, an application for conducting judicial test identification proceedings of A1 was moved. These proceedings were conducted by PW6 - Sh. Vijay Kumar Jha, Metropolitan Magistrate, Rohini Courts. However, accused refused to participate in the proceedings Ex.PW6/B. CDR of phone number 9953900755 recovered from the personal search of A2 and mobile phone number 9582549091 recovered from the personal search of A1 was obtained which reveals the communications done between these two phones at 8.29 and 8.30 hours and location of both the phones at that time was ND Block, Pitampura, Kohat Enclave, Delhi. During the course of investigation, the exhibits were sent to FSL from where results Ex.PW15/A and PW15/B were given by Ms Manisha Upadhyay Sr. Scientific Officer (Biology), FSL, Rohini, Delhi (PW15).

After completing investigation, charge-sheet was submitted against both the accused.

3. After compliance of S.207 of the Code of Criminal Procedure, the case was committed to the Court of Sessions. Charge for offence under Ss. 452/34, 392/394/397/34 IPC was framed against both the accused to which they pleaded not guilty and claimed trial. In order to bring home the guilt of the appellants, the prosecution examined as many as 19 witnesses.

4. All the incriminating evidence was put to the appellants/accused while recording their statements under S. 313 Cr.PC wherein they denied the case of prosecution. A1 pleaded innocence and false implication in this case. According to him, on receipt of a call from his wife Radhika that she had gone to the house of Smt Veena Guglani for taking her salary on which she was given a knife blow and beatings, he reached the spot and found the police officials and family members of Smt Veena Guglani. He was beaten and his signatures were obtained on some blank papers.

5. A-2 admitted that she was employed with Smt Veena Guglani. According to her, she had visited her house for taking her dues amounting to Rs.1200/- for the services rendered by her as a domestic help in their house. However, Smt Veena started arguing and fighting with her on her demanding the due amount. She denied that she had visited complainant's premises on that day four times. According to her, she had visited only once and was falsely implicated in this case alongwith her husband. Although both the appellants / accused initially stated that they want to lead evidence in defence, however, subsequently, no evidence was led by either of them.

6. After scrutinizing the testimony of witnesses and the entire material available on record, vide the impugned judgment, both the appellants/accused were convicted and sentenced as mentioned hereinbefore.

7. Feeling dissatisfied and aggrieved, separate appeals have been preferred by the appellants. Since both these appeals arise out of the common judgment as such they are taken up together.

8. At the outset, learned counsels for both the appellants did not challenge the conviction of the appellants for offence under Ss. 452 as well as 394 Indian Penal Code. The thrust of their arguments is that the offence under S. 397 IPC is not made out as neither any deadly weapon was used nor there was any evidence to show that any grievous hurt was caused to the complainant or her mother in law. Counsels submit that for offence under S. 394 IPC, the appellants were sentenced to undergo rigorous imprisonment for five years and both of them have served more than five years of sentence as such they be released on the period already undergone by them.

9. Per contra, learned Additional Public Prosecutor for the State submits that ample evidence is available on record to show that grievous hurt was caused to the complainant as well as to her mother in law. The ocular testimony of both these witnesses finds substantial corroboration from the medical evidence. Under the circumstances, the impugned judgment does not call for any interference.

10. PW2 - Smt Veena Guglani is the complainant in whose house A2 worked as domestic help for about one month. On 11.07.2011, A2 visited her house as many as four times – initially on the pretext of getting job for her daughter aged about 12/13 years; thereafter for taking a glass of water; then for taking her mobile phone, which she had left in her house and finally at about 6.15 pm on the pretext of taking drinking water. At that time, she was accompanied by her husband. Unmindful of the nefarious designs of the appellants/ accused persons, on the asking of A2, she went to bring a glass of water and when she returned back, A2 asked her to provide employment to her husband to which she told them that she would talk to her husband. Thereafter both the accused persons entered inside the room and A-1 started hitting her head against the floor three – four times; pushed his hand in her mouth and opened her mouth forcibly with the result her front two teeth broken at that time and the third one was removed in the hospital. When she tried to shut her mouth to save herself then the accused took out his hand from her mouth. He then started strangulating her from her neck. She raised alarm '*bachao – bachao*'. Someone came from upstairs on hearing her noise and peeped through

the door of jail and asked who is there. A1 brought a walking stick of her mother in law and hit her on her forehead, head and near her ears. A-2 gave fist blows on face, head and left shoulder of Shanti Devi (PW1), mother in law of complainant, and hit a glass on her head, pushed her forcibly, due to which she fell down. Blood started oozing out from her head. A2 entered the bedroom and opened the drawers of TV table and asked for the keys of the almirah. She took out the keys from the drawer and went to the room. The jalidar door of the bedroom was slightly opened per chance and she saw that A2 was giving beatings to her daughter in law – Smt Veena. When she tried to move towards the jalidar door to raise alarm, A2 came and gave her severe beatings with the stick as a result of which her hands got multiple fractures and thereafter operated. During operation, rod was inserted in her left hand and now she cannot even lift a glass of water with her left hand. Both the witnesses were subjected to lengthy cross examination but nothing material could be elicited to discard their testimony.

