

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

RESERVED ON : 9th MARCH, 2016

DECIDED ON : 31st MARCH, 2016

+ CRL.A. 1577/2013

SURENDER Appellant

Through : Mr.Neeraj Bhardwaj, Advocate.

VERSUS

STATE NCT OF DELHI Respondent

Through : Mr.Vinod Diwakar, APP.

AND

+ CRL.A. 1513/2013

SANJAY Appellant

Through : Mr.Jivesh Tiwari, Advocate.

VERSUS

STATE NCT OF DELHI Respondent

Through : Mr.Vinod Diwakar, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 16.08.2013 of learned Addl. Sessions Judge in Sessions Case No.29/10 arising out of FIR No.52/10 PS Bhalswa Dairy by which the appellants – Surender (A-1) and Sanjay (A-2) were held guilty for committing offences punishable under Sections

458/392/394/34 IPC and A-1 also under Section 397 IPC, the instant appeals have been preferred by them. By an order dated 21.08.2013, the appellants were sentenced to undergo RI for seven years with fine ₹5,000/- under Section 458 IPC; RI for five years with fine ₹2,000/- under Section 394 IPC; and, RI for three years with fine ₹1,000/- under Section 392 IPC each. A-1 was further sentenced to undergo RI for four years with fine ₹2,000/- under Section 397 IPC. The substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as stated in the charge-sheet was that on 09.04.2010 at around 09.30 p.m. the appellants in furtherance of common intention committed lurking house-trespass by night after having made preparation to cause hurt at House No.B-175, 1st Floor, Veer Bazar Road, Mukundpur Part-I, Delhi belonging to complainant – Pinki Aggarwal. They while armed with a knife robbed Pinki Aggarwal of her gold chain and inflicted injuries to her. The incident was conveyed to the police and Daily Diary (DD) No.53-B (Ex.PW-8/A) came into existence at 10.50 p.m. The investigation was assigned to ASI Rajeshwar who along with Const.Sudhir went to the spot. After recording victim's statement (Ex.PW-1/A), the Investigating Officer lodged First Information Report. The complainant was medically

examined. The accused persons were arrested. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against both the appellants in the Court. In order to establish its case, the prosecution examined eleven witnesses. In 313 Cr.P.C. statements, the appellants denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeals have been preferred.

3. I have heard the learned counsel for the parties and have examined the file minutely. Information conveyed to the police at the earliest vide Daily Diary (DD) No.53-B (Ex.PW-8/A) recorded at 10.50 p.m. was to the effect that a ‘thief’ has been apprehended committing theft at the house in question. In her complaint (Ex.PW-1/A), complainant – Pinki Aggarwal disclosed that at around 09.30 p.m., her sister-in-law Arti Aggarwal informed her about the presence of an ‘individual’ in the balcony in the house. After coming out, she saw both A-1 and A-2, who lived in her neighbourhood present there. When she enquired as to what they wanted, A-1 assaulted her with a knife in his hand and inflicted injuries to her on finger and left thigh. On raising alarm, her husband arrived at the spot and A-1 was apprehended; A-2 succeeded to flee the

spot taking away her gold chain. Call was made to the police at 100; PCR arrived at the spot and got her admitted in the hospital where her statement was recorded.

4. In her Court statement as PW-1, the complainant deposed that on 09.04.2010 in between 09.00 – 09.30 p.m., when she and her sister-in-law Arti Aggarwal were going for dinner, Arti Aggarwal suspected ‘someone’ present in the balcony. After coming out of the room, she saw both the appellants present there. When she enquired as to why they had come there, A-1 pounced upon her and inflicted injuries to her on hand, thigh and abdomen by a knife. On her raising alarm, Arti Aggarwal and other family members arrived and overpowered A-1. A-2 fled away from there through ‘momty’. The police arrived at the spot and took her for medical examination. In the cross-examination, she admitted that the appellants were known to her and lived in her neighbourhood. She denied about any previous quarrel with the of the appellants’ family. In her examination after recall in terms of order dated 11.09.2012, she informed that A-2 had snatched her gold chain.

