

\$~R-29A

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 13th November, 2018

+ CRL. APPEAL NO. 409/2000

JAI PRAKASH

..... Appellant

Through: Mr. Prag Chawla & Ms. Ruchi
Kapur, Advs. with appellant in
person.

versus

STATE

..... Respondent

Through: Mr. K.S. Ahuja, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The appellant was arrested during the course of investigation into first information report (FIR) no.48/1995 of police station Nangloi, involving offences punishable under Sections 398/399/34 of Indian Penal Code, 1860 (IPC) on 06.02.1995. He along with four others were sent up for trial on conclusion of investigation into the said case, the others being Rajesh @ Raja, Susheel Kr. Tyagi, Krishan Kumar and Anjesh Jain @ Ravinder Jain. The case eventually came up before the court of sessions (sessions case no. 102/1997) where the question of charge was considered. The trial judge found that there was no evidence to put Susheel Kr. Tyagi, Krishan Kumar and Anjesh Jain @ Ravinder Jain on trial and consequently ordered their discharge on 05.05.1998. Charge, however, was found made out against the

appellant for offences under Sections 393/34 read with Section 398 IPC and under Section 27 of Arms Act. The prosecution failed to bring home its case against Rajesh @ Raja who consequently stood acquitted.

2. The trial court, however, found that the charge of offence under Section 393 read with Section 398 IPC had been brought home against the appellant herein, holding him guilty and convicting him, he at the same time being acquitted of the charge under Section 27 of Arms Act. By subsequent order dated 06.06.2000, the trial court awarded rigorous imprisonment for ten years with fine of Rs. 20,000/- against the appellant for offence under Section 393 read with Section 398 IPC and directed that, in case of default, he would undergo further simple imprisonment for two years. At the same time, benefit of set off under Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was extended to the appellant.

3. Feeling aggrieved by the aforementioned judgment, and the order on sentence, the present appeal was filed.

4. At the hearing, it is submitted by the learned counsel for the appellant, on instructions of the appellant who is present in the court, that the evidence led by the prosecution primarily through the mouthpiece of Rukmani Devi (PW-1), Ram Avtar (PW-2), Radhey Shyam (PW-3), Rajesh (PW-4) and Mukesh (PW-6), at its best, makes out a case for conviction on the charge of robbery punishable under Section 392 IPC, there being no credible evidence to show involvement of five persons in the incident in question nor any clarity

about use of a fire arm (pistol) by the appellant in the commission of the said offence of robbery. The learned counsel submitted that in this view, the prayer is for the order of conviction to be modified from one punishable under Section 393 read with Section 398 IPC to one punishable under section 392 IPC and having regard to the time that has elapsed, a lenient view being taken in the matter of punishment taking further into consideration the fact that the appellant does not have any past criminal record, nor has he been involved in any criminal case after his involvement in the present one.

5. The FIR (Ex.PW-5/A) was registered on the basis of the statement (Ex.PW-1/A) of Rukmani Devi (PW-1). As per the version, forming part of the FIR which was supported by statements, *inter alia*, of her husband Ram Avtar (PW-2), two of her sons namely Rajesh (PW-4) and Mukesh (PW-6), as indeed of her neighbour Radhey Shyam (PW-3), the incident took place on 27.01.1995 sometime around 8.30 a.m. The first informant (PW-1) and her husband (PW-2) were at home, the latter upstairs, reading newspaper. It was her version that while she was cleaning the house and had re-entered through the main door after putting the garbage outside in the street, she was followed (into the house) by three young persons each of whom had muffled their faces with shawls. She stated that one of the said persons had put a pistol at her neck and asked her not to raise alarm and snatched her gold chain. She also alleged that when she raised alarm, it drew attention of her husband who came on the scene, at which stage he was also threatened at the point of fire arm (pistol),

this role being attributed to the appellant by name, PW-2 being threatened with death. It was also her version that the alarm raised had also drawn the attention of her two said sons and one another Kamal, who also came on the scene but were similarly threatened by the three intruders. In the FIR, it was also stated that the neighbour Radhey Shyam (PW-3) also came on the scene, his attention being drawn due to the commotion and it is he (PW-3) who had caught hold of the appellant at the spot, the other intruders statedly having run away from the scene.