11. The testimony of both these witnesses finds substantial corroboration from the circumstantial evidence. Sub Inspector Matadin Meena, In-charge, Crime Team found blood lying in the living room, drawing room, bedroom, stick, wiper coupled with 40 photographs Ex.PW5/B1 to PW5/B40 taken by Constable Parvinder (PW5). The blood stained clothes were also handed over in the hospital. Same were sent for forensic analysis and the reports Ex.PW15/A to Ex.PW15/B were given by Ms Manisha Upadhyaya, Sr. Scientific Officer (Biology), FSL, Rohini, Delhi opining the blood of 'B' group on various exhibits. Under the circumstances, more than ample evidence was available on record to convict the appellants for offence under Ss. 452/394/34 IPC. Moreover, A2 also does not dispute her presence at the spot and that injuries were also suffered by the complainant. However, the only plea taken by her is that she had gone to take her dues whereupon a scuffle took place in which she was inflicted injuries by knife. However, no knife was recovered and despite lengthy cross examination of PW1 and PW2, nothing material could be elicited to discard their testimony. There was no probable reason that for a petty amount of Rs.1200/-, the complainant or for

that reason her mother in law would inflict injuries on the person of A2. Moreover, as regards A1 is concerned, his presence at the spot is also not disputed. However, according to him, on receipt of call from A2, he reached the spot where he was falsely implicated in this case. However, such a plea does not inspire confidence as it has come in the statement of PW11 – Sub Inspector Daya Nand that on 11.07.2011 at about 7 pm during patrolling he reached alongwith QRT van and staff at road no.44 where he saw one person coming running from Lok Viah side towards road no.44 and his pant was blood stained and some persons were chasing him raising alarm ‘pakro – pakro’ He, with the help of staff apprehended that person and on interrogation his name was revealed as Ramesh. He came to know that this person alongwith one lady Radhika had entered a house situated at Lok Viah and had caused injuries to landlady of the said house. As such, he reached the spot where local police was also present there alongwith accused Radhika. This accused was handed over to the Investigating Officer of the case. Under the circumstances, presence of both the accused at the spot and the entire incident stands proved. That being so, learned counsel for the appellants rightly did not challenge the conviction of the appellants under Ss. 452/394/34 IPC.

12. The only question left for consideration is whether offence under S.397 IPC is made out or not. This section reads as under:

“397. Robbery, or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.”

13. A bare reading of this section goes to show that an act would fall within the mischief of this section if at the time of committing robbery or dacoity the offender—

- (a) Uses any deadly weapon; or
- (b) Causes grievous hurt to any person; and

(c) Attempts to cause death or grievous hurt to any person.

14. In the instant case, it is not the case of prosecution that at the time of committing robbery any of the accused used any deadly weapon. Therefore, it is to be seen whether the accused caused grievous hurt to the complainant or her mother in law – Smt. Shanti Devi or attempted to cause the same.

15. It has come in the statement of PW1 – Smt. Shanti Devi that A-2 gave fist blows on her face, head and left shoulder as well as hit the glass on her head and pushed her forcibly due to which she fell down. The blood started oozing out from her head. A2 also gave her severe beatings with a stick due to which her hand got multiple fractures and thereafter she was operated and during operation rod was inserted in her left hand and now she cannot even lift a glass of water with her left hand. During the course of recording evidence, observation was made by learned Trial Court that the left hand of the witness, particularly the fingers, are not properly moving and seems to be not in working condition. As regards, PW2 – Veena Guglani is concerned, she has deposed that A1 struck her head against the floor several times. He put his hand in her mouth and opened her mouth forcibly as a result of which her two front teeth got broken and the third one was removed in the hospital. Initially Veena was taken to Bhagwan Mahavir Hospital at Pitampura, Delhi by Constable – Surender with alleged history of physical assault and she was examined by Dr Manideepa (PW15) who prepared her MLC Ex.PW2/B and observed multiple injuries on her face, hands and mouth. The patient was referred to high centre for neurosurgical opinion and further management. She denied the suggestion that the patient had suffered the aforesaid injuries by fall from the bed on the aluminum stick and broken pieces of glass.