5. PW-2 (Arti Aggarwal) testified that at about 09.30 p.m. while watching T.V. in the outer room, she saw a ‘shadow’ in the balcony and informed her sister-in-law Pinki, who went out to the balcony. On hearing

her cries soon thereafter, she immediately rushed to the balcony and saw A-1 giving beatings to her by a knife. On her raising alarm 'Chor-Chor', A-1 pushed her 'jethani' aside and ran away. In the meantime, A-2 came from the ground floor and caught hold of her; A-2 having a knife attempted to stab her. A-2 succeeded to run away from the spot, but A-1 was apprehended with the help of mohalla people. A knife (Ex.P1) was recovered from his possession. In the cross-examination, she informed that Gyan was among the neighbours who had apprehended A-1 at the spot. The knife (Ex.P1) was in A-1's hand at the time of his apprehension. This witness in her examination on 18.12.2012 in terms of the order dated 11.09.2012 disclosed that on the day of incident after hitting her jethani Pinki, A-2 had snatched her gold chain from the neck.

6. PW-4 (Sushil Aggarwal) complainant's husband deposed that on 09.04.2010 at around 09.30 p.m. when he was present at his shop on the ground floor, he immediately went on 1st floor on hearing noise and saw A-1 and A-2 present there. A-1 had assaulted his wife with a knife and A-2 had snatched chain from her neck. A-1 was apprehended at the spot and A-2 succeeded to flee the spot. In the cross-examination, he denied if A-1 was apprehended from the 'gali'.

7. On scrutinizing the statements of the material prosecution witnesses referred above minutely, it reveals that divergent and inconsistent versions have emerged. Admittedly, both the appellants are real brothers and they lived in the complainant's neighbourhood since long without any previous history of hostile relationship. The appellants did not produce any evidence to show if any serious quarrel had taken place between the two families on any particular issue prompting the complainant to implicate them in the occurrence. Complainant had no oblique motive to concoct a false incident.

8. About A-1, the prosecution has established beyond doubt that he was apprehended at the spot. He was taken to Babu Jagjivan Ram Memorial Hospital and was medically examined vide MLC (Ex.PW-9/A) on 10.04.2010. All the prosecution witnesses have categorically deposed about his apprehension on the 1st floor of the house at the relevant time. Specific and definite role has been attributed to him in inflicting injuries by a knife on the various body parts of the complainant. PW-1 (Pinki Aggarwal) being an injured witness is not expected to spare the real offenders and to rope in innocent ones falsely. Despite searching cross-examination, no material infirmities could be elicited about A-1's apprehension at the spot and of causing injuries by him. A-1 did not

produce any evidence to show his presence at some other particular place at that time. Suggestion was put to PW-1 (Pinki Aggarwal) about his apprehension from a 'street' which was denied. A-1's involvement surfaced soon after the incident and it finds mention in the information conveyed to the police vide DD No.53-B (Ex.PW-8/A). A-1 did not furnish plausible explanation about his presence at the complainant's house at odd hours. He had no occasion to reach to the balcony clandestinely while armed with a weapon i.e. knife. When he was confronted by the complainant about his presence in the balcony, instead of justifying it for any bonafide purpose, he caused injuries to her and on her raising alarm, he was apprehended at the spot. Apparently, A-1 had committed lurking house-trespass by night with the intention to commit theft and to cause injuries to the complainant. The findings of the Trial Court on that score can't be faulted.