6. Upon the police being informed, besides registration of the FIR and seizure of a pistol (vide Ex.PW-2/A), allegedly taken into possession from the control of the appellant, investigation was carried out in the course of which, pursuant to the alleged disclosures of the appellant, the other arrests were made. The charge of Arms Act against the appellant, however, failed at the trial.

7. In the course of the trial, PW-1 (the first informant) initially narrated the incident along the lines of the prosecution story wherein she referred to the appellant as the person who had pointed the pistol at her neck. Her attention was drawn to her initial statement in the FIR (Ex.PW-1/A) whereupon she stated that the said earlier version would be incorrect. During her cross-examination, however, she expressed confusion stating that she could not tell as to which persons had shown pistol to her. In contrast, her husband (PW-2) also spoke almost along the same lines that one of the three intruders (with muffled faces) had pointed pistol on the neck of his wife and another

person had similarly threatened him with a pistol but he was not clear as to whether the appellant was one of the said persons who had used the pistol for extending such threats. He only deposed about the appellant being apprehended at the spot. Noticeably, at the same time, in the deposition of PW-1 and PW-2, there is lack of clarity as to whether the persons who had entered into the house, apparently with the intention to commit robbery, were three or four in number.

8. PW-4 and PW-6 have also spoken about the incident. But then it is clear from their respective testimonies that they were not present at the scene at the initial stages, neither of them being in a position to specifically narrate the role of the appellant their evidence only confirming that he was one of the three persons who had entered the household, at least two of whom were armed. There is no clarity in their version as to whether the appellant was one of the persons who was armed at the relevant point of time. The same is the deficiency in the testimony of PW-3.

9. There is no reason to disbelieve the evidence of PW-1, PW-2, PW-3, PW-4 and PW-6 as to the fact that the appellant had actually entered the house of the first informant in the morning hours of 27.01.1995 and the intent of the three persons in question was to commit robbery. The evidence of PW-1 clearly brings out that she was the first person to be accosted and threatened and her gold chain snatched from around her neck, though mercifully the one who had snatched the chain could not take it away the chain having come to be broken and getting entangled in her wearing apparel.

10. On the above facts, and in the circumstances, this Court is inclined to accept the submissions of the appellant that it is not clear from the evidence as to whether the appellant was one of the persons who were carrying fire arms or who may have used it to commit the offence of robbery. In these circumstances, the result of the case will have to be partially modified.

11. Consequently, the appellant is held guilty and convicted for the offence of attempted robbery under Section 393 IPC, the conviction for the offence under Section 393 read with Section 398 IPC being set aside.

12. The above result itself leads to reconsideration of sentence. The offence was committed in January, 1995. Almost 24 years have passed by. The nominal roll does not indicate any past criminal record nor were any such antecedents shown to the trial court since nothing to that effect is indicated in the order on sentence. It is not the case of the State even before this Court that the appellant has been involved in any criminal case after his complicity in the present one. In these circumstances, there is justification for reduction of sentence. It is directed that instead of the sentence awarded by the trial court, the appellant shall undergo rigorous imprisonment for six years with fine of Rs.10,000/-. In case of default, he shall undergo further simple imprisonment for four months. Ordered accordingly.

13. The appellant was enlarged on bail suspending the sentence by order dated 05.10.2004. The trial court shall execute the sentence, as modified above, in accordance with law by taking appropriate steps.

Needless to add, the period of incarceration already undergone shall be set off in terms of Section 428 Cr.P.C.

14. The appeal is disposed of in above terms.

R.K.GAUBA, J.

NOVEMBER 13, 2018

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