16. After she was referred by Dr Manideepa, she was examined by Dr Sanjay (PW7) and on examination, following injuries were found on her person:

1. CLW of 2 x .5 cm over left pinna;
2. CLW of 2 x .5 cm over left forehead;
3. CLW of 1 x .5 cm over right forehead;

4. Swelling bruises as well as blackening were found on the left eye;
5. Lower central incisors (teeth) were found missing;
6. Right and left lateral incisors (teeth) were found loosening;
7. Scalp haematoma was found present on right fronto parietal region;

17. On the same day, he had also examined PW1 Smt Shanti Devi who was referred by Dr. Manideepa and on examination following injuries were found:

1. Bilateral haematoma present on scalp on occipital region;
2. CLW measuring 6 x 1 cm present on bilateral parieto occipital region;
3. CLW measuring 2 x .5 cm present on left parietal region;
4. CLW measuring 3 x 1 cm over left hand;
5. Deformity found present on the left hand;

18. It has come in evidence that after getting initial treatment from Bhagwan Mahavir Hospital, the injured were shifted to Maharaja Agarsen Hospital at the request of their family members and they handed over medical papers to the Investigating Officer of the case which is Ex.PW2/X and PW2/Y, According to Smt Shanti Devi, she remained admitted in ICU for about ten days where her left hand was operated and steel rod was inserted in her left hand. According to Smt Veena Guglani, while she remained in the hospital for four days, her mother in law remained admitted there for about six days. Although the Investigating Officer of the case did not collect the medical papers pertaining to treatment of both the injured in Maharaja Agarsen Hospital and therefore no medical evidence could come on record that the left hand of Smt Shanti Devi was got operated and a steel rods were inserted in her left hand. However, there is no reason to disbelieve the ocular testimony of the witnesses who despite cross examination withstood the same. As regards Smt Veena Guglani, her ocular testimony regarding breaking of two teeth and dislocation of another teeth which was removed in the hospital finds corroboration even from the MLC which goes to show that Lower central incisors (teeth) were found missing and the right and left lateral incisors (teeth) were found loosening .

19. Grievous hurt is defined in S.320 IPC and reads as under:

“320. Grievous hurt.—The following kinds of hurt only are designated as “grievous”:—

(First) — Emasculation.

(Secondly) —Permanent privation of the sight of either eye.

(Thirdly) — Permanent privation of the hearing of either ear,

(Fourthly) —Privation of any member or joint.

(Fifthly) — Destruction or permanent impairing of the powers of any member or joint.

(Sixthly) — Permanent disfiguration of the head or face.

(Seventhly) —Fracture or dislocation of a bone or tooth.

(Eighthly) —Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

20. As per Clause “Seventhly” of this Section, fracture or dislocation of a bone or tooth comes with the category of ‘grievous hurt’. That being so, the prosecution has succeeded in proving that at the time of committing robbery, grievous hurt was caused on the person of the complainant as well as her mother in law by both the accused persons and therefore they were rightly convicted for offence under S. 397/394 IPC.

21. However, Ld. Trial court has while convicting the appellants for offence under Ss. 394/397 awarded separate sentences for these offences. S. 397 does not, however, create any substantive offence but regulate the measure of punishment when certain facts are found in an aggravated situation. That being so, learned Trial Court fell in error in awarding separate sentences for offence under Ss. 394 and 397 IPC. The sentence under S. 397 has to be with S. 394 IPC. Minimum sentence prescribed under S.397 IPC is seven years. Although as per the nominal roll dated 23.03.2016, both the appellants have undergone sentence for a period of four years ten months and ten days besides earning remission of eight months and

five days. The unexpired portion of sentence is one year five months and 13 days. The minimum sentence, however, prescribed under S.397 IPC is seven years, that being so, firstly the nature of injuries caused by the accused persons on the person of complainant as well as on her mother in law, who was aged about 80 years of age, does not call for any leniency. Even otherwise, since the minimum sentence prescribed under S.397 IPC is seven years, no discretion is vested with the Court to impose sentence lesser than seven years as prescribed under the statute.

22. That being so, both the appeals are dismissed being bereft of merits, however, with the modification that while maintaining the substantive sentence for offence under S.452 IPC, default sentence of fine is reduced to one month, separate sentence awarded under S.394 IPC is set aside and sentence will be under S. 394 read with S.397 IPC for seven years rigorous imprisonment with fine of Rs.2,000/-, in default, simple imprisonment for one month.

Trial court record be sent back.

Both the appellants be accordingly informed through Superintendent Jail.

(SUNITA GUPTA)
JUDGE

JULY 08, 2016/*rd*