9. About A-2, his presence at the spot along with A-1 has not been established beyond reasonable doubt; he was not arrested at the spot. There is no mention in DD No.53-B (Ex.PW-8/A) about the arrival of two individuals at the complainant's house. In her complaint (Ex.PW-1/A), the complainant undoubtedly disclosed about the presence of both A-1 and A-2 in the balcony and reiterated it in her Court statement too. PW-2

(Arti Aggarwal), however, contradicted her. She deposed that she suspected the presence of an ‘individual’ in the balcony. When she came out after hearing Pinki’s cries, she saw A-1 inflicting injuries to her with a knife. She did not claim if A-2 was present at the spot that time or she had seen him. She further informed that on her raising noise ‘Chor-Chor’ A-1 pushed her ‘jethani’ and ran away. In the meantime, A-2 also came there from the ground floor and caught hold of her; A-2 who had a knife attempted to stab her. He, however, succeeded to run away from the spot. This version is entirely at variance to the one given by PW-1 (Pinki Aggarwal) and her husband. PW-1 (Pinki Aggarwal) – complainant did not reveal if A-2 had arrived from the ground floor, on Arti’s raising alarm ‘Chor-Chor’. She also did not state if A-2 was armed with a knife or had attempted to stab Arti Aggarwal. PW-4 (Sushil Aggarwal) also did not speak if A-2 was in possession of any knife or had attempted to stab his sister-in-law. No injuries were inflicted to Arti Aggarwal.

10. Vital contradictions have emerged in the statements of the prosecution witnesses about robbing of the gold-chain in the incident. In the complaint (Ex.PW-1/A), no specific role was attributed to any of the appellants in snatching the gold-chain. It was merely informed that A-2 while fleeing the spot had taken her gold-chain. It was not informed as to

in what manner, she was divested of the chain. No role was assigned to A-1 in robbing the complainant's gold-chain. In their initial examination, the complainant and PW Arti did not claim if any gold chain was robbed in the incident. When they were recalled for examination subsequently after a considerable delay in terms of orders dated 11.09.2012, they implicated A-2 to have snatched the gold chain. During investigation, the gold-chain could not be recovered. The complainant did not furnish any description of the gold-chain allegedly robbed in the incident in her complaint. No independent public witness, including Gyan, allegedly present at the time of A-1's apprehension at the spot was examined to show A-2's presence there. Possibility of A-2's arrival at the spot after A-1's (his brother) apprehension cannot be taken as incriminating circumstance. In the absence of any specific overt act attributed to him, it cannot be inferred with certainty that he had accompanied A-1 to the complainant's house for any oblique motive; admittedly, he was not armed with any weapon.

11. Appellants' conviction under Sections 392/394/397 IPC cannot be sustained as the evidence is lacking to prove the ingredients. It was a simple case where A-1 committed lurking house-trespass by night at the complainant's house after having made preparation to cause hurt.

When confronted, A-1 inflicted 'simple' hurt by a sharp weapon to the complainant.

12. In the light of the above discussion, the prosecution has failed to prove its case beyond reasonable doubt against A-2; he deserves benefit of doubt. Appeal preferred by him is accepted and his conviction and sentence are set aside. A-2 shall be released forthwith if not required to be detained in any other criminal case. Maintaining A-1's conviction under Section 458 IPC alone, conviction under Sections 392/394/397 IPC is set aside.

13. By an order dated 21.08.2013, A-1 was sentenced to undergo RI for seven years with fine ₹5,000/- under Section 458 IPC. Nominal Roll dated 21.03.2015 reflects that the undergone period is one year, ten months and eight days besides remission for six months and twenty-nine days as on 20.03.2015. It further shows that he is not a previous convict; has clean antecedents; is not involved in any other criminal case; and, his overall jail conduct is satisfactory. Considering these circumstances, Sentence Order is modified and the substantive sentence under Section 458 IPC is reduced to RI for four years with fine ₹5,000/- and default sentence for its non-payment would be SI for one month. The appeal preferred by A-1 stands disposed of in the above terms.

14. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information / compliance.

(S.P.GARG)
JUDGE

MARCH 31, 2016 / *tr*